Public Procurement Training for IPA Beneficiaries

Student's Pack

Module A: Introduction and Principles

Module B: Organisation at the Level of Contracting Authorities

Module C: Preparation of Procurement

Module D: Public Procurement Law – Scope of Application

Module E: Conducting the Procurement Process

Module F: Review and Remedies; Combating Corruption

Module G: Contract Management

Module H: EU Procurement Rules and Procedures

PUBLIC PROCUREMENT TRAINING FOR IPA BENEFICIARIES

SIGMA is a joint initiative of the OECD and the EU,
principally financed by the EU.

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In December 2007, an Expert Group set up by the Regional School for Public Administration and SIGMA submitted a report presenting the situation of public procurement training in IPA countries, and a possible initiative to improve that situation. According to the report, the weakest link in the public procurement system of most of the region's countries/entities is national training capacity. Existing educational materials are often basic and mostly focused on legal requirements, and they largely neglect the economic and operational aspects of procurement processes.

To develop a strategy fostering sustainable training systems for public procurement, the report proposed a 3-year action plan to:

- develop comprehensive training materials,
- "localise" the materials for each beneficiary country,
- train and certify a group of trainers from the region,
- monitor and support the initial trainers' activities in their countries.

The European Commission asked SIGMA to elaborate generic training materials that would first be used to train future trainers and then tailored to the specific situation of each country.

The result presented is a semi-final product, based on EC legislation and practice, that will need to be adapted to the local legislation and context of each beneficiary country. The product is designed for training purposes and it provides several tools (case studies, exercises, tests) to be used in training classes. It intends to cover the totality of the public procurement process, from procurement planning and preparation to contract management and contract performance measurement, thereby going beyond the traditional focus on public procurement legislation. It follows the chronology of the whole procurement process and is organised around the topics that form procurement officers' "reality" - it addresses questions that they face in their daily practice. It also contains a module for economic operators.

The training package is divided into two parts: the Student's Pack and the Trainer's Pack. The former contains the main materials for training participants, and the latter offers additional resources for trainers (answers to exercises and questions, handouts, slides, pedagogical instructions).

The product was prepared between January 2009 and February 2010.

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The OECD's Directorate for Public Governance and Territorial Development kindly allowed the inclusion of two publications on integrity in public procurement.

The whole project was managed by a SIGMA team composed of Marian Lemke (lead manager), Peter Bennett, Peder Blomberg (also a member of the drafting and review teams) and Valérie Forges.

SIGMA

The SIGMA Programme — Support for Improvement in Governance and Management — is a joint initiative of the Organisation for Economic Co operation and Development (OECD) and the European Union, principally financed by the EU.

Working in partnership with beneficiary countries, SIGMA supports good governance by:

- Assessing reform progress and identifying priorities for reform against baselines set by good European practice and existing EU legilsation
- Supporting institution-building and the setting-up of legal frameworks
- Facilitating assistance from the EU and other donors by helping to design projects and implement action plans.

In 2010, SIGMA is supporting the public administration reform efforts in:

- **EU candidate countries** – Croatia, the former Yugoslav Republic of Macedonia, and Turkey
- **Potential EU candidates** – Albania, Bosnia and Herzegovina, Montenegro, Serbia, and Kosovo (under UNSCR 1244/99)
- **European Neighbours and Partners** – Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Occupied Palestinian Territory, Syria, Tunisia and Ukraine, as well as Russia

SIGMA supports the reform efforts of its partners in the following areas:

- Civil service and administrative law
- Public integrity
- External audit
- Public internal financial control
- Public expenditure management
- Public procurement
- Policy-making and co-ordination
- Regulatory policy and capacities

For further information on SIGMA, consult our website: http://www.sigmaweb.org

MODULE A

PUBLIC PROCUREMENT TRAINING FOR IPA BENEFICIARIES

Introduction and principles

Introduction and principles

MODULE A

Legislative framework and basic principles

PART 1

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

- How public procurement is regulated within the European Union
- Which provisions of the Treaty apply
- Which other general rules apply
- The application of secondary legislation (the Directives)
- How the European Court of Justice (ECJ) gets involved in the process
- How national procurement law has developed
- How various other national laws apply to the procurement process

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- The effect of the different sources of the rules
- The basic principles that apply to public procurement
- How national law must be adapted to the European rules [this presupposes accession and must be adapted to the local situation]

It is therefore critical to understand fully:

- The different levels of rules, where they come from, and how they interact to provide a comprehensive system of regulation
- The role of the European Court of Justice (ECJ) in interpreting the rules
- The role of the national law in completing the rules

1.3 LINKS

There is a particularly strong link between this chapter and the following modules or sections:

- Module C Part 4 on public procurement procedures and techniques
- Module E Parts 1-6 on conducting procurement procedure, which requires compliance with the basic principles

Compliance with the Treaty law principles and general law principles which apply to public procurement in the EU context is a requirement that flows through the whole procurement process, from the design of the technical specifications through the choice of award procedure and selection of tenderers to the award of the contract. Failure to respect these fundamental principles can jeopardise the entire procurement, and they apply independently of the European Directives or national procurement law [this last phrase again presupposes accession and must be adapted to the local situation].

1.4 RELEVANCE

This information is important for all persons implicated in the procurement process but will be of particular relevance to those procurement professionals who are responsible for procurement planning, the design of technical specifications and the preparation of tender documentation including qualification criteria, and for those involved in the evaluation process. Those responsible for contract administration will also need to ensure that the basic principles are respected during contract renegotiation (changing orders, price variation etc.).

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

In addition to looking at some of the provisions of the Directives and national law, consideration of the basic principles that apply to public procurement in an EU context also implies knowledge of the EC Treaty, as amended. In particular, you will need to be aware of the following articles of the Treaty:

- **Article 12** on the prohibition against discrimination on grounds of nationality;
- **Article 28** on the free movement of goods and the prohibition of quantitative restrictions on imports and exports and measures having equivalent effect;
- **Article 43** on the freedom of establishment;
- **Article 49** on the freedom to provide services.

In Directive 2004/18/EC, you should consider in particular Recital 2 and Article 2.

In national law, please look at:

To be adapted to national law

SECTION 2
NARRATIVE

2.1 INTRODUCTION

In this narrative, we will first look at the context of public procurement in the European Union (EU) in order to understand better how the procurement Directives and national laws that form the basis of this training programme apply in practice. We are concerned here with two issues: the legal framework and the basic principles that flow from it. We will then turn to consider how these are translated into national law.

2.2 EU PUBLIC PROCUREMENT LEGISLATIVE FRAMEWORK

In the case of public procurement, it is necessary to look not only at the procurement Directives themselves but also at the context within which they were adopted. Even with the Directives in place, more general provisions contained in the Treaty of Rome will apply, as well as more general principles of law, which will guide the interpretation of the Directives. These elements are referred to collectively as the "EU *acquis*" throughout this manual.

2.2.1 The Treaty of Rome

The Treaty of Rome 1957 (and subsequent treaties amending the Treaty of Rome) – hereafter referred to as the "Treaty" – does not include any explicit provisions relating to public procurement. That does not mean, however, that it does not contain provisions that affect public procurement within the EU. On the contrary, the Treaty establishes a number of fundamental principles that underpin the EU. These principles apply equally to the field of public procurement. Of these fundamental principles, the most relevant in terms of public procurement are:

- *Prohibition against discrimination on grounds of nationality* (article 12 of the Treaty)

  This principle embodies a standard of national treatment that requires persons in a situation governed by Community law to be placed on a completely equal footing with nationals of an EU member state, *i.e.* in a procurement context, an economic operator from one member state must be treated in the same way as an economic operator from the contracting authority's member state. This is not the same as the principle of equal treatment, which does not rely on the concept of nationality.

  This article applies only to Community nationals, individuals and legal persons who are resident in any of the member states of the Community. Nationals from third countries are excluded from the protection afforded by article 12 because they are "not within the scope of application of this Treaty".

- *Free movement of goods and prohibition of quantitative restrictions on imports and exports and measures having equivalent effect* (article 28 *et seq.*)

  This principle seeks to prevent all trading rules enacted by EU Member States that are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade. The objective is to prevent member states, through their contracting authorities, from buying only national products ("buy national"

campaigns). It applies to both distinctly applicable measures that are clearly intended to discriminate against foreign goods (such as local content clauses) and indistinctly applicable measures that apply equally to local and foreign goods but nevertheless discriminate indirectly against foreign goods in that their effect is to make market access more difficult for imported products than for local ones.

Under article 23(2), the provisions relating to the free movement of goods apply to both products originating in member states and products coming from third countries that are in free circulation in member states. Products coming from third countries are considered to be in free circulation in member states if the import formalities have been complied with and if any customs duties or charges having equivalent effect that are payable have been levied in that member state.

- *Freedom of establishment* (article 43 *et seq.*)

  This principle is designed to guarantee the rights of Community nationals to establish themselves or an agency, branch or subsidiary in the territories of other member states. It also acts to protect the pursuit of activities of self-employed persons. Thus, an economic operator from a member state will be permitted to carry out a business in another member state through the establishment of a local entity.

- *Freedom to provide services* (article 49 *et seq.*)

  This principle protects the rights of the nationals of member states who are established in the Community to provide commercial or professional services in the territories of other member states. This would include the right of temporary establishment in the territory of another member state for the purposes of providing a service in that member state. Thus, an economic operator based in one member state will be entitled to submit a tender in another member state without the need to set up a local entity or representative.

2.2.2 General principles of law

In addition to these fundamental principles in the Treaty, some general principles of law have emerged from the case law of the European Court of Justice (ECJ). As *general* principles, these will also be applied in the context of public procurement, and a number have, in fact, been applied by the ECJ in cases concerned with public procurement disputes. They are important because they will often be used by the ECJ to fill in gaps in the legislation and to provide solutions of principle to situations that are often very complex.

The most important of these general principles of law in the current context are the following.

- *Equality of treatment*

  This principle requires that identical situations be treated in the same way or that different situations not be treated in the same way. It does not depend on nationality (as with the principle of non-discrimination) but is based on the idea of fairness to individuals. Thus treating two economic operators from the same country differently could be unequal treatment but, since they are of the same nationality, there would be no discrimination (on grounds of nationality). The Danish Bridge case provides a good example of the difference.

The ECJ: Danish Bridge case

In this case, there were two alleged breaches of procurement law at issue. First, a clause that required the use of local goods and labour. Second, the way in which the employer had given one of the tenderers the chance of putting forward a variation to the specifications contrary to the instructions set out in the tender documents. The first breach was clearly discriminatory and thus gave rise to unequal treatment between those tenderers who could fulfil the nationality condition and those who could not, even though they could meet the output specifications. The second breach was not discriminatory because it did not distinguish between national and non-national tenderers. It merely treated one tenderer differently from the others. This is unequal treatment but is not necessarily discriminatory. It could also (coincidentally) be discriminatory if it were applied to different nationalities.

Case C-234/89 *Commission v Denmark* [1993] ECR I-3353

- *Transparency*

  This principle imposes an obligation of transparency on the contracting authority, which consists of ensuring, for the benefit of any potential tenderer, a degree of advertising that is sufficient to enable the opening up of the services market to competition and the review of the impartiality of procurement procedures.

The ECJ: Coname case

Where the Directives do not apply to the contract in question (either because it is outside the Directives or below the thresholds), the principle of transparency will apply, requiring some form of advertising of the proposed contract. That will be the case whenever the contract in question may be of interest to an undertaking located in another EU member state. This is not required, however, where the lack of advertising can be justified by "objective" or "special" circumstances, such as where there is only a very modest economic interest at stake.

Case C-231/03 *Consorzio Aziende Metano ("Coname") v Padania Acque SpA ("Coname")* [2005] ECR I-7287

Guidance on how the transparency objective might be achieved can be found in the Commission's Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the public procurement Directives (24.07.2006).

- *Mutual recognition*

  According to this principle, an EU member state must accept the products and services supplied by economic operators in other Community countries if the products and services meet in like manner the legitimate objectives of the recipient member state. In practice, this means that the member state in which the service is provided must accept the technical specifications, checks, diplomas, certificates and qualifications required in another member state if they are recognised as equivalent to those required by the member state in which the service is provided.

- *Proportionality*

  The principle of proportionality requires that any measure chosen be both necessary and appropriate in the light of the objectives sought. In choosing the measures to be taken, an EU member state must adopt those that cause the least possible disruption to the pursuit of an economic activity. As an example, exceptions to the Treaty principles discussed above (based on the protection of legitimate interests, such as public health or security) must be proportional to the objectives sought. In the case of contracting authorities, for instance, it could be said that when selecting candidates and tenderers, contracting authorities should not impose technical, professional or financial conditions that are excessive and disproportionate to the subject of the contract.

These general principles of law are enunciated, for the most part, by the ECJ. It does so in the exercise of its jurisdiction to apply and interpret Community law, where it uses these general principles of law to fill *lacunae* in Community law. These principles are unwritten rules, which are not contained in the Treaty but are inspired by those common general principles of law recognised in the national legal systems of EU member states.

Note on general principles: It is important to remember that these general principles apply independently of the Directives so that, even if the Directives do not apply, the principles may still apply. Thus contracts below the EU thresholds, for example, are not covered by the Directives but are subject to the general principles.

2.2.3 The EU Directives

General principles of law are difficult to apply in specific situations and tend to be negative in substance, *i.e.* they tend to proscribe incompatible behaviour but do not, at the same time, provide positive guidance on their application in the concrete situations to which they apply. It is not realistic to impose adherence to such broad principles without at the same time addressing the rules for the conduct of procurement, which previously differed widely in form throughout the membership of the European Economic Community.

It was necessary therefore to introduce procedural conformity to achieve non-discriminatory access to public procurement markets. To underpin the Treaty principles in the field of public procurement and to provide the necessary guidance to member states, the Community adopted a series of procurement Directives. Based on principles of non-discrimination and competitive procurement, the Directives are to be seen as a specific application of Treaty principles and complement them by setting out their application in the specific context of public procurement.

2.2.3.1 The main Directives

There have been a number of Directives. In the public sector, there have been three main Directives covering works, supplies and services, which have been amended many times. These Directives did not include contracts awarded by entities operating in the utility sectors of water, energy, transport or telecommunications, which have been covered since 1990 by a different series of Directives specifically for the utilities sector.

Since 2004, however, there has been a single directive that applies to the public sector and another that applies to the utilities sector:

- The public sector Directive is **Directive 2004/18/EC**.
- The utilities sector Directive is **Directive 2004/17/EC**.

These Directives cover only the procedural rules. There are two other Directives, which apply to complaints and review (*i.e.* to the enforcement of the Directives). These are known as the Remedies Directives.

- In the public sector, remedies are governed by **Directive 89/665/EC**.
- In the utilities sector, remedies are governed by **Directive 92/13/EC**.

The above two Remedies Directives have both been significantly amended by a new Directive: **Directive 2007/66/EC**, which was due to be implemented by the member states by 20 December 2009.

In addition, and as discussed further in module D4, there is now a new Directive, which applies a more flexible and confidential regime to the procurement of military supplies and related works and services: **Directive 2009/81**.

It should be added that the European Commission has supplemented these procedural and remedial Directives with further legislation dealing with various aspects of the procurement process. These include, in particular:

- **Directive 2001/78/EC** on the use of standard forms in the publication of public contract notices
- **Regulation 2151/2003** amending **Regulation 2195/2002** on the Common Procurement Vocabulary (CPV); updated CPV codes were adopted under **Regulation 213/2008**
- **Regulation 1564/2005** establishing standard forms for the publication of notices in the framework of public procurement procedures, pursuant to Directives 2004/17/EC and 2004/18/EC

2.2.3.2 Scope of the procedural Directives

The Directives are intended to co-ordinate national contract award procedures by introducing a minimum body of common procedural rules that reflect the basic Treaty principles rather than to achieve the harmonisation of all national rules on public procurement. The Directives do not seek to impose a new *common* regulatory regime on EU member states in the field of procurement, and member states can continue to apply their national procedures *adapted* to the Directives. The Directives thus limit their scope to those measures required for the co-ordination exercise and permit the member states to maintain or adopt substantive and procedural rules to the extent that these are not in conflict with the Directives or with Treaty provisions.

As a result, the member states remain free to regulate a number of issues, mainly practical matters. Thus member states may provide, for example, for the application of specific standard form tender and contract documents; they may require adherence to specific tender opening procedures or tender submission procedures; they may require the submission of appropriate tender or performance guarantees; and they may impose specific contractual obligations on public contracts resulting from public procurement.

Good practice note:
For economic operators seeking to tender for contracts in other member states, it will be important to keep in mind not only the provisions of the Directives themselves but also the applicable national rules and practices that remain unaffected (other than by reason of compatibility) by the Directives. These national rules and practices will often contain practical requirements that are not mentioned in the Directives.

Localisation: In XXX, for example, the [Procurement Law] applies the following requirements:

- xxx
- xxx

In essence, the common rules of the Directives consist of applying the basic principles referred to above, notably non-discrimination, equal treatment and transparency in the:

- publicity of proposed procurement contracts
- design of technical specifications
- choice of procurement procedure
- qualification and selection of candidates and tenderers
- award of contracts.

The Directives, however, apply only to proposed procurement contracts of a financial value above a given threshold. Rather than seeking to regulate with precision all public procurement contracts within the EU, the Community legislator chose to regulate in the Directives only those contracts that were most clearly capable of affecting trade between member states. Those falling within this broad definition include:

(i) contracts that are of a sufficiently high value to attract economic operators from other member states (*i.e.* where the potential benefits of winning the contract outweigh the extra costs of providing the goods, works or services from a greater distance); and/or

(ii) those contracts concerning objects that are amenable to cross-border trade.

This may require localisation: This does not mean that such contracts are not subject to competition. They are, in XXX, subject to the [Procurement Law] and, as indicated previously, to the fundamental principles of the Treaty and to general principles of law.

2.2.3.3 Structure of the Directives

One of the improvements brought about by the consolidation of the various Directives in 2004 was the simplification and streamlining of the Directives, which now evidence a greater degree of procedural logic, for example by starting with the general definitions, dealing with the scope of application (entity and activity coverage), and then essentially seeking to follow the sequential steps of the procurement process itself. This is also the general approach taken in this training programme.

Broadly, the structure (taken from the Public Sector Directive) is as follows:

- definitions and general principles
- rules on public contracts
- general provisions

- Scope: thresholds and provisions on specific situations, including exclusions and concessions
- Arrangements for public service contracts
- Specific rules governing specifications and contract documents
- Procedures
- Rules on advertising and transparency
- Conduct of the procedure: qualification and award
- Rules on public works concessions: award of public works concessions and contracts awarded by concessionaires
- Rules governing design contests
- Statistical obligations, executory powers and final provisions

2.2.3.4 "Legal effect" of the Directives

Member states are bound to take all appropriate measures to ensure the fulfilment of the obligations arising out of the Treaty or resulting from actions taken by the institutions of the Community. The procurement Directives, like all Directives, are by definition not directly applicable, *i.e.* they do not apply automatically. In order to produce their effects within the member states, they need to be implemented or "transposed" into national law. The member states are, therefore, required to take the measures necessary to give full effect to the provisions of the Directives in national law and to ensure that no other national provisions undermine their applicability. This normally takes the form of a transposition of the Directives into national law and the abrogation of all contrary legislative provisions.

The Directives are binding only in terms of the result to be achieved but leave to the national authorities the choice of form and methods. Thus, it is not necessary for EU member states to produce an exact copy of the Directives in their national legislation, although some member states have done precisely that, by reference to the Directives themselves. Include localisation where relevant: In XXX, the method chosen is to...

Failure to implement the Directives correctly or on time does not mean, however, that the Directives have no effect. Member states are not entitled to deprive the subjects of those Directives (contracting authorities and economic operators) of the rights they are intended to enjoy under the Directives. In accordance with the ECJ's doctrine of "direct effect", individuals may enforce in national courts the rights conferred by the Directives wherever the appropriate conditions are satisfied. This will happen, for example, if a member state fails to implement/transpose the Directive into national law by the due date (each Directive includes a date by which it must be transposed) or if it has transposed the Directive on time but done so incorrectly.

The conditions necessary to give rise to the direct effect of a particular Directive are as follows:

- the obligation imposed on member states is clear and precise;
- the obligation is unconditional;
- in the event of implementing measures, the member states or Community institutions are not given any margin of discretion.

The ECJ has stated that many of the provisions of the Directives do have direct effect but that each provision will be considered individually. The ECJ has found that the provisions relating to advertising, competition, selection and award criteria have direct effect. On the other hand, a number of the provisions of the Remedies Directives, which require additional choices and decisions to be taken by the member states, such as the choice of a review body, cannot – according to the third condition mentioned above – be considered as directly effective in their entirety. Nevertheless, some of the provisions of the Remedies Directives, such as the provisions relating to the available remedies (namely, articles 1(1) and 2(1)(b)), are directly effective.

Note on direct effect:
It is important to remember that economic operators may be able to rely on the provisions of the procurement Directives even if they have not been transposed into national law, provided the conditions are met.

2.3 NATIONAL PUBLIC PROCUREMENT LEGISLATIVE FRAMEWORK

This requires extensive localisation and should cover the following:

2.3.1 Primary public procurement law

- History
- Structure
- Scope of regulation

2.3.2 Secondary public procurement legislation

2.3.3 Other relevant legislation

- Administrative law
- Contract law
- Criminal law
- Budget law
- Other special laws

2.4 BASIC PRINCIPLES OF PUBLIC PROCUREMENT

Discussion of the European and national legislative frameworks discloses the basic principles that apply to public procurement.

From its origins, one of the main objectives of the EU has been to create a common market that eliminates barriers to trade in goods and services between EU member states. Creating a common procurement market means removing any barriers to trade arising from the procurement context.

The ECJ

"The purpose of coordinating at Community level the procedures for the award of public service contracts is to eliminate barriers to the freedom to provide services and therefore to protect the interests of economic operators established in a Member State who wish to offer goods or services to contracting authorities in another Member State."

Case C-360/96 *Gemeente Arnhem v BFI Holding BV* [1998] ECR I-6821

Barriers to trade can be erected by means of legislation or by the actions of contracting authorities or economic operators. Legislation can create barriers by imposing "buy national" requirements. Contracting authorities can impose barriers by making discriminatory award decisions. Economic operators can also create barriers by colluding together to rig tender prices. All of these barriers have the effect of distorting competition in the common procurement market, and one of the primary purposes of public procurement legislation is to eliminate existing barriers and prevent the erection of new barriers. It does so by applying the basic principles flowing through the legislation.

While they are all inter-linked, these principles can, for current purposes, be reduced to a series of core principles:

- *Competition*

  From an economic perspective, "competition" operates as a discovery procedure by allowing different economic operators to communicate the prices at which goods and services are available on the market. Those prices act as guideposts and reflect the demand and supply conditions at any given moment. They also reflect the differences in quality and in terms and conditions of sale of the different (non-homogenous) products available.

  This is why the advertising provisions discussed in module E2 are so important, as they guarantee the widest possible competition, enabling economic operators from all over the Community to communicate their prices to a given contracting entity, thus ensuring the greatest possible choice. This is also one reason why transparency is a core principle, since it ensures the widest possible publicity for procurement contracts.

  Keeping competition fair (or maintaining a "level playing field") is a key concern for achieving efficient and economic procurement results. Procurement legislation seeks to prevent any distortions or restrictions of competition within the Community, and any attempt to prevent economic operators from being able to tender will be prohibited. Such attempts can take many forms and can affect the products or services or the economic operator itself. As a result, the legislation prohibits:

  - barriers to the free movement of goods, *e.g.* import restrictions, customs duties, local content rules, "buy national" policies, national technical specifications or standards that prevent the sale of non-domestic products;
  - barriers to the freedom to provide services, *e.g.* attempts to restrict foreign economic operators from tendering through the use of local registration requirements, compliance with national professional standards or possession of local qualifications.

  Protecting competition is also a question of maintaining equality of treatment, avoiding discrimination, applying mutual recognition principles (of equivalent products and qualifications), and ensuring that any exceptions are proportional.

- *Equal treatment and non-discrimination*

  The concepts of equal treatment and non-discrimination are not the same. In general terms, all procurement legislation will seek to maintain equality between economic operators. In the European context, however, that equality will also be based on "nationality".

  Equal treatment is a concept that generally requires identical situations to be treated in the same way or different situations not to be treated in the same way, and it requires the identical treatment of identical people. In a sense, it implies that contracting authorities will not take into account the different abilities or difficulties faced by individual economic operators but will judge them purely on the results of their efforts, *i.e.* on the basis of the tenders they submit. It provides for an objective assessment of tender prices and tender qualities and ignores any considerations that are not relevant to the discovery of the economically efficient tender.

  In the European context, the concept of equal treatment requires yet another definition since, in this context, the concept of equality is, in addition, based on nationality or on the origin of goods, such that all economic operators of Community nationality and all bids including goods of Community origin must be treated equally (this is the principle of non-discrimination). This is more than simply an extension of the concept of equal treatment. It implies that any condition of eligibility or origin (based on nationality or local provenance) will automatically give rise to unequal treatment, since those conditions will, by definition, discriminate against a certain group of (foreign) economic operators or favour another. However, while discrimination in a given context will produce unequal treatment, unequal treatment does not always give rise to discrimination. This point is conveniently illustrated by the *Danish Bridge (Storebaelt)* case (Case C-234/89 *Commission v Denmark* [1993] ECR I-3353) explained in 2.2.2 above.

- *Transparency*

  Transparency" has only recently emerged as a principle in its own right, although it is probably better to think of it as a tool to be used to achieve other objectives. For example, publication and accessibility of the legislation provides clarity and certainty for all stakeholders and enables contracting authorities and economic operators to be aware of the rules of the game. The Directives apply requirements of advertising that guarantee transparency in the discovery process, *i.e.* guaranteeing the widest possible competition. Publicising in advance the technical specifications and the selection and award criteria permits stakeholders to check that these are fair and non-discriminatory. Recording and reporting requirements ensure that the actions of the contracting authorities may be verified where appropriate. The latter objectives are also a fundamental aspect of "accountability", *i.e.* holding procurement officers accountable for their decisions and actions. "Accountability" is also often an explicit objective of national procurement systems, and the transparency provisions reinforce this accountability.

The importance of the principle of transparency in the EU context, however, is that it applies independently of the legislation. So, if a particular procurement contracts falls below the threshold values of the EU legislation (or national legislation) or if a procurement is excluded from the scope of the Directives, *e.g.* public services concessions or the procurement of certain non-priority services, then it is possible that the principle of transparency will continue to apply so as to impose advertising requirements.

The ECJ has consistently stated that even if certain contracts are excluded from the scope of Directives, the contracting entities concluding them are nonetheless bound to comply with the fundamental rules of the Treaty in general and with the principle of non-discrimination on the grounds of nationality in particular. This implies an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with.

That obligation of transparency consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the opening up of the services market to competition and the review of the impartiality of procurement procedures.

The "degree of advertising" required will often depend on the member state in question, especially where there are provisions regulating low-value contracts. Localise as appropriate: In XXX, the [Procurement Law] applies… These procedures are discussed further in modules C4 and E2.

The principle of transparency will apply whenever the contract in question may be of interest to an undertaking located in another member state. That would not be the position, however, where the lack of advertising can be justified by "objective" or "special" circumstances. Such special circumstances will exist, at least where there is only a very modest economic interest at stake.

Some of the above principles are articulated differently or combined in national legislation. You might, for example, find principles stated in legislation, such as:

- *Economy and efficiency*

  This is a principle that is often used to describe the technical efficiency of the procedure itself, *i.e.* whether the planning has been appropriate and carried out on time; whether the various responsibilities have been engaged; whether sufficient time has been given to economic operators to prepare suitable tenders; whether the procurement is made in a timely manner. At a more "economic" level, the principle can also be used to identify whether the correct or best contracting strategies (see module A4) have been used to minimise waste and benefit from economies of scale. At a policy level, the principle may be used to analyse the allocative efficiency of transactions and of the system as a whole to determine whether this can be optimised further.

- *Value-for-money*

  Value-for-money is a loosely defined term used predominantly in Anglo-Saxon countries. To some extent, it overlaps with the concepts of economy and efficiency so that the procurement procedure is carried out with the least waste (in terms of cost and time) and as much benefit as possible. It comes into its own, however, when dealing with the setting of requirements and evaluation.

The basic premise is that the government should only buy what is actually needed: leather-covered chairs should not be bought where plastic chairs will do (*e.g.* in a waiting room). In other cases, leather-covered chairs may be preferred (*e.g.* in the boardroom). While it is for the contracting authority to decide what to buy, the point is that the specifications must match the real needs of the contracting authority.

The principle of value-for-money also recognises that goods and services are not homogenous, *i.e.* that they differ in quality, durability, longevity, availability and other terms of sale. The point of seeking value-for-money is that contracting authorities should purchase the optimum combination of features that satisfy their needs. Therefore the different qualities, intrinsic costs, longevity, durability, etc. of the various products on offer will be measured against their cost. It may be preferable to pay more for a product that has low maintenance costs than a cheaper product with a higher maintenance cost.

Example: Purchase of printers

There are three laser jet printers on offer, all of which provide the same technical output in terms of pages per minute:

Printer A: Cost of EUR 500, cost of toner EUR 175, life of toner 8 000 pages
Printer B: Cost of EUR 600, cost of toner EUR 190, life of toner 10 000 pages
Printer C: Cost of EUR 800, cost of toner EUR 50, life of toner 8 000 pages

Printer A is the lowest price, but does it offer value-for-money?

That depends on use.

For an office sending out occasional letters and preparing occasional reports with an output in terms of pages that is relatively low, the difference in toner prices and longevity is mostly irrelevant. On the assumption that the office produces about 10 000 pages every six months, the real cost of the printers over a 24-month period is:

Printer A: EUR 500 + EUR 875 (5 x EUR 175) = EUR 1 375
Printer B: EUR 600 + EUR 760 (4 x EUR 90) = EUR 1 360
Printer C: EUR 750 + EUR 700 (5 x EUR 140) = EUR 1 450

Printer B probably offers the best value-for-money.

However, assume that the office in question is responsible for generating weekly reports of activities and has an output of closer to 30 000 pages every six months.

The real cost of the same printers for that 24-month period would be:

A: EUR 500 + EUR 2 625 (15 x EUR 175) = EUR 3 125
B: EUR 600 + EUR 2 280 (12 x EUR 90) = EUR 2 880
C: EUR 750 + EUR 2 100 (15 x EUR 140) = EUR 2 850

For this office, Printer C, with the highest initial cost, is beginning to look like the best value-for-money.

If these printers are in use for many years and if the offices purchase several printers, then the savings to be made from buying the more expensive printers become significant.

In this sense, "value-for-money" broadly equates, in EU terms, to the award criterion of the *"most economically advantageous tender"*, which allows factors other than only price to be taken into account during the evaluation. See further in module E5.

- *Probity or integrity*

  Procurement legislation will also serve to reduce the opportunities for corrupt practices. It does this by imposing accountability and transparency requirements so that the activities of procurement officers can be checked and verified, thereby reducing the possibility that such officers will act in their own self-interest. The procurement officers must clearly set out in a public manner the requirements that they intend to procure as well as the selection and award criteria to be applied. Their decisions will be recorded and can later be verified either by the government (internal or external audit) or by aggrieved economic operators.

  Some national laws make probity and integrity an explicit objective and they often include in the procurement legislation additional clauses of a practical nature seeking to enforce probity (*e.g.* conflicts of interest provisions or the compulsory application of "integrity pacts"), together with consequential provisions addressing the actions to be taken where corrupt practices have been found to exist. As discussed in module E3, previous convictions for corrupt practices can also lead to automatic disqualification from a procurement procedure.

Localisation required: In XXX, for example, the [Procurement Law] is explicitly based on the following principles:

SECTION 3 EXERCISES

EXERCISE 1

You work for a local hospital and your boss, the new head of procurement, has some questions. She knows the applicable legislative provisions and understands the procurement process, but she is trying to understand how the basic principles affect the procurement function within the hospital.

1. Does the fact that low-value purchases fall below the thresholds of the law mean that she can carry out the purchases however she likes?
2. She asks whether the principle of transparency means simply that she needs to advertise according to the law.
3. She wonders whether there is anything in the Treaty principles that would oblige her to employ staff from overseas because she is not sure that they are as well qualified as [localise] staff.
4. There have been questions about the quality of sutures coming from certain European countries – does she have to buy the cheapest one regardless of quality?
5. There has been much talk of the new generation of keyhole surgery cameras. They are more expensive than existing models and she asks you to help provide a business case for purchasing the new cameras. What issues would you raise?
6. A local TV celebrity chef has been complaining that the hospital sources foodstuffs from abroad and the patients have been complaining of being forced to eat foreign food. Can she make it a condition that food products should always be locally sourced?
7. Local environmental groups have been complaining about the plastic waste of the hospital which comes mainly from drink packaging. The plastic bottles that are the basis of the complaint are produced by foreign companies, and she has discovered that most national companies supply glass bottles that are recyclable. She thinks she can avoid the problem by making it a requirement that only glass bottles may be supplied for environmental reasons. Is she right?

EXERCISE 2
POTENTIAL BREACH OF BASIC PRINCIPLES

Match the potential breach on the right to the principle(s) on the left

Clue: there could be more than one connection per principle

PRINCIPLE	POTENTIAL BREACH
FREE MOVEMENT	Allowing only tenderers registered in the member state of the contracting authority
EQUAL TREATMENT	Allowing only tenderers with a professional qualification from the member state of the contracting authority
NON-DISCRIMINATION	Excluding all products not conforming to national environmental standards
TRANSPARENCY	Allowing only products conforming to national technical standards
MUTUAL RECOGNITION	Requiring the use of local goods and labour
PROPORTIONALITY	Changing the specifications to match a preferred tender
	Remaining silent on the selection criteria to be applied
	Imposing a "buy national" policy

EXERCISE 3
GROUP DISCUSSION ON TRANSPARENCY

Split into groups of no more than 6 each for a debate on the application of the principle of transparency to below-threshold procurement.

Half of the groups will take the position that the imposition of such a principle is positive.

The other half will take the position that the imposition of such a principle is negative.

Issues to be addressed include (but are not limited to):

- whether transparency is required at all levels for reasons of accountability and probity
- whether economy and efficiency require a cut-off point below which the transparency principle does not apply
- the place of a cost/benefit analysis in the debate (cost of transparency/consequential benefit to contracting authority)
- whether the principle of proportionality has any role to play
- how such a principle is to be implemented and enforced

Each group is to present their arguments and conclusions in turn. A vote is to be taken at the end.

SECTION 4
THE LAW

EXTRACTS FROM DIRECTIVE 2004/18/EC

Recital 2: *Principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.*

Article 2: Principles of awarding contracts

Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.

Localisation: Extracts from national law:

EXTRACTS FROM THE TREATY OF ROME, AS AMENDED:

Article 12 on the prohibition against discrimination on grounds of nationality:

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.

Article 28 on the free movement of goods and the prohibition of quantitative restrictions on imports and exports and measures having equivalent effect

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 30 on permitted exceptions to the free movement of goods and the prohibition of quantitative restrictions on imports and exports and measures having equivalent effect:

The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Article 43 on the freedom of establishment:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.

Article 49 on the freedom to provide services:

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

Article 50 on the definition of services:

Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

"Services" shall in particular include:

(a) activities of an industrial character;

(b) activities of a commercial character;

(c) activities of craftsmen;

(d) activities of the professions.

Without prejudice to the provisions of the chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

SECTION 5
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. Does the Treaty of Rome, as amended, itself regulate procurement in the EU?
2. Describe the Treaty principles that apply to procurement.
3. What is the difference between the freedom of establishment and the freedom to provide services? How does each freedom assist tenderers from different member states?
4. Name the core general principles of law that apply to procurement.
5. Where do these general principles of law come from?
6. What is the difference between the principle of equality of treatment and non-discrimination?
7. Describe the principle of transparency.
8. When does the principle of transparency apply?
9. If the European directives have not been transposed into national law, do the Treaty principles or general principles of law matter? Why?
10. Identify the main procedural directives.
11. Are there any other directives that are important?
12. Do the directives provide a complete procurement code for the member states?
13. What, if anything, remains within the jurisdiction of the member states?
14. Do the directives apply to all contracts? Which contracts are not covered?
15. What distinguishes the coverage of the directives from the coverage of the national rules?
16. Set out the essential rules of the directives.
17. What happens if the directives are not transposed into national law by the deadline?
18. What happens if the member states transpose a directive incorrectly?
19. What is the main purpose of the European directives?
20. Identify four barriers to trade that could be erected by different players in the procurement market.
21. What is competition, and why is it important?
22. Why is advertising important to competition?
23. Explain the concept of non-homogenous products and services.
24. What effect do these have on competition?
25. Use the Danish Bridge case to explain the concept of equal treatment.
26. Explain the concept of "value-for-money".
27. In your opinion, should price be the only award criterion? Why?

FURTHER READING

The various texts that make up the EU legislative framework, along with a range of other useful documents and links, can be found on the DG Market website at:

http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm

This includes the Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (24.07.2006).

The XXX legal framework can be found at: XXXXXXXXXXXXXXX (localisation required)

The EU Treaty texts can be found at: http://www.eurotreaties.com/eurotexts.html

Introduction and principles

MODULE A

Institutional framework

PART 2

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

- The institutions that are involved at European level
- The institutions that are involved at national level
- The role of the contracting authorities
- The way in which these actors relate to each other

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- The legislative and regulatory functions of the various bodies
- The duties and obligations of the contracting authorities
- The importance of implementation and enforcement
- It is therefore critical to understand fully:
- The division of labour between these institutions
- The key functions and sources of authority of these institutions
- The limitations of each of these institutions *vis-à-vis* the others

1.3 LINKS

There is a particularly strong link between this chapter and the following modules or sections:

- Module A1 on the basic principles of public procurement and the legislative framework
- Module B on the duties of the contracting authorities
- Module F on review and remedies
- Module G on contract management

1.4 RELEVANCE

This information is important for all persons implicated in the procurement process because it provides a background to the institutions involved. It is of particular relevance to procurement officers who will need to communicate and liaise with the national institutions for information, guidance and assistance through the procurement process, and those that are implicated in review procedures.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

[Localisation required: It will be useful to refer to [xxxxx law/regulation] which contains a description of the duties and functions of the relevant national bodies, namely XXXX and XXXX]

In addition, it may be useful to refer to the following Papers prepared by OECD/SIGMA, which consider the institutional framework of a number of EU Member States in respect of public procurement.

SIGMA Paper No. 40:
Central Public Procurement Structures and Capacity in Member States of the European Union

SIGMA Paper No. 41:
Public Procurement Review and Remedies Systems in the European Union

SECTION 2
NARRATIVE

2.1 INTRODUCTION

The institutional framework operates at two levels: the European level and the national level.

Contracting authorities, which may also be considered as "institutions", are bound by the provisions of the Directives and the national provisions that transpose them. They are answerable both to the European Commission as emanations of an EU Member State and to individual economic operators, which may rely on the Remedies Directive to challenge infringements by them in the national bodies.

2.2 EUROPEAN INSTITUTIONAL FRAMEWORK

A number of different organisations are implicated in procurement at the European level. These organisations are the following:

2.2.1 Community Legislator

Although the Treaty (Treaty of Rome 1957 and treaties amending the Treaty of Rome) uses different terminology, the Community Legislator is, in effect, the Council of the European Communities, acting either alone or in co-operation with the European Parliament. All recent procurement Directives were adopted by these two institutions acting together, using the "co-decision" procedure.

The Council has been assigned the role of ensuring co-ordination of the general economic policies of the member states, and conferred the power both to take decisions and to in turn confer on the Commission, in the acts that it adopts, powers to implement the rules laid down by the Council.

Crucially, however, the Council does not have the right of initiative. Thus, it does not have the power to enact legislation that has not been proposed by the Commission.

2.2.2 Role of EU member states

For the purposes of the EU, the member states are bound to take all appropriate measures to ensure the fulfilment of the obligations arising out of the Treaty or resulting from actions taken by the institutions of the Community. They are required to facilitate the achievement of the Community's tasks and must abstain from any measure that could jeopardise attainment of the objectives of the Treaty.

In terms of the Directives, the member states are (therefore) required to take the measures necessary to give full effect to their provisions in national law and to ensure that no other national provisions undermine their applicability. This normally takes the form of a transposition of the Directives into national law and the abrogation of all contrary legislative provisions.

It is important to note that although the Directives are directly effective (where specific conditions are met – see module A1) in that they can convey rights even if not implemented, they are not directly applicable, *i.e.* they need to be transposed into national law.

Moreover, they are binding only in terms of the result to be achieved, but leave to the national authorities the choice of form and methods. Thus it is not necessary for the member states to produce an exact copy of the Directives in their national legislation. This is also discussed in module A1.

Provided they achieve the same results, national authorities can reproduce the provisions of the Directives in identical fashion by amending existing legislation or by creating new legislation or codes, etc.

Localisation required: In XXX, the relevant provisions of the Directives are, for example, transposed by the [XXX] (where that is the process chosen).

2.2.3 Role of the European Commission

In addition to acting as the proposer of legislation, the European Commission has also been given by the Treaty the role of its guardian. It is given the explicit task of ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant to it are applied.

Thus, in addition to having acted as the primary policy maker in the field of procurement, the Commission is also responsible for the application and general enforcement of the Directives. In the case of procurement, the responsible directorate-general is DG-Markt.

Implementation measures taken by DG-Markt include the adoption of secondary legislation to provide, for example, for the use of standard forms, the Common Procurement Vocabulary (CPV), interpretative guidelines and communications, and general guidelines.

While enforcement in national courts/review bodies against contracting entities in breach of their obligations is at the suit of interested economic operators, infringements by those public authorities, as emanations of the member state, will simultaneously amount to a failure of the member state to fulfil its obligations under the Treaty.

Such a failure may be challenged directly by the Commission before the European Court of Justice (ECJ) through infringement proceedings brought under article 226 of the Treaty. This process is described in detail in module F1.

2.2.4 Role of the European Court of Justice

There are two Community-level courts, each with its own jurisdiction: the Court of First Instance (CFI) and the European Court of Justice (ECJ). In most cases related to procurement, it is the ECJ that is of most interest.

The ECJ ensures observance of the law in the interpretation and application of the Treaty and its implementing rules. To this end, a number of powers have been expressly conferred on the ECJ. These powers are mainly intended to enable the ECJ to judge the acts and omissions of the institutions and the member states in accordance with Community law and to ensure uniformity in the interpretation of Community law and in the application of this law by the national courts.

There are three areas of the ECJ's work that are important in the case of procurement.

- *Dispute resolution*

  Under article 226 of the Treaty, the ECJ has jurisdiction to hear disputes between the Commission, acting as guardian of the Treaty, and member states in respect of a member state's failure to fulfil its obligations under the Treaty. These are often referred to as the Commission's infringement proceedings.

  Thus, the Commission will bring infringement cases against member states before the ECJ. Such actions may result from a failure to transpose the Directives correctly into national law or from a failure of a contracting authority to properly apply the Directives, the national provisions transposing them, or other enforceable Community law, such as the Treaty itself.

- *Preliminary rulings*

  A critical power conferred on the ECJ is the power, granted by article 234 of the Treaty, to pronounce, by means of a preliminary ruling, on the *interpretation* of the Treaty and on the *validity* and *interpretation* of acts of institutions of the Community if a question on this subject is raised before a national court or tribunal.

  Thus in disputes between member states and private persons, or between private persons themselves, questions relating to the interpretation, application and validity of Community law that arise in the context of national proceedings may be referred to the ECJ. Where such questions arise in the context of a procurement dispute that has been brought in a national court/review body under the Remedies Directive, for example, the national courts may refer them for interpretation to the ECJ. Under this procedure, the national court/review body will establish the facts of the case and formulate questions of interpretation for the ECJ, the answers to which are necessary for the resolution of the case.

- *General principles of law*

  In the exercise of its jurisdiction, the ECJ has cause to apply and interpret Community law and, in so doing, has often sought to fill lacunae in Community law by reference to general principles of law. These are unwritten rules, not contained in the Treaty but inspired by those common general principles of law recognised in the national legal systems of EU member states.

  Where decisions by the Commission impact on economic operators, they may brought before the Court of First Instance (CFI).

Section 4 below contains a practical note explaining how to find and use ECJ cases.

2.3 NATIONAL INSTITUTIONAL FRAMEWORK

Implementation and enforcement of procurement rules take place mostly at national level. In the case of XXX, the following institutions have been set up to carry out these tasks.

Localisation required:

2.3.1 Public Procurement Office/Agency

2.3.2 Procurement Review Body

2.3.3 Organisation at level of contracting authorities and contracting entities – procurement departments/units; (certified) procurement officers.

Provide link to module B.

2.3.4 Centralised procurement - central purchasing agency

Provide link to module A4

SECTION 3
EXERCISES

EXERCISE 1
EUROPEAN COMMISSION AS GUARDIAN OF THE TREATY

Compare and contrast article 226 of the Treaty and article 8 of Directive 89/665, as amended by Directive 2007/66.

Consider the following questions:

1. Are these both the same procedure?
2. If not, what are the differences?
3. Is one better than the other (faster, more efficient, more effective)?
4. What conditions apply to each?
5. What benefits does the Commission accrue in using one or the other?

Relevant/useful texts for Exercise 1:

1. Article 226 of the Treaty

   If the Commission considers that a member state has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

   If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the ECJ.

2. Directive 89/665, as amended by Directive 2007/66:

   Article 8: Corrective mechanism

   1. The Commission may invoke the procedure provided for in paragraphs 2 to 5 when, prior to a contract being concluded, it considers that a serious infringement of Community law in the field of procurement has been committed during a contract award procedure falling within the scope of Directive 2004/17/EC, or in relation to Article 27(a) of that Directive in the case of contracting entities to which that provision applies.
   2. The Commission shall notify the member state concerned of the reasons which have led it to conclude that a serious infringement has been committed and request its correction by appropriate means.
   3. Within 21 calendar days of receipt of the notification referred to in paragraph 2, the member state concerned shall communicate to the Commission:
      (a) its confirmation that the infringement has been corrected;
      (b) a reasoned submission as to why no correction has been made; or
      (c) a notice to the effect that the contract award procedure has been suspended either by the contracting entity on its own initiative or on the basis of the powers specified in Article 2(1)(a).
   4. A reasoned submission communicated pursuant to paragraph 3(b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial review proceedings or of a review as referred to in Article 2(9). In such a case, the member state shall inform the Commission of the result of those proceedings as soon as it becomes known.

5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3(c), the member state concerned shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That new notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.

3. Extract from P. Trepte, ***Public Procurement in the EU*** (OUP, 2006)

(2) Procedure under Article 226 (B)

9.123 Once the complaint has been delivered, the case is out of the complainant's hands. The Commission services may request further information from the complainant but the conduct of the case from this stage on is entirely the responsibility of the Commission. The complainant may not force the Commission to proceed and withdrawing the complaint, at this stage, will not necessarily halt the procedure. This is, of course, a tactical weapon in the hands of potential complainants. Where there has been a complaint, the Commission services will investigate the complaint to establish the existence or not of any breaches of Community law. The Commission may nevertheless follow the same procedure *ex officio* where it has discovered a potential breach by other means.

9.124 If the Commission decides that, in its view, there are no breaches there is little the complainant can do and an individual may not force the Commission to act.[1] If he is informed of this conclusion, he may attempt more persuasion but, if the complaint was originally carefully drafted and properly documented, there is not much chance of success. Equally, if the complaint did not contain sufficient information or evidence the impact of the complaint may have been lost and the tactical set-back will be difficult to overcome. If the Commission decides that there are breaches of Community law, it will take formal steps to correct the situation. It will normally use the procedure provided for in Article 226 of the Treaty.[2]

(a) Contacting the member state authorities (C)

9.125 The Commission will contact the member state authorities concerned, raising the alleged infringements and requesting the member state to submit its observations. It will do this by way of formal notice (*'lettre de mise en demeure'*).There is no time limit for this part of the procedure and much will depend on the importance given to the infringement by the Commission services. In practice, this 'administrative stage' is often beset by a good deal of prevarication on the part of the member states. If the Commission feels that it is a priority matter, this procedure will have a speedy journey through the bureaucracy's machinery. If not, the complainant will have to be patient. In *Sankt Pölten*[3], for example, in view of the perceived urgency of the case, the Commission provided only a week for Austria to reply.

9.126 The member state will usually reply to the Commission's objections. It may be that the member state concerned will amend its national provisions bringing to an end the alleged infringement. Alternatively, it may defend its position and claim that there is no infringement either in fact or in law.

[1] Case 48/65 *Lütticke v EC Commission* [1966] ECR 19.

[2] There is also a separate procedure under Art 228 where a member state relies on the provisions of Art 296 or 297 in respect of military equipment or war and other exemptions.

[3] Case C-328/96 *Sankt Pölten*.

If the complainant is fortunate enough to be informed of the different positions (and there is no right to this information), he may wish to make further comments. The likely situation, however, is that the complainant must hope to have supplied the Commission with sufficient facts and evidence to rebut the defence.

(b) Reasoned opinion from the Commission (C)

9.127 If the Commission is not satisfied with the member state's response, it will issue a 'reasoned opinion'. This will include a full statement of the facts and a formal statement of the infringements of Community law alleged to have taken place. The reasoned opinion will require the infringements to be brought to an end but will not normally suggest the measures to be taken. There is no set time limit between the previous stage and the issue of reasoned opinion but there will be a time limit within which the member state is required to comply. This would usually be set at two months but can be shorter where urgency requires. Again, in the *Sankt Pölten*[4] case, Austria was given a mere 14 days to respond to the reasoned opinion but, as the ECJ made clear in that case, such short time limits would need to be justified.

(c) Court of Justice (C)

9.128 If the member state does not comply within the time limit set, the matter will be brought before the ECJ in Luxembourg. Due to the pressures on the ECJ , it is unlikely that a judgment would be forthcoming before about 18 to 24 months. There is an expedited procedure before the ECJ[5], but the ECJ has apparently indicated[6], in the context of the expedited procedure for preliminary rulings, that that possible delay to an individual procurement does not satisfy the requisite condition of urgency to bring the expedited procedure into play.[7] If the final result is a judgment against the member state, the latter will be obliged to bring the infringement(s) to an end. The complainant does not have any standing in the ECJ procedure, may not be represented and may make no comments even as an observer. Contributions from the complainant will be limited to the contents of the complaint.

9.129 As will be surmised from the above, the value of the complaint lies largely in the initial stages. First, the threat of a complaint, where that can be made, may 'encourage' the offending authority to comply with Community law. Secondly, the initial reaction of the Commission in the form of a letter to the member state concerned may well achieve the same effect. Thirdly, the threat or the issue of a 'reasoned opinion' may also lead to compliance.[8] If the case goes to Luxembourg, the immediate value is lost because such an action could take about a minimum of two and a half years from the date the complaint is sent. If the ECJ agrees that there has been an infringement, that infringement must be brought to an end and the complaint will have been successful in legal terms. Failure to comply with the judgment can lead to the imposition of fines.[9] The commercial and financial success of the complaint for the complainant is a more difficult calculation to make.

[4] ibid.

[5] Introduced by the Amendments to the Rules of Procedure of the Court of Justice of the European Communities (OJ 2000 L322).

[6] See S. Arrowsmith (above) at 1451.

[7] The expedited procedure has, however, been used by the CFI against procurement conducted by the Community institutions: case T-211/02 *Tideland Signal v Commission* [2002] ECR II-3781.

[8] The *Danish Bridge* case settled at the end of the summary hearing.

[9] Art 228(2); see also case C-304/02 *Commission of the European v French Republic*.

EXERCISE 2
CASE SEARCH

Using the Internet, find the case known as "*Beentjes*" and provide:

- its full case reference, including reporting details
- the name of the Advocate General
- details of any cases referred to in that case
- a short summary of the findings of the ECJ, and
- an explanation of the role played by the ECJ in that decision (*i.e.* which of the roles discussed in section 2.2.4 was important)

EXERCISE 3
NATIONAL EXAMPLE

(to be localised)

SECTION 4
FINDING AND USING THE CASES OF THE EUROPEAN COURT OF JUSTICE

The jurisdiction of the European Court of Justice ("the ECJ") is described in section 2.2.4. As stated in that section, the decisions of the Court of First Instance (CFI) are of less concern in the case of procurement, although might occur in the event of a challenge against a decision of the Commission affecting procurement. One such case was the unsuccessful challenge of the Commission's decision to reject the supplier's tender under a PHARE programme procurement:

Case T-185/94 *Geotronics v Commission ("Geotronics")* [1995] ECR II-2795.

There is no appeal from the decisions of the ECJ. An appeal lies to the ECJ from the decisions of the CFI. For example, the judgment of the CFI in *Geotronics* was appealed to the ECJ:

Case C-395/95 *Geotronics v Commission* [1997] ECR I-2271.

4.1 CASE REFERENCES

The case referred to above serves to demonstrate the method of referring to cases.

The first item is the *case number*. The letter "T" indicates a case brought before the CFI. The letter "C" indicates a case brought before the ECJ. This is followed by a roll number (*i.e.* the first case introduced in any one year would be 1, the second 2, etc…) and the year in which the case is filed. Before the establishment of the CFI in 1989, the letters "C" and "T" were not used in case references, since there was only one court.

This is followed by the *case name*. These are the names of the parties. Where the case is made on a preliminary reference from a national court, the case will retain the name of the original parties. In a direct action, the first name will be the name of the entity bringing the case, the second the name of the defendant. Where the case is the result of an action brought by the European Commission under article 226 of the Treaty, the first name will be that of the Commission and the second the name of the member state against which the case has been brought. In the case of an appeal, the first name will be that of the entity bringing the appeal.

Especially in the case of Commission actions against member states, this often raises some confusion because there will be a large number of cases brought against any given member state relating to numerous provisions of the Treaty and secondary legislation. Often, therefore, commentators will give significant cases an abbreviated name (sometimes preceded by the Latin *sub nom.*), either relating to one of the parties or, in the case of procurement, referring to the object of the procurement. Thus, an early case brought by the Commission against Ireland (case 45/87 *Commission v Ireland* [1987] ECR 1369) is generally referred to as "Dundalk" after the name of the contracting authority, which was the Dundalk Urban District Council. Another case involving the construction of a bridge over the Storebaelt in Sweden (case C-243/89 *Commission v Denmark* [1993] ECR I-3353) is often referred to as either the "Danish Bridge" or the "Storebaelt" case.

After this, and once the case has been decided and reported, comes the reference of the *case report*. While there are some commercial providers of case reports that will include cases of a European dimension, the official reference is the European Court Reports ("ECR"), which provides the only authentic version of the judgments.

The method for citing report references is to set out first the year of the volume in which the judgment is reported, followed by the name of the reports in which it is recorded. Since 1990, the ECRs have been divided into two parts. For current purposes, Part I will include the judgments of the ECJ and Part II will include the judgments of the CFI. Prior to 1990 there were no parts, and so there will be no reference to them in cases before this date. Report names are followed by the page reference, which will be to the first page of the report concerning the case.

Thus,

> Case T-185/94 *Geotronics v Commission ("Geotronics")* [1995] ECR II-2795
>
> refers to the 185th case lodged with the CFI in 1994; it was brought by Geotronics against the Commission and the judgment was reported in 1995 in Part II of the ECR at page 2795; and
>
> Case C-395/95 *Geotronics v Commission* [1997] ECR I-2271
>
> refers to the 395th case lodged with the ECJ in 1995; it was brought by Geotronics as appellant against the Commission and the judgment was reported in 1997 in Part I of the ECR at page 2271.

These references are to the date of the report in the ECR, not to the date of the judgment. That will appear on the first page of the relevant report, but the report will generally be published some time after the judgment has been delivered.

4.2 READING THE CASE

It is important to bear in mind that the ECJ is made up of judges and Advocates General who have the same status as judges. Understanding their separate functions will assist in understanding the case reports.

When a case is received by the ECJ Registry, it will be assigned to one of the judges acting as a reporting judge (a *juge rapporteur*). His function is to provide an extensive statement of facts and the arguments of the parties, known as the Report for the Hearing.

The role of the Advocate General (AG) is to make a reasoned submission on the cases in order to assist the ECJ. The AG's submission, which is made in open court, is known as an Opinion. It is in this Opinion that readers will find a full discussion of facts, reference to relevant legal provisions, and a full consideration of the previous decisions of the ECJ. This Opinion is not binding on the ECJ; it is only an opinion, but a very valuable one. In many cases, the ECJ follows the AG fully; in others, it deviates from the Opinion either wholly or in part. It is probably best to view the AG's Opinion as a starting point or reference point for the ECJ's deliberations.

Following the written submissions of the parties, the Report for the Hearing, any oral hearings and the AG's opinion, the ECJ will begin its deliberations. These deliberations are generally conducted in French, the ECJ's working language (even though it is not the mother tongue of all or even a majority of the judges). Once the ECJ have reached agreement, the judgment is translated into the language of the case and signed by the judges. The judgment is a single concurring decision and does not contain any dissenting judgments or opinions. It is, in effect, a committee decision. For this reason, it is often possible to discern more than one line of reasoning in the judgment leading to the same conclusion. In some cases, it might appear that something is missing – this is usually the result of having removed certain statements or arguments that displease judges otherwise minded to dissent from the collective view.

As a result, the judgments tend to be rather terse and formalistic, and are not as discursive as, for example, those of common law countries. They are often less easy to read than the Opinions of the AGs, who have greater flexibility in exploring the issues and possible lines of reasoning.

When reported, the judgment will consist of three main parts: the Report for the Hearing, the ECJ's reasoning, and the actual ruling. The second part is the most important, but for the reasons set out above it tends to be less readable than the AG's Opinion. The final section, the operative part of the judgment, contains the ruling of the ECJ – generally a short statement.

The Opinion of the AG will also be attached.

4.3 RELIANCE ON PREVIOUS CASE LAW

In terms of a system of legal precedent, there is no doctrine at Community level of *stare decisis*, which would require the ECJ to follow its previous case law. However, the ECJ does tend follow its previous decisions in almost all cases. This was less evident in older cases, but the ECJ has now started to make extensive reference to earlier case law. Unlike common law systems, however, it tends to refer to more recent earlier cases rather than seeking out the oldest cases.

There are, of course, instances where the ECJ does not follow its previous case law. Generally, however, in such instances it does not refer to previous cases with which it disagrees, either because of changed circumstances or because the ECJ has effectively changed its mind. It just ignores them, making it difficult sometimes to track any changes in policy. This is where the Opinions of the AGs come into their own since they will often contain a consideration of the previous case law and indicate any proposed or potential divergences.

4.4 FINDING CASES

The obvious place to search for reported cases is in the European Court Reports themselves. These are available by subscription from the Office of Official Publications. The ECJ's decisions are also available on the ECJ's own website: www.curia.eu.int

Notifications of cases and short summaries are also found in the "C" series of the Official Journal. This is available by subscription from the Office of Official Publications, but copies are also available on the Community's official Europa website: http://eur-lex.europa.eu/en/index.htm.

Infringement proceedings are also tracked by DG Markt on their website: http://ec.europa.eu/internal_market/publicprocurement/infringements_en.htm.

Copies of the Opinions of the AG and the judgments of the ECJ are also available on the day of delivery at the ECJ itself in Luxembourg.

[Localisation: In XXX, it is also possible to access these cases through the XXX website]

SECTION 5
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. What is the responsibility of contracting entities?
2. Who is the Community legislator?
3. What is the critical power of the European Commission when it comes to legislation?
4. What other roles does the European Commission have?
5. What is the role of the member states in the legislative process?
6. Why are they sometimes held responsible for the actions of contracting entities? You may also want to consider module A1.
7. Name the two primary European Courts for our purposes.
8. What do you understand by the function of preliminary rulings of the Court?
9. Explain the phrase "general principles of law".
10. How is Community legislation implemented in XXX?
11. How is Community legislation enforced in XXX?
12. XXXX etc localisation required?

Legislative framework and basic principles of public procurement

Historical context

MODULE A

PART 3

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

- The context in which the procurement system of the EC was developed
- The history of that development
- The objectives at the heart of this system of regulation and where it has evolved, and
- How the EU system differs from other "systems" of procurement regulation

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- The principles that govern the regulation of public procurement in the EC
- The particular objectives of the EC that led to the development of the legislation
- The way in which the EC context has moulded the procurement regulation.

It is therefore critical to understand fully:

- The objectives of the EC Treaties
- The ensuing objectives of the Procurement Directives, and
- The objectives of other procurement systems

1.3 LINKS

There is a particularly strong link between this chapter and the following module:

- Module A1 on the basic principles of public procurement

1.4 RELEVANCE

This information will be of interest to all persons involved in procurement who wish to understand the objectives of the procurement legislation and follow its development from its beginnings. It is also of particular relevance to procurement professionals seeking to interpret provisions of the Directives that may be unclear if read out of context.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

In addition to referring to the EU legislative framework, it may be useful to have to hand the procurement rules developed in other contexts. These might include, for example:

(i) rules contained in the UNCITRAL Model Law: to be found at http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html

(ii) the rules of the WTO's Government Procurement Agreement (GPA): to be found at http://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm

(iii) the rules of the World Bank: to be found at http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:50002392~menuPK:93977~pagePK:84269~piPK:60001558~theSitePK:84266,00.html

(iv) the rules of the EBRD: to be found at http://www.ebrd.com/about/policies/procure/index.htm

SECTION 2
NARRATIVE

2.1 INTRODUCTION

The primary purpose of this module is to provide an historical context to the procurement Directives. However, this cannot be done without also considering the political and economic context within which the Directives have been developed. That context relates in particular to the purposes of the Directives, which are bound to the purposes and objectives of the European Community. The procurement Directives take on the particular flavour of the Community context, and the rules contained in them reflect the objectives of the Community itself. While the provisions of the Directives are superficially very similar to the provisions found in other systems of procurement regulation, the motivation for their adoption is Community-specific.

It is of course not surprising that all systems use very similar provisions – there has been no need to "reinvent the wheel". Procurement regulation existed well before the establishment of the European Community or the World Trade Organisation (WTO), and many countries, including a number of member states, already had sophisticated domestic systems. Procurement is not an invention of the European Community. Furthermore, the Organisation for Economic Co-operation and Development (OECD) had been working on the identification of procurement procedures among its members as early as the 1960s, and the results were contained in an OECD Report published in 1966. There was significant cross-fertilisation between the work of the OECD and that of the EEC (as it then was), at the time when the latter was developing its procurement regime. The work of the OECD also informed the international negotiations that were taking place at the level of the General Agreement on Tariffs and Trade – GATT (now the WTO).

At the same time, the existence of domestic procurement legislation was a key motivator for the creation of procurement legislation at Community level, because it was often used as a means of providing domestic preferences of one sort or another. Given the primary objective of the European Community, such national preferences and differences had the potential to disrupt the very goals of the Community. It was with this in mind that, at the outset at least, the Community Legislator began the process of developing and expanding its own procurement system. As time passed, other objectives were added, notably the pursuit of secondary Community objectives that foster social and environmental policies, but the core objectives of the Community procurement system has always been to create a common procurement market free of national preference and bias.

Article 2 of the Treaty of Rome (original text)

"The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it."

Other procurement systems that rely on similar terminology have different objectives and are thus drafted and implemented slightly differently, with the result that the various systems are not always identical in their goals, methods, implementation or interpretation. To facilitate understanding of the distinction between the various systems, Section 2.3 below will set out briefly the objectives and core requirements of other systems of procurement.

2.2. DEVELOPMENT OF THE EU PROCUREMENT SYSTEM

2.2.1. The Treaty framework

As indicated in module A1, the Treaty of Rome (as well as the subsequent treaties amending the Treaty of Rome) – hereafter referred to as "the Treaty" – does not include any explicit provisions relating to public procurement.

The Treaty is a framework treaty, setting out the main principles to be applied and leaving the detailed implementation to later secondary legislation. The procurement rules have largely been the product of secondary legislation, adopted by way of the Directives.

The silence of the Treaty in respect of procurement may also be the result of the failure of the negotiators of the Treaty to reach agreement on such a complex issue, characterised by considerable differences in national procurement systems and by the extreme sensitivity connected to preferential procurement practices. It is also possible that the issue of non-tariff barriers to trade (such as preferential procurement practices) was not as critical at that time as the abolition of tariff barriers to trade.

Module A1 also discusses the way in which a number of provisions of the Treaty affect public procurement directly, even if they are not mentioned explicitly. In respect of procurement, the core freedoms are crucial and have underpinned the development of secondary procurement legislation from the 1960s to today. Two of those freedoms, in particular, have been fundamental in the development of the procurement Directives: the free movement of goods and the freedom to provide services.

In addition to these principles, the ECJ has also developed a series of additional "general principles of law", which are ultimately derived either from the Treaty or from the legal systems of the member states. The ECJ has been content to apply both of these types of principles to the field of public procurement in the absence of explicit provisions. Such principles have subsequently often found their way into the Directives themselves, and their impact can be seen in the later iterations of the Directives.

2.2.2. The General Programmes

Explicit Community intervention in procurement began with two General Programmes, which dealt with the lifting of restrictions in public works contracts. These programmes demonstrated at an early stage the concern of the Community with discrimination in the field of procurement. They only dealt with public works contracts since they were adopted under the provisions relating to the freedom of establishment and the freedom to provide services, and did not concern the supply of goods, which for Community purposes falls under the provisions relating to the free movement of goods.

Both programmes required the elimination of restrictions – including rules and practices of member states with respect to foreigners – , which exclude, limit or impose conditions upon the capacity to submit offers or to participate, whether as contractor or subcontractor, in contracts awarded by the state or other legal persons governed by public law.

These were transitional provisions, and the restrictions were to be removed by the end of the transition period.

With some foresight, both General Programmes stated that the elimination of discrimination and restrictions in the field of procurement would need to be accompanied by measures to co-ordinate the procurement procedures of the member states.

2.2.3 The early Directives

The General Programmes were implemented by way of a series of subsequent Directives. These Directives were of two types, referred to as the Liberalisation Directives and the Co-ordination Directives.

The ***Liberalisation Directives*** were used to eliminate restrictions and discriminatory measures.

The ***Co-ordination Directives*** were aimed at the approximation of the laws of member states, and in the case of procurement, at the co-ordination of national contract award procedures.

2.2.3.1 Liberalisation Directives

Three general Liberalisation Directives were adopted in 1964 in an attempt to implement the General Programmes: **Directives 64/427, 64/428 and 64/429**.

The first two Directives imposed an immediate prohibition on the restrictions identified in the General Programmes. In the case of public procurement, this meant a prohibition on national measures excluding, limiting or imposing conditions on foreigners in respect of the submission of offers or participation, whether as contractor or subcontractor, in contracts awarded by the state or other legal persons governed by public law. In respect of procurement, Directive 64/428 provided that, in demonstrating technical capacity, certificates relating to the completion of works contracts in the territory of other member states would have equal value to those referring to works carried out in the host member state.

Following a proposal dating from 1964, the Council adopted its first Liberalisation Directive, aimed specifically at removing restrictions to the freedom of establishment and the freedom to provide services in the area of works contracts. This was **Directive 71/304, the first Works Directive.**

This Directive called again for the immediate abolition of the restrictions contained in Title III of the General Programmes and set out in greater detail the types of discrimination that were prohibited, including (in article 3(c)) those national measures that had been applied irrespective of nationality but which nonetheless hindered exclusively or principally the activities of nationals of other member states.

In the case of supplies, the first Directive specifically to address public procurement was **Directive 70/32**. It was, however, adopted shortly before the end of the transition period and is mainly of interpretative value.

The Directive applied to all nature of goods supplied to the state, regional and local authorities and to legal persons governed by public law, including the supply of products necessary for the completion of building works, whether or not these goods were an integral part of a public works contract. The aim of the Directive was to require member states to apply the provisions relating to the free movement of goods to all legislative, regulatory and administrative provisions as well as to administrative practices that totally or partially:

(1) excluded the supply of imported products;

(2) protected or granted preference to national products (other than those provided by way of state aid); or

(3) placed imported products at a disadvantage other than by means of a tax.

The Directive also contained a list of typical forms of discrimination that were targeted for abolition. These included, for example, differential treatment with respect to the provision of securities and deposits and the practice of making the supply of imported products conditional on reciprocity granted by the member state from which the products were imported.

The Directive further prohibited indistinctly applicable technical specifications that had restrictive effects that were out of proportion to the goals sought and that could have been achieved by means of less restrictive trade.

In the case of both supplies and works, therefore, the Liberalisation Directives applied the principles relating to the free movement of goods, the freedom of establishment and the freedom to provide services.

The Liberalisation Directives were based on the specific Treaty provisions aimed at removing obvious cases of discrimination. As recognised in the General Programmes, however, the removal of formal instances of discrimination needed to be accompanied by further positive measures designed to co-ordinate the various procurement procedures of the member states.

The subsequent Co-ordination Directives were thus based on Treaty provisions designed for the approximation of those laws, regulations or administrative actions in the member states that directly affected the establishment or functioning of the common market.

2.2.3.2 Co-ordination Directives

Two Co-ordination Directives were adopted in succession:

- Directive 71/305 on public works contracts; and
- Directive 77/62 on public supplies contracts.

This separation between public works and public supplies contracts was probably explained by the different legal bases upon which the earlier Directives had been adopted and cited in the recitals to the Directives. The provisions of both Directives were largely the same, but they remained separate until 2004 when they, together with a later Directive concerning public services contracts, were consolidated into a single text.

Directive 71/305 was adopted following the two General Programmes, with the purpose of co-ordinating the national award procedures of member states in respect of the award of their public works contracts. Recital 3 of the Directive restates the main objectives of the General Programmes as the prohibition of technical specifications that have a discriminatory effect, adequate advertising of contracts, and the fixing of objective criteria for participation. In recital 9, the Directive places particular emphasis on the development of effective competition in the area of public contracts for which advertisement is necessary throughout the Community. The purpose was to provide economic operators established in the Community with adequate information to enable them to decide whether such contracts were of interest to them.

Directive 77/62 was adopted with a view to supplementing the prohibition contained in article 30 of the Treaty through the co-ordination of procedures relating to public supply contracts. The Directive reiterates the core objectives of Directive 71/305 and, in recital 2, emphasises that the Directive is necessary "in order, by introducing equal conditions of competition for such contracts in all member states, to ensure a degree of transparency allowing observance of this prohibition to be better supervised". The key mechanism of both Directives is thus to impose Community-wide advertising of public contracts that will (1) provide effective competition by ensuring equality of opportunity (by notifying tenderers in all member states of contracts to be let throughout the Community) and equal access to those contracts (by fixing objective criteria for participation and prohibiting the use of discriminatory technical specifications); and (2) guarantee a degree of transparency enabling supervision.

It should be added that, as co-ordination measures, the Directives do not seek to impose a new common regulatory regime on member states. Recital 2 of Directive 71/305 indicates that the co-ordination effort should take into account as far as possible the procedures and administrative practices in force in each member state. Article 2 of both Directives makes it clear that the authorities awarding contracts are to apply their national procedures *adapted* to the Directives. The Directives thus limit their scope to those measures required for the co-ordination exercise and permit member states to maintain or adopt substantive and procedural rules, to the extent that these are not in conflict with the Directives or with Treaty provisions.

Furthermore, the Directives applied only to proposed procurement contracts of a financial value above a given threshold (1m units of account in the case of works and 200,000 units of account in the case of supplies). These were the contracts that were most clearly capable of having an impact on competition (recital 1) and of affecting trade between member states.

2.2.4 Directives following the Single European Act

A series of communications prepared by the European Commission concerning the implementation of these early Directives revealed the disappointing results achieved. As well as expressing its criticism of the member states' failure to effectively and fully implement the Directives in national law, the Commission identified a number of factors that were of particular concern:

- the limited coverage of the Directives as a result of the exclusion in the previous Directives of the utilities sectors, *i.e.* public and or private entities operating in the sectors of water, energy, transport and telecommunications;
- the limited effect due to the level of the thresholds, notably because contracting authorities brought a high proportion of contracts below the thresholds by underestimating contract values and by an excessive division of projects into lots, with a view to avoiding application of the Directives;
- the infrequent use of the open procedure, with more reliance placed on non-competitive procedures;
- the absence of any enforcement mechanisms that would bolster the implementation of the Directives.

To achieve completion of the common market, the Single European Act (SEA) provided a new legal base, and the Procurement Directives adopted following the SEA were based on the new article 100a (now article 95), which permitted the Council to adopt, by qualified majority, measures for the approximation of the provisions laid down by law, regulation or administrative action in member states that had as their object the establishment and functioning of the internal market.

Broadly, two initiatives were taken: first, to improve the existing Directives and second, to extend the scope of the Directives and rationalise the growing number of applicable documents.

2.2.4.1 Improvement measures

Amendments were made to:

- the Works Directive by Directive 89/440; and
- the Supplies Directive by Directive 88/295.

The main thrust of these amendments, as set out in recital 6 to Directive 89/440 and reflected in recital 5 to Directive 88/295, was to "guarantee real freedom of establishment and freedom to provide services in the market for public works contracts" by improving and extending "the safeguards in the directives that are designed to introduce transparency into the procedures and practices for the award of such contracts in order to be able to monitor compliance with the prohibition of restrictions more closely and at the same time to reduce disparities in the competitive conditions faced by nationals of different member states."

Increased transparency effectively meant an improvement of the advertising rules and of the information to be made available in order to allow for better supervision and monitoring. The Directives introduced:

- a new requirement to publish prior information notices (PINs), by which contracting authorities would indicate their intended purchases for the coming budgetary year and would, in return, be permitted to reduce the minimum time limits set out in the Directives to be observed between the call for competition and the submission of bids;
- a further measure to improve the flow of information by requiring the publication of a contract award notice and a debriefing of unsuccessful tenderers upon request;
- mandatory references to European standards in order to further reduce the disparities in the competitive conditions faced by foreign tenderers;
- a stricter approach to the contract award procedures to be used, together with an extension of the minimum time limits;
- a negotiated procedure simply for those circumstances in which the original Directives no longer applied.

Furthermore, in cases not falling within the conditions enumerated for use of the negotiated procedure, the use of the open or restricted procedure was made the rule in the case of works. In the case of supplies, the open procedure was made the rule, with the use of a restricted procedure requiring justification based on either the need to maintain a balance between contract value and procedural costs or the specific nature of the products to be procured. This provision was later removed.

In addition, the threshold level for works contracts was increased to ECU 5 million "in view of the rise in the cost of construction work and the interest of small and medium-sized firms in bidding for medium-sized contracts".

2.2.4.2 Extension and rationalisation

In terms of works and supplies, the next major step was the consolidation of the various amendments into two new Directives: 93/36 and 93/37. The preambles reflect those of previous Directives, although the term transparency is now largely replaced by references to the provision of information.

In addition, the period following the SEA witnessed the adoption of four new Directives:

- **Directive 89/665** on remedies in the public sector and **Directive 92/13** on remedies in the utilities sector

  The lack of enforcement measures had been identified by the Commission as an obstacle to the effective implementation of the procurement Directives. The provisions of the Public Sector Remedies Directive were largely reproduced for the utilities sector in Directive 92/13, although this Directive also took account of the greater flexibility afforded to the utilities sector and contains some additional provisions, introducing both an attestation system and a conciliation procedure.

  These Remedies Directives have now been amended.

- **Directive 90/531** on the award of public works, supplies and services contracts by entities operating in the utilities sector

  The utilities sector was excluded from the original public procurement regime largely as a result of the identity of the contracting authorities and entities operating in the sector (often private undertakings). This situation is discussed further in module D2. With the adoption of the original Utilities Directive, these entities were brought within the regime under certain conditions and were subject to a rather more flexible set of procedures so as to take account of the more commercial environment within which they operated.

- **Directive 92/50** on public (non-construction) services contracts

  The procedural provisions of the Services Directive are almost identical to those of the Supplies Directive, except that they have been adapted to the particularities of services contracts. It was based on the Treaty provisions concerning the freedom of establishment and the freedom to provide services. The only significant difference is that the Services Directive applies two levels of provisions depending on the type of services concerned (see module D3). Only a small number of provisions relating to the use of non-discriminatory technical specifications and the obligation to publish a contract award notice apply to non-priority services, which are those where the full potential for increased cross-frontier trade will not be realised.

2.2.5 The new Consolidated Directives

Reform of the Directives discussed above was under serious consideration from as early as the Commission's Green Paper of November 1996, which was followed by its 1998 Communication on Public Procurement in the European Union. This reform resulted in proposals for two new Directives, one for the public sector and the other for the utilities sector. Following a number of amendments and after intense debate with the European Parliament, these proposals finally became Directives in January 2004. They were adopted against the background of the developments of the Treaty itself, which are also reflected in the new Directives. These two Directives form the essential subject matter of this training.

The most obvious change in the public sector was the consolidation of the previous three Directives applying to contract award procedures for public works, supplies and services, respectively, into a single new Directive. Along with this consolidation exercise, the new public sector Directive was simplified and streamlined, and it now shows a greater degree of procedural logic.

To a very large extent, the amendments brought to the new Utilities Directive mirrored those made to the new *single* public sector Directive.

In clarifying the existing provisions, however, the Legislator also took the opportunity of bringing about some significant as well as more minor changes to the substance of the Directives. Some of these changes merely reflect the ECJ's evolving case law in respect of public procurement matters or recognise the reality of national procurement practices.

The public sector Directive nevertheless does introduce some novel provisions, some of which are also reflected in the Utilities Directive. In summary, the main amendments to the public sector procurement regime are as follows:

- recognition that a number of contracting authorities may conduct centralised procurement;
- explicit acceptance of the use of framework agreements, albeit subject to the conditions set out in the Directive (these had already been permitted in the existing Utilities Directive);
- amendments to the provisions relating to technical specifications that removed the obligatory use of references to European standards;
- introduction of a new competitive dialogue procedure in situations where procuring entities cannot either define the technical means to meet their needs or specify the contractual or financial make-up of the project (this amendment was not extended to the new Utilities Directive);
- introduction of electronic procurement mechanisms, including electronic auctions, dynamic purchasing systems, and reduction of the relevant time limits in the event of electronic communications;
- explicit approval of the use of social and environmental considerations in the setting of specifications, selection and award criteria, and application of contract conditions, as well as provision for procurement from sheltered workshops;
- introduction of new requirements for minimum qualification and relative weighting of selection and award criteria that are to be disclosed in advance.

In addition to introducing consistency with the public sector Directive, the new Utilities Directive also brings about some significant changes that are specific to the utilities sector. Some of the more minor amendments concern the information that must now be supplied to tenderers by *all* procuring entities and not only those subject to the WTO's Government Procurement Agreement (GPA) (art. 49); the introduction of the general principle of mutual recognition for all procedures and not only in the case of the qualification procedure (art. 52); and the amendments to the provisions on design contests, ensuring that all of the general exemptions also apply (art. 62).

The more significant amendments include:

- exclusion from the scope of the Directive of entities operating in the telecommunications sector;
- inclusion of entities operating in the postal services sector;
- introduction of a general mechanism that would permit the exclusion of those entities that can demonstrate their operation in competitive markets;
- amendment to the definition of special or exclusive rights so as to align it with the jurisprudence of the ECJ;
- revision of the threshold values to counter the problems of varying thresholds brought about by the GPA;
- extension of the affiliated undertakings exemption to include works and supplies contracts.

2.2.6 Recent developments

There have been two recent developments:

Directive 2007/66/EC, which significantly amends the two Remedies Directives in the public and utilities sectors, respectively. The Directive introduces, *inter alia*, a standstill provision between the award and conclusion of a contract, allowing tenderers time to bring proceedings in the event of perceived breaches of the Directives. The deadline for implementation was 20 December 2009.

Directive 2009/81, which now applies a more flexible and confidential regime to the procurement of *military supplies and related works and services*, which were previously excluded from the public sector Directive. All other public contracts awarded in the fields of defence and security remain covered by the public sector Directive.

2.3 OTHER PROCUREMENT SYSTEMS

This section briefly considers a number of other "international" procurement systems: the WTO's Government Procurement Agreement (GPA); the UNCITRAL Model Law; and the Procurement Guidelines of the Multilateral Development Banks (MDBs), taking the examples of the World Bank and the EBRD.

In general terms, only one of these, the WTO's GPA, has a direct impact on the EU procurement system due to the EU's membership of the GPA on behalf of all EU Member States. As a result, the GPA applies to public procurement in the member states. However, since the procurement Directives have been amended to take account of the GPA requirements, compliance with the Directives will also signify compliance with the GPA, and therefore no specific further action is required.

The UNCITRAL Model Law may have an indirect impact, however, since it has been used on occasion as a model for procurement reform in countries acceding to the EU. The result is that some provisions of national law reflect the wording and intent of the UNCITRAL Model Law and have only subsequently been amended to bring them into line with EU requirements. [Localisation required where target country originally based its procurement law on the UNCITRAL Model Law: This is the case in XXX, where (provide a description of the process with reference to section 2.4)]

2.3.1 The GPA

The Government Procurement Agreement (GPA) is the procurement regulation of the World Trade Organisation (WTO). It provides an international system of procurement regulation in the sense that it imposes obligations on the signatory states, which much provide access to their procurement markets to tenderers from other signatory states. As with the European Community, the GPA seeks to set up a procurement market between the members of the agreement, to which all members have equal access.

The current GPA dates from 1994 and is part of the Uruguay Round of international trade negotiations held under the auspices of the General Agreement on Tariffs and Trade (GATT), which led to the creation of the World Trade Organisation (WTO). The GPA of 1994 replaced the earlier GPA (1979), which had been amended in 1987.

This new GPA has an expanded scope and now covers not only central government but also sub-central government entities and some utilities. It covers goods and also some services, including construction services. It further contains a bid-challenge mechanism, which allows disappointed tenderers to invoke the GPA before national courts.

The stated objective of the GPA (1994), as set out in its preamble, is to provide an effective and transparent multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement. The aim is to achieve greater liberalisation and expansion of world trade and to improving the international framework for the conduct of world trade.

The GPA provides this framework, in theory, by extending the GATT principles of non-discrimination (Most Favoured Nation and national treatment) to the tendering procedures adopted by government bodies at both central and regional levels as well as to the tendering procedures of other specified entities. However, this extension of the GATT principles is not complete.

- First, the GPA is one of the "plurilateral" agreements under the WTO umbrella, signifying that only those states that have signed the agreement are bound by it. It does not apply between all of the members of the WTO.
- Second, the non-discrimination obligations do not apply to all government procurement of the signatories. Rather, they apply in a qualified manner to specified entities, goods and services that have been the subject of extensive bilateral negotiations between the signatories.

The results of these bilateral negotiations are contained in a series of annexes to the GPA, which are critical to an understanding of the true scope of application of the GPA. Coverage is not uniform between all of the parties, and this is also true of the European Community. For example, the benefits of the GPA are not extended by the Community to Canada in respect of bodies governed by public law. Similarly, until such time as reciprocal access is given to Community suppliers and service providers, the European Community will not extend the benefits of the GPA to, for example, Canada and the United States in respect of water activities; Canada and Japan in respect of electricity activities; and Canada, Korea and the United States in respect of airport terminal facilities.

In respect of access therefore (as opposed to compliance), the GPA annexes will be critical.

As with the European Community provisions, implementation of the basic obligations of non-discrimination by the GPA signatories is ensured by setting out a number of detailed operational rules for tendering to be followed by procuring entities. This is done by prescribing three methods of tendering (open, selective and limited) and one additional mechanism, which may be applied to each of those methods (competitive negotiation), supplemented by provisions relating to the preparation of tender documentation, qualification of suppliers, selection procedures, receipt and opening of tenders, and award of contracts. In addition, the rules provide transparency requirements relating to tender notices and their publication, time limits for tendering and delivery, and information on the award of contracts. The GPA also contains specific rules with regard to technical specifications.

As with the Community rules, the GPA does not seek to replace national procurement systems but sets out a requirement of consistency between the applicable national systems and the GPA. As a result, the national procurement systems of the parties have been modified to a greater or lesser extent in order to bring them into line with the GPA. This modification might pose some difficulty for EU member states, which would thus need to adapt their national legislation to the requirements of both the procurement Directives and the GPA.

However, the Community Legislator has amended the Directives with a view to ensuring compliance of the Directives with the GPA. The latest Directives, in particular, amend the threshold levels so as to provide consistency between the application of the Directives and the application of the GPA. Since the two sets of provisions are considered to be consistent (if not identical), the Commission considers that if contracting entities covered by the Agreement comply with the Directives and apply them to economic operators of third countries that are signatories to the Agreement, they "*should* therefore be in conformity with the Agreement".

Compliance with the Directives is thus considered to be sufficient and to equate with compliance with the GPA. The only readily apparent difference in application consists of the different threshold values that apply to contracts for goods and services awarded by central government authorities (listed in annex IV of the GPA) and the differential treatment accorded to certain defence products and services. Otherwise, specific compliance with the GPA is not necessary.

All contracting authorities that are public authorities for the purposes of the public sector Directive, namely public authorities and bodies governed by public law, are also covered by the GPA (the annex to the Directive sets out the coverage of each signatory).

In the case of the utilities sector, only contracting authorities and public undertakings are covered, and not those entities operating on the basis of special or exclusive rights, which operate in defined activities. Even then, not all of the utilities sectors are covered. Entity coverage was based on the idea of reciprocity, so that each member would offer to the other members *equivalent* access to its government procurement in proportion to its size and to the size of the economy as a whole based on negotiations.

In the case of the utility sectors in the European Community, the Community negotiated access to the contracts let only by public authorities and public undertakings defined in the Utilities Directive, where they carry out one or more activities in the areas of water, electricity, urban transport, and terminal facilities in ports and airports. In the case of the European Community, the GPA does not apply to activities in the areas of gas and heat, extraction of oil, gas and solid fuels, transport by railway (other than urban railway), or telecommunications.

2.3.2 The UNCITRAL Model Law

UNCITRAL is the United Nations Commission on International Trade Law. It was established in 1966 in recognition of the disparities in national laws governing international trade, which create obstacles to the flow of trade, as identified by the General Assembly of the United Nations. UNCITRAL was given the general mandate to further the progressive harmonisation and unification of the law governing international trade. Among its achievements has been the adoption of a Model Law on the Procurement of Goods, Construction and Services. The Model Law was first adopted for goods and construction in 1993 and for other services in 1994. It is currently under review.

As the title suggests, it is intended as a model law; it is not itself a law or regulation. It is intended to serve as a model to enable states to evaluate and modernise their procurement laws and practices and to establish procurement legislation where none currently exists.

Article 3 of the Guide to Enactment

The decision to adopt the UNCITRAL Model Law was taken "in response to the fact that in a number of countries the existing legislation governing procurement is inadequate or outdated. This results in inefficiency and ineffectiveness in the procurement process, patterns of abuse, and the failure of the public purchaser to obtain adequate value in return for the expenditure of public funds. While sound laws and practices for public sector procurement are necessary in all countries, this need is particularly felt in many developing countries, as well as in countries whose economies are in transition. In those countries, a substantial portion of all procurement is engaged in by the public sector. Much of such procurement is in connection with projects that are part of the essential process of economic and social development. Those countries in particular suffer from a shortage of public funds to be used for procurement. It is thus critical that procurement be carried out in the most advantageous way possible."

The Guide to Enactment makes it clear that the objectives of the Model Law – which include maximising competition, according fair treatment to suppliers and contractors bidding to do government work, and enhancing transparency and objectivity – are essential for fostering economy and efficiency in procurement and for curbing abuses. These are essentially economic objectives and there is no explicit intention, as in the case of the European Community or WTO, of creating any international system of procurement that regulates procurement between the parties to the agreement (*i.e.* EU member states or signatories of the GPA).

It is, by definition, a model that may be used to guide the development of domestic systems of regulation. The resulting regulations will be domestic, not international, even though one of the stated purposes of the Model is to foster international trade. The Model nevertheless does also have a generalised objective of harmonising domestic systems with a view to facilitating international procurement and the accession to international procurement systems.

As already mentioned above, a number of countries that acceded more recently to the EU had originally developed procurement legislation based on the UNCITRAL Model Law. To a large extent this was a positive move, since it enabled those countries to begin the process of reform on the basis of the pursuit of economy and efficiency in procurement at a time when procurement from the market economy was relatively novel.

The EU accession process required more, however, since its primary objectives were not economic (in the sense of economic efficiency) but political, in the sense that they were designed to establish and maintain a common procurement market within the Community. UNCITRAL-based domestic legislation thus required amendment to align it with the goals of Community procurement legislation. [Localisation required where target country originally based its procurement law on the UNCITRAL Model Law: In the case of XXX, this process can be seen in certain articles of the XXX, such as…]

2.3.3 Procurement rules of the multilateral development banks

The third type of procurement regulation of interest concerns the procurement rules of the multilateral development banks (MDBs). As will be mentioned in module D4, the Directives do not apply to contracts that are governed by different procedural rules and awarded, *inter alia*, pursuant to the particular procedure of an international organisation. This exclusion includes the procedures of the MDBs.

These procedures are formal rules that have been developed by various international organisations (not only the MDBs, but also the United Nations, European Investment Bank, the Commission through the Practical Guide [PRAG], OPEC, bilateral donors, etc.) to govern procurement benefitting from aid to state projects. The aid may be in the form of loans, grants or other assistance, and it is given to countries by the MDBs and other organisations for projects of all sorts, but notably for infrastructure projects.

While the procurement procedures connected with these projects are generally conducted by the beneficiary states as executing agencies, the donors generally maintain some form of supervision over the procurement. The purpose of such supervision is to ensure that the money is used efficiently and effectively and for the purposes that it was given.

Example of purpose of the European Bank for Reconstruction and Development's PP&R (Article 13 of the Agreement Establishing the EBRD)

"(xiii) the Bank shall take the necessary measures to ensure that the proceeds of any loan made, guaranteed or participated in by the Bank, or any equity investment, are used only for the purposes for which the loan or equity investment was granted and with due attention to considerations of economy and efficiency."

The supervision may well include prior and post review and the requirement to obtain "no-objections" from the donor institutions before actions are taken, but it will frequently also take the form of a set of procurement rules or guidelines that govern the whole procurement process. This is notably the case for the MDBs.

Thus, the World Bank (as well as, *e.g.*, the Asian Development Bank, African Development Bank and Inter-American Development Bank) maintains a set of Procurement Guidelines for the procurement of goods and works and for the selection of consultants, and the EBRD maintains its Procurement Policies and Rules.

These procedures will also often contain sets of standard tendering and contract documents based on international models (such as the FIDIC Works contracts) or on harmonised documents agreed between the MDBs, thereby providing a complete assistance package to the beneficiaries in the conduct of their procurement.

In many developing and transition countries, some of which have since acceded to the EU, national procurement legislation has also drawn inspiration from such procedures. Notable here is the case of the World Bank, which has sometimes required the adoption of modern procurement laws (frequently modelled on its own Procurement Guidelines) as a condition for granting aid or loans. This has clearly had a beneficial effect since, like the UNCITRAL Model Law, these guidelines are largely based on the principles of economy and efficiency and do not have overtly political objectives. However, as with national laws originally based on the UNCITRAL Model Law, some amendment will have been necessary to align those laws with the requirements and objectives of the procurement Directives.

2.4 HISTORY OF THE NATIONAL PROCUREMENT SYSTEM

Full localisation required.

SECTION 3
EXERCISES

EXERCISE 1
OBJECTIVES OF PROCUREMENT REGULATION

Carry out a website search of the procurement rules of the following institutions:

UNCITRAL Model Law:
http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html

WTO's Government Procurement Agreement (GPA):
http://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm

World Bank:
http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:50002392~menuPK:93977~pagePK:84269~piPK:60001558~theSitePK:84266,00.html

EBRD:
http://www.ebrd.com/about/policies/procure/index.htm

List the stated objectives of each of these "systems" and identify the common features. Compare these with those of the EC procurement Directives and list those objectives that do not appear in the latter.

EXERCISE 2
NON-DISCRIMINATION

Using additional material from module A1, consider and explain how the principle of non-discrimination is used and applied in the EC and under the GPA.

Referring again to additional material from module A1, consider and explain how the principle of equal treatment is used and applied in the UNCITRAL Model Law and in the procedures of the World Bank and/or EBRD.

Explain how these principles are linked to the objectives of the procurement rules in question.

EXERCISE 3
FLOWCHART OF PROCUREMENT LEGISLATION

Prepare a flowchart of the development of the procurement Directives from the General Programmes to today; it should include all relevant Directives to date.

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. Provide a general explanation of the objectives of the European Community.
2. Explain how this is achieved through the procurement Directives.
3. Do all procurement systems share the same objectives?
4. Provide examples of objectives that are not or were not *explicitly* contained in the procurement Directives, and that you think are fundamental.
5. Explain the difference between liberalisation directives and co-ordination directives.
6. What was the impact of the Single European Act on the development of the procurement Directives?
7. Is there a reason of principle why the works, supplies and services rules were contained in separate Directives?
8. Apart from consolidation, what other changes were brought about to the structure of the rules in the consolidation Directives of 2004?
9. Name three other innovations of the consolidation Directives.
10. What are the goals of the WTO's Government Procurement Agreement (GPA)?
11. How are they different from those of the EU?
12. Is the UNCITRAL Model Law a system of procurement regulation?
13. How should it be used?
14. What are the goals of the UNCITRAL Model?
15. Explain the applicability of the procurement rules of the multilateral development banks (MDBs)
16. What are the goals of these procurement rules?
17. Do the rules and procedures of the MDBs offer any additional assistance to beneficiaries in terms of assistance with procurement?
18. Complete with questions about local historical development…

Introduction and principles

The economics of public procurement

MODULE A

PART 4

SECTION 1
INTRODUCTION

Localisation: The structure and much of the commentary is generic but there will need to be adaptations for local use. The notes in green highlight areas where particular attention will need to be paid to local requirements. The notes in green are intended only as an aid to localisation and are not intended to be an exhaustive list of changes that will be required.

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

- The economic drivers and economic influences on public procurement decision making and processes

1.2 IMPORTANT ISSUES

The most important issues in this chapter are concerned with the need to ensure that you understand the impact of economic issues on:

- How to select the best approach to centralisation
- Procurement contracting strategies
- The use of e-auctions
- Whether and how to split contracts into lots
- The potential for collusive behaviour between economic operators

If this is not properly understood, you risk adopting approaches to procurement that will reduce the efficiency of the procurement process; that may have a negative impact on the quality and cost of the contract; and that may lead to collusive behaviour.

1.3 LINKS

There is a particularly strong link between this this section and the following modules or sections:

- Module C on preparation of procurement
- Module E on conducting the procurement process

1.4 RELEVANCE

This information will be of particular relevance to those procurement professionals who are responsible for procurement planning and scoping the requirements of contracting authorities.

Adapt for local use

Utilities

The same economic issues will apply for utilities.

SECTION 2
NARRATIVE

Localisation: This module may require significant localisation, in particular if national legislation sets out the form of contract to be used by contracting authorities, whether and to what extent contracts can be divided into lots, and whether e-auctions are permitted or required.

Where national requirements differ significantly from the approaches outlined in module A4, it may be appropriate to retain A4 as drafted and to add a note indicating that a large portion of the module is for general reference purposes only.

SECTION 2A
CHOOSING THE APPROPRIATE MIXTURE OF CENTRALISED AND DECENTRALISED PUBLIC PROCUREMENT PROCESSES

Localisation: Significant amendment to this section may be required if centralisation is either not permitted or if centralised arrangements are covered by local rules or laws.

OVERVIEW

In this section we will consider the economic arguments relating to the advantages and disadvantages of centralised public procurement. We will look at a range of issues, including how to design procurement processes so as to achieve better value-for-money, what circumstances lead to economies of scale, the role of information processing costs in public organisations, the link between the degree of demand aggregation, and the nature of competition for contracts.

2.1 INTRODUCTION

Effective procurement strategies, which control costs and streamline processes, are vital to all contracting authorities as well as to purchasers in the private sector. Pursuing the 'best value-for-money" in public (and private) procurement, while keeping the process management costs at bay, requires several crucial decisions.

In this section we will explore, from an economic perspective, the appropriate degree of centralisation and, in this context, the extent to which the demand by contracting authorities for works, goods and services should be aggregated.

In undertaking this analysis we will consider the two extreme ends of the spectrum of options that are available to contracting authorities – full centralisation and full decentralisation – whilst acknowledging that, in practice, the approaches adopted by contracting authorities fall between the two extremes and are often hybrid models in which aspects of both centralised and decentralised procurement coexist. Consequently, a more effective way of rephrasing the above question may be: what are the main forces influencing the 'optimal' mixture of centralised and decentralised procurement models?

Terminology: Readers should note that the term 'centralised' procurement in this context is not used as a synonym for procurement designed at a national level, and the term 'decentralised' procurement is not used as a synonym for locally designed procurement processes. The appropriate level of centralisation is a practical problem that might also arise within the same contracting authority, for example for a government ministry or department where several units would be able to spend public money independently of each other.

This section then examines the role played by the following factors in shaping the appropriate mixture of centralised and decentralised procurement processes:

- Efficiency through cost control
- Favouritism
- Strategic procurement
- Network effect and standards
- Emergencies
- Electronic procurement

It is important to note that although these factors are covered separately, they are closely interlinked so that it is artificial to evaluate the role played by each factor independently of all of the others.

2.2 EFFICIENCY THROUGH COST CONTROL

Cost control is a key issue in public (and private) procurement. Everywhere, contracting authorities need to control public spending. This is very often done by rationalising public spending for goods and services, which account for a considerable amount of resources. At government level, goods and services are generally perceived as 'politically less sensitive' targets for budget cuts than pension or health expenditure.

The issue of whether to centralise or decentralise will generally arise when an organisation or structure has reached a certain size and/or geographical presence. When organisations enlarge, controlling the costs of local structures becomes increasingly more difficult; clearly, this problem can be addressed by assigning budgets to decentralised units, although this measure would not necessarily imply efficient spending.

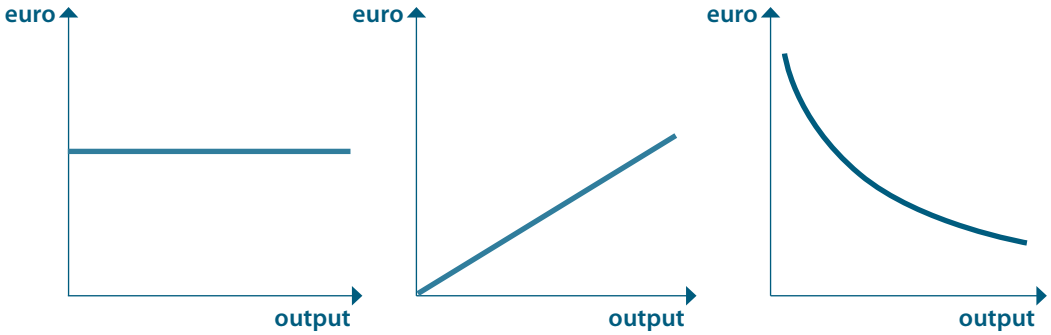
Centralisation may help to reduce purchasing costs considerably, which is mainly due to:

- Synergies (production economies of scale, avoiding effort/work duplication, reducing legal challenges)
- Increased specialisation
- Knowledge/resource-sharing

2.2.1 Synergies

The more standardised the product/service, the more potentially advantageous it is to the contracting authority to aggregate demand since economic operators are in a position to exploit economies of scale, thus operating at a lower unit cost.

Economies of scale arise whenever production costs comprise a sizeable fraction of fixed costs, that is, costs that are independent of the production scale. Production costs consist of two components: fixed costs (FC) and variable costs (VC). The first component does not vary with production (or at least it does not vary within a certain interval of production), whereas the second does increase with each additional unit of production. Assuming that variable costs increase proportionally (that is, linearly) with output, we can provide in figure 1 a simple graphical representation of the two components.



a) Fixed costs **b) Variable costs** **c) (Total) Average cost**

Figure 1: Production Costs

Since fixed costs are non-sensitive to output, they can be represented by means of a horizontal line; variable costs vary proportionally with output, and therefore the graphical representation of output is a straight line with a positive slope. Figure 1.c) also provides the graph of total average cost (TAC), which is given by the ratio (FC+VC)/output. TAC is an average measure of cost for each unit of output. Its non-linear shape depends on the presence of positive fixed costs. When output is low, fixed costs have to be spread over a few units, whereas when production is high, the same fixed costs apply to many more units, thus explaining TAC's shape, which decreases with the level of output.

In order to better understand the role of TAC in procurement contracts, consider the following example:

Example 1. Economies of scale in a procurement contract for delivering heating oil

A procurement contract requires the delivery of 10,000 litres of heating oil to a school. This is accomplished by using a tank truck with a capacity of 20,000 litres. From the economic operator's viewpoint, delivery costs (truck driver's salary, insurance, gasoline, etc.) are fixed costs up to 20,000 litres. If more oil were to be delivered, a second tank truck would be necessary. If the economic operator could serve two (possibly neighbouring) schools, each demanding 10,000 litres, then fixed costs would be spread over a twice as large output, thus implying a lower total average cost, that is, higher economies of scale.

2.2.2 Economies of scale, participation and competition

The dimension of product standardisation is sometimes hard to disentangle from demand heterogeneity. To see this dimension, consider a very simple case of procurement of gasoline. Gasoline might be considered to be a highly standardised commodity, but contracting authorities might have different preferences concerning delivery conditions and payment delays (this is referred to as 'demand heterogeneity'), with the result that procurement contracts would end up being different and unit costs could be pushed up.

Commodity standardisation should also be coupled with a low degree of demand heterogeneity so that aggregation can deploy its full potential. When this is the case, demand aggregation generally allows firms to produce at a lower unit cost.

Lower production costs yield lower purchasing prices *only* if the contracting authority keeps or increases its bargaining power, that is, provided that the degree of competition is (at least to some extent) positively correlated with the value of procurement contracts. Two conflicting forces come into play. Demand aggregation can lead to fiercer competition between economic operators. However, as the size of contracts becomes larger and larger, smaller economic operators may find it impossible to participate in the competitive processes – because of more demanding economic and financial requirements – and this entails a lower number of competitors. This last point can be illustrated by the following example:

Example 2. Demand aggregation, participation and competition

Procurement contract 1: EUR 150 000	
Participating economic operators	Yearly turnover
A	EUR 1 000 000
B	EUR 500 000
C	EUR 200 000

Procurement contract 2: EUR 200 000	
Participating economic operators	Yearly turnover
A	EUR 1 000 000
B	EUR 500 000
D	EUR 300 000
E	EUR 250 000

Consider two separate procurement processes for the same goods/services designed by two contracting authorities located in different regions. Suppose that one of the minimum requirements for selection to participate is that the economic operator's yearly turnover has to be greater than or equal to the value of the procurement contract. The following participation pattern has been observed: A and B competed for both contracts 1 and 2, whereas C competed only for contract 1, and D and E only for contract 2. If the two contracts had been merged into one EUR 350 000 contract, then C, D and E would have not been able to participate at all.

In public procurement, centralisation can also save significant duplication costs, such as publication costs for advertisements (where charges are made), administrative costs, and litigation costs or costs associated with legal challenges. The likelihood, and thus the cost, of legal challenges may decrease with centralisation because:

- qualified resources involved in centralised procurement should improve the clarity, transparency and measurability of the formal requirements, i.e. the overall 'quality' of tender documents;
- centralisation reduces the number of procurement contracts for any item involved;
- it may be the case, depending on the venues in which procurement processes can be challenged under national legislation, that centralisation concentrates the challenges/litigation in a single court, while decentralisation may involve the courts, commissions or tribunals of each local administrative area.

2.2.3 Specialisation and knowledge/information-sharing

Generally the higher the level of centralisation, the more information/knowledge/data can be shared among procurement specialists. Large organisations are usually characterised by a high degree of specialisation in terms of human capital while, at the same time, producing a large volume of information. Knowledge-sharing is recognised to be a key (positive) externality arising within the boundaries of such organisations. In general, information-sharing improves efficiency through the use of more up-to-date data/information, problem-sharing and common solutions.

2.3 FAVOURITISM

Location-specific information – such as information regarding cleaning services, asset management, and road cadastre – may favour more decentralised procurement processes, as local information is likely to be relevant in setting quality standards and local delivery requirements that are not easily retrievable from official documents.

While the relevance of local information may favour decentralised procurement, it may also give rise to local favouritism, especially towards local economic operators, which may well be in breach of the EU *acquis*. Decentralised decisions have the potential of bringing local economic operators and local procurement officials into a closer, potentially long-lasting relationship, and the possibility of local lobbying activity influencing local procurement decisions may have a seriously negative impact on the efficiency of the whole process.

Favouritism may also take place at central level. However, the higher visibility of centralised procurement makes 'tailored' procurement strategies more difficult to implement. This last argument seems to be consistent with the results of international studies, such as the survey summarised in the comment box below.

Comment: Corruption in the Public Sector

According to the results of its 2005 worldwide survey on corruption entitled "Resisting Corruption in the Public Sector", the International Consortium on Government Financial Management (ICGMF) recommended several actions to reduce corruption, including the action "[to] cure corruption-prone procurement by centralizing purchases". The ICGMF suggested, whenever possible, to centralise acquisitions in order to reduce the opportunity for extra-tender negotiations or other forms of corruption, and to use electronic purchases, which reduce the discretion of processes and limit personal interactions.

2.4 STRATEGIC PROCUREMENT

Procurement is 'strategic' when it involves items/activities that have a considerable impact on business or national socio-economic policies. The higher the importance of those activities, the more centralised decisions tend to be since each purchasing decision is likely to exert a huge impact on the entire organisation. Governments usually consider the following areas as strategic activities:

- Defence
- Public health
- Environment

2.4.1 Defence procurement

Defence provides an example of foremost importance. Thus *defence procurement* is typically considered a strategic activity that requires centralised strategies, which is also due to the sensitivity of much of the information concerning such procurement. In the United States, defence procurement appears to be partially centralised in the hands of the Department of Defence (DoD), although the DoD allows for some degree of decentralisation. China has also progressively adopted a more centralised approach to defence procurement.

Example 3. Defence Procurement in the United States and in China

United States:

The Defence Acquisition Guidebook establishes that the Defence Acquisition System is the:

"management process by which the Department acquires weapon systems and automated information systems. Although the system is based on centralized policies and principles, it allows for decentralized and streamlined execution of acquisition activities. This approach provides flexibility and encourages innovation, while maintaining strict emphasis on discipline and accountability".

China:

In December 2004, the State Council Information Office published a white paper entitled China's National Defence in 2004. The document describes China's national defence policies and the army's modernisation process, including procurement approaches.

See module A5 for further information on procurement in the defence sector.

2.4.2 Public health

Public health stands as another strategic sector that would suggest the use of centralised procurement strategies for certain types of purchasing. For example, the requirement of co-ordinated actions and the enforcement of uniform minimum quality standards may favour a centralised approach to the procurement of drugs.

2.4.3 Environmental considerations and public procurement

Broadly speaking, *green procurement* policies aim to procure products and services that are more environment-friendly. Governments and international organisations alike are assuming increased responsibility to take into account the environmental impacts of their activities.

Centralised *green procurement* strategies may occur at a regulatory stage whenever minimal quality standards of environmental friendliness, which are compatible with the EU *acquis,* are imposed at a national or supranational level. In other circumstances, contracting authorities may be left free for example, within the context of the limits set by the *acquis,* to reward appropriately green dimensions characterising an economic operator's technical proposal. See module C5 for further information on environmental and social considerations in procurement.

Besides regulatory strategies, centralised procurement might be an important channel for promoting environment-sustainable policies and for establishing common standards. By imposing minimal (environment-friendly) quality standards and/or by rewarding green dimensions in the technical proposal, a contracting authority is compensating an economic operator for the positive externality that will be generated (for example, lower CO_2 emissions). Since positive externality affects a large community – possibly much larger than the one concerned by the current acquisition – the contracting authority's willingness to pay is likely to be greater the higher the degree of centralisation. Following this line of reasoning, only a fully centralised procurement system would be able to correctly reward the positive externalities generated by green policies.

2.5 NETWORKS AND STANDARDS

Network industries are predominant in modern economies. Key network industries are telecommunications, Internet services, computer software, some aspect of modern banking (ATM networks), and e-markets such as B2B, B2C and B2G platforms.

Note: Network effects

Goods or services are said to display *network effects* if their value to any user increases with the number of users already using them (a.k.a. *the installed base*). Take, for instance, the simple case of PCs' operating systems or software: using the same system, people can exchange many different types of files and easily process other users' documents. In other words, people in the same network 'speak the same language'. An even older example is the telephone. If only one person owned a telephone, its value would be nil.

When the number of users of a certain product with network effects is large enough, that product may *de facto* become a standard. A potentially serious problem may arise when another standard is available, but consumers, although inclined to consider the latter technologically superior to the former, are unwilling to switch because they are afraid that most of the other users will not follow ('users' lack of co-ordination'). Considerable care has to be exercised in these circumstances to ensure that specifications are not discriminatory and that economic operators are given equal opportunity and equal treatment.

A similar phenomenon may concern the government's purchases. When purchasing decisions are decentralised, switching to potentially superior technologies may become difficult if not impossible. Thus centralisation turns out to be a solution to the problem of the lack of co-ordination. In this spirit one might interpret the joint decision taken by the Brazilian Government and IBM in September 2004 to expand LINUX as an alternative to Microsoft Windows. This strategy was meant to fix common standards for the public sector but also to challenge Microsoft's dominant position in the relevant market.

2.6 EMERGENCIES

An emergency is usually considered as an *urgent need for goods or services,* due to facility failure in large areas or extensive damages caused by natural catastrophes. There are several reasons for favouring a centralised rather than a decentralised approach to procurement in the case of genuine emergencies:

- need for co-ordinated interventions;
- reduced risk of providing essential goods/services of different quality;
- reduced risk of corruption when additional funds are handled.

Example 5. Emergencies procurement in Afghanistan

An instructive example of emergencies procurement is the Afghanistan Reconstruction and Development Services (ARDS), created in May 2002 by the Transitional Islamic State of Afghanistan (TISA) in order to *cope up with the urgent task of reconstruction.* The ARDS appointed a consultant as the country's central Procurement Consultant (PC) to put in place emergency procurement capacity. Among the main objectives of the Procurement Consultant's assignment were:

- to facilitate rapid and transparent utilisation of donor resources for reconstruction and development;
- to improve efficiency in the procurement of the relevant goods, services and works;
- to disseminate the same information to all eligible economic operators in countries throughout the world and to offer to them an equal opportunity to compete;
- to encourage the development of domestic contracting and manufacturing industries in the borrowing country.

See module C4 for information on the conditions where an emergency situation may constitute an exceptional circumstance permitting the award of a contract without prior publication of a contract notice.

2.7 CENTRALISATION AND E-PROCUREMENT

The term e-procurement (electronic procurement) is often associated with e-auctions, which occur as the final tendering phase of the procurement process, although the coverage of e-procurement is in principle much wider, ranging from e-notices to e-invoicing and e-payment, not to mention e-catalogues.

Comment: The European Commission on e-procurement

The relevance of e-procurement is emphasised by the following statement by the European Commission:

"Modernising and opening up procurement markets across borders – including through the expansion of electronic procurement – is crucial to Europe's competitiveness and for creating new opportunities for EU businesses. Using information technology appropriately can contribute to reducing costs, improving efficiency and removing barriers to trade, which will ultimately result in savings for taxpayers. The Directives adopted in March 2004 as part of the public procurement legislative package provide a legal framework aimed at boosting the development and use of electronic procurement."

While the technological aspects of information technology (IT)-based procurement processes are endlessly debated, far less attention is paid to the impact on the organisational aspects and, more relevant to the current discussion, on the degree of centralisation of public procurement.

Even if e-procurement were limited to the final tendering stage of the process by using an e-auction, it could be argued that an electronic procedure might be less expensive than a paper-based procedure. Consequently, e-procurement solutions should make centralised procurement less convenient, as each isolated contracting authority would spend fewer resources by setting up its own e-tendering procedure. However, such an argument overlooks the technological choice that underlies a simple e-auction. In other words, there is no unique *technological standard* for running e-auctions. Therefore the more independently local purchasing units behave, the more likely that technological choices will turn out to be not entirely compatible, thus raising firms' costs in becoming acquainted with different standards.

Because it relies on a single standard, a centralised procurement strategy would reduce such costs, thereby fostering, all other factors being equal, the participation of smaller firms in the procurement market. Furthermore, *centralisation is likely to magnify the benefits of e-procurement*. Internet-based sourcing magnifies efficiency gains if procurement becomes more centralised since such gains would affect larger volumes of transactions and would impact on a greater number of organisational structures.

See below section C of this module A4 for further discussion of the economic issues affecting the choice of using e-auctions and also module C4 for rules applying to the use of e-auctions.

SECTION 2B
PROCUREMENT CONTRACTING STRATEGIES

Localisation: This section may require considerable amendment if, for example, local laws set out the form of contract that contracting authorities are obliged to use. Under those circumstances, consider retaining this section for general information and include a warning that sets out the local legal situation.

1 OVERVIEW

In this section we will look at the main types of procurement contracts used by contracting authorities and how the nature of the economic operator's tasks and the degree of predictability of events affecting the economic operator's performance determine the contracting authority's choice of contract. We also consider how to design a contract so as to encourage the economic operator to take those actions that are most likely to satisfy the contracting authority's requirements. At the end of this section we look at some examples of objective and subjective performance measures.

2.1 CHOICE OF PROCUREMENT CONTRACT

There are three broad categories of procurement contracts from an economic perspective: cost reimbursement (or cost-plus), fixed price, and incentive contracts. Many procurement contracts are in fact a combination of the three broad categories, specifying incentives for some aspects and fixed-price for others, and combining contract types in order to adapt the contract to the specific circumstances faced by the contracting authority.

- **Cost-reimbursement contracts**

  The distinguishing feature of cost-reimbursement contracts (CRCs) is that the contracting authority agrees to reimburse all (documented) production costs related to the project and may also agreed to pay a fee for supervision (also defined as a cost-plus-fixed-fee contract, according to the Federal Acquisition Regulation in the United States). While fully ensuring against cost overruns, CRCs do not provide the economic operator with any incentive to undertake cost reduction.

Comment

A capped-price contract (CPC) is a special form of CRC in that a daily fee, which also includes a profit component, is agreed for a certain capped (limited) number of days. The cap is clearly indicated in the contract/purchase order. If the economic operator is able to complete the task in less than the stipulated number of days, then its bill will be lower than the capped amount. If, however, the economic operator needs additional days to complete the task, it either has to take a loss or make a case for increasing the cap, in accordance with pre-agreed contractual provisions, where permissible, under the EU *acquis* and national legal provisions.

Unit-price contracts (UPCs) are similar to CPCs in that the contracting authority asks economic operators to submit offers specifying a separate unit price for each input factor, but UPCs do not include any cap. Moreover, the contracting authority announces an estimate of the quantity of the input factors needed to complete the project. For each incoming offer, the contracting authority evaluates the overall expected cost, or the 'score" of this offer. The contracting authority awards the contract to the firm with the lowest score (cost), but is obliged to pay for the input factor needed to complete the project. This approach may be more appropriate for a mini-competition run in the context of a framework arrangement.

Fixed-price contracts

A fixed-price contract (FPC) is a contractual agreement whereby the economic operator is paid a fixed price for realising a project that satisfies a predetermined quality standard. While the economic operator receives no additional payment for achieving higher quality standards, penalties are typically included in the contract so as to protect the contracting authority from the risk of having the economic operator opportunistically deliver lower-quality standards than those laid down in the contract. An FPC does not generally provide any 'insurance' for the economic operator against cost overruns, but at the same time the economic operator enjoys the benefit of possible cost savings while fulfilling quality standards as agreed.

The category of fixed-price contracts also comprises some variants. One example is the fixed-price contract with economic price adjustment (FPCPA), which takes into account fluctuations of input costs (labour and material) incurred by the economic operator. The logic behind such a contract is to reduce the risk of large and, possibly unexpected, fluctuations in input prices, which normally leave the economic operator with no other option but to save money by reducing quality standards if renegotiation is too costly.

- **Incentive contracts**

  Incentive contracts (ICs) may be considered as a compromise between the two extremes of CRCs and FPCs. ICs typically include a target cost, a target profit, and a profit adjustment formula, which ensures that *(i)* actual cost or quality that meets the target will result in the target profit or fee; *(ii)* actual cost that exceeds the target will result in a downward adjustment of the target profit or fee; and *(iii)* actual cost or quality that is below the target will result in an upward adjustment of the target profit or fee. In the next part of this section we will look at how two main alternative contractual solutions, Cost-Reimbursement Contracts (CRCs) and Fixed-Price Contracts (FPCs), work in a given scenario. Each contract solution generates different behaviour on the economic operator's side in particular and may consequently have a different impact in terms of perceived or actual levels of quality and overall costs. We will illustrate the fundamental line of reasoning by analysing the following scenario.

Example 1. From the procurement of heating oil to the procurement of heating services

Consider a municipality facing the problem of heating local schools. Procurement officials have been tackling the problem for quite some time in a seemingly intuitive fashion: they select an economic operator to supply oil for heating according to the schools' needs. For instance, high-consumption patterns would be observed from December to February, while demand would drop in October and March. The economic operator is paid according to the amount of fuel that is supplied. This is commonly known as a cost-reimbursement contract (CRC).

More recently, a different approach called 'energy services' has been advocated. The basic idea is to sel–ect an economic operator that would take all necessary measures in order to keep the temperature inside school buildings at an agreed level, say 19°C, from 8 a.m. until 5 p.m. The economic operator is paid an agreed, fixed fee for the entire service, which includes the cost of fuel, irrespective of how much fuel is actually used. Such a contractual agreement is known as a fixed-price contract (FPC).

We will now look at the two contracting strategies and consider the key issue of the allocation of procurement risk between the contracting parties (the contracting authority and the economic operator).

2.1.1. Procurement risk

Referring to the example above, suppose that the contracting authority wishes to keep the temperature in the school buildings at 19°C, whichever the kind of contract. By using a cost-reimbursement contract (CRC), the economic operator would be reimbursed for all documented costs necessary to achieve the agreed performance. The economic operator would be paid for the heating oil that it supplied and so it would not be concerned, for example, about the frequency of winter storms or broken glass in the windows, as neither of these factors would affect the payment that the economic operator would receive. In this case the risk would be fully borne by the contracting authority, and the economic operator would be unconcerned and unaffected by external events or issues, such as the quality and maintenance of the school buildings.

The choice of a fixed-price contract (FPC) shifts almost all risks to the economic operator. The economic operator now has a strong interest in undertaking all possible actions to reduce the impact of cost-increase factors. For instance, it makes sure that the glass in the windows is not broken and evaluates loft insulation. Since in an uninsulated building up to one quarter of the heat is lost through the roof, proper insulation would help use fuel oil more efficiently (thus reducing CO2 emissions), and the economic operator might therefore decide to install more insulation in order to reduce the amount of oil consumed and to reduce the economic risks associated with volatile fuel prices. While paying a fixed price for the contract, the contracting authority also knows that the contractor will invest resources in building maintenance, thus 'killing two birds with one stone'.

A more in-depth discussion of the concept of procurement risk is provided in the box below.

Note: The nature of economic agents' attitude towards risk

Procurement risk refers to those events that may affect the realisation of the contractual performance, and occurrence of which cannot be accurately *predicted* and *influenced* by contracting parties. By affecting *actual* production costs, it has an impact on the actual quality of the performance. Most importantly, the buyer and the economic operator care about 'extreme' events, such as the risk of default by the economic operator, which might disrupt the service altogether. The degree of fear of (procurement) risk, is also called *risk aversion*.

The concept of risk aversion can be clarified by the following example. Suppose that a firm has to choose between two possible investment decisions, A and B. Option A guarantees a yield of EUR 100, option B yields zero 50% of the time and EUR 200 the other 50% of the time. A firm is said to have a fear of risk (or to be risk-averse) if it prefers option A to option B, that is, if it prefers a risk-free investment with a (guaranteed) monetary value that is exactly equal to the expected monetary value of the risky investment, where the latter is a weighted average of the risky outcomes, with weights provided by the probability that each outcome occurs (1/2*EUR 0 + 1/2*EUR 200 = EUR 100). Indifference to risk (or risk neutrality), on the other hand, describes a firm that has no particular interest in either option A or option B. In other words, the firm is indifferent to whether the investment is a sure bet or a risky bet that has an expected monetary value equal to that of the sure bet.

In procurement contracts, it is unlikely that an economic operator is able to immunise itself (for example, through an insurance contract) against all unpredictable events. However, the breadth and nature of an economic operator's activities may provide useful *proxies* for its ability to 'insure' itself against the vagaries of a specific procurement contract. Possible internal 'insurance policies' are thus provided by the value of the contract being only a tiny fraction of the economic operator's turnover, a high degree of diversification of the economic operator's activities, and, more generally, by the economic operator's ease of access to the credit market.

The absolute capacity of each contracting party to bear the procurement risk is not, however, the most relevant factor in the selection of the contractual form. What really matters is the contracting parties' *relative* attitude toward risk: other factors being equal, efficient risk-sharing calls for the allocation of risk to the party that is able to manage it best.

2.1.3. Fixed price or cost reimbursement?

So far the discussion has focused on a specific set of circumstances where contracting authorities may find it to be both value-for-money and a commercial opportunity to shift the brunt of procurement risk to economic operators.

The following general guidelines point to where each of the two different types of contracts may be more appropriate than the other:

Cost-reimbursement contracts may be favoured in the following circumstances, where:

- it is a highly complex project;
- there are unforeseen contingencies, that is, events out of control of contracting parties that may lead to serious project disruptions;
- there is a need for contract flexibility;
- the relevance of quality dimensions are difficult to measure (e.g. proactiveness of a management consultant, user-friendliness of computer software).

Fixed-price contracts may be favoured where:

- the contracting authority wishes to buy goods/services satisfying only a minimum level of technical specifications;
- the economic operator has full control over most of the events affecting production costs;
- the economic operator's needs remain unchanged throughout the execution of the contract.

Before concluding this section, it is worth emphasising that in many real-world procurement processes various kinds of contracts or various elements of both types of contracts may be combined, such as the example in section 2.2 below.

2.2. HOW TO DEAL WITH HETEROGENEOUS TASKS IN THE SAME CONTRACT

Contracting authorities sometimes procure complex projects, where the complexity stems from tasks with performance measures that either may be of varying precision or may become available at different points in time due to, for example, the contracting authority's evolving needs. The example below will briefly illustrate a situation in which the latter scenario arises.

Example 2. Procurement of IT consultancy services

It is customary that IT consultancy procurement contracts (for e-government projects, for example) require the realisation of quite heterogeneous tasks, such as:

- process re-engineering;
- software maintenance and development;
- data warehouse, database management, and data monitoring;
- management of websites (development, publishing, etc.);
- help-desk and end-user assistance and support;
- corporate assistance and support.

As regards software development, there exists a common standard in the IT service market that measures software complexity, namely the *function point*. In addition to measuring output, function point analysis is useful when measuring consultant teams' productivity and when communicating functional requirements.

Other on-demand types of tasks become projects of their own, which have to be realised by a team of consultants with varying skills/seniority.

The example above highlights the presence of two quite heterogeneous sets of tasks: one concerns software development, which is characterised by a measure of output/performance; the other is more input-oriented (the composition of the team of consultants) due to the fact that the tasks are only loosely specified and the contracting authority's needs may change as the project develops.

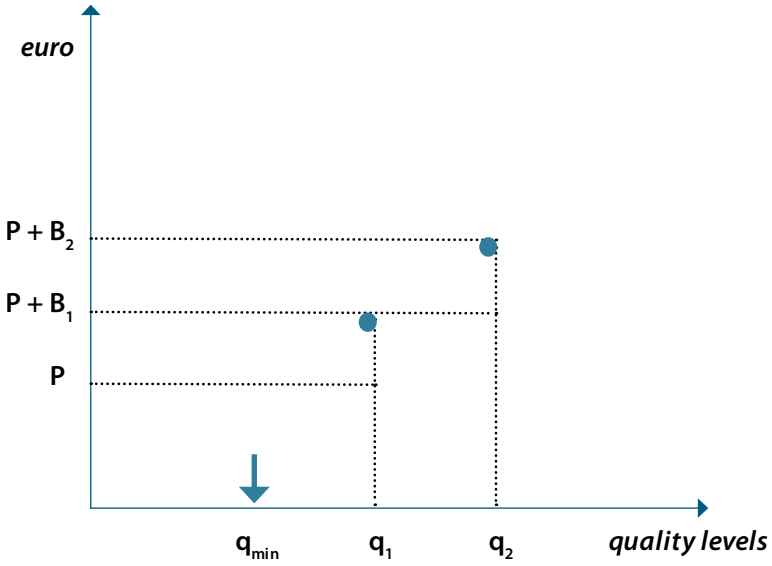
In those circumstances, the contracting authority should consider awarding a contract that has more than one payment method: a number of requirements would be paid by means of a fixed amount (fixed-price component), while on-demand projects could be paid by using a capped-price component. The latter is a kind of cost-reimbursement reward scheme whereby a set fee per day (to be applied to the whole team) for a maximum number of days (i.e. the longest estimated duration of the project).

2.3. INCENTIVE CONTRACTS: QUALITY-INCENTIVE CONTRACTS

Incentive contracts are within the spectrum between cost-reimbursement and fixed-price contracts in that the contractor receives a two-part reward scheme: a fixed component and a variable component, where the latter depends upon performance-enhancing targets. While referring to section 2.3.1 below and the Additional Note on cost-incentive contracts, which are mainly used in public works or in the procurement of high-tech products, we focus here on quality-incentive contracts, which are more commonly used for the procurement of off-the-shelf goods and services.

Quality-incentive contracts normally set a baseline quality level and an improvement schedule, specifying how much the contracting authority buyer is willing to pay for quality targets that are higher than the baseline level. In this case, an incentive contract normally specifies a base payment **P** for minimum performance $\mathbf{q_{min}}$, typically a quality measure, and additional higher target levels $\mathbf{q_1,\ldots,q_n}$ with corresponding bonuses $\mathbf{B_1,\ldots, B_n}$. Figure 1 below illustrates a simple quality incentive scheme with two quality levels higher that the minimum performance.

Figure 1: A quality incentive scheme



There are two main categories of incentive schemes, depending on the extent to which contracting parties are able to define *objective performance measures,* that is, quality targets that are not only observable by themselves, but that can also be checked by third parties (e.g. courts of law). In the first category of quality-incentive schemes, we are dealing with *verifiable quality dimensions.*

Example 3. Some verifiable quality dimensions

- Time of delivery of a product
- Speed of problem-resolution in a help-desk service
- Level of faultiness of new software, which can be measured by the ratio between the number of failures during the testing phase and the software's complexity level (covered by the software's number of function points – see example 2 above)
- Network size of cafeterias that are willing to accept a specific restaurant voucher as a means of payment
- Number of gasoline stations owned by an oil company

Quality-incentive contracts are, in principle, a more sophisticated tool than fixed-price contracts in that the contracting authority buyer has to specify in advance how many quality targets, besides the baseline level, are to be rewarded and the value of bonuses. Consequently, management costs are likely to be higher than for fixed-price contracts. On the other hand, the contracting authority buyer offers the economic operator some degree of 'upward flexibility' in quality performance, thus providing a very efficient economic operator with an incentive to pursue higher rewards by increasing quality levels, provided that the economic operator's marginal benefit in delivering higher quality (the bonus scheme) more than compensates for additional production costs. These arguments will be further developed in the following example.

Example 4. Quality-incentive schedule for software maintenance

When contracting authorities plan to purchase sophisticated software (such as those used for running a state budget or managing public debt), maintenance clauses are among the most sensitive dimensions of the procurement contract. A standard contract would in principle specify a maximum delay (say, three hours) for restoring the software after any breakdown occurs. A baseline payment (EUR 1 000) is established accordingly. The contracting authority can also determine additional delay thresholds and corresponding bonuses. For instance, a bonus of EUR 100 if recovery occurs within two hours, and EUR 200 if recovery occurs within one hour.

When the quality-improvement schedule is fixed, the contracting authority is always unsure as to whether the selected economic operator will find it profitable to go beyond the baseline quality level. For this reason, the contracting authority may find it in its interest to let economic operators submit offers for both the fixed and the variable parts of the contract. Why? If economic operators can bid on both the fixed and the variable parts, very efficient economic operators will 'signal' their nature by submitting a relatively low fixed component and a relatively high variable component, as they have a comparative advantage (compared to less efficient economic operators) in achieving a higher level of performance. In terms of Figure 1 above, given the levels of $\mathbf{q_{min}}$, $\mathbf{q_1}$ and $\mathbf{q_2}$, which are determined by procurement officials, efficient economic operators will submit a low P and high $\mathbf{B_1}$ and $\mathbf{B_2}$.

Warning!

All activities related to the management of an incentive contract constitute transaction costs. Sizeable transaction costs may undermine the feasibility of incentive contracts. If the expected benefits of adopting an incentive contract are outweighed by the value of transaction costs, the contracting authority may find it in its interest to adopt a fixed-price contract that is easier to write and less costly to manage. While the fixed-price contract shifts completely the procurement risk to the economic operator's side, it allows the procurer (the contracting authority) to minimise costs in information collection.

2.3.1. Incentive schemes with non-verifiable quality dimensions

Procurement contracts often require the economic operator to invest resources in quality dimensions that cannot be explicitly described by contractual clauses, even if they can be observed by both parties. We will refer to such quality dimensions as *non-verifiable quality,* as these dimensions cannot be verified by third parties. Examples would include the acquisition of IT or management consultancy services, where the quality of human capital is a multi-dimensional variable, but also procurement contracts for the development of new software. Some non-verifiable quality dimensions are listed below.

Example 5. Some non-verifiable quality dimensions

- A consultant's proactiveness
- A new software's degree of user-friendliness
- Kindness/courtesy of a help-desk operator

There are internationally accepted (statistical) tools to measure a user's perception of quality dimensions for a product or service that are *subjective* (i.e. non-verifiable by anyone else but the user) rather than *objective* (thus verifiable). One of the most widely used tool is the *Customer Satisfaction Index* (CSI). The final example of this section will briefly illustrate how a CSI can be used to construct an incentive scheme.

Example 6. A simple CSI-based incentive scheme for call-centre/help-desk services

Call-centre services are normally rewarded on a fixed-price basis. For instance, each phone call yields the economic operator EUR 6, provided that some objective quality measures are fulfilled (delays in answering the phone call, number of problems remaining unresolved, etc.). Yet much of the users' benefit from using the help-desk service is based on subjective dimensions that could be measured, at least in principle, by a specialised firm (outside of the procurement contract) through a customer satisfaction survey.

Consequently, procurement officials might design a contract in such a way that the contract award price P is split into two parts. The payment of the first part, αP, with α greater than 0% and lower than 100%, is conditional on the fulfilment of objective quality targets; the remaining part $(1-\alpha)P$ is paid only if a certain threshold of CSI is reached. For a two-year contract, the incentive schedule might look as follows:

Suppose that P = EUR 6 and that α is 90% (remember that P is the price per phone call!). Then,

Year 1: One-third of 0.1P (the fraction of the compensation linked to a subjective measure) is paid if CSI is above 70/100, but below 85/100; the remaining two-thirds of 0.1P is paid if CSI is greater than 85/100.

Year 2: One-third of 0.1P is paid if CSI is above 75/100, but below 90/100; the remaining two-thirds of 0.1P is paid if CSI is greater than 90/100.

Localisation: The extent to which a fraction of the contract can be linked to a subjective measure – that is, $(1-\alpha)P$ – is likely to vary from country to country, depending on various aspects, such as secondary legislation concerning public contracts and contractual practices.

Additional note on incentive contracts

Incentive contracts (ICs) often take the form of linear cost-incentive contracts. The most common form of cost-incentive contracts is linear and can be described by the following compensation scheme for the economic operator:

T = P +b(C-P)

where **T** is the total transfer to the economic operator, **P** is the target cost (or bid price), **C** is the realised (verifiable) cost, and **b** is the (positive) parameter representing the share of costs borne by the contracting authority. If **P > C** then the contracting authority enjoys a fraction **b** of the cost savings. Instead, if **P < C** the contracting authority pays for a fraction **(1-b)** of cost overrun.

The cost-sharing parameter **b** plays a crucial role in the economic operator's incentives to reduce cost. The higher **b,** the less the economic operator is responsible for cost overruns and the less the economic operator benefits from cost reduction, and therefore the higher the cost-sharing parameter **b,** the lower the incentive of the economic operator to reduce cost (that is, using economics terms, the lower 'power of the incentive scheme').

What criteria should the contracting authority adopt to set the cost-sharing parameter **b?** Three factors affect the choice of **b:** the ability of the economic operator to bear the procurement risk, the predictability (*i.e.* the variability) of events affecting production costs, and the responsiveness of the actual production cost to cost-reducing activities (*e.g.* investment, efforts).

In a procurement environment where both unpredictable events and the economic operator's actions/investments affect the level of actual production costs, but where neither of these factors is *the* crucial dimension, ICs can be a good choice for the contracting authority. ICs *(i)* motivate the economic operator to undertake cost-reducing actions, and *(ii)* offer the economic operator a form of 'insurance' against adverse exogenous events.

SECTION 2C
DESIGN OF THE COMPETITIVE TENDERING FORMAT: COMPETITION WITH SEALED-BIDS AND ELECTRONIC AUCTIONS

Localisation: This section may require amendments to reflect local requirements in relation to the use and conduct of e-auctions.

1 OVERVIEW

In this section we look at the elements that make up the costs of a contract and the mistakes that economic operators can make when estimating the cost of delivering a contract. We will see the impact of uncertainty on an economic operator's production costs and the role that uncertainty plays when a contracting authority is deciding whether or not to use an e-auction. We will also look briefly at the way in which a specific competitive approach affects the risk of collusion between economic operators.

2.1 PRIVATE AND COMMON DIMENSIONS IN THE COST FUNCTION

When estimating the cost of performing a contract, each economic operator has to consider at least two different dimensions. The first dimension concerns the economic operator's efficiency in performing each task specified in the contract. Efficiency results from the interaction between the experience of the economic operator's personnel in carrying out similar tasks and, more generally, the firm's managerial skills. Thus the economic operator's efficiency includes a *private* component in its production cost. It is *private* in that it is entirely firm-specific. The second dimension concerns the economic operator's ability to correctly estimate the mix of the various tasks specified in the contract. Such an uncertainty is *common* to all economic operators.

Uncertainty about the common component matters, as the economic operator may find out that the 'true' cost of performing the contract differs from its initial estimate. This may happen if the economic operator submitted a bid on the basis of an overly optimistic estimate of the common component. More generally, if an economic operator does not take this possibility into account at the time of bidding for the contract, it may suffer from the 'winner's curse', that is, it may realise that the actual production costs are higher than the estimated costs. On the one hand, the danger of running losses *ex post* may induce economic operators to bid too cautiously for the contract, which potentially implies high award prices for the contracting authority. On the other hand, the economic operator's inability to recognise the 'winner's curse' may generate overly aggressive bidding, which may result in lower prices for the contracting authority but may also induce the economic operator to cut production costs by lowering the quality of the performance.

One simple way of including both private and common dimensions in the economic operator's costs is by using the following general relationship:

Cost = C (Private, Common)

The relationship makes it clear that, in general, both components affect production costs, although the design of a competitive procurement process sometimes requires the contracting authority to establish which dimension is the more relevant, as we will see in the following sections.

2.1.1 The private component

Example 1. Procurement of cleaning services

Consider a contract for cleaning services. The contract comprises two main space categories A) offices and corridors, and B) laboratories. Table 1 below summarises the estimated costs per square metre for PROPER Ltd ('PROPER'), one of the competing economic operators. The table also indicates the exact size of the surface areas to be cleaned for both categories A and B.

Thus we consider the simplest bidding environment, where each economic operator understands clearly the composition of the final demand for cleaning services. Hence PROPER's bid for the contract will depend only on its (private) efficiency component, although perhaps also on its conjectures concerning other competitors' efficiency levels. The cleaning contract for the two space categories will be awarded by means of a competitive tendering process, using lowest price as the award criterion and with a reserve price of EUR 70/m2, so that any bid above this level will be rejected.

Table 1

	A	B
Reserve Price (EUR/square metre)	70	
Private Value Component Estimated cleaning costs: (EUR/square metre)	40	80
Common Value Component with no uncertainty Surface to be cleaned: (square metres)	30,000	10,000

PROPER's cost for performing the contract is simply a weighted average of the two unit costs, where the weights reflect the fraction of each category of space in the contract:

Unit Cost = (EUR 40 x 30,000 + EUR 80 x 10,000) / 40,000 = EUR 50/m2

PROPER can safely submit prices between EUR 50 and EUR 70, without losing money. The exact bid will depend on its conjectures about other competitors' bids. For instance, if PROPER faces a group of rivals with large market shares and with an established reputation of high expertise in the business, then it may anticipate intense competition for the contract. This would probably induce PROPER to bid closer to EUR 50 than to EUR 70.

2.1.2 The common component and the 'winner's curse'

PROPER's bidding strategy becomes more complex when uncertainty affects the common component of production costs. Table 2 below illustrates the situation in which the demands of both category A and category B of surface area are unknown to PROPER and to all other economic operators. Imprecise information about the composition of the final demand often arises when the contracting authority awards framework contracts or, more generally, when the awarding authority is acting on behalf of other contracting authorities. In this case, a contract may specify the minimum and maximum quantities that the participating contracting authorities can purchase. However, it is not known at the time of the competitive tendering whether contracting authorities – and which ones in particular – will make use of the contract under a framework agreement. In this case the precise mix of the various categories of surface areas to be cleaned may not be clear to the economic operators when they prepare their tenders.

Table 2

	A	B
Reserve Price (EUR/square metre)	70	
Private Value Component Estimated cleaning costs: (EUR/square metre)	40	80
True Demand for Cleaning Services Surface to be cleaned: (square metres)	30,000	10,000
Estimated Common Value Component Surface to be cleaned: (square metres)	32,000	2,000

Economic operators may gather information about both categories of surface areas by inspecting a sample of buildings. In fact, PROPER has inspected a sample of five buildings and recorded the surface areas occupied by offices, corridors and laboratories in each site. Table 3 below indicates the results of that inspection.

Table 3

First Building	Second Building	Third Building	Fourth Building	Fifth Building	Sample Average (SA)	Estimated Number of Buildings to be Cleaned (NB)	Estimated Surface Area (SA*NB)
1,000	2,200	1,600	500	2,700	1,600	20	32,000
80	120	100	140	60	100	20	2,000

Table 3 shows that PROPER observed a sample average of 1,600 m2 of category A surface area; it also observed a sample average of 100 m2 of category B surface area. Moreover, data concerning a previously awarded contract and other similar contracts induce PROPER to believe that the contract will cover 20 buildings. Multiplying the sample average by the estimated number of buildings to be cleaned, PROPER estimates a surface of 32,000 square metres for category A and 2,000 square metres for category B. If PROPER were to predict the unit cost by using only the sample observations, it would derive a unit cost equal to:

(40 x 32,000 + 80 x 2,000) / 34,000 = EUR 43.52/(square metre)

Sample observations lead PROPER to overestimate the task requiring the lower unit cost and to underestimate the task with the higher unit cost. As a result, submitting unit prices between EUR 43.52 and EUR 50 will result in PROPER losing money.

In practice, different economic operators may have different information concerning the composition of the demand, which is easily explained by different samples of inspected buildings, but also by the economic operators' past experience with similar contracts. PROPER, for instance, belongs to the group of economic operators that has almost no experience with similar contracts, while CLEANFAST Ltd ('CLEANFAST'), for example, has a long history of participation in procurement contracts for cleaning services and is able to reasonably predict the range of category A and category B surface areas to be cleaned.

If economic operators are similar in terms of intrinsic efficiency (due, say, to similar efficiency of their cleaning personnel), the contract is likely to be awarded to the firm with the most favourable information concerning the contract, that is, to the economic operator that most accurately underestimates the impact of the high-cost task and overestimates the impact of the low-cost task.

In general, some estimates of the 'true' cost for cleaning the different categories of surface areas will be higher, while others will be lower than the 'true' cost. Given the heuristic bidding strategy, the successful economic operator will be the one that had the most optimistic estimate of the 'true' cost. Hence, it is possible that the economic operator's winning bid (that is, its initial cost estimate plus a fixed mark-up) does not cover the 'true' cost of performing the contract.

To sum up, if an economic operator ignores the possibility of holding an overly optimistic view of the composition of the demand, it may end up suffering from the 'winner's curse', i.e. being awarded the contract that will eventually generate losses.

From the contracting authority's point of view, the 'winner's curse' may generate two kinds of problems: underbidding and overbidding.

- *Underbidding:* If an economic operator is aware of the 'winner's curse' and is afraid of suffering losses, it may adopt an overly cautious bidding strategy, which in turn will generate high prices.
- *Overbidding:* If an economic operator is unaware of the 'winner's curse', it prepares its bidding strategy on the basis of its cost estimate only. It may therefore end up bidding too aggressively, thus submitting prices that are too low. Although this might benefit the contracting authority in terms of low award prices, it might also deteriorate the economic operator's financial stability and induce it to adopt opportunistic cost-reducing actions that would result in a poor quality of service. Even worse, the economic operator might go bankrupt and fail to deliver the contract altogether.

2.3. COSTS AND BENEFITS OF INFORMATION CIRCULATION: CHOOSING THE COMPETITIVE TENDERING FORMAT

The previous section described a competitive environment in which two competitors, PROPER and CLEANFAST, relied on considerably different experiences when preparing their tenders. In addition, the simple fact that PROPER considered CLEANFAST as an 'expert' in the market may have induced the former to believe that any positive information that it had received about the current contract (with a low estimated unit cost) made it more likely that CLEANFAST had received positive information as well.

This situation covers a broad set of circumstances in which the contracting authority would benefit from using an e-auction rather than a competitive, sealed-bid tendering format without an e-auction. The latter would certainly leave inexperienced and poorly informed economic operators (like PROPER) fully exposed to the risk of overbidding. Why? The simple, almost obvious, reason is that such a bidder would have to rely on its very limited information and experience to make a fairly complicated assessment of the 'true' demand for the cleaning service.

Information production during an e-auction process helps economic operators revise their estimates of the common component. In doing so, they may avoid becoming victims of underbidding when adjusting for the 'winner's curse' or of overbidding when relying only on their estimates of the common component (this was the case of PROPER). In an e-auction more confident economic operators bid more aggressively than in competitive processes with sealed-bid formats, thus benefiting the contracting authority through a lower price. Moreover, the winning economic operator discovers more frequently ex post that the cost of serving the contract is no higher than its *ex ante* estimate. It is therefore less likely that the economic operator will look for opportunistic, cost-reducing actions that would undermine the quality of the service.

There are two sources of concern for a contracting authority when opting for an e-auction:

1. Information circulation may increase the risk of collusion, especially in e-auctions for multiple contracts. Indeed, economic operators can exploit the openness of the e-auction format to send signals to each other (through prices) in order to co-ordinate their bids. Moreover, e-auctions may enable members of a bidding ring to detect deviation from a collusive scheme and to punish deviating economic operators.
2. The transparency and openness of an e-auction format may induce some economic operators to adopt bidding strategies in order *(i)* to conceal their information from rivals or, to the other extreme, *(ii)* to bluff, i.e. deceive, rivals.

The kind of strategies in 2. *(i)* above, sometimes described as acting like a 'snake in the grass', are more likely to take place in those e-auction formats in which the pace at which prices evolve over time depends entirely upon bidders' activity. A slow-moving bidding process may produce little valuable information and may result in an excessively long auction. Strategies in 2. *(ii)* above may take the form of 'jump bidding', namely bidding behaviour whereby an economic operator submits a very aggressive – that is, low – price early in the contest, which is meant to 'persuade' competitors that it is in a position to be awarded the contract at a very low price, thus deterring further competition.

Does an e-auction format automatically solve the problems of underbidding and overbidding? Unfortunately, there are other aspects of information circulation during the auction that are likely to affect the learning process for economic operators and, consequently, the extent to which underbidding or overbidding occurs, as the following example illustrates.

Example 2. e-auction with a fixed-end rule

A fixed-end rule means that procurement officials publicly announce a deadline for the bidding process. This deadline can be expressed in terms of a predetermined number of rounds or a fixed time period (e.g. three hours since the starting time). If economic operators are allowed to raise discounts (or lower prices) by small amounts ('ticks'), they may opt for a 'snake-in-the-grass' strategy. Experienced economic operators may have a special interest in doing so as not to disclose their information to less experienced or poorly informed economic operators. Bidding activity may therefore become more lively only in the last few minutes (or in the final round), thus leaving little time (or no time at all) for inexperienced economic operators to learn about the common component. However, if the end of the e-auction can be extended, the outcome might change substantially. Such a simple modification of the design might considerably affect the evolution of the bidding process and, consequently, the amount of information circulation during the auction.

Whenever the contracting authority is concerned with information production, it can take other actions that may be at least as effective as the appropriate choice of rules for an e-auction. In an effort to mitigate uncertainty, the contracting authority should include in the contract, and more generally in the e-auction design, as many important aspects related to the market as possible. Together with the duration of the contract, the contracting authority can specify the geographical areas where the contract applies, maximum and/or minimum quantities to be supplied, and any other aspects that may help bidders to properly evaluate the cost of the contract.

Guidelines on the tendering format

- Consider a sealed-bid tendering without an e-auction when economic operators' cost functions are mainly driven by private-value components or when competing economic operators have access to similar information about common-value components.
- When opting for an e-auction, ***avoid:***
  - fixing exogenously the number of rounds, unless mechanisms for forcing bids downwards are put in place;
  - leaving economic operators in a position to determine price dynamics.

SECTION 2D
SPLITTING CONTRACTS INTO LOTS

1 OVERVIEW

In this section we will look at the economic factors that contracting authorities should take into account when deciding whether or not to split contracts into lots. We will look at the consequences of that decision on the procurement process and on the degree of competition. We will also consider how to split contracts into lots while minimising the risk of collusion between economic operators.

2.1 INTRODUCTION

One of the main choices in public procurement is the decision as to whether works, goods or services should be bought by means of one contract or a number of separate contracts. The decision is not an easy one. On the one hand, large corporations and centralised public procurement agencies often find it profitable to divide contracts into smaller – often geographical – lots when economic operators are dispersed over the relevant territory. On the other hand, the presence of fixed costs in realising the procurement contract gives rise to potentially sizeable economies of scale, thus leading to the decision to use a single contract.

Division into lots has two key consequences in terms of levels of participation in the competitive tendering process and of the degree of competition.

- First, the size of each lot determines which potential economic operators possess the economic requirements to participate in each separate competitive tendering. As it affects participation, the division into lots therefore has a huge impact on economic operators' behaviour and on the final outcome of the tendering process.
- Second, the division into lots determines how a procurement contract can be 'split' between potential competitors and it therefore makes it easy for bidders to achieve and sustain implicit or explicit collusive agreements so as to share the supply at inflated prices.

2.2 DIVISION INTO LOTS AND REVENUE/EFFICIENCY CONSIDERATIONS

In this section we will take the number of economic operators as fixed and assume that these operators do not collude, i.e. they bid for the contract without attempting to co-ordinate their strategies. We will focus on the case where each lot is awarded using the lowest-price criterion. In order to correctly address the question of optimal division into lots, we have to make an assumption about the contracting authority's objective(s): its objective might be to either minimise procurement costs or achieve an efficient allocation of lots (i.e. to award the lots to the most efficient economic operators) or some combination of both. Sometimes those two objectives coincide, while in some other cases a conflict between the two arises. We will explicitly mention whenever the latter is the case.

When deciding on the number and configuration of items, the contracting authority should consider the following factors:

- Relevance of economies of scale
- Number of potential participants and their degree of specialisation in production
- After-market trade (subcontracting)

The importance of each of the above factors will be illustrated by means of the following scenarios.

Example 1. Procurement contract for office refurbishment

Consider the procurement of the manufacturing and installation of furniture for two neighbouring office buildings. A firm that furnishes both buildings is likely to have a lower unit cost than that of two separate firms furnishing one building each. The reason for this is that for the former many tasks have to be accomplished only once, independently of the order's size. In other words, there may exist some fixed costs, such as transportation (up to a certain capacity), inspection and interior design, which may vary only slightly when two buildings are to be refurbished rather than just one.

If both contracts were awarded simultaneously albeit separately, production costs for any of the economic operators would depend on whether the operator is awarded one lot or two lots. This uncertainty exposes each economic operator to a high risk in the bidding process: if it bids a price that is lower than the cost it would bid for a single contract (speculating that it will also be successful in the other bidding), it may nevertheless end up being awarded only one contract – at a bid that is lower than its actual production cost. A conservative bid (i.e. higher than the production cost for a single contract) would guarantee a positive profit if the firm were awarded one lot only. However, the chances of winning are rather low if other firms bid aggressively in order to exploit synergies.

Example 2. Procurement of foodstuffs for school refectories

Even without synergies in production, if there are only a few economic operators competing for several lots, competition among them can be increased by bundling the lots. Let us illustrate this point by the following example. Foodstuffs have to be purchased and delivered to school refectories that are scattered all over the country. Market analysis reveals the existence of two large economic operators, A and B. Firm A has a larger market share in the northern part of the country, whereas firm B is the leader in the southern part of the same country. Procurement officials have to decide whether to split the contract into two lots (north and south) or to have just one national contract.

Suppose that, due to warehouse location, firm A bears a distribution cost equal to EUR 1 for lot N (north) and EUR 10 for lot S (south). Firm B bears production costs equal to EUR 9 for lot N and EUR 1 for lot S. In other words, firm A has competitive advantage in the north, whereas firm B has a competitive advantage in the south, which explains the different market shares in the two regions. To make the exposition simple, assume that both competitors know each other well, namely they are aware of each other's cost structure since they have been competing for quite a while. It is easy to see that awarding the contracts as one bundle lowers the contracting authority's procurement costs.

Since each economic operator knows its rival's costs, awarding the contracts separately would cost the contracting authority EUR 9 for lot N (that is, the highest price A can offer while being sure of getting lot N), and EUR 10 for lot S (that is, the highest price B can offer while being sure of getting lot S). Thus, the total procurement cost is EUR 19 if the contracts are procured in separate tendering processes. In this case, economic operator A would serve lot/contract N and economic operator B would serve lot/contract S. If instead the two contracts were bundled, the contracting authority would pay EUR 11 for both, and economic operator B (that is, the firm with the lower *total* cost) would supply both lots.

Example 2 illustrates an important trade-off: bundling the two contracts in one competitive tendering increases the competition between the bidders and therefore *lowers the price* paid by the procurer. However, the allocation generated by awarding the bundle is not efficient: the economic operators' total production cost would be minimised by awarding the first lot to economic operator A and the second one to economic operator B, which happens to be the case in the two separate tendering processes. This example sheds some light on a more general principle: in the absence of synergies, separate competitive procurement procedures allocate procurement contracts efficiently, whereas bundling may allocate inefficiently, although the latter decreases the total cost borne by the procurer price to be paid by the contracting authority if there are only few bidders. If there are many firms competing for both lots, separate sales are more profitable.

Example 3. Procurement of foodstuffs for school refectories with subcontracting

Let us consider a slightly modified version of example 2 above by assuming that there exists an efficient, medium-sized firm (call it firm C), which is located in the southwest part of the country. Firm C would fulfil the economic requirements to participate in competitive tendering for lot S, but not for the national contract S+C.

Suppose that A and C were in a position to negotiate for a subcontract, according to which 50% of food delivery in the south would be allocated to C, which operates at a cost of EUR 5 (southwest and southeast are equally large). When bidding for the national lot, economic operator A would now bear a cost of EUR 1 for lot N and a cost of EUR 7.5 for lot S. The latter results from the fact that A would still take care of 50% of the contract in the southeast (at a cost of EUR 10), while it would subcontract the southwest part of the contract to firm C. So it is as *if* firm A were producing at a total cost of EUR 1 +(EUR 10 + EUR 5)/2 = EUR 7.5. Consequently, economic operator A would now be awarded both lots at a price of EUR 10 which yields EUR 1 of savings to the contracting authority.

Example 3 illustrates that, while bundling may exclude smaller firms from bidding directly for the procurement contract, it does not prevent them from executing part of the contract. Once again, a trade-off between revenue and efficiency arises: bundling lots generally does not hurt from a savings perspective in the presence of efficient after-market trade (subcontracting). The reason is that large economic operators, when formulating their financial offers, anticipate the additional expected cost savings from subcontracting parts of the project to smaller firms. Thus, the existence of efficient medium-sized and/or small-sized firms lowers the procurement cost, even if the latter are not able to bid directly for the procurement contract.

Let us summarise some of the main conclusions reached so far.

Guidelines on lot design: savings and efficiency

- Bundling is to be preferred when strong synergies in production are expected (due, for example, to high fixed costs).
- If the contracting authority's main goal is to maximise savings, then bundling should be preferred if the number of economic operators is small or if after-market trade (subcontracting) occurs smoothly, whereas lots should be awarded separately if the number of economic operators bidding is large.
- If the contracting authority's main goal is efficiency, then procurement contracts should be split into multiple lots (to foster participation) if production synergies play a negligible role.

2.3 DIVISION INTO LOTS AND PARTICIPATION

In some circumstances, higher participation is associated with more intense competition. In general we should expect a firm to participate in the procurement market if its expected profit from the tendering process is high enough relative to its bidding cost and its outside options (*e.g.* bidding elsewhere or not bidding at all). Thus, the question we have to address is: how to split the contract into lots in order to increase the expected profit of *potentially new* economic operators while at the same time leaving untouched the (participation) incentives of *incumbent* economic operators?

The question is not an easy one since firms are heterogeneous, and therefore driven to participate by quite different incentives. Firms can be distinguished by:

- their size (large vs. small);
- whether or not they already have an established position in the market (incumbent vs. entrant).

2.3.1 Size

Small and medium-sized enterprises (SMEs) usually do not have sufficient capacity to execute the whole contract on their own. Thus, by designing large lots, the contracting authority may exclude smaller firms from the competitive process. However, in many cases the participation of SMEs is desirable. Often highly specialised smaller firms are more efficient than large firms in executing at least certain parts of the project. Moreover, they increase competition on the lots they bid on, which lowers the expected cost. Finally, the existence of smaller economic operators may hamper collusive strategies among bigger players in the market.

The arguments just outlined above favour the division of the procurement contract into many small lots. On the other hand, the existence of complementarities between lots may induce economic operators to bid more aggressively for a bundle. This argument favours a bundled contract. The two opposite forces should be appropriately weighed case by case in order to reach the most appropriate contract strategy.

2.3.2 Incumbent economic operators and new entrants

If the group of potential economic operators that which will compete comprises both well-established firms and new entrants, the tendering process should be designed so that the latter perceive a reasonable chance of success. It may happen that the contracting authority is uncertain whether new entrants are in fact more efficient than incumbents, and therefore designing the competitive process in order to ensure equal entry does not necessarily sound attractive in terms of expected purchasing cost. However, if experience plays any role in correctly executing the procurement contract, then learning-by-doing might put new (small) economic operators in a position to be more competitive in the future. Consequently, splitting the contract into several lots may achieve two goals at the same time: fostering current participation and increasing competition in the future. Contracting authorities must ensure that decisions on division into lots and also on bundling do not favour national suppliers, are non-discriminatory, and ensure equal treatment of all participants in the tendering process.

See module E5 for further discussion on SMEs and procurement.

2.4 DIVISION INTO LOTS AND COLLUSION

Broadly speaking, collusive agreements among economic operators aim to soften price competition. There are several collusive strategies for achieving such an outcome. When procurement contracts are split into several lots, (colluding) economic operators attempt to share the pie, that is, to decide in advance which firm is going to bid on which lot as well as the financial offers to be submitted. Intuitively, each cartel member has to get a slice of the pie at a price that is high enough to deter it from cheating, that is, from taking the whole pie by undercutting its fellow conspirators.

Successful co-operation between firms (that is, collusion) requires three main ingredients:

1. agreement on prices/quantities;
2. effective monitoring of rivals' actions;
3. enforcement, that is, the ability to punish deviant behaviour.

Enforcement is a crucial dimension. Conspiring economic operators have to find it more profitable to adhere to the collusive strategy rather than cheating on the other conspiring economic operators in order to get a bigger share of the pie. Adherence to a collusive strategy can be maintained only if cheating triggers retaliation in future market interactions. Thus collusion requires repeated interactions over time.[1]

The effect of division into lots on the risk of collusion among economic operators can be explored by considering the following dimensions:

- Number of participants
- Symmetry
- Nature of tendering format
- e-auctions

[1] The appendix at the end of this section provides a more formal, albeit simple, economic framework to study how co-operation may arise between self-interested participants.

2.4.1 Number of lots and participants

For a given number of lots, the larger the number of participants the lower the risk of collusion, as the size of a would-be cartel increases, it is increasingly difficult to agree on how to split the lots. However, varying the number of lots does affect participation since economic requirements are positively linked with the contract value of a single lot. Thus the risk of collusion does vary with the number of lots, as explained in the following example.

Example 4. Lots and participation

A procurement contract for cleaning services could be split into several geographical lots. The value of the contract is such that if only one (national) lot is awarded, no firm would be able to participate because of its limited size (and/or turnover). If the contract was split into two lots, then two firms would be in a position to compete; finally, if the contract was split into three lots, then seven firms would fulfil the economic requirements. If the contracting authority aims to minimise the risk of collusion, then the contract should be split into three lots.

2.4.2 Symmetry

Symmetric economic operators (i.e. of similar capacity/dimension/market shares) find it easier to split *symmetric* lots (of similar economic value); in contrast, they find it more difficult to split asymmetric lots. In general, each conspirator's bargaining power within the cartel is proportional to its relative position in the relevant market. Therefore, to prevent collusion, the contracting authority should split the contract in such a way as to create some asymmetries between economic operators and between lots.

The discussion developed so far leads to quite a natural policy for procurement design, as indicated in the guideline below.

Guideline on the number of lots and collusion

- The number of lots should always be smaller than the expected number of participants.

Some contracting authorities use the above guideline as a simple rule of thumb to prevent economic operators from colluding by sharing lots. This guideline is indeed useful, but it would be unwise to believe that collusion may be successfully sustained only when the number of lots is high enough. Even when the number of lots falls short of the number of economic operators, collusive agreements may be implemented through rotation schemes, where tendering processes are typically repeated over time. Moreover, since many firms operate in more than one market, collusion can be sustained by multi-market sharing agreements.

Collusive gains can also be shared by taking turns in winning procurement contracts or through side transfers, such as subcontracting; economic operators could agree in advance on the winning firm and on the conditions for the award of subsequent subcontracts to the others. There are definitely tendering processes in which the technical aspects of the procurement contract require a very large number of lots, which makes it impossible to follow the above guideline; as we will see, in those cases a large number of lots may even hinder collusive behaviour.

Most importantly, it should never be forgotten that participation is *endogenous, i.e.* it depends on the number and size of lots, as well as on all of the other elements of the tender design. Therefore, it is far from clear that reducing the number of lots will reduce the risk of collusion, as this may be counterbalanced by potential lower participation, which in itself favours collusion.

2.4.3 Nature of the tendering format

Once contracting authorities have decided on the most appropriate division into lots, one additional issue is to be addressed: should the lots be awarded *simultaneously* or *sequentially?* The following example can help to illustrate the two alternatives.

Example 5. Simultaneous vs. sequential tendering format for multiple lots

Suppose that a contracting authority wishes to buy 1,000 laptops, 500 monitors, 1,000 printers and 50 servers. Market analysis shows that four firms (A with an average market share in the relevant markets of 40%, B and C with market shares of 15%, and D with 10%) are in a position to supply all four types of products. Procurement officials are nonetheless reluctant to award the contract as a bundle since they are not sure whether the firm D would fulfil the economic requirements. Thus the contract will be split into four lots, one for each product category. Two competitive tendering formats could be adopted:

Simultaneous: firms are requested to submit at the same time four bids;

Sequential: firms bid for laptops first; once the economic operator has been selected, they then submit bids for monitors, and so on.

If the risk of firms co-ordinating to split the four lots is significant, can the choice of a simultaneous rather than sequential tendering format be of help?

There are two ways in which a sequential format may facilitate collusion between economic operators compared to a simultaneous one. The first, intuitive collusive drawback of sequential competitive procurement is linked to the ability of cartel members to identify defections and to react quickly, within the same sequence. This situation limits the defector's short-run gains, thereby facilitating the enforcement of collusion in comparison to a simultaneous format. In the case of the procurement of related goods, this effect can be seen as an increase in the frequency of interaction. The effect is stronger the larger the number of related goods that are sequentially procured (or the smaller the lots in which given divisible goods are fractioned before being procured). The second way that a sequential format facilitates collusion is linked to the possible asymmetry within a cartel of colluding economic operators. The viability of cartels is often limited by the presence of 'mavericks', i.e. firms that are difficult to discipline as they have more to gain from undercutting a cartel (or less to gain from being part of it). This is the case of firm A in example 5 above. If economic operators are asymmetric, a sequential competitive tendering can facilitate collusion by allowing the cartel to soften the maverick's aggressiveness by allocating to that economic operator the last object(s) in a given sequence. This action minimises the maverick's incentive to defect and strengthens the viability of the cartel.

SECTION 3
EXERCISES

EXERCISE 1
CENTRALISED AND DECENTRALISED PROCUREMENT

Group discussion. Divide into groups and discuss the following questions:

1. Would a fully centralised procurement strategy for pencils automatically guarantee tougher competition among participating tenderers? Why?
2. Why would green procurement strategies require a centralised rather than a decentralised approach?
3. Would the increasingly widespread use of electronic tools favour decentralised procurement strategies? Explain.

EXERCISE 2
PROCUREMENT CONTRACTING STRATEGIES – FIXED-PRICE BUT NOT PERFORMANCE-ORIENTED CONTRACTS FOR CLEANING SERVICES

Procurement contracts for cleaning services are normally rewarded on a fixed-price basis (say, EUR XX per square meter). Are they really performance-based contracts? If not, how could they be made (more) performance based?

Action: Prepare a list of at least 5 quality standards you could include in the specification that are performance-based standards.

EXERCISE 3
THE DESIGN OF THE COMPETITIVE TENDERING FORMAT COMPETITION WITH SEALED BIDS AND E-AUCTIONS – "INCUMBENT EFFECT" IN A PROCUREMENT CONTRACT FOR AMBULANCES

A central purchasing body is planning to award a new, two-year contract for purchasing ambulances on behalf of five different hospitals scattered over a vast region. The procurement strategy hinges on two points: tenderers are asked to submit offers both for a "basic model" of ambulance and for a catalogue of specialised accessories to add to a basic model ambulance that can be selected by each hospital according to their specific needs. For example, a hospital based in a ski resort may require an ambulance with equipment suited to use in snowy conditions.

Two previous (two-year) contracts have been awarded to the same firm.

What advice you can provide to procurement officials so as to reduce the possible competitive advantage that the incumbent contractor has gained over the past four years?

EXERCISE 4
THE DESIGN OF THE COMPETITIVE TENDERING FORMAT

COMPETITION WITH SEALED BIDS AND E-AUCTIONS – "LAST-MINUTE BIDDING" IN E-AUCTIONS

Having used e-auctions (with a fixed deadline) for a while, procurement officials have been observing a slow price dynamic – that is, bids being reduced by small amounts – together with several cases of "last-minute bidding". In order to get round such a problem, they are planning to introduce a slight variant: if any bid is recorded within five minutes before the deadline, the latter is extended by 30 additional minutes.

Would this be enough to make a dynamic auction more "lively"? – that is, would it induce more informed bidders to bid more aggressively? Explain.

EXERCISE 5
SPLITTING CONTRACTS INTO LOTS – FIRMS' HETEROGENEITY

Two local authorities, L1 and L2, wish to award a contract for car rental services in the same period. The value of L1's contract is EUR 500 000, while L2's is EUR 1 million. Two leading firms operate in the market: firm A with a market share of 65%, and firm B with a market share of 35%.

What advice would you give L1 and L2 as to whether or not to award two separate contracts?

EXERCISE 6
SPLITTING CONTRACTS INTO LOTS – LOTS AND PARTICIPATION

A procurement contract for cleaning services could be split into several geographical lots. The value of the contract is such that if only one (national) lot is awarded, only one large firm would be able to participate. If the contract were split into two lots (of equal value), then three firms would be in a position to compete. Finally, if the contract were to be split into three lots (of equal value), then seven firms would fulfil the economic requirements.

Which division into lots would you favour if you were asked to minimise the risk of collusion among participants?

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

Centralised and decentralised procurement

1. What key elements of centralised procurement will help to reduce purchasing costs?
2. Does centralisation help to reduce or in fact increase the risk of favouritism?
3. What areas of strategic procurement are commonly centralised, and why?

Procurement contracting strategies

4. What kind of (procurement) risk can a public institution transfer to the economic operator by adopting a fixed-price contract?
5. What economic factors should procurement officials consider when designing the number of quality improvement thresholds in a quality incentive contract?
6. Can you provide some examples of non-verifiable quality dimensions?

The design of the competitive tendering format – Competition with sealed bid and e-auctions

7. What is a private dimension in a cost component in production costs?
8. What is a common dimension in a cost component in production costs?
9. In a rental and maintenance contract for photocopiers, what might be the most important common components in tenderers' costs?
10. Under what conditions is information circulation in an e-auction good for competition?

Splitting contracts into lots

11. What are the two key consequences of division into lots in terms of levels of participation in the process?
12. What key factors should contracting authorities consider in deciding on the number and configuration of lots?
13. Is it true that awarding several lots sequentially rather than simultaneously makes collusion more difficult because each colluding firm may end up receiving a "smaller slice of the pie"? Why?

APPENDIX
A SIMPLE ECONOMIC MODEL OF CO-OPERATION IN MARKETS

This appendix provides a brief theoretical overview of how co-operation may arise among selfish (that is, self-interested) economic agents. Although we use a very simple model of interaction, some of the main insights about collusion in stylised markets are nearly in a ready-to-use form for application in procurement markets.

A.1. A stylised model of static competition: The 'prisoners' dilemma'

One of the most frequently mentioned example for studying the scope of co-operation/ collusion is the 'prisoners' dilemma'.

Example A1. *'The Prisoners' Dilemma'*

"A pair of transients, Al Fresco and Joe Prison, have been arrested for vagrancy. They are suspected of complicity in a robbery, but the evidence is inadequate to convict them. The district attorney interrogates them in separate cells and offers each the following deal. 'If you confess and your friend does not, you will be released and your friend will have the book thrown at him; and the other way if he confesses and you do not. If both confess, both will receive moderately long sentences. If neither confesses, both will be convicted of a minor vagrancy charge.' Specifically, the promised jail sentences, in months, are in the following table, with the first number in each pair representing Al's sentence and the second Joe's. (A minus sign is put in front of each of the numbers to remind us that, in the reverse of the usual interpretation, here more is worse.)"

Table 1: Prisoners' Dilemma

		JOE	
		Confess	Don't Confess
AL	Confess	(–8, –8)	(0, –15)
	Don't Confess	(–15, 0)	(–1, –1)

What is the logic of the situation represented in Table 1? Imagine Al's reasoning process; should he confess or not? If Al believes, for whatever reason, that Joe is going to confess, then (reading down the first column) Al sees that he has a choice between eight months in jail (if he confesses) and 15 months in jail (if he does not confess). Confessing is clearly his best strategy. If, on the other hand, Al believes that Joe will not confess, then (reading down the second column) Al sees that his choice is between going free (if he confesses)

and one month in jail (if he does not confess); again, confessing is the best choice for him. Although, when working through the logic of the situation, Al had to make conjectures about what Joe would do, in the end these conjectures were irrelevant. Regardless of what Joe does, Al's best action is to confess. Now notice that Joe is exactly in the same situation as Al, and so Joe reaches the same conclusion; Joe also rationally confesses. Thus *the equilibrium* of this game (more precisely, the *Nash equilibrium*), the outcome of *simultaneously rational decisions by both of the players,* is that both of them confess.

This outcomes seems to be paradoxical. Compare the confess/confess equilibrium (which results in eight months' jail for each) with the alternative of neither of them confessing (which results in one month's jail for each). Both would be better off if neither confessed. There is a contradiction between what is individually rational and what is collectively rational. The pursuit of individual gain results in both being worse off than they need to be. Each would be better off if they could succeed in co-operating, but they cannot. If one decided to act in their mutual interest by not confessing, then, according to the logic already given, it is in the interest of his rival to confess.

Let us introduce some economics jargon to describe the situation. We will call an outcome 'efficient' if there is no alternative outcome that would leave some players better off and none worse off. To reverse this definition, an outcome is inefficient if there is another outcome that the players unanimously prefer. In the prisoners' dilemma, the (-1, -1) outcome is efficient (just as, for that matter, are the (-15, 0) and (0, -15) outcomes). We have seen that the equilibrium of the prisoners' dilemma game is inefficient.

What the prisoners' dilemma shows is that people who fail to co-operate for their own mutual benefit are not necessarily foolish or irrational; they may be acting perfectly rationally. The prisoners' dilemma is a paradigm for many diverse business and economic interactions. For example, two firms are competing to sell the same product. The logic of profit maximisation forces each to set a low price when both would earn more profits if each set a higher price. Two nations trading with each other are driven by rational, national-interest motivations to erect trade barriers, when both would be better off if these barriers were eliminated. Fishermen overfish their common fishing ground and destroy the industry, to everyone's loss. A potential contracting authority and a potential seller bargain so hard that they fail to reach a potential agreement on a price, despite the fact that there are prices that would make them both better off had the sale occurred.

A.2. Modelling repeated interaction and incentives to co-operate

One of the main features of the basic version of the 'prisoners' dilemma' is that the participants play only once. Being a metaphor of real world competitive situations, it clearly lacks one main feature, namely the interaction of participants over time. The question that we are going to address in this section may sound a bit obvious: *are there any other rational patterns emerging when people interact repeatedly?* The main answer that our analysis is going to deliver is that co-operation may emerge as a rational behaviour among completely selfish (i.e. self-interested) participants. To put it in a more business-friendly jargon, competing economic operators may find it mutually profitable to soften competition in order to achieve a better outcome (that is, higher profits).

We will maintain a stylised competitive situation in which two participants – namely the two suspects in the prisoners' dilemma – interact for an infinite number of times. This may sound like quite an unrealistic assumption, as one of the properties of infinitely repeated games is that the stage game is played each period for an infinite number of periods. Although such a game may not seem realistic at first (people do not live forever), infinitely repeated games are useful for modelling some real-world situations. Consider an infinitely repeated game with *discounting,* whereby the payoffs in the stage game are discounted over time. Let us use δ (a number between 0 and 1) to denote the discount factor. When comparing a payoff received today with a payoff received tomorrow (the next period), we discount tomorrow's payoff by multiplying it by the discount factor. In this way we say that the stream of payoffs – from today and tomorrow – are 'discounted to today'. Payoffs obtained two periods from now are discounted by δ^2, payoffs obtained three periods from now are discounted by δ^3, and so on.

For infinitely repeated games, we will have to calculate the sum of the stream of discounted payoffs. For example, a player may obtain one unit each period for an infinite number of periods. In this case, the sum of the player's discounted payoff stream is the following:

$$s \equiv 1 + 1\delta + 1\delta^2 + 1\delta^3 + \ldots = 1 + \delta + \delta^2 + \delta^3 + \ldots.$$

We can simplify this expression by noting that:

$$\delta + \delta^2 + \delta^3 + \ldots = \delta\,[1 + 1\delta + 1\delta^2 + 1\delta^3 + \ldots] = \delta s$$

Therefore, we have:

$$s \equiv 1 + \delta s,$$

which means that $s = 1/(1 - \delta)$. In summary,

$$1 + \delta + \delta^2 + \delta^3 + \ldots = \frac{1}{1 + \delta}.$$

This expression will come in handy. Note that, by multiplying both sides by any constant number *a,* we have:

$$a + a\delta + a\delta^2 + a\delta^3 + \ldots = \frac{a}{1 + \delta}.$$

The strategies in infinitely repeated games can be exceedingly complex. In general, a player's strategy is a full description of which action to take at every information set for every period *t* and every different history of play from the beginning of the game through period *t-1.* Thus, a strategy prescribes an action for a player to take that is conditional on everything that took place in the past. Fortunately, it is often sufficient to consider just a few types of simple strategies in repeated games. The simplest are those that prescribe stage Nash profiles in each period.

To capture the idea of reputation, we can examine another simple type of strategy called a *trigger strategy*. Trigger strategies specifically refer to two action profiles for the stage game: one profile is called the 'co-operative profile', and the other is called the 'punishment profile'. The punishment profile is assumed to be a stage Nash profile. In a trigger-strategy equilibrium, the players are supposed to play the co-operative profile in each period. However, if one or both of them deviate from the co-operative profile, then they play the punishment profile forever after. In other words, deviating from the co-operative profile destroys a player's reputation and triggers the punishment profile for the rest of the game.

To see how this works, consider a modified version of the infinitely repeated prisoners' dilemma studied in the previous section. The stage game is given in Table 2 below. There is only one stage Nash equilibrium (D, D), so we can use it as the punishment profile. Let (C, C) be the co-operative profile. Our goal is to understand whether the players have the incentive to play (C, C) each period under the threat that they will revert to (D, D) forever if one or both of them cheat. To be precise, the trigger strategy specifies that the players select (C, C) each period as long as this profile was already played in the past; otherwise, they will play (D, D). This is sometime called the *grim-trigger strategy*.

Table 2: Prisoners' Dilemma

		2	
		C	D
1	C	(1, 1)	(0,3)
	D	(3, 0)	(1, 1)

Let us evaluate whether the grim-trigger strategy is a Nash equilibrium of the infinitely repeated game. Consider the incentives of players i ($i = 1, 2$) from the perspective of period 1. Suppose the other player – player j – behaves according to the grim trigger. Player i basically has two options. First, he/she can also follow the prescription of the grim trigger, which means cooperating as player j does. In this case, player i obtains a payoff of 2 each period, for a discounted total of:

$$2 + 2\delta + 2\delta^2 + 2\delta^3 + \ldots = \frac{2}{1+\delta}.$$

Second, player i could defect in the first period, which yields an immediate payoff of 3 (the highest discounted defection payoff) because player j co-operates in the first period. However, player i's defection induces player j to defect in each period, starting in the second period. Thus, by defecting in period 1, player i obtains the payoff:

$$3 + \delta + \delta^2 + \delta^3 + \ldots = 3 + \delta[1 + \delta + \delta^2 + \delta^3 + \ldots] = 3 + \frac{\delta}{1+\delta}.$$

If $2/(1-\delta) \geq 3 + \delta/(1-\delta)$, then player i earns a higher payoff by perpetually co-operating according to the grim trigger rather than defecting in the first period. Simplifying this inequality yields:

$$\delta \geq \delta^* = \frac{1}{2}.$$

The grim-trigger analysis applies to the repeated prisoners' dilemma, although the 'cutoff discount factor' (that is, δ^*) depends on the payoffs in the stage game.

Let us try to generalise the result that we have just proven. First, any two-player strategic game, such as the one in Table 3 below, represents a prisoners' dilemma if, and only if, the relevant payoffs are such that: $\Pi_B < \Pi_D < \Pi_C < \Pi_O$.

Table 3: Generalised Prisoners' Dilemma

		2	
		C	D
1	C	$(\Pi_C \Pi_C)$	$(\Pi_B \Pi_O)$
	D	$(\Pi_O \Pi_B)$	$(\Pi_D \Pi_D)$

The condition for the discount factor now becomes:

$$\delta \geq \delta^* = \frac{\Pi_O - \Pi_C}{\Pi_O - \Pi_D},$$

that is, collusion is easier to be sustained (*i.e.* the threshold value is low): i) the closer the payoff for unilateral opportunistic behaviour to the payoff for co-operation ($\Pi_O - \Pi_C$ is low); and ii) the lower the punishment payoff (Π_D). In most economic situations, however, payoffs are not exogenously given as in a prisoners' dilemma, but they are endogenously determined, as they are the outcome of firms' choices about price/quantity. Consequently, the 'size of the pie' to be divided among conspiring firms as well as the profit levels when cheating occurs depend on several factors, such as market conditions, the degree of asymmetry between firms' size, and other institutional factors.

MODULE

B

PUBLIC PROCUREMENT TRAINING FOR IPA BENEFICIARIES

Organisation at level of contracting authorities

Organisation at level of contracting authorities

Contracting authorities' internal regulation

MODULE B

PART 1

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this module are to make participants aware of how the procurement team and contracting authority in which it works are accountable for their activities, including:

- Best practice in the organisation of procurement services to meet the needs of stakeholders
- The merits of different options for organising procurement services to meet the needs of stakeholders
- The key components of internal legal governance processes in relation to the core (standing orders) procurement team, other stakeholders, and the economic operators
- The need to maintain an audit trail and key stages of procurement linked to the audit trail
- Best practice in the maintenance of legal governance documentation
- An appropriate code of ethics for procurement staff and stakeholders
- An example of governance documentation

1.2 IMPORTANT ISSUES

Procurement as an organised system its people and its processes must be accountable. In this respect, procurement must be "above suspicion".

Fundamental issues within this module include:

- Organisational structure options for the operation of procurement services
- Procurement governance documentation (an internal legal framework of the procurement process including manuals and instructions)
- Guidelines for the preparation of procurement governance documentation
- Maintenance of appropriate procurement governance documentation
- Identification of audit trail points
- The accountability of the contracting authority

1.3 LINKS

Links to other modules appear throughout the text of this document. This module does however contain major links to modules:

- B2 The procurement cycle
- B3 The role of the procurement officer
- B4 The role of stakeholders

1.4 RELEVANCE

Procurement officers need to:

- Understand the concept of accountability throughout their organisation
- Understand the good practice options available when designing the organisational structure for procurement, and understand the issues relating to each option
- Live by a code of ethics
- Be able to develop, enhance and maintain procurement governance documentation, to underpin best practice procurement in their organisation
- Understand the concept of transparency and the need to audit their actions
- Be able to link the concepts in this module to module B2, where procurement processes are discussed, and modules B3 and B4, where the roles of procurement officers and stakeholder are discussed

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

This section will link to other areas referring more closely to legal information.

LOCALISATION WILL NEED TO REFER TO SPECIFIC LEGAL DOCUMENTS

SECTION 2
NARRATIVE

2.1 INTRODUCTION

This first section describes the concept of accountability in the sense that the contracting authority itself, the procurement team, and the individuals working for the contracting authority are accountable for their actions. The section considers the issues concerning delegation and then considers the options for structuring a procurement team.

2.2 ACCOUNTABILITY

Accountability is defined as:
"the quality or state of being accountable, especially an obligation or willingness to accept responsibility or to account for one's actions".

In accordance with this definition, it is said that public officials have the obligation and must be willing to accept responsibility for their actions. Accountability has a literal meaning related to counting and accounting for items of monetary value, but as a concept its expanded meaning covers ethics and corporate social responsibility. Procurement officers and contracting authorities need to demonstrate:

- Good governance and a structure that encourages good governance
- Enforcement of internal and external legal regulations
- An absence of corrupt practices
- Accountability for their actions

Contracting authorities spend money. In this context contracting authorities are spending public money, generally derived from taxation imposed on citizens of the town, city and country as a whole. It is therefore fundamental that contracting authorities are made accountable to the electorate and to elected representatives of the town, city and country for the money spent on their behalf. Contracting authorities must therefore have structures and processes that allow them to 'account' for:

- Actual expenditure
- Value for money spent
- Effective processes used to achieve value for money spent
- A structure that organises its resources effectively

The actions, decisions and processes of the contracting authority must be transparent so that it is clearly understood why decisions were made and that these decisions reflected what was considered to be the best value opportunity at the time. Mistakes can always be made, and subsequent events may make it seem as though the decision taken was the wrong one. It is therefore vital for anyone to be able to see, by looking back at the information available at the time, that an appropriate decision was made.

With transparency goes the ability to have an auditable structure and auditable processes. Module B2 covers in detail procurement processes and audit touch points.

Procurement officials must juggle a number of requirements. They have to:

- remain in control;
- behave in an ethical manner;
- deliver the services that stakeholders need;
- deliver value-for-money;
- minimise bureaucracy;
- maintain the fair competition of the supply market.

The accountability of public officials must revolve around the exercise of appropriate managerial, administrative and financial control over the resources that are entrusted to them as part of their role. Procurement officers must therefore:

- manage effectively their own time and the time of those working for them to provide value-for-money;
- use other resources as effectively as possible, including the processes and equipment required to procure as well as the buildings in which these operations take place;
- administer and manage procurement in accordance with local and national laws and with the EU *acquis* (where applicable);
- ensure that there is control that adds value, with as little bureaucracy as possible so as to reduce added costs;
- be able to account for the spending of every cent of every euro;
- ensure that processes are transparent;
- make decisions in an equitable way;
- maintain ethical behaviour.

Good practice note – use of local economic operators

One area where 'accountability' can place procurement officers in conflict is the consideration that accountability does not mean using local or national economic operators in preference to others. Procurement officers must promote competition between economic operators, whether they are local, national, from a neighbouring country or from anywhere else in the world.

Accountability can be summarised by evoking two concepts:

1. The power of approval in decision-making:

   Public officials work within processes that require the approval of steps in the procurement process at several stages. Typically, approval would be required for:

   - establishing a budget;
   - preparing annual procurement plans;
   - preparing individual, contract-specific procurement plans;
   - searching for tenders by using formal procedures;

- taking specific steps in the procurement process;
- deciding which economic operator is to be awarded the contract;
- completing and signing contractual documents;
- accepting goods and services as 'fit for purpose';
- paying an economic operator.

Line managers and procurement officers following steps in the procurement process and receiving authorisation from more senior officers, as prescribed by internal legal processes, will be most likely to make decisions that clearly demonstrate their accountability.

2. The responsibility to provide answers to questions:

   Public officials have the duty to make themselves available to other public officials, elected officials or the general public through designated channels. Public officials have the duty to answer the questions of other public officials, elected officials or the general public as to why they made a given decision at whatever stage of the procurement process in which they made the decision, depending upon the specific national rules under which they are operating. Need for localisation here.

   A question from an elected official asking 'why we bought 50 laptops from economic operator X', which is answered by a public procurement official to the effect that 'my brother runs economic operator X, I trust him and I like to keep it in the family', should lead to the dismissal of the public official.

   An appropriate answer would be: 'We had five award criteria and economic operator X scored highest on four of the five criteria. When the panel calculated the responses from all of the economic operators that had submitted a tender we found that economic operator X scored the highest and thus submitted the most economically advantageous tender. Consequently, we recommended the award of the order to economic operator X, and the senior procurement manager agreed with us and signed the procurement approval.'

Note the following aspects of the second answer:

- There were several economic operators.
- Five evaluation criteria were used.
- Economic operator X came out on top in four of the five criteria.
- Overall, economic operator X came out on top.
- There was an evaluation panel – this means officials from several departments.
- The panel made a recommendation to a senior purchasing manager and he signed the approval.
- The information will be available for auditors to review in years to come.

Good practice note - corruption

Corruption is more likely if one person is making a decision alone. Here several people from different departments would have to collude to make a corrupt decision and then they would have to convince the senior procurement official to go along with them. In some cases this could happen, but it is a most unlikely set of events.

Public sector purchasing contracting authorities must have processes that insist upon accountability. The ability of procurement officers to make decisions on their own may exist through delegated authority for low-value and low-risk purchases. However, as the cost of the purchase and the risk to the contracting authority increase, the need to involve peers, stakeholders, senior managers and elected officers in some way and at various stages of the process will also increase.

2.3 GOVERNANCE STRUCTURES

In recent years procurement practitioners have increasingly recognised the importance of ensuring behavioural compliance with ethical standards through a governance structure. A governance structure is defined as:

> "an ethics infrastructure that contains the tools, systems and conditions for motivating and enforcing high standards of conduct amongst a workforce". Adapted from an article about the Encyclopaedia of Public Administration and Public Policy, Second Edition in http://www.informaworld.com

Governance structures can take many forms, but all include systematic policies and procedures to impartially monitor compliance with an ethical code, ethical mission, or other form of articulated standards of conduct deemed as being vital to the contracting authority concerned.

2.4 CORRUPTION

Corruption is defined as:

> "impairment of integrity, virtue, or moral principle, depravity, decay, decomposition, inducement to wrong by improper or unlawful means (as bribery), a departure from the original or from what is pure or correct".

Procurement officials must reject corrupt practices, which are contrary to good practice in the procurement profession. A code of ethics similar to the one appended in Appendix A should be the norm for procurement officers.

2.5 DELEGATION OF AUTHORITY

Delegation is defined as:

> "the act of empowering to act for another".

Therefore, delegation of authority is allowing someone or some contracting authority to act on your behalf to perform tasks and consume resources that are available to you. The initial delegation may be to the finance department and then to the procurement team, depending upon specific national conventions. Need for localisation.

The contracting authority's governance documentation will ascribe roles and responsibilities to officials to enable them to make decisions and approve activities. For example, in order to despatch a contract notice for publication in the *Official Journal of the European Union*, the process may work like this (demonstrating that in public procurement key decisions are not taken by a single person but collectively by a number of stakeholders):

- Department heads need to spend money the following year and request budgets from financial controllers.
- The budgets may or may not be approved.
- The approved budget is represented as a procurement plan by the procurement team working with the stakeholders.
- The procurement plan is approved or not approved.
- Stakeholders approve individual procurement within the plan at an appropriate time during the year.
- Procurement staff draft a procurement plan and a business case and propose a process in accordance with the policies and procedures of the contracting authority.
- The procurement plan and the business case are approved by senior procurement officials and senior stakeholders.
- The contract notice is despatched for publication in the *Official Journal of the European Union*, and the procurement process continues with the involvement of a number of stakeholders.

The procurement process is described in module B2, the roles of procurement officials are described in module B3, and the roles of stakeholders are described in module B4.

2.6 ORGANISING WITHIN A CONTRACTING AUTHORITY TO MEET THE NEEDS OF STAKEHOLDERS

A procurement stakeholder is defined as 'anyone who has a stake or interest in the process of procurement'. Individuals with roles within the end-user, officials in finance, legal and IT departments, and elected officials all have a 'stake' in procurement.

Procurement has many stakeholders, and the identification and management of stakeholders are discussed in detail in module B3. One vital mindset that procurement officers need to adopt is the realisation that their stakeholders are customers and that they must provide a service to those customers. As all contracting authorities differ and stakeholders in different city councils may vary, there is therefore no single contracting authority model that is 'right' for procurement within the public sector.

Procurement officials working in procurement may report up the contracting authority hierarchy through the finance directorate, through a chief procurement office to the chief executive, or through the clerk in public works; there is no one set-up. One concept is vital, however, and that is that procurement must be left alone to work within the rules prescribed for it by the contracting authority and not subjected to undue influence by stakeholders.

There are four fundamental models for procurement within a single contracting authority:

- Centralised procurement model within a contracting authority
- Decentralised procurement model within a contracting authority
- Centre-led action network model within a contracting authority
- Matrix management of procurement model within a contracting authority

Good practice note – choice of model

It is important to stress that none of the above options is considered "right" in preference to any of the others, although it is probable that fewer contracting authorities select the decentralised model. These models are options for organising procurement within a contracting authority and are to be distinguished from structures relating to central purchasing bodies and other forms of co-operation between a number of contracting authorities, which are discussed in module B2.

2.7 CENTRALISED PROCUREMENT MODEL WITHIN A CONTRACTING AUTHORITY

Centralised procurement is a concept where all requests for goods, works, materials and services are passed through a central team within a contracting authority. The central team prepares and runs the procurement exercise and may manage the contract afterwards.

2.7.1 Advantages of a centralised model

The advantages of a centralised function include:

- Economies of scale exist:
  - within purchasing teams because the whole team is in a single location;
  - because more professional and capable resources can be employed;
  - when approaching the supply market, because large volume purchases can be made;
  - making communication easier within the central team;
  - allowing all of the human resources focused on purchasing to be assembled to meet stakeholder requirements;
  - where a single contract within the contracting authority can be established rather than several small ones.
- The processes can become clear and standardised because all purchases must be made through a single internal contracting authority.
- A single team can more effectively communicate purchasing decisions.
- The approach to both the contracting authority and the supply market can be consistent, and therefore everyone knows where they stand.
- Control over what is spent can be more closely exercised by the central team.
- A central team will have the resources to employ specialist procurement officials to make purchases, of fuel for example.
- Quality and speed of decision-making are improved.

2.7.2 Disadvantages of a centralised model

The disadvantages of a centralised function include:

- Remoteness from stakeholders: A central team located 400 kilometres away may not appreciate the needs of local stakeholders.
- Bureaucracy: The centrally enforced processes may not allow for local flexibility.
- The central contract may not be appreciated by all stakeholders, with the result that some may seek to work around it.
- The central team may constitute an additional layer of administration.

- Decision-making may be slower as requests must be transmitted through the central team.
- Processes may take longer if the additional central step is in place.
- Local people may feel that local economic operators are not given a chance.

2.8 DECENTRALISED PROCUREMENT MODEL WITHIN A CONTRACTING AUTHORITY

Decentralised procurement is a concept whereby purchasing is carried out at a local level by the officers who need the goods, works, materials and/or services at a local level, without reference to anyone else within a contracting authority.

2.8.1 Advantages of a decentralised model

The advantages of decentralised procurement include:

- Closeness to stakeholders: A local team understands the needs of local stakeholders.
- Less bureaucracy: The local team can allow for local flexibility.
- The central contract may not be appreciated by all stakeholders, with the result that some may seek to work around it.
- There is no additional layer of administration in the form of a central team.
- Decision-making may be faster as requests can be met locally.

2.8.2 Disadvantages of a decentralised model

The disadvantages of a decentralised function include:

- Economies of scale are not made:
  - because the whole purchasing team is not in a single location;
  - because more professional and capable resources cannot be employed for each local purchase;
  - resulting in higher costs when approaching the supply market because volumes are small;
  - meaning communication between purchasing teams may be fragmented or non-existent;
  - where stakeholder requirements are not aggregated;
  - where multiple small contracts are established within the contracting authority.
- The processes can become ragged and ineffective without a central force driving standardisation.
- Purchasing decisions may not be widely communicated, and an economic operator may be found to charge different parts of the contracting authority with different prices for the same item.
- The approach to the contracting authority as a whole and the supply market may be inconsistent.

- There is no central view of 'spending' and control over what is spent may not be adequate.
- Local teams may not have specialist purchasing knowledge.
- Local favouritism may exist.
- Quality of decision-making may be poor.

2.9 CENTRE-LED ACTION NETWORK (CLAN) MODEL WITHIN A CONTRACTING AUTHORITY

With a centre-led action network (CLAN) approach to procurement, experienced procurement officials are physically placed alongside key stakeholders. This model facilitates local involvement in procurement whilst organising and co-ordinating the total effort of the procurement team through the network so as to enable the maximum impact for the purchasing contracting authority.

2.9.1 The CLAN concept

The CLAN concept involves:

- A small central team of procurement officials that sets policy, monitors statistics, co-ordinates efforts and manages common systems and processes
- Experienced procurement specialists, who are seated next to the stakeholders using the goods and services they procure and embedded in the local team
- Collaboration between central and local teams on procurement that impacts one or more stakeholder areas
- Local purchasing procurement officials who take a global lead for the contracting authority in some purchases and a back seat role in others.

2.9.2 Advantages of a CLAN model

CLAN enables local and central accountability, functional excellence from centre-led resources, and synchronised action in the form of procurement plans with stakeholder buy-in. CLAN can achieve:

- The best centralised purchasing, without incurring the costs and overheads of a central team
- Local buy-in from stakeholders, who have a voice and resources to work with CLAN to aggregate spending and deliver economies of scale

For a contracting authority with several purchasing sites, a national railway for example, or for a contracting authority on a single large site, a CLAN approach can work well.

2.9.3 Disadvantages of a CLAN model

A CLAN can become more like a decentralised function whenever the central team does not co-ordinate well, when stakeholders use their local procurement resource to push their position at the expense of others, and when communication is poor.

2.10 USE OF A MATRIX MANAGEMENT MODEL WITHIN A CONTRACTING AUTHORITY

Like CLAN, a matrix model tries to gain the best of both worlds by organising itself to address specific needs. Contracting authorities using a matrix model may have some central specialists and some local resources. As procurement needs arise, the central team attempts to draw upon the expertise of officials and other experts in all areas to provide input and to manage the procurement.

The matrix concept may involve:

- A team assembled from various areas for a single project
- A team assembled from various areas meeting monthly to address the total requirements of the purchasing contracting authority for a commodity area
- Specialists co-opted from other functions
- Participation of certain officials and experts for specific parts of the process

2.10.1 Advantages of a matrix model

The matrix approach can:

- ensure that everyone with a stake in a given project or ongoing requirement is involved;
- draw upon resources as and when needed, allowing individuals to return to their normal jobs when they are no longer needed;
- provide the advantages of central procurement, focused on specific requirements with local buy-in.

2.10.2 Disadvantages of a matrix model

The matrix approach can:

- be seen as drawing officials into unnecessary meetings;
- depend for its success on the quality of the officials released to participate in it;
- fail if officials do not consider the task to be important.

ETHICAL BEHAVIOUR AND GOVERNANCE DOCUMENTS

2.1 INTRODUCTION

This second section builds on the topics of accountability and structure to consider the issues of ethical behaviour and governance and to examine the relevant documents that describe the policies and procedures necessary to operate procurement processes. The accountability and good governance of these processes is then demonstrated within one of the above structures.

Good practice note – governance documents

Comprehensive information has been provided on what could be included in governance documentation. Readers seeking to develop their own documentation must select what they feel is appropriate to their needs and what reflects their own situation and their own national laws.

'Good practice' is intended to meet the needs of your situation and it is therefore obliged to walk a tightrope between complexity and burdensome rules on the one hand and the lack of adequate guidance on the other.

2.2 A CODE OF ETHICS

2.2.1 Definition

Ethics is defined as 'the rules of conduct recognised appropriate to a particular profession or area of life'.

2.2.2 CIPS code of ethics

Worldwide, one of the foremost custodians of ethical standards in procurement is the Chartered Institute of Purchasing and Supply (CIPS). Based in the UK, CIPS updated its code of ethics in 2009. All CIPS members sign the code of ethics when they join CIPS. Appendix 1 includes a full copy of the CIPS Code of Ethics. Localisation note

Good practice note

Whilst the CIPS code of ethics is internationally recognised, it is only one of several codes that are available. You may find others by searching the Internet.

2.3 EXAMPLE OF A POLICY AND PROBITY STATEMENT

Appendix 2, which provides an example of a policy and probity statement, has been extracted from the website of the city of Salisbury in Australia. While this city is not expected to comply with the EC directives, it policy and probity statement serves as an example of how public procurement worldwide has very similar values.

2.4 GOVERNANCE DOCUMENTATION

All contracting authorities must have written statements that govern the process of procurement. These statements may be referred to as governance or policy and procedure manuals, and they may be provided electronically on a website. Many contracting authorities make their policy and procedure statements available to the public via the Internet.

2.4.1 Objectives of governance documentation

The objective of governance/policy and procedure statements and the supporting documentation is to make sure that everyone within the contracting authority and all those who supply it with goods and services are aware of the standards according to which the contracting authority wishes to operate in the business world. Specifically, the documentation should help readers understand:

- The need for best practice policies, rules and controls
- How to obtain the best results from procurement policies and processes and ensure their appropriateness
- How inefficient or unethical policies, practice and processes inhibit the success of a contracting authority or prevent it from obtaining the best results from its resources and economic operators
- The factors that shape policy and processes
- How the review or design of policies, practices and processes, and the development of contemporary solutions to meet the current needs of the contracting authority are part of a continual process

2.4.2 Advantages of good governance documentation

Good governance documentation facilitates:

- Clarity of purpose within procurement and across the contracting authority
- A shift of focus from the resolution of procurement issues to the provision of solutions to the contracting authority, through improved alignment with the contracting authority's strategic objectives
- Demonstrably fair, equitable and transparent processes
- Appropriate corporate governance and compliance
- Certification to established standards
- Continual professional development of procurement staff
- Consistent delivery of business objectives
- Consistent service to stakeholders

2.4.3 Risks taken when effective governance documentation is lacking

Contracting authorities working without effective policies and procedures to govern their procurement activities expose themselves to risks in the following areas:

- Poor cost control
- Little or no understanding of who is spending the purchasing contracting authority's resources, what they are spending it on, and with which economic operators
- Possible challenges by economic operators who believe that the public procurement law may not have been followed
- Complaints by economic operators to the European Commission
- Poor or biased decision-making process
- Payments being made for goods and services that have not been received
- Exposure to fraud through lack of control of accountabilities, responsibilities, records and audit trails, gifts and hospitality, and vested interests
- Poor reputation through late payment, adversarial behaviour, lack of regard for environmental and corporate social responsibilities, and lack of regard for disreputable, unethical, or illegal practices
- Insecure supply chains through:
  - Poor understanding of economic operators and the supply markets they operate in
  - Inadequate management of economic operators
  - Lack of knowledge about supply and demand
  - Inadequate recognition of the pace of technical and commercial changes

2.4.4 Summary of the contents of governance documentation

The 'documentation' may be Internet-based and may be represented by a series of documents or by a single comprehensive manual. The contents should include:

- A statement defining the extent to which the governance applies
- A signed statement from the head of the contracting authority mandating the governance and requiring all who are affected by it to comply with it
- The mission statement of the contracting authority
- A mission statement for procurement
- Policy statements reflecting the broad policies of the contracting authority
- An indication of roles and responsibilities of procurement staff and stakeholders relating to the process of procurement
- Specific descriptions of the processes and procedures that the procurement team and stakeholders are required to undertake, including the use of manual and computer systems
- A link to operational manuals, where computer systems are used to carry out procurement activities
- A statement on ethics

- A statement relating to how relationships with economic operators are managed
- A reference point for readers to ask questions
- Version control and/or a validity date for the documentation
- Statements linked to processes indicating how records should be kept
- Statements of the role of internal and external auditors
- An indication of sign-off by internal audit
- The endorsement of an internal audit committee (if one exists)

2.4.5 Controls

The governance documentation must include specific statements on the following controls, which may be cascaded upwards from the procurement officer to the head of the contracting authority:

- Authorisation of expenditure (budget control)
- Authority to approve claim settlements
- Authority to approve single tender action
- Authority to approve variations
- Authority to contract (commitment)
- Authority to make payment (accounts payable)
- Authority to pay *ex gratia* sums
- Compliance and improvement
- Delegated powers under procurement contracts
- Executive or board approvals
- Self-audit
- Separation of duties

NB: None of the controls listed above is repeated in the checklist below.

2.4.6 Audit and separation of duties

Good practice note – separation of duties

Procurement processes must be audited. 'Separation of duties' is a vital concept, which makes fraud less likely by requiring that several appropriate persons in a contracting authority take different roles within the procurement process.

The worst-case scenario when this concept is lacking is that one person decides whether a purchase is necessary, makes an agreement with an economic operator, confirms receipt and acceptance of the purchase and approves payment. **The above procedure represents bad practice. There have been cases where goods and services have been received at the homes of employees and subsequently paid for by their employers!**

In a procurement process, different officials within the contracting authority should:

- agree that their budget can be used to make this purchase (this is a stakeholder role);
- carry out the procurement process on behalf of the stakeholder (this is a procurement role and results in a contract being signed);
- carry out the receipt of the goods or services (ideally this is a third person in a store or warehouse, but it could also be someone in the stakeholder area);
- assess acceptance of the goods or services (ideally this is a fourth person, but it could be someone in the stakeholder area, particularly in the case of services; more detail on this aspect is provided in module B2);
- receive and process the invoice (this must be a person other than the stakeholder or the procurement person, and is typically someone working in accounts payable);
- authorise the payment (depending upon the policies and procedures of the contracting authority, this could be a person in accounts payable or the original budget-holder).

This separation of duties is not an absolute guarantee that improper practices will not take place, but it is less likely that several officials working together will wish to commit fraud.

Procurement teams have a duty to take care to exercise probity in all of their activities, and part of that probity is to ensure that evidence of decisions and transactions made is available for auditors to inspect at any time. Procurement staff should keep orderly records so that the arrival of an internal auditor would not be a source of concern and so that any procurement chosen at random by internal audit would demonstrate the necessary compliance and probity.

Internal auditors and/or the audit committee will want to verify that:

- approval to commence a procurement process was given by a budget-holder who is separate from the procurement team;
- processes were followed to issue a notice by the procurement team that is separate from the budget-holder/stakeholder, where such a separate team exists;
- the supply market had no cause for concern over the selection and award process;
- tender receipt and opening processes can be demonstrated – here signing and logging by persons who are not members of the procurement team may be required; – localisation if covered by laws or local rules
- evaluation was made according to the selection and award criteria and involved the necessary stakeholders;
- a decision was made and approved in accordance with the delegation of authority;
- the award of contract was made;
- in cases where the economic operator(s) challenged the award, the appropriate processes were followed;
- receipt transactions for goods and services were made by a person separate from the procurement team and from the stakeholder, and the receipt was matched to the procurement order, contract or call-off;

- qualitative checks on goods and services were made by a competent person;
- only for acceptable goods and services were payment requests forwarded;
- invoices were matched to receipts and ordering transactions;
- approval to pay was authorised by an appropriate person based upon a matched invoice;
- payment was made in an approved manner.

Separation of duties is a fundamental procurement concept.

2.5 GUIDANCE IN COMPILING GOVERNANCE DOCUMENTATION

The following guidance notes are based on observations concerning implemented purchasing policy and procedure frameworks. They address the fundamental aspects of the approach to these frameworks, rather than the details of their contents.

2.5.1 Language

The language used to describe governance must not be ambiguous, contradictory, or subject to misinterpretation. However, all languages contain nuances and subtleties, and it would be very difficult to write a text that could not possibly be misinterpreted in the future. The following points will help:

- Use terms consistently – for example, 'purchasing' and 'procurement'.
- Maintain a glossary of terms – define what you mean when using a term.
- Avoid using jargon, acronyms, and expressions that obscure the common understanding and clarity of what you wish the reader to understand.
- Use plain language.
- Be concise.
- Define the terms you use – this will help the reader to understand them.
- Number the documents consistently.
- Number the text within the documents consistently.
- Include cross-references to other documents.
- Provide a cross-reference rather than repeating the same text.
- Provide a high-level map, flowchart or picture of how the governance documentation joins together.
- As part of the development and drafting process, ask someone who is knowledgeable about procurement to read the documentation produced – this will test whether the documentation is correctly understood.
- As part of the development and drafting process, ask someone who knows nothing about procurement to read the documentation produced – this will test whether someone new to procurement would be able to understand the documentation.

- Beware of emerging practices and fashion statements. Strike a balance between pragmatism and innovation, but retain the flexibility to support continual improvement.
- Avoid the temptation to minimise content by concentrating on "what works today". Instead, adopt an approach that supports competency development and lessons learned.
- Keep it simple.

2.5.2 Clarity of purpose

Clarity of purpose is essential when preparing governance documentation that is to be understood by its readers. Writers must explain why governance, policies and processes are necessary and what are the factors that shape them. Consider the following recommendations:

- State the need for control prominently in plain, simple language.
- Embed corporate governance understanding and controls within policies and processes to facilitate fraud prevention, mitigate risk, and implement the delegation of power and authority.
- Include only those elements concerning external influences (for example, international standards, EC directives, legislation, customer requirements, industry codes, and corporate social responsibilities) that have a direct impact on procurement and that can be owned by the contracting authority.

2.5.3 Accountability and roles

Accountability for policy and process must be placed at the highest level of the contracting authority, which will help to ensure compliance and clarify roles, both inside and outside procurement. Consider the following recommendations:

- Be clear about who owns procurement policies and procedures. It may be that the head of procurement is accountable for them, but the reader needs to know whom to contact for advice and support.
- Identify those in need of detailed knowledge and understanding of the contracting authority's policies and procedures; use them to familiarise and increase awareness across a wider audience.
- Enable local accountability for policy and processes where decentralised procurement models exist or where national teams require different solutions.
- Avoid duplication and ambiguity as well as heavy-handed central control whenever this may inhibit efficient and effective local practice.
- Maintain change management and version control. It is vital to circulate changes to everyone using the documentation and to ensure that each change issued to readers has a different and incremental version number.

2.5.4 Design for access and availability

The procurement team must manage the planning, development, consultation, launch, roll-out and marketing of the contracting authority's policies and processes to ensure their effective access and ongoing use. Access to this information must be quick and easy if it is to be effective for those who need it, as otherwise officials may use this difficult access as an excuse to avoid applying the procedures. Consider the following comments and recommendations:

- Adopt a consistent, branded house style to reinforce procurement's role in the contracting authority.
- Consider a single source of truth. Implement effective version control.
- Choose the most appropriate media to deliver ongoing ease of access:
  - Design for use, not abuse – so keep the information short and to the point.
  - Decide when and where the information can be viewed.
  - Templates may enable uniformity of style but may restrict flexibility.
  - Printed documents may meet immediate needs but are more difficult to control and update than electronic versions.
  - Electronic documents may be easier to control and distribute but may not be conveniently accessible to everyone.
  - Do not underestimate the difficulty experienced by users in searching for information; create simple but effective navigation tools (contents, indexing or menus).
  - Time the launch of major updates to avoid holiday periods and dates of other significant corporate activities.

2.5.5 Design and Content

The most fundamental prerequisite for successful content design is to know what the content is intended to facilitate. One may choose to rely on:

- Prescriptive manuals that lock down processes and practices as a means of delivering compliance, or
- Guidance notes, with minimal constraints to facilitate creativity, or
- Something in-between the above two options

The option chosen must reflect the needs of the contracting authority and the level of its procurement maturity. With care, a balance of control and freedom to express individuality will promote both willing compliance and success in the face of changing circumstances as well as the ability to exploit opportunities. Divide the components into segments:

- Rules – what must be done
- Guidance – what to consider when engaging in x/y/z
- Checklists – as reminders
- Physical and electronic template documents – to improve consistency and speed up processes,

2.5.6 Continual Development

A well-developed series of policies and processes will not in itself ensure compliance with governance, continuing good practice, or improved performance, but it will help. Successful policy and process regimes continually monitor their successes and failures; the challenge they face is to continuously adapt to change and to drive change so that it leads to improvements. Consider the following development issues:

- Procurement officials' competency measurement and development
- Induction training for beginners
- Compliance audit and self-audit protocols to challenge practitioner behaviours rather than process
- Benchmarking or peer comparison
- Accreditation or certification by a professional body
- Self-assessment - have we got it right, is it being used?
- How to identify or develop better practice
- How to manage contracting authority change
- How to manage version control, obsolete documents, and historical records

2.5.7 Barriers to successful governance documentation

Barriers to successful governance documentation may include:

- Lack of direction from senior officials in the development, implementation, and continual improvement of a professional procurement resource
- Lack of funding for the documentation; time and resources may not be made available
- Closed mindsets that inhibit development and innovation; as examples, officials could say:
  - 'That's not how we do it here.'
  - 'If it isn't broken, then don't fix it.'
  - 'I am happy with the service I receive today, so don't mess with it.'
  - 'You (procurement) are a service department – just do the paperwork for me.'
  - 'Let me worry about the impact on the business.'
- Cultures of non-compliance in which offenders are not held to account

2.5.8 Enablers of successful corporate governance documentation

Enablers of successful policy and process represent the opposite of the above barriers, but also include:

- A 'no blame' culture
- A willingness to seek out good practice and to learn from:
  - one's own contracting authority
  - other contracting authorities
  - other sectors
  - other professions
- Learning from mistakes by:
  - implementing what works well
  - not repeating what does not work well
- Combining the best processes and practices of efficiency with an adaptable approach to change

2.6 MAINTENANCE OF GOVERNANCE DOCUMENTATION

Governance documentation must be maintained if it is to serve the needs of the contracting authority it represents. The following circumstances may require a change or update:

- Change in the contracting authority's structure
- Update of EC directives
- Case law
- New computer system
- New stakeholder area
- Officials leaving, arriving and/or changing responsibilities
- Merger or separation of a contracting authority
- New site being set up
- Passage of time

All of these circumstances and others will impact on the policy and procedures of the contracting authority.

Major changes in the contracting authority must be reflected by a prompt change in the documentation. In addition, it is good practice for the person responsible for maintaining the documentation to undertake an annual review. This review will draw in other procurement staff and stakeholders as necessary to discuss and make revisions.

The documentation should have a version number that should be incremented when the update is issued.

Updates need to be communicated to all persons affected by them.

Where a paper-based update is used, good practice is to ask the recipient to sign and return a document confirming that they have read it and that they have revised processes and procedures accordingly and have briefed others as necessary.

Where electronic Intranet-based systems are used, good practice can include an online test relating to the new update and an email return indicating that they have read the update and have accordingly revised processes and procedures and briefed others as necessary.

2.7 GOVERNANCE DOCUMENTATION – DETAILED CHECKLIST

The following is a detailed checklist of areas to include in governance documentation, presented alphabetically. **The list is long; a contracting authority should not necessarily expect to include every item in its documentation.**

- Accuracy and completeness of information
- Advance payments
- Alignment of procurement with the contracting authority's objectives
- Annual procurement planning
- Anti-competitive behaviour
- Award criteria and evaluation
- Award recommendations
- Briefing unsuccessful economic operators
- Challenges by unsuccessful economic operators
- Confidentiality agreements
- Contract award notification
- Contract documents
- Contract price adjustments
- Diagrammatic representation of approval structure
- Diagrammatic representation of contracting authority structure
- Disciplinary action if documentation is not followed
- Disposal of assets
- EC directives and EU acquis
- Economic operator assurance
- Economic operator development
- Economic operator financial probity
- Economic operator performance management
- Economic operator pre-qualification/selection
- Economic operator references
- Economic operator registration

- Economic operator visits – economic operators visiting the contracting authority
- Economic operator visits – visits to economic operators by officials of the contracting authority
- Engaging with stakeholders
- Ethical code of conduct
- Fitness for purpose
- Foreign currency payments
- Framework agreements
- Fraud prevention
- Health and safety – contractor
- Health and safety – hazardous materials
- Health and safety – on-site
- Inspection on receipt
- Inspection prior to receipt
- Insurances
- Intellectual property rights
- Inviting and receiving tenders
- Invoice payment
- Keeping records
- Late payment
- Law of contract
- Letters of intent
- Limitation of liabilities
- Liquidated damages
- Long-term procurement planning
- Measuring procurement performance
- Negotiation
- Parent company guarantees
- Payment
- Performance bonds
- Policy development and policy process
- Post-tender negotiation
- Process maps
- Procurement cards
- Procurement strategies
- Product evaluation
- Provisional sums
- Purchases made outside procurement
- Qualification of economic operators

- Reciprocal trading
- Relationships with economic operators
- Requests for information
- Requisitions and ordering systems
- Retentions and bonds
- Rights of third parties
- Risk assessment
- Risk management
- Role descriptions with accountabilities
- Single-tender sourcing
- Software piracy
- Stage payments
- Statutory and case law compliance
- Stock control
- Supply-base management
- Team development
- Tender documents
- Termination and suspension
- Terms and conditions of contract
- Three-way matching
- Trading with joint ventures and consortia
- Travel and entertainment policy
- Unacceptable staff behaviour
- Unacceptable economic operator behaviour
- Waste management
- Whistle-blowing

SECTION 3
EXERCISES AND CASE STUDY

EXERCISE 1
DEFINITIONS

Please complete the table by providing a specimen answer/definition in the right-hand column.

No.	Word	Answer/Definition
1	Ethics	
2	Governance	
3	Accountability	
4	Delegation	
5	Centralised procurement	
6	Decentralised procurement	
7	Probity	
8	Fraud	
9	Transparency	
10	Separation of duties	
11	Governance structure	
12	Corruption	

EXERCISE 2
ORGANISATIONAL STRUCTURES

You will be divided into four equal teams. Each group will receive a description of one of the four organisational structures. Your team task will be to prepare arguments in support of your procurement structure and then make a presentation to the rest of the group to persuade them that your structure is best.

INFORMATION SECTION

CASE STUDY – IMPLEMENTATION OF A CLAN PROCUREMENT STRUCTURE

The following case study demonstrates how the implementation of a CLAN structure can improve relationships between the procurement team and the stakeholder departments.

Basic data about the institution

The institution is a major United Kingdom county council; it spends EUR 2 billion per year.

Introduction

The culture within the council was typical of almost all large organisations, where purchase order placement and processes had been manually intensive and paper based, with approval of spend typically taking place at invoice stage. A central procurement team existed in a separate building three kilometres away from county hall, where most people worked. Eighty-five per cent of procurement was placed through this team. People in major departments felt that the procurement team was remote and unresponsive to their needs. It was considered important to ensure that an effective to change management was put in place to remove the barriers between procurement and their stakeholders.

The course of the event(s)

An analysis of the procurement spend by department was undertaken and consultation process begun with senior people in certain departments. Account was taken of the size, complexity and commonality of spend across departments.

Analysis of the event(s)

1 The analysis revealed that some of the procurement team worked almost entirely for a given department on specialised purchases. In phase one these people were relocated to sit physically within the team of their stakeholder, which brought the benefits of immediate communication and a greater team feeling. This led to 60% of the procurement team moving to work with stakeholders.

2 Phase two considered the largest spend on common items across the council. Members of the procurement team were moved to work in areas alongside the staff in the department which accounted for the largest element of spend in the council in this area. Their role was of course to take account of the needs of others as well as the major spender.

3 A small nucleus of staff remained with the director of procurement with responsibilities for systems, processes and training and development for the procurement team.

4 The staff who were re-located were actually transferred to the budget of the stakeholder departments.

Conclusions

Relations between the stakeholder departments and the procurement team were vastly improved, as the procurement team was now seen as part of "our" team.

EXERCISE 3
GOVERNANCE DOCUMENTATION

Answer the two questions. below

1. What are the advantages of good governance documentation?
2. What risks do I face if my governance documentation is poor?

EXERCISE 4
GOVERNANCE

CASE STUDY – INKJET ALISON

Alison was a bright girl. She was married with a young daughter and she and her husband had a nice flat.

Her job at the city council was in the busy stationery purchasing team, where she had been promoted to senior supervisor. Alison was responsible for a team of fourteen people purchasing stationery items; however her favourite commodity was the inkjet cartridge, and she had made a significant saving on the cartridges used by leveraging the volumes. Alison saw the cartridges as her private domain; she checked the stocks every day, reordered from economic operators once a week and sent the cartridges out from the central location to the 120 departments that used them, sometimes by courier.

Peter used to do Alison's job before he was promoted, and he was proud to have promoted Alison. He approved the purchases and the invoices that Alison and her team had checked. Everything was fine – or so he thought.

Rob was an auditor and he checked through the paperwork and the stock levels, noting that demand had increased by 15% over the previous year. Everything seemed fine and in order so Rob gave the department a green light.

1. Was everything really fine? What could the worst-case scenario be?
2. How would you improve the organisational structure of the procurement department to avoid the worst-case scenario?

EXERCISE 5
AN ETHICS TEST

Below is a list of bullets that form the CIPS code of ethics. THE PROBLEM IS THAT WE HAVE AMENDED THE TEXT SO FIVE OF THE POINTS ARE MOST DEFINITELY WRONG. Your task is to workout which five points are incorrect.

The CIPS code of ethics states that as a member of CIPS procurement, officers must:

- Maintain the highest standard of integrity in their business relationships
- Remain partial in business dealing and be influenced by those with vested interests
- Declare any personal interest that might affect, or be seen by others to affect, their impartiality or decision making
- Enhance the proficiency and stature of the profession by acquiring and applying knowledge in the most appropriate way
- Use their authority of position for their own personal gain
- Foster the highest standards of professional competence amongst those for whom they are responsible
- Ensure that the information they give in the course of their work leads economic operators to the position that they want them to be in
- Optimise the use of resources which they have influence over for the benefit of their organisation
- Comply with both the letter and the intent of:
  - The law of countries in which they practise
  - Agreed contractual obligations
  - CIPS guidance on professional practice Localisation here
- Ensure that the information they give in the course of their work is accurate
- Respect the confidentiality of information they receive and never use it for personal gain
- Accept business practices that might reasonably be deemed improper
- Not accept inducements or gifts, other than items of small value such as business diaries or calendars
- Always declare the offer or acceptance of hospitality and never allow hospitality to influence a business decision

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. How would you define accountability?
2. Corruption is more likely if several people are involved in making a procurement decision.

   Do you agree with this statement?

   Give your reasons.
3. Local procurement officers should use local economic operators. True or false?
4. Four models for organising procurement within a contracting authority are discussed in this module. "Matrix" is one model, what are the others?
5. Is the following bullet point a disadvantage of a centralised procurement model or a decentralised procurement model?
   - Remoteness from stakeholders.
6. Which procurement model used in contracting authorities has a small central team of people setting policy, monitoring statistics, co-ordinating efforts and managing common systems and processes, with experienced procurement specialists seated next to the stakeholders?
7. The CIPS code of ethics is used as an internationally recognised ethical standard in the module.

   There is a mistake in the following statement. Can you correct it?

   > Maintain the lowest standard of integrity in their business relationships.
8. Governance documentation must be maintained if it is to serve the needs of the organisation it represents. In which circumstances might "maintenance" be appropriate?
9. A "no blame" culture and a willingness to seek out good practice and learn were two enablers to successful policy and process in governance documentation. Can you remember the other two enablers?
10. In your job, who are you accountable to? Think not just of your boss, but up the c hain of command.

OTHER RESOURCES

The following websites have information on organisational structures and governance documentation:

www.cips.org

http://www.pasa.nhs.uk/PASAWeb/Guidance/

www.ogc.gov.uk

http://cweb.salisbury.sa.gov.au

APPENDIX 1
THE CIPS CODE OF ETHICS

The CIPS code of ethics states that as a member of CIPS procurement, officers must:

- Maintain the highest standard of integrity in their business relationships
- Reject any business practice which might reasonably be deemed improper
- Never use their authority or position for their own personal gain
- Enhance the proficiency and stature of the profession by acquiring and applying knowledge in the most appropriate way
- Foster the highest standards of professional competence amongst those for whom they are responsible
- Optimise the use of resources which they have influence over for the benefit of their organisation
- Comply with both the letter and the intent of:
  - The law of countries in which they practise
  - Agreed contractual obligations
  - CIPS guidance on professional practice
- Declare any personal interest that might affect, or be seen by others to affect, their impartiality or decision making
- Ensure that the information they give in the course of their work is accurate
- Respect the confidentiality of information they receive and never use it for personal gain
- Strive for genuine, fair and transparent competition
- Not accept inducements or gifts, other than items of small value such as business diaries or calendars
- Always declare the offer or acceptance of hospitality and never allow hospitality to influence a business decision
- Remain impartial in all business dealing and not be influenced by those with vested interests

Use of the Code

Members of CIPS are required to uphold this code and to seek commitment to it by all those with whom they engage in their professional practice.

Members are expected to encourage their organisation to adopt an ethical purchasing policy based on the principles of this code and to raise any matter of concern relating to business ethics at an appropriate level.

The Institute's Royal Charter sets out a disciplinary procedure which enables the CIPS Council to investigate complaints against any of its members and, if it is found that they have breached the Code of Ethics, to take appropriate action. Advice on any aspect of the Code of Ethics is available from CIPS.

This Code was approved by the CIPS Council on 11 March 2009

APPENDIX 2
AN EXAMPLE OF GOVERNANCE DOCUMENTATION AND POLICY AND PROBITY STATEMENTS

http://cweb.salisbury.sa.gov.au/manifest/servlet/page?pg=12145

1. Preamble

Modern procurement in Australia involves the use of best practice in contracting and purchasing and provides a foundation for organisations to achieve their mission, goals and objectives.

The elements of best practice applicable to Local Government procurement incorporate:

- Broad principles covering ethics, value for money, responsibilities and accountabilities;
- Guidelines giving effect to those principles;
- A system of delegations (*i.e.* the authorisation of officers to approve a range of functions in the procurement process);
- Procurement processes, with appropriate procedures covering minor simple procurement to high value complex procurement; and
- A professional approach to all major procurements.

Council contracting and purchasing needs to be able to demonstrate that public money has been well spent and that the procurement process was conducted and seen to be conducted in a manner which generates business in the local community and is impartial, fair and ethical.

As part of the City's goal to embrace innovative and technological advances, electronic purchasing and tendering processes will be made available and used whenever appropriate.

In complying with legislation, section 49 of the Local Government Act 1999 requires:

'A council must prepare and adopt policies on contracts and tenders, including policies on the following:

- The contracting out of services; and
- Competitive tendering and the use of other measures to ensure that services are delivered cost-effectively; and
- The use of local goods and services; and
- The sale or disposal of land or other assets.

This policy relates to all procurement activities at Council.

2. Policy Purpose/Objectives

In accordance with best practice principles and the constant pursuit for continuous improvement, the purpose of this policy is to:

- Provide policy and guidance to Council employees to allow consistency and control over procurement activities;
- Demonstrate accountability to rate payers;
- Provide guidance on ethical behaviour in public sector purchasing;
- Demonstrate the application of elements of best practice in purchasing; and
- Increase the probability of obtaining the right outcome when purchasing goods and services.

3. Policy Statement

The procurement method for obtaining goods and services will be determined according to the estimated costs of the goods or services sought. Depending upon the estimated costs, the procurement method may be by oral quotes, written quotes or by a tender process. The level of these thresholds will be determined from time to time by the Management Executive Group of Council. The authority to provide an exemption from using the required method of procurement will be delegated to Officers of Council, depending upon the level and nature of the exemption.

4. Key Principles

Persons engaged in procurement activities on behalf of Council will at all times pursue the City's six key procurement principles. These are:

1. Value for money
2. Open and Effective Competition
3. Ethical Behaviour and Fair Dealing
4. Accountability and Transparency
5. Environmental Preference
6. Economic Development of the Northern Region

4.1 Value for Money

Value for money involves obtaining goods, works or services for Council that best meet the end user's needs at the lowest total cost with the minimum level of contractual risk.

Value for money may mean not always accepting the lowest price. Factors to be considered as part of evaluating quotes and tenders include fitness for purpose, fair market prices and whole of life costs. 'Whole of life' includes, price, cost of spares, running costs, post-delivery support, effective warranties, cost of replacement, installation costs, etc.

All decision-makers in the procurement process must satisfy themselves that the proposed expenditure will make efficient and effective use of rate payers' funds.

4.2 Open and Effective Competition

Open and effective competition is the central operating principle in pursuit of the best outcome. Openness requires procurement actions that are visible to Council, ratepayers and economic operators/contractors. The probability of obtaining the best outcome is increased in a competitive environment.

Council will create effective competition by maximising the opportunities for firms to do business with Council through the selection of procurement methods suited to market conditions. These methods will include requesting offers from a number of economic operators, providing timely and adequate information and allowing ease of entry for new or small economic operators.

Council will provide feedback to unsuccessful bidders, if requested.

4.3 Ethical Behaviour and Fair Dealing

Council will not use or disclose information that confers unfair advantage, financial benefit or detriment on an economic operator.

Employees have a responsibility to act honestly and impartially, and be accountable for procurement actions. Adopting an ethical and fair approach is important because the concepts of honesty, integrity, fairness and accountability in local government are core expectations of public sector procurement.

Council employees and officials will not engage in any private business or professional activity that would or may be seen to create conflict between personal interest and the interest of the organisation.

In pursuit of ethical behaviour and fair dealing, employees will:

- treat potential and existing economic operators with equality and fairness;
- not seek or receive personal gain;
- maintain confidentiality of contract prices and other sensitive information;
- present the highest standards of professionalism and probity;
- deal with economic operators in an honest and impartial manner that does not allow conflicts of interest;
- provide all economic operators and tenderers with the same information and equal opportunity;
- Be able to account for all decisions and provide feedback on them.

4.4 Accountability and Transparency

Accountability in procurement means being able to explain and evidence what has happened. An independent third party must be able to see clearly that a process has been followed and that the process is fair and reasonable.

The processes by which all procurement activities are conducted will be in accordance with Council's Procurement Policy and Procedures.

Delegations define the limitations within which Council employees are permitted to work. They ensure accountability and provide confidence to Council and the public that purchasing activities are dealt with at the appropriate level. As such, Council has delegated responsibilities to employees relating to the expenditure of funds for the purchase of goods and services and the acceptance of tenders.

Employees must be able to account for all decisions and provide feedback on them. Additionally, all procurement activities will leave an audit trail for monitoring and reporting purposes.

4.5 Environmental Preference

As part of the procurement process, economic operators may be asked if they can offer products and services which conserve resources, save energy, minimise waste and/or contain recycled products and/or are environmentally sustainable.

Prospective economic operators to Council may be required to communicate their environmental practices as part of the tender specification.

4.6 Economic Development of the Northern Region

When all other factors are considered equal, procurement methods will consider as a final choice the capability of the Region to supply required products and services.

When tenders are found to be of equal value, preference will be given to those economic operators whose activities contribute to the economic development of the Region.

Organisation at level of contracting authorities

The procurement cycle

MODULE B

PART 2

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this module are to make participants aware of:

1. A typical good practice procurement process, from "cradle to grave"
2. Vital audit touch points within good practice procurement processes
3. The occasions when procurement processes require interaction with stakeholder departments
4. The circumstances when differing contracting authorities will collaborate

1.2 IMPORTANT ISSUES

The following issues are of importance:
localisation here depending upon the laws of each country

1. A recognition that procurement processes must be followed
2. A recognition that flexibility is required: the same process will not necessarily be used to make every purchase
3. A recognition that procurement adds value to a contracting authority, and is not simply an administrative clerical function
4. An understanding that while procedures must be followed, value can be added to the benefit of contracting authorities when procurement officers develop effective processes
5. An understanding of the opportunities, advantages and disadvantages of co-operating with other contracting authorities

1.3 LINKS

Links to other modules appear throughout the text of this document; by its very nature this module touches almost every other module in the training programme. The major links, however, are to modules:

B1 Governance, internal regulation and organisation of public procurement
B3 The role of the procurement officer
B4 The role of stakeholders

1.4 RELEVANCE

Procurement officers need to:

- Have a thorough knowledge of the whole procurement cycle and its three parts, to perform effectively
- Understand the competencies that are required of them
- Understand the opportunities, advantages and disadvantages of co-operating with other contracting authorities

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

This section will link to other areas referring more closely to legal information.
LOCALISATION WILL NEED TO REFER TO SPECIFIC LEGAL DOCUMENTS

SECTION 2
NARRATIVE

2.1 INTRODUCTION

The procurement process is frequently seen as a cycle. The cycle runs from: identifying what is needed and who can supply it, determining and selecting the 'best' supply option, and then managing the supply with the selected economic operator throughout the life of the contract.

One clear fact to note early on is that not every stage of the procurement cycle described below will be needed for every requirement procured. The process will differ with the:

- Nature of the requirement
- Risk inherent in purchasing the requirement
- Risk inherent in providing the requirement to stakeholders
- Cost of the requirement
- Complexity of the requirement
- Legal issues surrounding the requirement
- Supply market
- Procedure selected in accordance with the national public procurement legislation
- Relevant laws of the land localisation here

The procurement cycle prepared below has 39 individual steps, which are divided into three divisions. The three divisions are:

- Prepare for the procurement
- Run the procurement exercise
- Manage the contract

The three divisions are described below.

"Prepare for the procurement" considers the steps that procurement officers and other stakeholders within the contracting authority have to take in order to arrive at a stage where a given procurement has been planned, approved and prepared in such a way that economic operators may be asked to tender.

"Run the procurement exercise" considers the steps necessary to ascertain which of several economic operators is the most appropriate for delivering the goods, services or works for the contracting authority.

"Contract management" considers the steps that enable both the contracting authority and the economic operator to meet their obligations within the contract in order to meet the contract objectives.

2.2 OVERARCHING CONCEPT

Before considering the process in detail, there is an overarching concept known as the upstream/downstream concept. This concept considers steps in the procurement cycle up to and including the award of contract as 'upstream' and steps occurring after the contract has been awarded as 'downstream'. This means that the first two divisions described above, which prepare and run the procurement process, are upstream and the contract management activities are downstream.

The concept reflects upstream activities as 'adding value':

> because the focus is on getting the procurement 'right' during the processes occurring up to the time when the contract is awarded.

The concept reflects downstream activities as 'adding cost':

> because where the goods, works, materials and services being utilised are not 'right', extra costs in terms of time and resources may have to be incurred to make them right.

Good practice note – overarching concept

Procurement officers considering how to allocate their time should therefore attempt to spend most their time working upstream, adding value to the organisation which employs them (getting it right first time) and should not be mired in downstream activities which add cost (spending time putting it right).

Activities forming part of upstream processes within contracting authorities include:

localisation here

- Undertaking an internal customer needs analysis
- Assessing economic operators' processes and quality capabilities
- Market research
- Setting performance criteria
- Considering terms and conditions carefully
- Obtaining tenders
- Planning
- Analysing and evaluating tenders
- Economic operator selection and contract award

Activities forming part of downstream processes include:

localisation here

- Checking acknowledgements
- Expediting
- Matching goods to purchase orders
- Searching for economic operator paperwork
- Sorting out quality problems

- Returning substandard items
- Sorting out invoice queries
- Routing the invoice "around the houses"
- Processing credit notes
- Changing the requirement specifications

Take this concept further and it is true to say that if the upstream activities are well performed, resulting in a complete contract that meets the needs of the stakeholders and is clear to the economic operators, the downstream activities that add cost will either be performed much more easily or in some cases hardly be necessary at all.

This document now discusses the 39 individual steps in the procurement cycle, within the three divisions:

- Preparing for the procurement exercise
- Running the procurement exercise
- Managing the contract

2.3 THE PROCUREMENT CYCLE – PREPARING FOR THE PROCUREMENT EXERCISE

This section considers the activities necessary to prepare for the procurement (steps 1 to 11 in the total procurement process). A useful quotation to remember here, attributed to Harvey Mackay, is:

"Failures don't plan to fail; they fail to plan."

Although only one of the steps in this section is called 'planning', so much of the preparation division of the overall procurement process is about planning that it is worth remembering the quote here. The 11 process steps within this division are:

localisation here

1. Pre-planning and the annual procurement plan
2. Determining the need
3. Procurement planning
4. Market review
5. Specification
6. Performance measures
7. Terms and conditions
8. Constructing a business case
9. Approval
10. Preparing a procurement notice
11. Preparing an invitation to tender (ITT)

Each step will now be covered in more detail and particular attention will be given to:

- Decision points
- Working with stakeholders
- Audit touch points
- Effectiveness

Where other modules deal in more detail with the topics under consideration, the text in this section will be limited, and a cross-reference will be made to the appropriate sections or modules where further information can be found.

1. Pre-planning and the annual procurement plan

This process will ideally take place during the year, before the procurement needs to be made. Procurement people will sit down with user departments and key stakeholders and discuss their procurement requirements and budgets for the next year, giving advice on likely costs based on their market knowledge and deciding which items to include within a Prior Indicative Notice (PIN). Modules C4 and E2 describe the actions necessary to publish a PIN. localisation here

Regardless of whether a PIN is used, this process is vital in helping to inform procurement officers about what they may be expected to purchase during the following year, and it should be part of the annual engagement process between stakeholders and procurement.

Once procurement officers have been given the information about what they may be expected to purchase during the coming year, they can then be alerted to what is happening in the relevant supply markets, and that knowledge can be fed into subsequent processes.

Whilst pre-planning is acknowledged as 'good practice' everywhere, it is recognised that in some countries the procurement plan that results from the process described above can be:

- The plan that has been, or has to be, adopted by the contracting authority
- A document that has to be published
- A document closely linked to budgets and financial plans
- The annual plan, which forms the only basis on which procurement can be carried out in the year concerned

localisation here

The annual procurement plan may also indicate those cases where a contracting authority intends to collaborate with other contracting authorities.

2. Determining the need

This is the very first stage in the actual procurement process. Here the basic need of the stakeholder(s) is explored, options considered, and the requirements briefly described as the basis for a plan and a specification. Procurement officers should not take the initial need for granted, but rather they should engage in a process that evaluates the needs and considers alternative cost-effective solutions. Some 'needs' may already have been met by a previous and or by a current contract, the item sought may already be in stock from an alternative economic operator, or a potential purchase could be aggregated with other forthcoming purchases so as to present a more attractive supply opportunity to the supply market.

Good practice note – ensuring there is a need
A procurement officer should not simply be a rubber stamp! Auditors will want to understand that there is a clear need.

3. Procurement planning – individual procurement level

Within the framework of the annual procurement plan, this is the stage in the process when the objectives of making an individual procurement are considered in relation to stakeholder needs and when a planned approach to the procurement is set out. This process is vital to the success of the procurement, although it may be executed in parallel with or immediately after the specification. Procurement planning is dealt with in more detail in module C1, where a sample procurement plan is provided. Auditors will want to see a clear procurement plan signed off by key stakeholders, as it represents a decision to proceed. An individual procurement level plan could also involve co-operation with other contracting authorities.

4. Market review

This stage involves the review of the range of potential tenderers for the requirement, and it may be an iterative process with planning and specification.

The nature of the market identified in this review may influence the procedure selected for this procurement so as to obtain the greatest value for money for the purchasing organisation. The review may lead to a decision on how to construct the requirement and whether to include or exclude items from the bundle forming the invitation to tender. For example, it may be possible to award a service contract or to outsource. It may also be possible to outsource everything or to retain some service provision within the organisation.

The market review may also reveal which other contracting authorities:

- have purchased a similar requirement and may provide opportunities for learning lessons;
- have a similar need and may provide opportunities to collaborate.

5. Specification

With simple requirements a description may be adequate; however, a detailed 'specification' is necessary for all but the simplest requirement. The specification describes, clarifies and defines the requirement in detail that is adequate enough to enable potential economic operators to make a clear offer to the contracting authority that should meet its needs. This process involves stakeholders in a major way, as well as procurement officers. The different types of specification are discussed in more detail in module E1.

6. Performance measures

This step involves the consideration by the contracting authority of the way in which it will measure the success of the goods, works, materials and services supplied to it in response to the specified requirement. This consideration may:

- mean a change in the specification to add clarity if the difficulty of measuring performance has been considered;
- influence the wording of the notice and the invitation to tender (ITT);
- influence the weighting and scoring mechanisms used in the procurement;
- form the basis of the performance measurement to be used when economic operators are actually delivering the requirement.

Good practice note – performance measures

This step is closely linked with step 36 and Module G3 includes more detail on performance measurement. This step may also set the evaluation criteria to be used to evaluate an economic operator's tenders and propose milestones against which payment will be made.

Essentially, if we do not know what a good job looks like then how we can expect economic operators to know it!

7. Terms and conditions

This step includes the consideration by the contracting authority of the specific terms and conditions that it would prefer to apply to the supply of goods, works, materials and services. It is vital to do this before the Invitation to Tender is prepared and issued.

The terms and conditions may be extracted from the standard terms and conditions of the purchasing organisation. However, procurement officers:

- must ensure that the standard terms and conditions used are appropriate to the requirement;
- should use internationally recognised forms of contract wherever this will encourage competition from an international supply base (*e.g.* International Federation of Consulting Engineers – FIDIC); localisation here
- add to, develop or amend standard terms and conditions to meet the specific requirements;
- add to, develop or amend standard terms and conditions to deliver best value;
- must ensure that terms and conditions satisfy legal standards.

Decisions here can impact on economic operators' costs, particularly if the terms and conditions place unnecessarily heavy burdens on them. These costs may be passed on to the purchasing organisation.

8. Constructing a business case (localisation here)

A business case tests the viability of a project or purchase and proves that the purchase the contracting authority is making is worthwhile.

At the simplest level the business case captures the reasoning behind the purchase and adds up all of the costs and compares them with the likely benefits to ensue. When this is done, it is possible to see whether the purchase should go ahead.

For major purchases a business case should be constructed demonstrating that there is clear benefit in making this procurement. This case must reflect the costs and benefits of the procurement and of all the options considered. The business case should be revisited at the end of the process - during the performance review and continuous improvement steps - to ensure that the project has lived up to its expectations.

This document is a key decision-making tool. Completing a business case can call a halt to unnecessary or unwise procurement that is not going to pay back. The business case is also a key document for auditing the performance of the contract.

9. Approval

In some circumstances procurement staff may have been given formally delegated authority to go to the next stage without further approval being needed; however, in other circumstances it will be necessary to seek the approval of more senior staff in, for example, a ministry, before the procurement can move forward. Where approval is necessary, auditors will regard the signature of the appropriate person as a vital authorisation to proceed, and progressing without the necessary approval will frequently contravene internal legal procedures.

10. Preparing a procurement notice

A notice to be published must be prepared to allow all potential economic operators to have an opportunity to bid for the requirement in question. Module E2 describes this notice in detail. This document and/or transaction is a key part of the audit trail.

11. Preparing an invitation to tender (ITT)

It is necessary to create an ITT that will be available for despatch to potential economic operators, using formats that have been approved by the contracting authority and that in some cases are required by law. Within the standard approved template, the text describing the actual requirement may be:

- A simple and relatively short document (*e.g.* for the supply of stationery)
- A vast document (*e.g.* for the construction of a new bridge) including a set of drawings, graphical performance charts, images, etc.

Irrespective of its size, the ITT should include a number of key features that reflect good practice and the law of the land; these features are described in module E1. This step will also ensure that the evaluation criteria used for economic operators' tenders are included in the information sent to economic operators.

2.4 THE PROCUREMENT CYCLE – RUNNING THE PROCUREMENT EXERCISE

This section considers the activities necessary to run the procurement exercise (steps 12 to 23 in the total procurement process). The process steps within this division are:

12. Publishing a notice
13. Supplying an ITT
14. Handling questions
15. Receiving tenders
16. Qualification of economic operators
17. Evaluation
18. Clarification
19. Award approval
20. Standstill period
21. Bid protest and contract review
22. Award of contract
23. Publishing an award notice

Referring specifically to the evaluation of tenders, but with reference elsewhere, consider this quote from Oscar Wilde: "What is a cynic? A man who knows the price of everything and the value of nothing." (from Lady Windermere's Fan, Act III, 1892).

Each step will now be covered in more detail and particular attention will be given to:

- Decision points
- Working with stakeholders
- Audit touch points
- Effectiveness

Where other modules deal in more detail with the topics under consideration, the text in this section will be limited, and cross-references will be made to appropriate sections or modules where further information can be found.

12. Publishing a notice

This process, which notifies potential economic operators that a requirement exists,is described in module E2. It is vital that the procurement officer is able to demonstrate that the notice has been placed and that all potential economic operators have had access to the information it contains about the requirement. The publishing of a buyer profile is encouraged. The buyer profile may include prior information notices, information on ongoing invitations to tender, schedules of purchases, contracts concluded, procedures cancelled, and any useful general information, such as a contact point, telephone number, fax number, mailing address and e-mail address. localisation here

13. Supplying an ITT

This process involves manually or electronically sending or making available the documents describing the procurement requirement to the potential economic operators who request them. The documents will vary depending upon the process selected. The processes are described in module C4. It is vital that all potential economic operators receive the same information about the requirement.

14. Handling questions

Despite careful preparation on behalf of the procurement team, economic operators attempting to respond to the ITT may have questions, and the process must include the receipt of and reply to these questions. The process is fully described in module E1.

Questions may relate to many areas of the ITT, including:

- Evaluation process
- Extent of the requirement
- Payment terms
- Quality standard required
- Return processes
- Terms and conditions
- Timing of the delivery
- Understanding of the requirement as described

Good practice note – handling questions
Good practice is to record all questions and answers in due course. Answers to all questions should be sent to all tenderers.

This topic is dealt with more fully in module E1. Questions may also arise at later stages in the procurement process. Localisation – if specific legislation comments on what to do here

15. Receiving tenders

This is the process in which the procurement officer receives offers to deliver/perform the specified requirement from economic operators. Tenders must be held in a secure location once they have been received and, depending upon the process used, tenders may not be opened until the time prescribed as the final date for receipt of a tender.

The tender opening process may in some cases be a public event, where the tenderers can visit the contracting authority and see that initially all of the tenders are unopened and then that they are opened in the same way at the same time. A senior official in the contracting authority may be asked to open the tenders, and therefore the procurement officer must ensure that time is set aside in the senior official's agenda and that a suitable venue is booked in advance.

Once opened, tenders should be stored in a secure place and transmitted via a secure means of transfer to the persons who will evaluate them.

On some occasions two separate envelopes from each economic operator may be requested. One envelope will contain the economic operator's response with costs included and the other envelope will contain the economic operator's response without costs. The objective of this method is to allow technical specialist stakeholders to evaluate the response without considering the cost. In these circumstances the responses with costs included remains with the procurement officer and the responses without costs are passed to the technical stakeholder. There is further discussion on the action required from procurement officers at this stage in module B3.

Late tenders must not be accepted and must be returned unopened to the economic operators concerned.

16. Qualification of economic operators

This step in the process seeks to confirm whether economic operators are qualified to perform the contract that is to be awarded. This qualification will refer to the pre-established selection criteria set out in stage six above and may include an examination of the economic operator's accounts and performance with other customers. If the restricted procedure, the negotiated procedure or the competitive dialogue procedure is used, this qualification step is part of the process of selecting the economic operators who are to receive the full ITT. Qualification of economic operators is discussed in more detail in module E3. Qualification can be confirmed on the basis of financial, legal and technical (experience) assessments.

17. Evaluation

This is the process of reviewing the offers made by economic operators and comparing them, with a view to determining which offer(s) are most likely to meet the needs of the contracting authority. The process uses the weighting and scoring criteria set out in step six above. In some cases the evaluation may require an on-site review of an event or a site visit. The roles of the procurement officer and the stakeholder in the evaluation are described in more detail in modules B3 and B4 respectively. Evaluation is also dealt with in module E5.

The evaluation can take the form of determining the lowest price offered by the tenderers or of assessing the Most Economically Advantageous Tender (MEAT).

In the former case, where three tenderers have bid EUR 170,000, EUR 155,000 and EUR 160,000 for a requirement advertised by the contracting authority, the tenderer bidding EUR 155,000 will be awarded the work, all other criteria being equal.

In the latter case, weighted criteria reflecting issues of vital importance to the purchase are specified and communicated to tenderers, who then submit a tender with that information in mind. Where three tenderers have bid EUR 640,000, EUR 665,000 and EUR 649,000 for a trolleybus, the contracting authority may select the tenderer who has demonstrated that his offer represents the most economically advantageous tender when all of the criteria are compared.

For example, it may be that the tenderer bidding EUR 665,000 can demonstrate that his trolleybus:

- uses substantially less electricity than the other two options; and/or
- will operate on its battery for longer than the other two options.

The cost of the higher purchase price at EUR 65,000 will, over the life of the use of the trolleybus, result in a more economically advantageous purchase.

The need to obtain answers to questions may make the evaluation process an iterative one, taking several days before a final decision can be made. During this time it is vital that no one on the tender panel leaks information to anyone else in the contracting authority or to economic operators.

Good practice note – make the most of MEAT

Make the most of MEAT. This principle allows you to get the best solution. One city authority describes MEAT as 'The criteria which the authority may use to determine that an offer is the most economically advantageous including delivery date, running costs, cost effectiveness, quality, aesthetic and functional characteristics, technical merit, after sales service, technical assistance and price.'

18. Clarification

Clarification is the process undertaken by the purchasing officer and stakeholders in order to understand more precisely the details and implications of the economic operator's offer(s) in relation to the specified requirement. This step may not be necessary if the tender is perfectly clear. In the same way that the specification prepared by the procurement officer may not be completely clear to staff working for economic operators, the tender provided by economic operators may not be clear to the evaluators in the contracting authority. Typically, questions can relate to:

- The discovery of arithmetical errors
- The requirement not appearing to be fully covered
- The quality standard being offered
- Changes in terms and conditions
- Timing of the delivery
- The understanding of the tender's description of its offer
- Conflicts between the same statistics shown on different pages of the tender
- The tender being incomplete

To fully understand the offer being made by an economic operator, the contracting authority, through the procurement officer, may need to contact the economic operator and seek answers to its questions. It must be clear that this process is a simple question and answer session and not a negotiation session. Good practice is to record all questions and answers. The need to obtain answers to questions may make the evaluation process an iterative one, taking several days before a final decision can be made. During this time, as with the evaluation process, it is vital that no one on the tender panel leaks information to anyone else in the contracting authority or to economic operators. Module E5 deals with clarification in more detail.

19. Award approval

In some circumstances procurement staff may have been given formally delegated authority to proceed to the next stage without formal approval being needed; however, in others it will be necessary to seek the approval of more senior staff in, for example, a ministry before the procurement can move forward. Where approval is necessary, auditors will regard the signature of the appropriate person as a vital authorisation to proceed, and progressing to the next stage without the necessary approval will frequently contravene internal legal procedures.

20. Standstill period

Following a court case involving Alcatel, it is now a requirement that all procurement carried out under the EC procurement directives must include a standstill period of a minimum of ten (10) calendar days between advising tenderers by fax, e-mail or post (whichever is the fastest method) of the contract award decision and entering into a contractually binding agreement with the successful tenderer.

This period allows unsuccessful tenderers an opportunity to challenge the decision of award of the contract and, if they so choose, to bring an action to court for the suspension and setting aside of the decision.

Within the first two days after notification of the intended award, tenderers can ask for feedback, which must be supplied by the contracting authority by the seventh day following the award notice. This leaves the tenderer three days to considerchallenging the award decision if they feel that such a course of action is appropriate. The feedback supplied must be sufficient for the unsuccessful tenderer to understand where they fell short of the successful tenderer, and it must be related to the selection and award criteria. The standstill period and challenges are discussed in more detail in module F1.

21. Bid protest and contract review

Localisation is needed here. Where a tenderer registers a complaint concerning an award of contract within the standstill period, procurement officers must immediately make their legal team and others (as appropriate) aware of the situation. The 'successful' tenderer must also be made aware of the situation and understand that the supply cannot i mmediately proceed.

The nature of the complaint may shape the precise route taken, for example where fraud is alleged the procurement officer will need to involve an internal audit. In all cases, procurement officers must review the file containing the information on the decision-making process and ascertain from those colleagues who made the decision whether they consider that there may be grounds for a complaint. Where this review leads to a conclusion that the decision was not properly made, the contracting authority may choose to re-tender the requirement, participate in a court case, or seek alternative methods of dispute resolution. Module G2 reviews alternative methods of dispute resolution. The standstill period and challenges are discussed in more detail in module F1.

Where a challenge is taken to court, the contracting authority and the selected tenderer cannot proceed to sign contracts or prepare to commence work in any way as the court may set aside the contract. Module E5 will give further details on the procedures to follow in these circumstances.

22. Award of contract

This step is the process of formally notifying an economic operator that it has been selected as the provider of the goods and services required and specified by the contracting authority. This process will include the completion and signing of contracts - legally binding documents. The successful economic operator may need to provide the contracting authority with a performance bond before the contract is signed.

The roles of the procurement officer and stakeholders are described more fully in modules B3 and B4 respectively. Where the agreement made with an economic operator is in the form of a single purchase order, this order will form the first of three transactions, which auditors refer to as a three-way match. For each transaction auditors will seek to establish the existence of:

- A validly authorised instruction to an economic operator indicating that it is to proceed with a requirement – step 22 (see also a call-off order linked to a contract, step 26)
- A validly authorised receipt demonstrating that what had been ordered was received (usually on the premises of the contracting authority) – steps 29 or 31
- An authorised payment demonstrating that the contracting authority is only paying for what it had ordered and has received – step 35

23. Publishing an award notice

A notice of the contract awarded must be published as required by national law. This process is described in module E2.

2.5 THE PROCUREMENT CYCLE – MANAGING THE CONTRACT

Consider this quotation: "To manage a system effectively, you might focus on the interactions of the parts rather than their behaviour taken separately." (Russell L. Ackoff) Effective contract management relies upon processes interacting efficiently and effectively and on people taking a holistic view of the subject, not a view from within their own silo.

This module considers the activities necessary to run the procurement exercise (steps 24 to 39 in the total procurement process). The process steps within this division are: localisation here

24. Internal communication
25. Engaging the economic operator
26. Enabling ordering mechanisms
27. Acknowledgement
28. Expediting
29. Quality control
30. Special transportation
31. Receipt
32. Inspection
33. Storage and control
34. Issuing to stakeholder
35. Payment
36. Performance review
37. Continuous improvement
38. Disposal
39. Close-out

Each step will now be covered in more detail and particular attention will be given to:

- Decision points
- Working with stakeholders
- Audit touch points
- Effectiveness

24. Internal communication

This step involves members of the procurement team communicating to the relevant stakeholders in the contracting authority concerning the specific nature of the contractual arrangements agreed with the economic operator(s). This step is particularly vital where one group in the contracting authority 'procures' and another 'manages the contract'.

On occasions when this step is not adequately performed, stakeholders may not know who the new economic operator is, when the new economic operator starts and the old one stops, whom to contact about their needs, and which process to use. It is a fundamental process that procurement officers must not leave as a loose end. Key steps involve communication to:

- Persons managing the contract
- Persons who will be requesting the service - to inform them which processes to use and to provide contact points and numbers

- Persons who will be using the service - to let them know the name of the new or changed contractor
- The IT Department - to set up, amend and remove entries from computer systems
- The finance department – to make sure that payments go to the correct places
- Departments concerned with organising site access to contractors as appropriate and where necessary - to prevent access to previous contractors
- Persons engaged in receiving or inspecting consignments
- The economic operators involved, if a handover is needed
- Others involved in actions as necessary - to ensure the effective implementation of the contract

25. Engaging the economic operator

This step sees the initial engagement of the purchasing and selling organisations, which are now working together within the agreed contractual framework. This step will involve:

- Planning cutover from the existing contractor (if appropriate)
- Planning the introduction of the requirement through a new contractor
- Organising meetings between procurement staff, stakeholders and contractors' staff
- Considering systems integration
- Considering ordering mechanisms
- Organising accommodation, site passes, etc.
- Pilot run, where appropriate
- Handover of stocks or other equipment from in-house service providers or existing economic operators
- Press releases, where appropriate
- Other actions as necessary to ensure the effective implementation of the contract

One other vital change needs to take place at this stage. Up until the contract was signed, there was a feeling of competition between the contracting authority and the selling organisation about who would or would not do this or that and about who would bear the cost of this or that aspect of the contract. At this stage, within the framework of the contract, the two organisations must now move from 'competition' to 'collaboration', which means working together to produce a successful result for both parties. Procurement officers must ensure that they avoid corrupt activities or activities that could be viewed as potentially corrupt when working with economic operators.

26. Enabling ordering mechanisms

In many cases there is more work to do than simply placing a contract or an order!

Specifically, staff from a number of stakeholder departments, IT and the economic operator will need to be involved to ensure that business processes and procedures between the organisations involved actually work. They will also need to ensure that the information required to fulfil the contract flows punctually, securely and completely in both directions between the organisations concerned. Stakeholder departments can include:

- End-users
- Finance
- Receivers
- Inspectors
- Project managers
- Procurement
- Engineers

Where call-off or other similar arrangements have been agreed with an economic operator, this step activates those arrangements involving internal stakeholders and economic operators. The ongoing supply of goods and services provided by economic operators is therefore "called off" by stakeholders directly, without involving the procurement team in each individual "call-off".

A call-off Order linked to a contract or a purchase order constitutes the first of three transactions that auditors refer to as a three-way match. Module ## deals with framework agreements in more detail. For each transaction, auditors will seek to establish the existence of:

- A validly authorised instruction to an economic operator to proceed (a call-off order linked to a contract) – step 26
- A validly authorised receipt demonstrating that what had been ordered was received (usually on the premises of the contracting authority) – steps 29 or 31
- An authorised payment demonstrating that the contracting authority is only paying for what it had ordered and has received – step 35

27. Acknowledgement

This process is the receipt by the contracting authority of a communication from the economic operator agreeing to supply the goods and/or perform the services required by the contracting authority. Signing the contract together normally makes this communication redundant, but economic operators may inadvertently issue an acknowledgement, and there may be legal consequences.

Localisation will be required here to understand the status of the acknowledgement in the local 'battle of the forms'

28. Expediting

This is the process of establishing the current delivery status of the specified requirement. Procurement staff contact the economic operator when goods and services are supplied and/or update the project plan with information on the progress of an economic operator when more complex requirements are being procured.

Ideally, economic operators should always deliver as agreed – meaning on time. However, procurement officers live in the real world and on-time delivery may vary from 'most of the time' with some economic operators to 'hardly ever' with other economic operators. This expediting step is a pure cost for the contracting authority, although there may be an even greater cost if the delivery does not occur, and it may therefore be the lesser evil to have procurement officers phoning economic operators to check and chase delivery. Poor performance here may be reflected in the performance review (step 36) and in continuous improvement (step 37). Delivery time may also be the essence of the contract and as such it is vital.

29. Quality control

This is the process of monitoring the progress of work being undertaken by the economic operator on behalf of a contracting authority where this is necessary, for example in the design and construction of a building. Procurement staff need not necessarily 'do' the inspection or progress report themselves, but they need to ensure that it is done. It is possible to use other economic operators who are specialists in measurement and/or certification to undertake this work on behalf of the contracting authority.

As an example, a quantity surveyor may be asked to visit a construction project to determine whether progress has been satisfactorily made and whether stage payments could be made because the foundations of the building were correctly in place. Another example could be an assessment of the development of software, where a systems analyst would test the software developed to date and deem whether it was fit for purpose. A stage payment could then be made. Using a qualified professional to make an assessment is a vital control in this part of the procurement process, and auditors will want to be assured that qualified persons have completed the step before payment is released.

In these cases, the inspection or on-site quality control becomes a receipt and an inspection can trigger payment. These transactions can form part of the three-way match sought by auditors – refer to steps 22 or 26, 29 or 31, and 35.

30. Special transportation

The delivery of the requirement is not normally a problem; however, it may be a problem when the item being delivered:

- is large and requires special transport;
- is hazardous;
- requires a permit;
- is heavy and requires additional equipment to unload or install it.

In these circumstances the procurement team must organise appropriate permits, resources and/or facilities. In one example a French lorry driver had to wait for an extra 24 hours to unload his vehicle because the contracting authority had not organised a crane to unload the compressors at its site. This failure added cost to the procurement and reduced the effectiveness of the contracting authority.

localisation here for examples of laws governing transportation of hazardous goods

31. Receipt

Receipt is the process by which the contracting authority receives the goods, works, materials and services from the economic operator, checking that the quantity it ordered has been received. This process will vary depending on the nature of the requirement. When goods are received it is easy to count and account for the delivery, for example of six boxes of stationery. The contracting authority will also need to comply with legislation on the removal and disposal of packaging. Localisation – implementation of European WEEE legislation

Good practice note – receipt
Receipt is a vital process and it is the focus of auditors who wish to check that what has been ordered has been received. Don't let people escape without providing a receipt transaction for goods or services.

Services, by their very nature, are more intangible than goods. It would be difficult to answer the following questions: Has the consultant been on site for an entire day? How do we measure the delivery of a training programme? How do we measure the output of consultants and contractors working on their premises and not on our site? How do we know that the window cleaner has cleaned all of the windows on the site that were supposed to be cleaned?

Receiving services is more difficult that receiving goods, but it is a process that must not be shirked. Examples of service receipts are:

- Signing in/signing out for people performing a service on-site
- Acceptance testing of software
- Sample checks on work accomplished, *e.g.* whether all of the windows have been cleaned or all of the rat traps emptied and set
- Deliverables, such as written outputs or reports of the appropriate length and quality, demonstrating that a consultant has spent time as agreed on a project for a contracting authority
- Surveys of performance, *e.g.* of a training programme or restaurant, confirming receipt and fitness for purpose
- Timesheets provided for work, wherever it takes place

In some cases, the above 'receipt' transactions cross over the boundary to log 'acceptance' as well as receipt. A pragmatic view must be taken and if one step will meet two needs then it should be used. Effective receipt processes can make use of technology, and they must not be unnecessarily bureaucratic.

Receipt of works and other intangible services, such as software, was discussed in step 29 (quality control) above. This transaction is a vital part of the three-way match sought by auditors – refer to steps 22 or 26, 29 or 31, and 35.

32. Inspection

This is the process whereby the fitness for purpose is established of the goods, works, materials and services received by the contracting authority. This process will vary depending on the nature of the requirement. Procurement officers need to ensure that:

- appropriate tests take place promptly;
- acceptance testing takes place (*e.g.* testing of equipment, such as x-ray machines);
- persons conducting the test are 'qualified';
- health and safety legislation is complied with;
- prompt communication of acceptance or rejection takes place with relevant stakeholders;
- rejected goods and services are not paid for until they are revalidated;
- rejected goods are returned and replaced;
- rejected services are carried out again, at a quality level in accordance with the contract.

This process is a vital one, as it tests the fitness for purpose of the delivery. For example, it would be possible to order and receive 12 bottles of vodka, but without a sampling test it would not be possible to determine whether the bottles were full of water or vodka. Tests for goods can include:

- Dimensional tests
- Weight tests
- Spectral analysis
- Certification
- Air pressure tests
- Vibration tests
- Tension tests

Some of the tests are non-destructive and others take an item and test it to the point of destruction. On some occasions only samples are checked and on others the whole batch is checked.

Tests for works, services and supplies were discussed in step 29.

Irrespective of the nature of the requirement, it is incumbent upon the contracting authority to make sure that they have received what they paid for. Some form of 'inspection' is therefore appropriate, although this inspection should also be tempered by the cost and risk of the requirement.

33. Storage and control

This step is the process of storing and controlling goods and materials in such a way that they can be readily used by stakeholders as and when required. It does not apply to works and services. Having paid for the goods and materials, the contracting authority must store them to ensure that they are both available and in good condition when stakeholders use them.

localisation here – storage of hazardous goods

34. Issuing to stakeholder

This step reflects the process of making goods and materials available to authorised stakeholders within the organisation. This process is of vital importance because 'goods tend to develop legs and walk'. The absence of items required by stakeholders may prevent a key business process from taking place, and any items stolen, whether by internal or external persons, must be replaced at a cost. Someone working in the contracting authority must be tasked with the process of control issues. Again, depending upon the value of the goods and their criticality, auditors may be interested in these transactions. Effective issuing processes can make use of technology but they must not be bureaucratic.

35. Payment

This step reflects the process of making payments to economic operators for the goods, works, materials and services they have supplied to the contracting authority. Auditors will typically be interested in this process, which constitutes the last of the component parts of the three-way match. The three-way match is described in step 22 and links also to steps 26, 29 and 31.

Finance departments in the contracting authority should seek to make a three-way match with all invoices received, expecting to be quizzed by auditors wherever this is not the case. Depending upon the systems available to the contracting authority, it may or may not be possible for the payment authorisation to be made before the economic operator's invoice document has left the finance department.

Some contracting authorities find it acceptable for an economic operator's invoice to be part of a three-way match made by the finance department, which can confirm, by means of either paperwork or a computer system, that the other two parts of the match are in place.

Other contracting authorities find it necessary to send an economic operator's invoice to other stakeholders for their approval, even in cases where the finance department can see, from paperwork or a computer system, that the other two parts of the match are in place.

Public sector organisations in some EU Member States are striving to achieve the former example above, while others feel they must maintain the latter process. The minimum information needed on an invoice document includes:

- Invoice number
- VAT number Localisation
- Contract and reference point in the economic operator
- Name and address of recipient organisation (contracting authority)
- Details of the goods, works or services for which the invoice has been established

- Dates and times of provision of the services
- Invoice date or tax point
- Sum invoiced

Localisation may be required here

36. Performance review

This process involves a comparison of the performance of the goods, works, materials and services provided to the contracting authority against the quoted, specified and agreed criteria. Module G3 includes more details on performance measurement.

Measurement is a vital part of the procurement process but is sometimes forgotten when procurement officers are concentrating on a subsequent project. For large procurement, a post-implementation review is an appropriate tool.

37. Continuous improvement

This step involves looking at the procurement process and at the goods, works, materials and services purchased and identifying areas for improvement, which could be applied to future procurement.

Good practice note – continuous improvement
As higher mammals, the experiments of Pavlov indicated that we learn from our experiences. Procurement people and contracting authorities must not be immune from this. Learn from your experiences and improve for next time.

At the end of a procurement process it is appropriate to ask:

- What went really well with this procurement? Can we implement those features elsewhere?
- What needs improving? How can we do that? Who will help us?

In terms of the goods, works, materials and services procured, we could ask:

- Did we specify appropriately? Did any issues arising during delivery demonstrate that the specification could have been better?
- Was the economic operator unreliable in delivering what it had promised? How could we require it to be clearer in the future?
- Were all of the checks and controls needed during the processes in place? What could be done better with a similar procurement next time?

38. Disposal

This process includes the steps necessary to dispose of goods, works and materials in an ethical and environmentally friendly way, whilst ensuring value for money for the contracting authority. Sometimes this step is the responsibility of procurement. Disposal to 'friends' or disposal below market value are normally viewed as corrupt activities. Procurement will also need to ensure that the organisation complies with the EC directives on disposal. LOCALISATION on disposal legislation.

39. Close-out

Contract close-out is achieved when the contracting authority and the economic operator have completed all procurement steps and administrative actions. Close-out occurs when all disputes have been settled and final payment has been made. The following list of actions, where applicable, can contribute to the close-out of a contract:

- Complete any price revisions
- Complete contract audit
- Complete contractor's final closing statement
- Submit and obtain acceptance of contractor's final invoice
- Ensure that all indirect costs are settled
- Ensure that all subcontracts are settled by the prime contractor
- Ensure that there are no outstanding change proposals
- Identify excess funds for re-distribution
- Review contract data and confirm that all deliveries have been accepted

Module G1 covers this step in more detail.

2.6 CO-OPERATION WITH OTHER CONTRACTING AUTHORITIES

What is meant by co-operation?

Co-operation with other contracting authorities aims at 'working with others to achieve best value'. It can be achieved by leveraging greater economies of scale through the supply base due to larger size order. There are at least two models for achieving this co-operation:

According to one model, a separate organisation is set up to act, for example, on behalf of local authorities within a geographical area, making all of their major purchases. The authorities may or may be not free to purchase outside the organisation, and the organisation levies a small percentage on each purchase it makes so as to recover its operating costs.

Another model involves sharing out purchasing between the organisations concerned and running the joint procurement activity as a virtual organisation. For this model charges are usually not levied.

Informal co-operation

Public sector organisations can informally collaborate:

- between themselves;
- with private sector organisations;
- on specific projects;
- for specific purchases.

Example of an organisation set up to act on behalf of authorities

Extract from the ESPO (Eastern Shires Purchasing Organisation in the UK) website http://www.espo.org:

"ESPO is a joint Committee of Local Authorities and operates within the Local Government (Goods & Services) Act 1970. It acts as a purchasing agent for its member authorities and other customers and provides a professional, cost effective procurement and supply service. The use of our products and services by our member authorities and other customers, as measured by the value of their combined procurement activities, amounts to some £700 million PA and the procurement services provided can be grouped into four categories as follows:

- A strategic role offering good practice relating to the procurement function as a whole. ESPO offers leading edge advice on major complex procurement and contracting issues, competition and services, best value-driven reviews of service provision and one-off project based procurements. Over the last two years in particular, this aspect of our procurement activity and expertise has grown significantly.
- A procurement role for goods and services commonly used by a number of customers throughout the consortium area. This type of activity includes framework call off contracts and some local contracting where local issues are of key consideration.
- A catalogue based provision where ESPO is able to purchase products in volume (usually low value high volume type products) from manufacturers in the main, and the resultant economies of scale means that we can purchase into our central warehouse here at Grove Park and deliver to customers using a combination of our own and contracted transport. An on-line ordering facility is available for those who want to use it.
- A procurement service for 'ad hoc' goods and services required by customers where advice, guidance and good practice are the watchwords. Often customers need commercial solutions to meet a need or specific requirement in this field.

We are a self-financing organisation, operating on a not-for-profit basis, utilising the aggregate buying volumes of our member authorities and other customers to maximise the potential savings for all customers in every area of our procurement activity."

Advantages of co-operation

The advantages of co-operation include:

- Lower unit cost through aggregation of spending;
- Small organisations are able to access large contracts and the benefits that come with them;
- Access to the procurement skills of other specialists;
- Compliance with EC directives should be ensured;
- An individual contracting authority may not need its own procurement team or may be able to manage with a smaller procurement team;
- Improved quality;

- Reduced burden on economic operators; an economic operator will only have to answer one ITT rather than five from different contracting authorities, thereby reducing costs;
- Good practice can be shared between organisations.

Disadvantages of co-operation

The disadvantages of co-operation include:

- Choice may be restricted by the selection requirements of other contracting authorities within the group – it could be a majority decision;
- Timing may not completely suit the contracting authority;
- If the consortium makes a mistake and a decision is contested, the individual contracting authorities are also liable;
- Where the organisation of the consortium relies on other contracting authorities inputting their resources into a joint approach, some organisations may want to take more than they are prepared to give;
- Organisations with higher spending may try to dominate the consortium;
- Where a framework agreement is established on behalf of the consortium, economic operators may not view this agreement as 'real' business.

Legal issues to consider

When co-operating with other contracting authorities, the following legal issues should be considered:

- Joining existing framework agreements with other contracting authorities;
- Buying from another contracting authority (ECJ Hamburg case);
- Implications of competition law, which applies whenever the purchasing power of the contract exceeds 15% of the market for a given requirement. An example would be the procurement of breathing equipment for firemen.

Conclusion

For small or local contracting authorities, joining a consortium can be a way of achieving benefits that are otherwise not available to them. Consortium organisations frequently succeed when all participants actively support and participate in the joint venture.

2.7 SUMMARY

This module has drawn out the 39 steps within the procurement cycle, whilst accepting that not every step will be necessary with every procurement and that in some countries the law of the land may impose specific practices.

The text has referred to the overarching concept known as the upstream/downstream concept. This concept considers steps in the procurement cycle up to and including the award of contract as 'upstream' and steps occurring after the contract has been awarded as 'downstream'.

SECTION 3
EXERCISES

EXERCISE 1

We would like you to take the 39 cards you will be given, read the process step description and then:

1. Place them into one of the three divisions of the procurement process
2. Place the cards in sequence from step one to step thirty-nine

The problem is that the cards have no number on them!

INFORMATION SECTION

CASE STUDY – COLLABORATIVE PROCUREMENT

Basic data about the institution

The local town council spends only EUR 20 million. It has a population of 169 000 people in its district.

Introduction

The town council has one procurement officer who also has other duties and is not therefore in a procurement role "full time". The council nevertheless wants to have the advantage of best practice procurement for the people within its district.

The course of the event(s)

The council joined the Eastern Shires Purchasing Organisation www.espo.org, and pays a fixed fee each year to take advantage of the procurement arrangements set up by ESPO.

Analysis of the event(s)

When the council has a specific requirement, it can either:

1. Take advantage of an existing framework contract let by ESPO for the goods, works or services required, or
2. Ask the ESPO procurement specialist to make the purchase on its behalf.

In this way the small local council gains access to the procurement activity of a major purchaser within the country.

SECTION 4
CHAPTER SUMMARY

QUICK QUESTIONS

Quick questions part 1: Preparing for procurement

1. There is not much advantage to pre-planning procurement requirements. True or false?
2. A procurement officer should not simply be a rubber stamp to obtain the requirements of stakeholders. True or false?
3. Specifications are a joint activity involving stakeholders and procurement officers. True or false?
4. Specifications are a key means of delivering transparency. True or false?
5. There may be iteration between the consideration of performance measures and the specification. What is it?
6. Using economic operators' terms and conditions is a good idea. True or false?
7. What does a business case test?
8. Which comes first, the ITT or the specification?
9. What might a market review influence?
10. What is meant by an "upstream" process?

Quick questions part 2: Running the procurement exercise

11. What is "vital" about publishing a notice?
12. Why it is vital that all potential economic operators receive the same information about the requirement?
13. Provide three examples of questions that a procurement officer might receive about an ITT that has been issued.
14. "I only send answers to the people who ask the questions", said Marie. Is she correct?
15. Yvette said, "I open all of the tenders when I receive them. I don't need to wait until all of the tenders are received before I open them". How would you advise Yvette?
16. "Late tenders sometimes contain really low prices", said Marian. What is the worst-case scenario here?
17. When looking at two economic operators' tenders, a very experienced procurement officer was heard to say, "This is like comparing an apple and a banana!" What did he mean?
18. It is necessary to clarify the offer that economic operators have made to us. Provide three examples of what you might wish to clarify.
19. The contract award can be the first part of a three-way match. What are the other parts?
20. What might unsuccessful economic operators do if they feel that they have been unfairly treated?

Quick questions part 3: Contract management

21. "All of the hard work is done once the contract is placed." Comment on this statement.
22. Identify three things that may be necessary during the "internal communication" step.
23. "I don't order things late and so I don't expedite", said Jacques the procurement officer. Is there a risk in Jacques' approach?
24. In what circumstances might a receipt be performed by a specialist resource away from the site of the purchasing organisation?
25. Provide examples of a service receipt.
26. Inspection is part of the three-way match. True or false?
27. Where in the whole procurement cycle are the measurement criteria first considered?
28. "A payment should only be made if a three-way match is evidenced." What does this mean? Provide an example.
29. When we consider "continuous improvement", we are referring to both _____ and _____. Complete the blanks.
30. Identify three examples of what might take place during closeout.

Organisation at level of contracting authorities

Role of the procurement officer

MODULE B

PART 3

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this module are to make participants aware of what is required of them in terms of:

1. Understanding stakeholder requirements
2. The elements of a competency profile of professional procurement officers relating to good practice and operating within the environment of EU Directives. This includes the skill sets required to effectively prepare, run and manage the procurement process
3. Managing stakeholders
4. Providing advice to stakeholders on key issues relating to procurement
5. Managing the procurement process as a whole
6. The need to communicate in four directions
7. Handling relationships with economic operators
8. Drafting a report on procurement activity

To assist in explaining these issues, the main narrative is divided into three sections:

- A discussion of the stakeholders in a procurement process and where the power to influence procurement processes and decisions lies within a contracting authority.
- The role of the procurement officer where that role is not specifically linked to a procurement process: this includes an introduction to the core competencies of a procurement officer, communication and reporting requirements.
- The role of the procurement officer during the 39 steps of the procurement cycle: the 39 steps are covered in detail in B2.

1.2 IMPORTANT ISSUES

A key issue is to understand that the procurement officer and procurement team are service providers and that procurement is a service to the stakeholders within the contracting authority. If there were no goods or services to purchase, there would be no need for a procurement team.

To successfully deliver the service for stakeholders, a procurement officer should have a wide range of competencies. These competencies are highlighted in this module.

1.3 LINKS

Links to other modules appear throughout the text of this document, in particular module B2 and module B4.

1.4 RELEVANCE

Procurement professionals should:

- Understand and demonstrate the competencies they need to fulfil their role
- Be trained to have a thorough understanding of policy and processes, and be able to determine what is appropriate for the contracting authority
- Maintain a body of knowledge of best practice
- Have a full understanding of rules, regulations, laws and guidelines that impact on their policy and process
- Ensure that policy and process mitigate business risk and manage cost
- Ensure that policy and process are developed to deliver the objectives, vision and/or mission of the contracting authority
- Ensure supply chain compliance or alignment with adopted policy and process through economic operator assessment and evaluation
- Formalise policy and process development

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

This section will link to other areas referring more specifically to legal information.

LOCALISATION WILL NEED TO REFER TO SPECIFIC LEGAL DOCUMENTS

SECTION 2
NARRATIVE

1. OVERVIEW

This narrative is split into three sections:

- A discussion of the stakeholders in a procurement process where the power to influence procurement processes and decisions lie within a contracting authority
- The role of the procurement officer where that role is not specifically linked to a procurement process, including an introduction to the core competencies of a procurement officer, communication and reporting requirements
- The role of the procurement officer during the 39 steps of the procurement cycle: the 39 steps are covered in detail in module B2

2. STAKEHOLDERS

2.1 Stakeholders - Introduction

A stakeholder is defined as 'anyone who has a stake or interest in the process of procurement'. According to that definition, this would include:

- Persons with a role in end-user departments who use the items purchased by the procurement officer, the procurement team and the procurement process. In a sense they are the customers of procurement;
- Persons working in other areas of the contracting authority who have a 'stake' or interest in procurement. This would include staff in finance, legal, IT and audit departments as well as elected officials, as appropriate to the contracting authority.

There is no 'correct' single list of stakeholders; however, procurement officers ignore their stakeholders at their peril.

Good practice note – stakeholders

Identifying the stakeholders in a procurement exercise and understanding their drivers and needs is vital information for procurement officers seeking to provide their contracting authority with a cost-effective solution. Assuming that you know what stakeholders want can be a dangerous game, even for experienced procurement officers.

Stakeholders can exert influence and power within the procurement process, and prudent procurement teams analyse the stakeholders of large projects and then address their needs relative to their importance.

2.2 TYPICAL STAKEHOLDERS

'Stakeholders' are those individuals, groups and organisations – both internal and external – who have an interest or influence in the operations, processes or outcomes of an organisation. When making major purchases, initiating projects or seeking to bring about change, it is appropriate to consider the stakeholders who can affect the outcome and to determine what their attitude might be and what they might seek in the existing or future situation.

Many purchases and projects bring about change, and successful management of change requires that all stakeholders are identified and taken into account in some way. A major component in a change strategy should be the management of relationships with stakeholders so that they behave in such a way as to ensure the success of the change. In particular, this means mobilising support where it is needed and overcoming or removing resistance where it can be expected. Things go wrong when key stakeholders are ignored and are not involved in the change process or are needlessly alienated. Points to note include:

- Both internal and external stakeholders are included.
- It is crucial to choose the right level of detail. A single category of 'staff' is rarely adequate because different groups of staff are affected in different ways (and will to some extent require different responses). Separating out different tiers/ functions/ specialities/ locations, etc. is usually worthwhile.
- This is of course no more than a snapshot; stakeholders and their actual stake will change over time.
- Account should to be taken of the links between stakeholders. A diagram should properly be drawn, showing these links as a network.
- The analysis must identify potential alliances and conflicts between all of the stakeholders.

Figure 1 (below) shows typical stakeholders in a change project. The stakeholder list will reflect the given project, change or purchase.

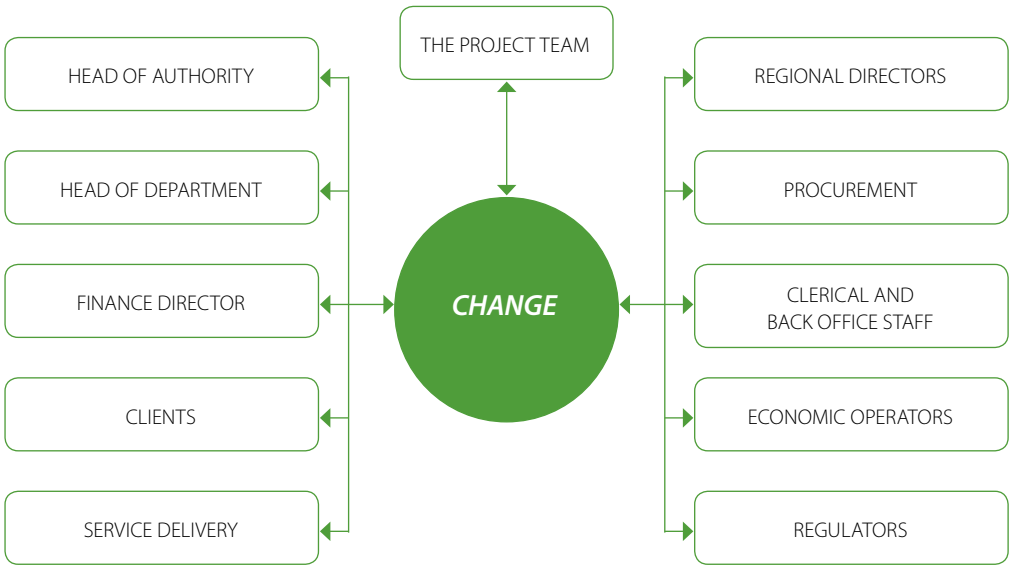
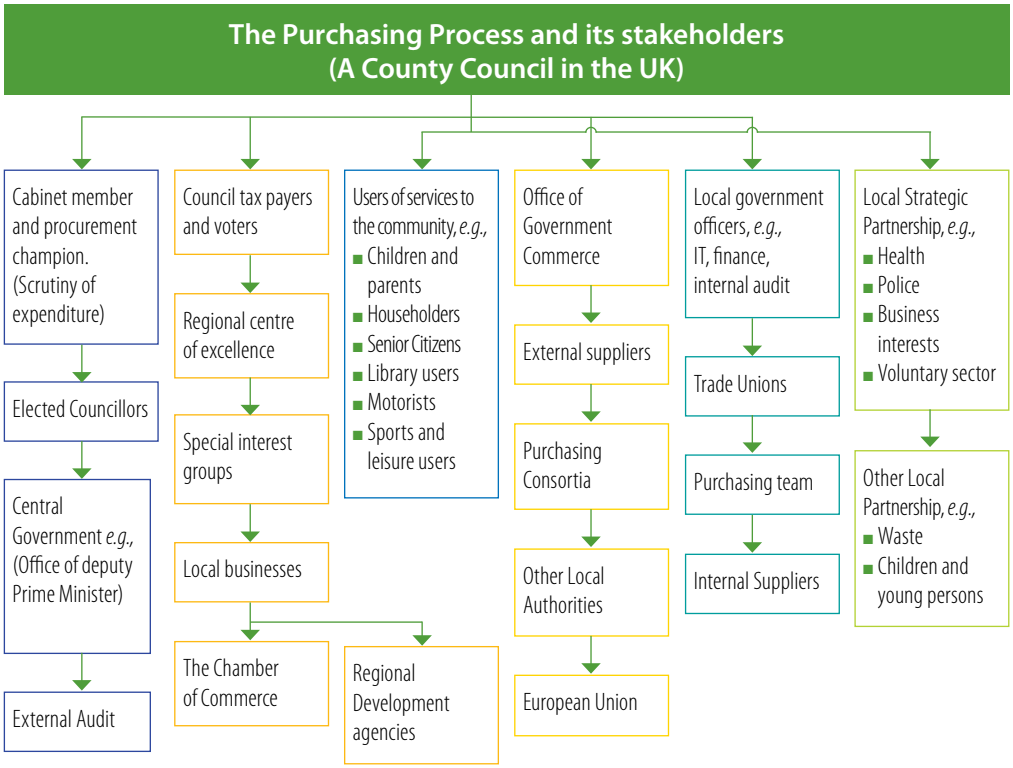


Figure 2 shows the stakeholder map of a local authority (county council) in the UK. Localisation: This could be replaced by a country-specific example.



NB: The hierarchical sequence of the business functions in this chart is not meant to give prominence to one function over another, it is simply a convenient way of grouping stakeholders together in this environment. The author would like to thank Fiona Holbourn of Leicestershire County Council and Ken May of ESPO for their assistance in refining this diagram.

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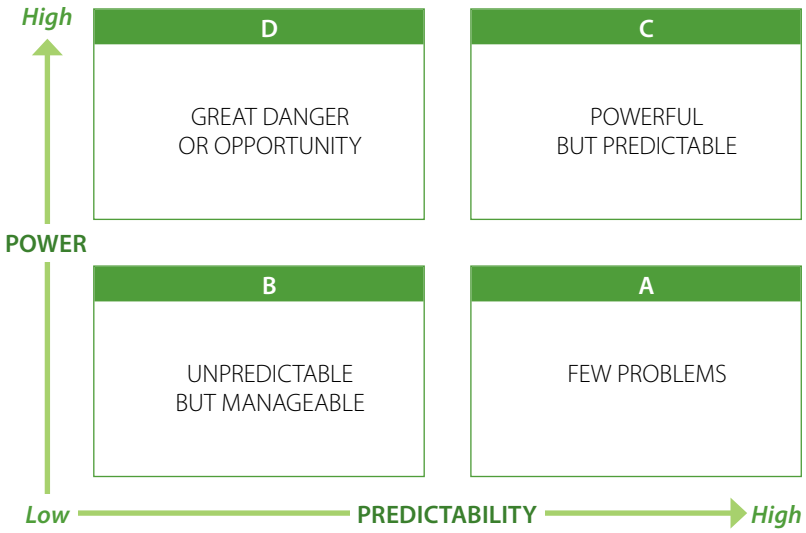
2.3 STAKEHOLDER MAPPING

Assessing the importance of stakeholder expectations is an important part of any strategic analysis. It consists of making assessments and positioning stakeholders on these issues:

- How likely each stakeholder is to impose their expectations on the purchasing strategy;
- How interested the stakeholders are in becoming involved; we have all had experience with stakeholders who show no interest in the early stages but are at the forefront of criticism when "things" have not gone well;
- Whether the stakeholders have the means and/or power to exert their views and expectations; this is possibly at the expense of others with less power but with more important needs.

2.3.1 Power / predictability matrix



Source: A Mendalow

The power / predictability matrix is a useful way of assessing where the efforts to engage stakeholders should be channelled during the development of the purchasing strategy. The most difficult group to cope with are those in segment D, since they are in a powerful position to block or support the strategy, but their stance is difficult to predict. The implication is very clear: means must be found to at least bring them 'on board', if not into the team, before an irrevocable position has been established.

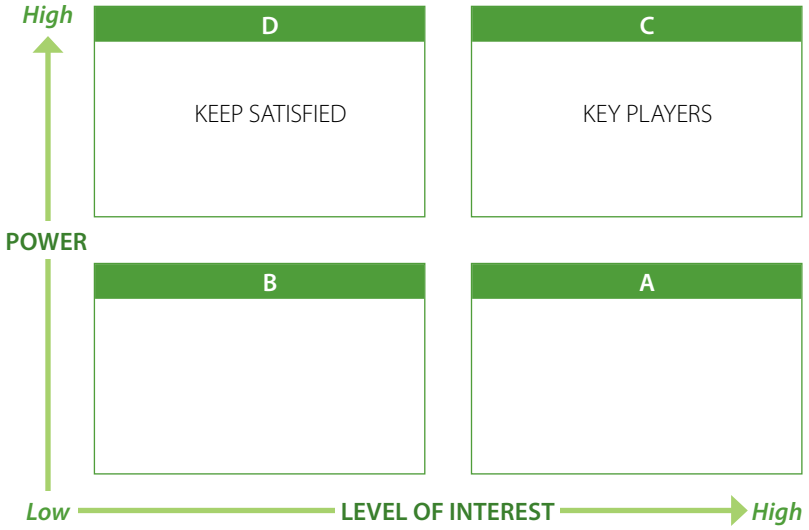
In contrast, stakeholders in segment C are likely to influence a purchasing strategy process of those managers who anticipate their stance and build strategies that will address their expectations. This does not mean that the stakeholders should be ignored, but the job of ensuring that they are on board should be more straightforward.

Although stakeholders in segments A and B have less power, this does not mean they are unimportant. Indeed, the active support of such stakeholders may in itself have an influence on the attitude of the more powerful stakeholders.

2.3.2 Power / interest matrix

The power / interest matrix classifies stakeholders in relation to the power they hold and the extent to which they are likely to show interest in the contracting authority's purchasing strategies. The matrix indicates the type of relationship that the contracting authority will need to establish with each stakeholder group. Clearly the acceptability of strategies to the key players (segment C) should be a major consideration during the formulation and evaluation of new strategies.

Often the most difficult stakeholders are those in segment C. Although these stakeholders might in general be relatively passive, readers are reminded that stakeholder groups tend to emerge and influence strategy as a result of specific events. It is therefore critically important that the likely reaction of stakeholders towards future performance is given full consideration. A disastrous situation could arise if the stakeholders' level of interest were underrated and they suddenly repositioned themselves in segment D, which would impact on the strategy and on the expectations of the economic operator and the contract.



Source: A Mendalow

Similarly, the needs of stakeholders in segment B need to be properly addressed, largely through information. They can be crucially important "allies" in influencing the attitudes of more powerful stakeholders.

This type of stakeholder positioning is of value when assessing the following:

- Whether the situation is likely to undermine the adoption of a particular purchasing strategy. In other words, mapping is a way of assessing cultural fit and serves as a form of risk assessment. We are trying to ensure that the whole contracting authority thinks as one before we place what may be a very strategic contract.
- Who the key blockers and facilitators of change are likely to be, and therefore, whether activity needs to be put in place to reposition selected stakeholders. This activity could be aimed at lessening the influence of key players or persuading them to adopt another point of view.
- The extent to which maintenance activities will be needed to discourage stakeholders from repositioning themselves if 'things go wrong' or if they feel that the service they are receiving does not meet their expectations. This is what is meant by 'keep satisfied' in relation to stakeholders in segment C, and to a lesser extent 'keep informed' in segment B.

2.3.3 What is power?

The previous section was concerned with analysing stakeholder expectations and highlighted the need to assess the power of the various stakeholders. Power is the mechanism by which expectations are able to influence strategies. In most contracting authorities, power will be unequally shared between the various stakeholders.

Before proceeding, it is necessary to understand what is meant here by 'power'. In particular, a distinction needs to be drawn between the power that people or groups derive from their position within the contracting authority and the power that they actually possess by other means. For the purposes of strategic analysis, power is best understood as the extent to which individuals or groups are able to persuade, induce or coerce others into following certain courses of action. This is the mechanism by which one set of expectations will dominate strategic development or seek compromise with others. Analysis of power must, therefore, begin with an assessment of the sources of power.

2.3.4 Sources of power within organisations

Power within organisations can be derived in a variety of ways, any of which may provide an avenue whereby the expectations of an individual or a group may influence outcomes.

Within organisations sources of power might be:

- The hierarchy…….the formal structure
- The network……..the informal structure
- Controllers of resources
- Possessors of knowledge
- Possessors of (rare) skills
- Decision-makers

2.4 ADVICE AND LEADERSHIP PROVIDED BY PROCUREMENT OFFICERS TO STAKEHOLDERS

Procurement officers should be a source of advice and leadership to stakeholders concerning:

- Best practice procurement processes
- Options for a specific procurement:
  - Selecting the right process
  - Timing
  - Bundling the requirements appropriately
- Best value concepts, for example:
  - Total cost of ownership (whole-life costing)
  - Procurement planning
  - Generic specifications
  - Economic operator conditioning
  - Setting evaluation criteria and weightings
  - Separating priced and unpriced tenders

- MEAT (Most Economically Advantageous Tender) principle
- Evaluating tenders
- Communication between economic operators and the contracting authority
- Separation of duties
- Three-way matching
- Need for an audit trail
- Adding value upstream and diminishing costs downstream

- Ethical behaviour
- Procurement policies
- Using procurement procedures
- Compliance with EC directives
- Relationships with economic operators
- Specification options
- Advice to those drafting the specification
- Performance management

3. THE ROLE OF THE PROCUREMENT OFFICER – NOT SPECIFICALLY LINKED TO THE PROCUREMENT PROCESS

Good practice note – a procurement officer's role

Procurement is about process and following rules and laws. However, a procurement officer's role also concerns other things, which include seeing the big picture within the contracting authority, identifying and managing risk, serving as a source of knowledge to others, and actively promoting good practice within the contracting authority. The list is long and there is a standard to uphold!

3.1 ROLE AND ACTIVITIES NOT SPECIFICALLY LINKED TO THE PROCESS

The role of a procurement officer can be summarised by the following broad activities:

- Link the strategy of the contracting authority – through procurement planning and selection of individual procurement strategies – to the operational procurement of works, supplies and services, which will allow the contracting authority to meet its strategic objectives;
- Work effectively within internal and external legal frameworks to determine the most appropriate and effective method of procurement for each requirement;
- Strive to obtain value for money on behalf of the contracting authority for all items procured;
- Abide by the contracting authority's ethical code;
- Build comprehensive knowledge of the supply market relating to the works, supplies and services needed by the contracting authority;
- Liaise closely with stakeholders as needed on procurement matters;
- Communicate effectively with stakeholders;
- Encourage truly competitive procurement while still satisfying the needs of the contracting authority;
- Conduct all formal communications with economic operators regarding purchases;
- Develop and maintain current information on sources of supply;
- Maintain an accurate record of the process of procuring all requirements;
- Promptly report any improper practices to the appropriate authorities;
- Develop manual and electronic systems and procedures aimed at eliminating bureaucracy and increasing effectiveness;
- Maintain governance documentation, including a policies and procedures manual;
- Work with procurement officers in other authorities to develop legitimate collaborative approaches to the supply market, where appropriate;
- Identify and manage risks inherent in the process of procurement.

3.2 COMPETENCIES OF A PROCUREMENT OFFICER

Good practice note – competencies

If you are not competent then you should not be in the position you are in! The precise nature and extent of competency required for any given position will vary with the organisation, what it purchases, and the level of the job-holder. This section discusses an internationally acknowledged set of competencies tested on more than 5500 procurement professionals in several countries.

3.2.1 Introduction and definition

Procurement staff must be competent. But what does competent mean? A dictionary definition is:

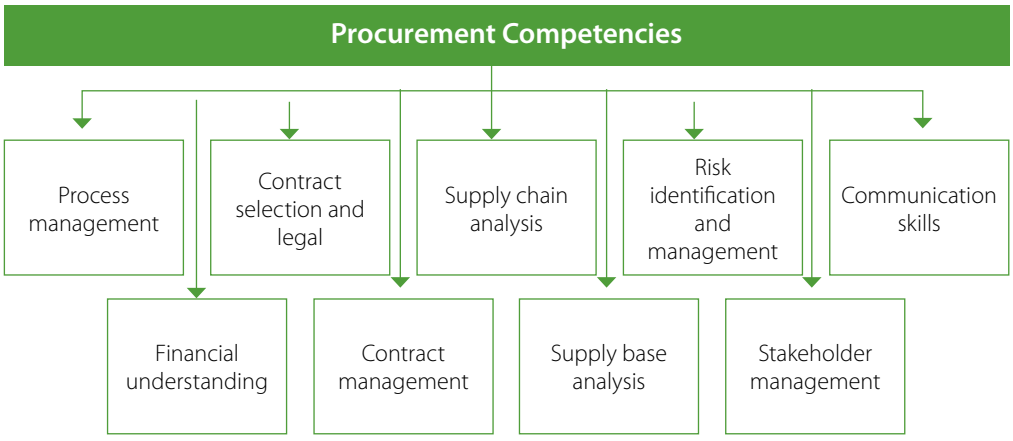
> "Proper or rightly pertinent, having requisite or adequate ability or qualities, having the capacity to function or develop in a particular way, having the capacity to respond".
> Source: Merriam Webster Dictionary

The same dictionary defines competence as "the knowledge that enables a person to speak and understand a language".

Procurement officers need to have specific abilities, qualities and capacities: they need to be able to understand and talk the language of procurement. Procurement officers equally need to continue to develop and refresh their competencies through a continuous professional development programme.

3.2.2 Procurement competencies

The diagram below identifies nine procurement competencies to be used as a benchmark for identifying the needs of professional procurement officers worldwide. The competencies focus on the key attributes that procurement officers must possess.



Each of the competencies will be examined below.

Localisation note: some countries may require more formal qualifications

3.2.3 Procurement process management

The ability to effectively manage the totality of the procurement process is vital. Everyone involved in the process can contribute to value creation, and procurement officers need to be able to draw this out of other stakeholders. The establishment, development, compliance with and maintenance of core procurement processes, strategies and control procedures will result from review and constructive challenge at each stage of the procurement process. The procurement process should have the appropriate strategic context and key elements, including:

- Regulatory compliance
- Procedural knowledge
- Demand management
- Sourcing
- Economic operator performance and measurement
- Performance management
- Knowledge management

3.2.4 Contract selection and legal

Procurement officers must be able to draft, negotiate and agree on clear, concise, and complete contractual documentation, which identifies roles and responsibilities and makes provision for all aspects of the agreed procurement plan with reference to process steps and appropriate templates.

An understanding of contract law, the business application and its critical success factors, negotiating skills, and the ability to access and apply specialist legal and technical advice, are all required in order to protect the contracting authority's commercial position in such areas as liabilities, indemnities, insurance and warranties.

Procurement officers need to be able to build flexibility into contracts so that business change and associated requirements can be reflected over the life of the contract. Elements here include:

- Contract execution
- Economic operator performance measurement
- Risk assessment
- Risk mitigation
- Exit strategies
- Selection of appropriate terms and conditions

3.2.5 Supply chain analysis

Procurement officers need to be able to apply knowledge and awareness of supply chain processes and supply networks so as to control and optimise the performance of both the contracting authority and economic operators. The execution of a supply chain strategy, understanding how elements integrate and the risks/rewards associated with their integration, is an important consideration when preparing to go to the market. Also important is an understanding of the concept of activity-based costing models and of the primary factors that impact on supply chain complexity and how these factors impact on supply chain costs.

3.2.6 Risk identification and management

Procurement officers must be able to manage commercial, reputation, compliance, ethical and other risks associated with the procurement process so as to ensure that undesirable consequences of the risks identified are mitigated. In addition to market knowledge and commercial acumen, an understanding of health and safety authority expectations relating to procurement is valuable. Elements of risk management include:

- Health and safety assessment
- Financial assessment
- Market analysis
- Operational continuity
- Strategic impact on the contracting authority
- Ethical conduct

3.2.7 Communication skills

Communication skills are a vital asset for a procurement officer. Communication must take place between the procurement officer and stakeholders, economic operators, peers and colleagues, using a range of communication tools. Procurement officers should ideally be able to communicate in more than one language.

3.2.8 Financial understanding

Procurement officers must be able to undertake a meaningful financial appraisal of economic operators, making an assessment of any risk taken by using that economic operator and utilising this information in decision-making and contract management. Procurement officers are required to interpret financial ratios and the interrelationships of financial statements (balance sheets, profit and loss accounts, cash flow information, etc.) to assist in arriving at appropriate conclusions.

Also required is an ability to understand costing methods and to analyse financial information so as to arrive at a potential cost make-up of an economic operator's tender.

Conducting an economic and financial analysis prior to the award of a contract can result in the elimination of economic operators that are a potential risk. Procurement officers should also satisfy themselves that economic operators have complied with legal, financial and finance-related corporate statutory regulations.

3.2.9 Contract management

Procurement officers must establish and manage a robust contract management system. Successful contract management will add value to contract delivery by providing review and feedback, assessing contractual compliance by both parties, establishing appropriate and effective key performance indicators, managing any disputes in a timely, appropriate and effective manner, identifying continuous improvement opportunities, and liaising with stakeholders to ensure that their business needs are met and developed.

3.2.10 Supply base analysis

Procurement officers need to be able to evaluate economic operators and the supply markets that form part of their area of responsibility for the purchase of goods, works, materials and services. The management of appropriate supply-base analysis processes and the identification and implementation of optimal economic operator selection processes in accordance with the EC directives are vital.

The utilisation of tools and technology, where appropriate, to understand pressures on the contracting authority and the supply base is required. An integral part of this competence is the ability to work with accountable line managers and other stakeholders (including legal, financial, technical, integrity, and health and safety specialists) to establish a comprehensive assessment of the requirement and of the economic operators under consideration. This competence includes being able to:

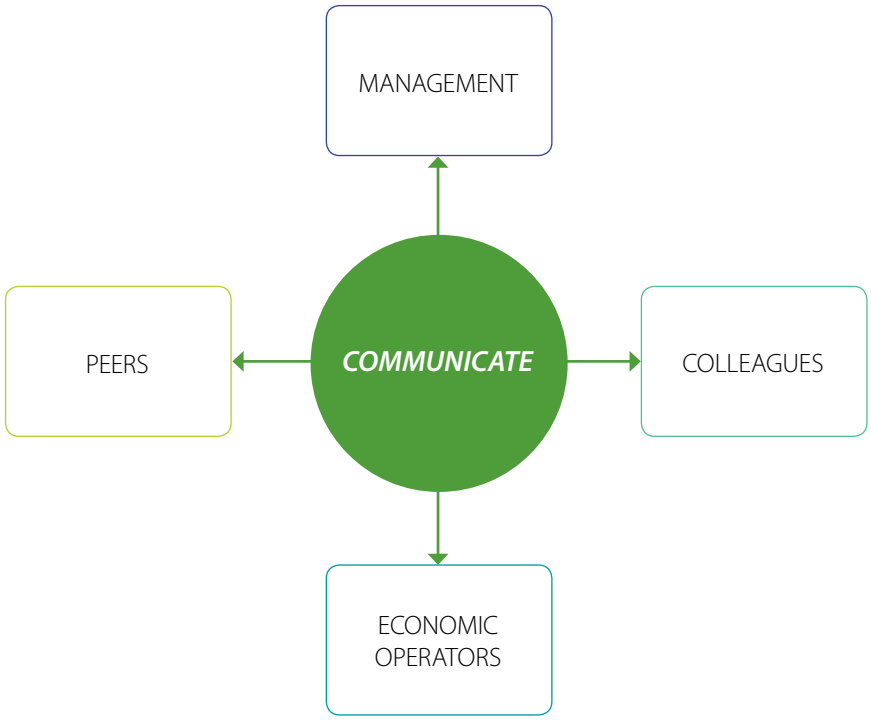
- develop award criteria;
- undertake full and robust external market analysis;
- undertake financial analysis;
- feed the analysis into economic operator selection steps;
- understand economic operator segmentation;
- develop risk mitigation strategies.

3.2.11 Stakeholder management

Procurement officers must be able to determine and implement appropriate management of internal relationships, utilising stakeholder mapping. They must have an awareness of the importance of working in cross-functional teams as an aid to decision-making and an awareness of how procurement can raise its own profile through a strategy of internal procurement marketing as well as improved and effective communications. The ability to build relationships with stakeholders is essential to enable the procurement team to anticipate, identify, understand and meet the developing stakeholder requirements and to feed this information into key processes, such as the annual procurement plan.

3.3 THE NEED TO COMMUNICATE

'Communicate' means to impart, participate, convey knowledge of or information about something, make known or reveal by clear signs. Procurement officers need to communicate to their managers and senior stakeholders, to colleagues on their team, to peers in other stakeholder departments and to persons working for economic operators. The diagram below shows the concept of communication in four directions.



Irrespective of whom we are trying to communicate to, the communication must be appropriate, timely and relevant, and it must be received and understood by the recipient.

Good practice note – communication

Procurement people have to communicate to be effective. There is a balance, however, between the communication methods selected and the frequency, content and language used in the communication. Achieving this balance is of crucial importance.

Equally vital is the recognition that communication is a two-way process. People will receive the contract authority's communication and they may or may not understand it, they may or may not respond, and their response may or may not be the one that the contract authority wanted to hear.

Communicating effectively in procurement is vital.

3.3.1 Communication with management

'Management' is a term that can be used to describe the team of senior staff that is responsible for the overall performance of the contracting authority. This team may fall into the category of powerful stakeholders, predictable or unpredictable, and given the demanding schedules that its members probably have, communication with the team must be:

- related to major issues;
- to the point;
- probably one-way communication (from the procurement officer to the management team), thereby offering them an opportunity to seek further information if they need it;
- delivered through an agreed channel – *e.g.* a monthly activity report;
- simple and straightforward;
- capable of being delivered through a third party (the procurement officer's boss to a more senior boss).

Any attempt to set up a meeting to discuss a minor contractual issue with the head of the authority will be unsuccessful. Obtaining a meeting that the head of the authority considers as a waste of time will be career-limiting. A monthly briefing report or a staged project briefing report should provide the information needed and allow the management team members to ask questions as and when they consider it necessary.

3.3.2 Communication with colleagues

'Colleagues' are other persons on the procurement team or current procurement project, and communication with them must be both one-way and two-way. Procurement officers need to exchange ideas and information with colleagues and to enter into discussions in order to solve problems. Problems are caused when colleagues do not discuss:

- what they propose to do;
- problem situations;
- opportunities;
- decisions that need to be made;
- difficulties they encounter with systems, processes, stakeholders, and persons working with economic operators.

Procurement and project teams should have regular face-to-face meetings to discuss progress on the procurement processes they are carrying out and in other areas. E-mail can be an overused means of communication and copying people unnecessarily on e-mail can also lead to 'e-mail fatigue', which occurs when people receive too many communications and therefore fail to spot and act upon the priority messages.

3.3.3 Communication with persons working for economic operators

Persons working for economic operators must receive communications from the contracting authority and vice versa, and there are times when issues are discussed together. Communication is therefore both one-way and two-way. The next section deals with the procurement officer's role in the procurement process; as many activities concerning communication are described in that section, they are not mentioned here. However, it is worth repeating that the communication that the contracting authority carries out with persons working for economic operators must be appropriate, timely and relevant, and it must be received and understood by the recipient. If this is not the case, the authority is encouraging poor performance by the persons working for the economic operator.

3.3.4 Communication with peers

'Peers' are stakeholders who work in other departments and work with or against procurement officers and procurement processes. Communication must again be both one-way and two-way, with e-mails or documents being used to provide updated briefings and face-to-face communication for discussions. Care must be taken to strike a balance between over-communication and under-communication. Examples of one-way communication to peers include:

- Updates on the progress of a procurement process or project
- Information provided by economic operators
- Prompts for action
- Examples of templates and documents used for previous procurement

Examples of two-way communication to peers include:

- Discussions on the annual procurement plan
- Discussions on timing
- Meeting to set weightings
- Call for discussion of specifications
- Call for discussion of an issue raised by an economic operator completing an invitation to tender

There is no single correct channel of communication in these circumstances. Selection of the channel could depend upon the following factors:

- Physical nearness of the person
- Importance of the communication
- Preference of the peer
- Time available
- Communication media available
- Extent to which the peers are familiar

3.4 RELATIONSHIPS WITH ECONOMIC OPERATORS

It is necessary to establish relationships with economic operators, although it can be argued that procurement officers do not have relationships with economic operators but with the persons working for economic operators!

Good practice note – corruption

Procurement officers must avoid giving the impression that their 'relationship' with the economic operator goes beyond the limits of ethical behaviour.

The contracting authority should therefore have prepared governance documentation that clearly indicates:

- a consistent approach of the contracting authority towards persons working for economic operators regarding how business as a whole will be carried out and how specific requirements will be met;
- who can and who cannot contact persons working for economic operators and what they can and cannot discuss.

The governance documentation (described in module B1) and its thrust, emanating from the fact that procurement officers are spending public money, provide a key driver for these relationships, which are embodied in the code of ethics. Relationships with persons working for economic operators may be characterised by:

- Quality of information exchange
- Trust in the relationship
- Openness in the relationship
- Commitment to each other in the relationship
- Duration of the relationship
- Risk assessment carried out by the parties
- Risk management carried out by the parties

3.4.1 Quality of information exchange

Procurement officers must provide persons working for economic operators with high quality information and must comply with statutory obligations. The provision of relevant, accurate, complete, timely and well-organised information is closely linked to the successful provision of goods and services by persons working for economic operators. Procurement officers have the right to expect a reciprocal arrangement.

Information provided by the procurement officer should be linked, however, to the requirement in question. Some persons working for economic operators will attempt to exploit purchasing officers and gain information relating to areas that are commercially confidential. An example would be a sales manager requesting the prices of his/her competitor.

3.4.2 Trust

The extent to which persons working for both organisations feel that they can trust each other will influence the quality of the relationship. There is a clear element of 'feeling' here, but the extent to which both parties honour their promises, provide information and treat each other well when they meet will influence this aspect of the relationship. Procurement officers must be able to trust the persons working with economic operators and these persons must be able to trust procurement officers. For example, the persons working with economic operators must be able to trust procurement officers not to leak the intellectual property of the economic operator to its competitors.

3.4.3 Openness

Procurement officers must be open about what they need. Hiding terms and conditions or performance requirements will, for example, not enable the persons working with economic operators to deliver the best goods and services to the contracting authority. The persons working with economic operators must also be open and honest about whether their solution will meet the contracting authority's needs. The credibility of a procurement officer who attempts to trick an economic operator by introducing a new term late in the procurement process will diminish. Equally, the credibility of persons working for economic operators will rapidly diminish if they propose a solution that will clearly not meet the needs of the contracting authority.

3.4.4 Commitment to each other

The extent to which the parties are committed to each other once they enter into a contractual relationship is a key factor in the success of the relationship. Both parties must move from the pre-contract situation, where there is competition, to a post-contract situation where they are co-operating to deliver the requirements of the contracting authority within the framework of the contract. Prior to signing the contract, this commitment must be characterised as follows:

- The procurement officer provides all of the necessary information to enable economic operators to submit a first-class tender;
- Persons working for the economic operator honestly attempt to meet the needs expressed by the contracting authority through their best endeavours. Offering less than the best demonstrates a lack of commitment.

Once the contract has been signed, the focus of both parties should be on the successful delivery of the goods, works, materials or services to the persons in the contracting authority who require them.

3.4.5 Duration

The relationship duration is in one sense limited to the duration of the contract. However, in another sense, persons working for both organisations will relate to each other before and after the contract as:

- both will know the other exists;
- sellers will be aware of the sorts of needs the contracting authority has;
- procurement officers will be aware of the services provided by the economic operator.

3.4.6 Risk assessment

Both parties will undertake a risk assessment before doing business together:

- The contracting authority will look at the risk of doing business with the economic operator (Can this operator meet our needs? Is it financially stable?).
- The economic operator will look at the risk of doing business with the contracting authority (Will the authority pay? Will it pay on time? Will it take advantage of us?).

3.4.7 Risk management

Both parties will undertake risk management while doing business together. This risk management will include:

- The contracting authority will look at obtaining value-for-money and will carry out checks and controls during the selection and contract management phases.
- The economic operator will look at the risk of cost overrun and will seek to limit what is supplied to the provisions of the contract, unless additional funds are provided.

3.5 REPORTING ON PROCUREMENT ACTIVITY

According to article 43 of the EC Directive, contracting authorities are obliged to prepare annual reports on their procurement activity and to provide that information to the European Commission if requested. In practice, governments oblige public sector contracting authorities to provide the statutory information to a central government department and to provide additional information, for example on the award of contracts that are under the EU financial thresholds. It is good practice to provide a report on procurement activity to the managing body of the contracting authority. Paragraph 3.5.1 lists the mandatory reporting requirements under article 43 of the directive, and paragraphs 3.5.2, 3.6 and 3.7 provide examples of information that may be included in a report on procurement activity provided to the managing body of the contracting authority.

Good practice note – reporting

The text below provides a comprehensive list of reporting options. Procurement officers may not need to complete all of them, and they should work with their management and stakeholders to establish a suitable basis for appropriate reporting based on the lists provided below.

3.5.1 Mandatory reporting under Article 43

A contracting authority is required to draw up a written report on every contract and framework agreement and on the establishment of a dynamic purchasing system. The contracting authority must send the written report to the European Commission if requested to do so. The written report must contain (as a minimum) the following:

- Name and address of the contracting authority
- Subject matter of the contract, framework agreement or dynamic purchasing system

- Value of the contract, framework agreement or dynamic purchasing system
- Names of the successful economic operators (candidates or tenderers) and the reasons for their selection
- Names of the rejected economic operators (candidates or tenderers) and the reasons for their rejection
- Reasons for the rejection of tenders found to be abnormally low
- Name of the successful economic operator and the reason for its selection. If known, the share of the contract or framework agreement that the successful economic operator intends to sub-contract to third parties
- For negotiated and competitive dialogue procedures, the circumstances specified in the EC directive justifying the use of these procedures
- Where a contracting authority has decided not to award a contract or framework agreement or to establish a dynamic purchasing system, the reason(s) why.

3.5.2 Examples of reporting on procurement activity

It may be that senior managers in the contracting authority:

- want to keep only a digest of the information and nothing else;
- want a digest of the information and other information kept, to be reviewed as and when needed;
- prefer to have a comprehensive report of activity.

The information below is divided into information that is:

- related to a single procurement;
- to be placed in an annual report of activity.

The information in the annual report could be adapted for smaller quarterly or monthly reports

3.6 REPORTING ON A SPECIFIC PROCUREMENT

A brief introductory sentence about the specific procurement will help to put the following list of reporting options in context:

- Comparisons with the procurement plan and budget
  - Progress in terms of time and budget of a partially completed project
  - Outcome in terms of time and budget of a completed project
  - Major lessons learned that impact on future procurement activity
  - Savings

3.7 ANNUAL REPORTING

Annual reports should include, where appropriate, the following six main spending figures:

1. Total spending
2. Spending by stakeholder area
3. Spending by economic operator
4. Spending by type of goods, works, materials or services
5. Spending by size of order
6. Trend of spending of each of the above, presented by using charts as well as figures

The reports could also include the following information:

- Number of purchase orders, invitations to tender and economic operator tenders corresponding to the above main spending figures 1-6
- Spending analysed according to the following ratios:
  - Average spending per economic operator
  - Average spending per member of the procurement team
  - Average spending per employee
- Savings made in procurement processes, analysed according to the main spending figures 1-6 above
- Compliance with internal legal processes
  - Number of non-compliant incidents within the period
  - Actions taken to resolve non-compliant activity
- Compliance with external legal processes
  - Number of non-compliant incidents within the period
  - Actions taken to resolve non-compliant activity
  - Contracts awarded without a competitive process – in absolute numbers and with the justification for such action
  - Contracts awarded without a competitive process – as a proportion of total orders
  - Contracts awarded without a competitive process – as a proportion of total spending
- Number of transactions processed by the procurement team:
  - Requisitions
  - Procurement plans
  - Invitations to tender despatched
  - Tenders received
  - Notices placed
  - Invoices processed
  - Invoice queries
  - Contract variations
  - Challenges to decisions
- Analysis of economic operators
  - Value of spending with an economic operator
  - Economic operators analysed by country
  - Economic operators analysed by area of the country
  - Number of tenders accepted as a percentage of number of tenders submitted
  - Number of process improvements made during the period resulting in cost savings, greater accuracy or time saved
- Number of process improvements identified but not yet enacted
- Average order value
- Number of electronic orders placed
- Value of stock, stock turnover and wastage (according to the main spending figures 1-6 above)
- Days lost through sickness
- Percentage of staff who have passed exams to be qualified as procurement officers (Localisation – they may not have a body to qualify them)
- Cost of the procurement department as a proportion of total spending

4. ROLE OF THE PROCUREMENT OFFICER – LINKED TO THE PROCUREMENT PROCESS

This section takes each of the process steps identified in the procurement process model in module B2 and provides an objective for the process, a list of procurement officer actions, a note on tools and/or templates used, and the process output sought.

4.1 ROLE AND ACTIVITIES DURING PREPARATION FOR PROCUREMENT

The process steps in preparation for procurement are:

1. Pre-planning and annual procurement plan
2. Determining the needs
3. Procurement planning
4. Market review
5. Specification
6. Performance measures
7. Contract terms and conditions
8. Constructing business case
9. Approval
10. Preparing procurement notices, including contract notices
11. Preparing invitation to tender (ITT)

Step 1 – Pre-planning and annual procurement plan	
Step objective(s)	To propose a plan of the procurement activity to be undertaken for the next financial year
Procurement officer actions	Procurement officers will need to: 1. Start three to four months before the beginning of the year 2. Work with stakeholders to identify what they must purchase during the period 3. Test the budgets available against the likely market costs 4. Consider the bundling and/or unbundling of requirements likely to attract economic operators (see discussion in A4 on lots and bundling) 5. Advise on lot strategy and contract strategy (these aspects are covered in modules A4, C1 and C2)
Tools and templates used	Use templates from previous years
Outputs	A considered, itemised time-phased list of procurement requirements on which individual procurement plans can be based. Input to a prior indicative notice (refer to modules C4 and E2)

Step 2 – Determining the needs	
Step objective(s)	To explore the basic needs of the stakeholder(s), consider options and form the basis for an individual plan and a specification
Procurement officer actions	Procurement officers will need to: 1. Obtain an outline description of the requirement from the stakeholders 2. Debate the options available 3. Explore what is available 4. Explore what others authorities have done
Tools and templates used	Internet searches, networking
Outputs	A series of options for the delivery of the goods or services

Step 3 – Procurement planning – individual procurement level	
Step objective(s)	To lay down a plan for the procurement of specific goods, works, supplies or services
Procurement officer actions	Procurement officers will need to: 1. Draft a time-phased plan for the procurement with stakeholders and submit it for approval where necessary 2. Note the specific time and process requirements of internal governance and external legal requirements
Tools and templates used	A procurement plan template (refer to the sample provided in module C1)
Outputs	A time-phased, approved plan that everyone can work to

Step 4 – Market review	
Step objective(s)	To review the supply market from which likely economic operators will emerge
Procurement officer actions	Procurement officers will need to: 1. Research the state of the market and its complexity 2. Obtain information about potential solutions
Tools and templates used	Internet searches and networking
Outputs	An informed understanding about the market

Step 5 – Specification	
Step objective(s)	To arrive at a generic statement of the goods, works, supplies or services required by the stakeholders
Procurement officer actions	The procurement officer must advise upon: 1. The state of the supply market 2. Supply options 3. Aspects of best practice in drawing up a specification 4. How EC directives support best practice by insisting that competition is encouraged
Tools and templates used	1. Templates of specifications related to the goods or service 2. Checklists of things to be included/avoided
Outputs	A generic description of the required attributes fundamental to the needs of the prime user of the requirement, which includes an indication of how fitness for purpose will be measured

Step 6 – Performance measures	
Step objective(s)	To state the performance that, if achieved by an economic operator, will meet the objectives of the procurement
Procurement officer actions	Procurement officers will need to: 1. Understand what performance options are available 2. Understand what other authorities have done on equivalent procurement 3. Advise the stakeholders on performance options 4. Ensure that a multi-disciplinary team composed of appropriately competent people is available to set performance criteria. For complex projects, different technical specialists may need to be drawn together to evaluate different parts of the requirement
Tools and templates used	Templates for similar purchases
Outputs	A validated specification. A clear statement of what good performance will look like when it is delivered. Module G3 deals with this in more detail

Step 7 – Contract terms and conditions	
Step objective(s)	To identify the terms and conditions that the contracting authority will apply to the procurement
Procurement officer actions	Procurement officers will need to: 1. Understand the risks in the procurement 2. Select the appropriate terms and conditions from the authorised terms and conditions 3. Draft amendments to terms and conditions from the authorised version (where they are permitted to do so) 4. Use internationally recognised terms and conditions where appropriate to encourage competition 5. Gain authorisation for amendments
Tools and templates used	Standard sets of terms and conditions, with options depending upon the procurement
Outputs	A clear set of terms and conditions for this procurement that will meet the needs of the stakeholder and the authority

Step 8 – Constructing business case	
Step objective(s)	To ensure that there is a sound business case for the money being spent
Procurement officer actions	Procurement officers will need to: 1. Work with stakeholders and financial colleagues to construct a business case that demonstrates a payback 2. Understand, document and calculate all of the costs and benefits relative to a given procurement and ensure that there is an appropriate level of payback
Tools and templates used	Business case templates
Outputs	A sound business case demonstrating a payback

Step 9 – Approval	
Step objective(s)	To gain the necessary approval for the procurement to go ahead
Procurement officer actions	Procurement officers will need to: 1. Submit or contribute to the submission of the evidence required by those tasked with signing off on the procurement. This may be: ■ A business case ■ A collection of documents ■ A presentation ■ An electronic transaction
Tools and templates used	Internal legal documents and processes
Outputs	An approval, a request for more information, or a rejection

Step 10 – Preparing procurement contract notice	
Step objective(s)	To prepare the procurement notice for publication
Procurement officer actions	Procurement officers will need to take the specification, procurement plan, performance criteria and terms and conditions to create the procurement notice. Module E2 describes this in detail
Tools and templates used	Standard form contract notices – refer to module E2
Outputs	A notice ready to be published

Step 11 – Preparing invitation to tender (ITT)	
Step objective(s)	To prepare an invitation to tender (ITT) to send to economic operators
Procurement officer actions	Procurement officers will need to: 1. Use the specification, procurement plan, performance criteria and terms and conditions to create an appropriate invitation to tender 2. Ensure that the evaluation criteria are included in the ITT package 3. Ensure that the information within the package to be despatched to economic operators is: ■ Accurate ■ Complete with all necessary attachments ■ Unbiased (seen not to favour one economic operator) ■ Adequately detailed ■ Clear ■ Attractive to economic operators wanting the business ■ Checked for errors ■ Clear about how, when and where it must be returned ■ Compliant with the requirements in the Directive (see C4 for information on the content of the ITT)
Tools and templates used	12. Standard templates for invitations to tender 13. Checklist of what to include
Outputs	An ITT ready to be sent to economic operators

4.2 ROLE AND ACTIVITIES WHEN RUNNING THE PROCUREMENT EXERCISE

This section considers the activities necessary to run the procurement exercise (steps 12 to 23 in the total procurement process). The process steps within this division are:

12. Publishing procurement notice
13. Supplying ITT
14. Handling questions
15. Receiving tenders
16. Selection (qualification) of economic operators
17. Evaluation
18. Clarification
19. Award approval
20. Standstill period
21. Tender protest and contract review
22. Award of contract
23. Publishing contract award notice

Step 12 – Publishing procurement notice	
Step objective(s)	To make the requirement known to the supply market via the *Official Journal of the EU (OJEU)*
Procurement officer actions	Procurement officers will need to despatch the contract notice for publication. The publishing of a buyer profile is encouraged. The buyer profile may include prior information notices, information on ongoing invitations to tender, schedules of purchases, contracts concluded, procedures cancelled, and any useful general information, such as a contact point, telephone and fax numbers, a mailing address and an e-mail address This process and statutory time scales are described in module E2 and C4
Tools and templates used	Standard electronic processes (localisation)
Outputs	A requirement visible to the supply market

Step 13 – Supplying ITT	
Step objective(s)	To manually or electronically send appropriate information about the requirement to potential economic operators requesting it
Procurement officer actions	Procurement officers will need to: 1. Act as the focal point for the ITT between the contracting authority and the supply market 2. Ensure that all economic operators receive the same information. The processes are described in module C4 *NB:* This step will not follow step 12 on the restricted or negotiated procedures, where the economic operators will first be selected on the basis of the initial request to participate.
Tools and templates used	e-mail or postal services
Outputs	A number of economic operators considering the requirement as specified and advertised to the supply market

Step 14 – Handling questions	
Step objective(s)	To ensure that all economic operators have the best possible understanding of the contracting authority's requirement
Procurement officer actions	Procurement officers will need to: 1. Provide a communication channel for economic operators to pose both technical and commercial questions concerning the contracting authority's requirement 2. Receive questions from economic operators concerning the requirement 3. Answer promptly economic operators' technical and commercial questions concerning the requirement 4. Circulate all questions and all answers to all economic operators 5. Ensure that there is only one communication channel 6. Comply with statutory requirements and time scales (see Module C4) The process is fully described in module E1
Tools and templates used	e-mail and word processing systems
Outputs	A group of economic operators fully cognisant of the requirement of the contracting authority and able to submit a first-class tender

Step 15 – Receiving tenders	
Step objective(s)	To provide a secure means of receiving and storing economic operators' tenders until they are opened and to deliver a demonstrably transparent tender opening process
Procurement officer actions	Action here will vary depending upon whether the receipt is electronic, Internet-based or manual. Procurement officers will need to: 1. Ensure that the process provides for logging and recording of tenders separately from procurement where this is necessary 2. Ensure that no one has access to tenders or is able to understand who has tendered and who has not tendered 3. Provide a locked location for physical tenders received, which may be in another department 4. Provide a secure electronic location for e-mailed tenders (liaison with IT colleagues will be necessary) 5. Ensure that Internet-based tenders are secure (liaison with IT colleagues will be necessary) 6. Organise appropriate opening procedures where senior officials wish to be involved in an official opening ceremony. This will include booking a room and securing a slot on the agenda of a senior official in the contracting authority 7. Notify economic operators of the location of a public opening ceremony 8. Check for missing documentation 9. Reject late tenders, inform economic operators and return the tenders unopened 10. Reject improperly submitted tenders and inform economic operators 11. Make sure information does not leak out to economic operators
Tools and templates used	IT systems
Outputs	Secure receipt and opening of tenders that are have not been viewed by anyone since they were despatched by the economic operators

Step 16 – Selection (qualification) of economic operators	
Step objective(s)	To confirm whether the economic operators are qualified to perform the contract to be awarded and to select the best qualified tenders if that approach is being used
Procurement officer actions	Procurement officers will need to: 1. Evaluate the information submitted by economic operators 2. Ensure that a competent person checks the financial probity of the supplying contracting authority 3. Check that the economic operator meets the standards of competency set by the contracting authority 4. Check that key individuals within the economic operator are competent and have no criminal convictions or other circumstances that would prevent them from working with the contracting authority 5. Discuss any issues that arise with economic operators 6. Make sure that information does not leak out to economic operators Qualification of economic operators is discussed in more detail in module E3
Tools and templates used	Financial ratio analysis, questionnaires on probity
Outputs	A robust view of an organisation that is fit to supply the contracting authority with its requirement

Step 17 – Evaluation	
Step objective(s)	To review the tenders made by economic operators and compare them so as to understand which tender(s) has (have) the best opportunity of meeting the needs of the contracting authority
Procurement officer actions	Procurement officers will need to: 1. Ensure that a multi-disciplinary team composed of appropriately competent people is available to review different aspects of the economic operators' tenders. For complex projects different technical specialists may need to be drawn together to evaluate different parts of the tender 2. Ensure that each economic operator's tender is evaluated fairly and in an unbiased manner on a lowest price or MEAT basis in accordance with the pre-set criteria 3. Ensure that the same scoring mechanism is used for all tenders 4. Record the scores and the decisions 5. Evaluate the commercial aspects of the economic operators' tenders 6. Make sure that information does not leak out to economic operators 7. Check for arithmetic errors
Tools and templates used	Spreadsheets and templates based upon the weighting and scoring mechanism and the specific requirement
Outputs	A prioritised group of tenders where an unbiased process has been used to identify tender(s) that best meet the needs of the contracting authority. A recommendation of which tender to accept or a decision of which tender to accept

Step 18 – Clarification	
Step objective(s)	To clarify parts of the economic operators' tender that are unclear to persons in the contracting authority. This step may not be necessary if the tender is perfectly clear.
Procurement officer actions	Procurement officers will need to: 1. Take comments from members of the multi-disciplinary evaluation team and contact economic operators to clarify the points at issue 2. Ask economic operators to review arithmetic errors 3. Refrain from being drawn into negotiation 4. Feedback clarified points to the evaluation team or panel
Tools and templates used	e-mail and word processing software
Outputs	A clear view of what is being offered. A recommendation of which tender to accept or a decision of which tender to accept. Refer also to module E5

Step 19 – Award approval	
Step objective(s)	To seek the necessary approvals within the contracting authority before the procurement can move forward
Procurement officer actions	Procurement officers will need to: 1. Provide information to senior people within the contracting authority concerning the tenders made by economic operators and the rationale for the decision or recommendation being made. 2. Keep the recommendation and/or decision secret until it is fully approved 3. Make sure information does not leak out to economic operators
Tools and templates used	Recommendation templates
Outputs	An approved go-ahead to purchase

Step 20 – Standstill period	
Step objective(s)	To formally administer the statutory standstill period
Procurement officer actions	Procurement officers will need to: 1. Issue the contract award decision notice in the required format 2. Run the 10-15 day standstill period 3. Comply with the statutory provisions
Tools and templates used	Standard templates should be prepared, but feedback should be specific to the requirement being procured and the economic operator's tender
Outputs	The output of this step in the process is beyond the control of the contracting officer. It may be a challenge or it may be a formal award of contract. Challenges are dealt with in module F1

Step 21 – Tender protest and contract review	
Step objective(s)	To contribute to the management of the challenge and contract review - Localisation required
Procurement officer actions	Procurement officers will need to: 1. Inform stakeholders and colleagues in the legal department of the challenge (modules E5 and F1 deal with this area in more detail) 2. Inform audit where the challenge relates to fraud 3. Notify the successful economic operator of the challenge so that it is understood that the supply cannot immediately proceed 4. Review the decision with the tender board and/or others as appropriate. Where this review leads to a conclusion that the decision was not properly made, the contracting authority may choose to re-tender the requirement 5. Prepare for a court case where this may occur 6. Prepare for alternative dispute resolution where this may occur (refer to module G2)
Tools and templates used	None
Outputs	The output of this process step is beyond the control of the contracting officer. It may be a formal award of contract, the contract may be set aside, or the court may award damages to other economic operators

Step 22 – Award of contract	
Step objective(s)	To formally notify the economic operator that it has been selected as the provider of the goods, works, supplies or services as required and specified by the contracting authority
Procurement officer actions	Procurement officers will need to: 1. Prepare the contractual documents, possibly with legal colleagues 2. Organise the signing of the contractual documents by both parties 3. Request and receive performance bonds or other forms of security from economic operators
Tools and templates used	Standard contractual documents, standard letters and briefing formats
Outputs	A contractual arrangement with an economic operator

Step 23 – Publishing contract award notice	
Step objective(s)	To publish a notice of the contract
Procurement officer actions	Procurement officers will need to: 1. Use standard form contract notices to prepare the notice This process is described in module E2
Tools and templates used	Standard form contract notices
Outputs	A notice is published in accordance with the EC directives and national law

4.3 ROLE AND ACTIVITIES DURING CONTRACT MANAGEMENT

This section considers the activities necessary to run the procurement exercise (steps 24 to 39 in the total procurement process). The process steps within this stage are:

24. Internal communication
25. Engaging with contractor
26. Enabling ordering mechanisms
27. Acknowledgement
28. Expediting
29. Quality control
30. Special transportation
31. Receipt
32. Inspection
33. Storage and control
34. Issuing to stakeholder
35. Payment
36. Performance review
37. Continuous improvement
38. Disposal
39. Close-out

Step 24 – Internal communication	
Step objective(s)	To communicate to the relevant stakeholders in the contracting authority the specific nature of the contractual arrangements agreed with the economic operator(s). This step is vital wherever one group in the contracting authority procures the contract and another manages it. A good handover is essential.
Procurement officer actions	1. Procurement officers will need to communicate information about the new contract to: ■ persons managing the contract ■ persons who will be requesting the service ■ persons who will be using the service ■ IT department - to set up, amend and remove entries from computer systems ■ finance department - to make sure that payments go to the correct places ■ departments concerned in organising site access ■ persons engaged in receiving or inspecting consignments ■ economic operators concerned, if a handover is needed ■ others involved in actions to ensure the effective implementation of the contract, as necessary
Tools and templates used	IT systems and e-mail
Outputs	Everyone in the contracting authority who needs to know about the contract does in fact know what they need to know, including when the new contract will start

Step 25 – Engaging with contractor	
Step objective(s)	To move from competing with the persons working for the economic operator to legitimately collaborating with them
Procurement officer actions	Procurement officers will need to: 1. Meet with persons working for the economic operator. This may be the first time that these persons, who are actually tasked with delivering the goods or services, will meet with procurement and stakeholder staff. 2. Involve stakeholders in appropriate meetings and set up communication channels between key stakeholders and key persons working with the economic operator. There is no single, finite list of stakeholders to be engaged – this will depend upon the contract. A typical list could include: ■ persons who will be requesting the service ■ persons who will be using the service ■ IT department – to set up, amend and remove entries from computer systems ■ finance department – to make sure that payments go to the correct places ■ departments concerned in organising site access ■ persons engaged in receiving or inspecting consignments ■ others as necessary 3. Undertake specific actions, which could include: ■ planning cutover from the current economic operator (if appropriate) ■ planning introduction of the requirement through a new contractor ■ considering systems integration ■ considering ordering mechanisms ■ organising accommodation, site passes, etc. ■ pilot run, where appropriate ■ handover of stocks or other equipment from in-house service providers or current economic operators ■ press releases, where appropriate ■ others actions to ensure the effective implementation of the contract, as necessary 4. Progressively carry out handover activity from procurement/contract management staff to stakeholders, where appropriate 5. Check the progress of handover
Tools and templates used	Diary systems to be used to prompt checks
Outputs	A good working relationship between the persons from the economic operator and the procurement and contract management persons in the contracting authority

Step 26 – Enabling ordering mechanisms	
Step objective(s)	To ensure that the mechanisms to be used for communicating to economic operators under the contract are available for procurement and stakeholders to use when necessary This is particularly relevant where a framework agreement has been set up and other stakeholders will make call-off orders within the framework, as it forms part of the three-way match.
Procurement officer actions	Procurement officers will need to: 1. Ensure that IT, stakeholders and economic operators discuss and agree specific means of communication for all transactions within a framework or call-off agreement 2. Ensure that forms for paper-based systems are prepared with appropriate information 3. Ensure that access to electronic systems is provided on time for potential system users 4. Test or ensure that electronic processes are tested with sample or dummy orders 5. Ensure that contact numbers and e-mail addresses are exchanged 6. Organise a launch meeting where appropriate
Tools and templates used	IT systems, software templates and paper templates
Outputs	An ordering mechanism that is tested and ready to go

Step 27 – Acknowledgement	
Step objective(s)	To ensure that this document does not contradict the agreed contract or introduce new terms and conditions
Procurement officer actions	Procurement officers will need to: 1. Check the document thoroughly 2. Seek legal advice where necessary 3. Discuss the document with the economic operator if necessary Localisation issue here – the different legal systems will treat the acknowledgement differently
Tools and templates used	The signed contract
Outputs	A reconciled situation, where the acknowledgement attempts to introduce new terms and conditions

Step 28 – Expediting	
Step objective(s)	To ensure timely delivery of works, supplies and services
Procurement officer actions	Procurement officers will need to ensure that an appropriate level of expediting is completed (by contract managers, stakeholders, or procurement officers themselves). The person responsible for expediting should: 1. Know whom in the economic operator to contact about delivery and discuss a means of expediting with them. This can include: ■ progress reports submitted on agreed dates ■ planned conference calls ■ exception reporting by economic operators (reporting assuming that delivery will be on time unless exceptionally the economic operator duly informs the contracting authority) 2. Devise a means of keeping a diary of actions when necessary and therefore be proactive on behalf of stakeholders 3. Obtain the facts about the situation before chasing economic operators 4. Contact the economic operator contact point by e-mail, fax or phone 5. Be persistent 6. Be assertive 7. Escalate problems in an economic operator's organisation as necessary 8. Report the results of actions to stakeholders 9. Seek to identify systemic problems and address them internally and with economic operators
Tools and templates used	Expedite templates
Outputs	1. The best possible delivery 2. The remedy of a bad situation 3. Lessons learned for future requirements

Step 29 – Quality control	
Step objective(s)	To ensure that, where this step is necessary, a qualified person confirms that the requirement is progressing properly
Procurement officer actions	Procurement officers will need to: 1. Understand when this step is necessary and when it is not 2. Ensure that the plan for this purchase includes this step 3. Ensure that a person with appropriate skills carries out the assessment 4. Keep a diary of the timing of the assessment and check that it has been carried out 5. Record the outcome of the assessment 6. Address any issues from the assessment with the economic operator and stakeholders internally 7. Ensure that links are made to payment triggers when necessary
Tools and templates used	Diary
Outputs	Progress is monitored satisfactorily

Step 30 – Special transportation	
Step objective(s)	To organise special transportation and unloading services when appropriate
Procurement officer actions	Procurement officers will need to: 1. Understand which procurements require this step 2. Keep a diary of actions when necessary 3. Link to economic operators and other stakeholders, who may be able to organise the requirements 4. Establish contracts with the economic operator for transportation or unloading as necessary
Tools and templates used	Diary
Outputs	Delivery occurs as planned without problems

Step 31 – Receipt	
Step objective(s)	To ensure that a formal receipt is promptly made by an authorised person for each requirement received
Procurement officer actions	Procurement officers will need to: 1. Take no action at all where receipts are processed via a store that has a formal goods receipt procedure 2. Ensure that stakeholders make receipt transactions that are linked to purchase orders and to the payment system, particularly for services 3. Contact economic operators where delivery quantity is greater or lesser than the quantity expected
Tools and templates used	None
Outputs	The second stage of the three-way match is completed

Step 32 – Inspection	
Step objective(s)	To ensure that the goods and services received are fit for purpose
Procurement officer actions	Procurement officers will need to: 1. Take no action at all where inspection is processed via other competent departments or where specialist economic operators are used 2. Ensure that stakeholders clarify that acceptance transactions are linked to purchase orders and to the payment system, particularly for services 3. Contact economic operators where delivery quality is lower than expected 4. Organise the return of faulty goods to economic operators 5. Expedite delivery of replacement goods from economic operators 6. Close out the order
Tools and templates used	Procurement systems
Outputs	Only goods that are fit for purpose are flagged as acceptable and forwarded for payment

Step 33 – Storage and control	
Step objective(s)	To store and control goods and materials in such a way that they can be readily used by stakeholder as and when required
Procurement officer actions	Procurement officers will need to: 1. Take no action at all where a storage facility is run by professionals 2. Help stakeholders by providing or obtaining advice on suitable means of storage
Tools and templates used	None
Outputs	Goods and materials are in good condition when needed by stakeholders

Step 34 – Issuing to stakeholder	
Step objective(s)	To make goods and materials available to authorised stakeholders in the contracting authority when needed
Procurement officer actions	Procurement officers will need to: 1. Take no action at all where a storage facility is run by professionals 2. Help stakeholders by providing or obtaining advice on suitable issuing procedures
Tools and templates used	None
Outputs	Goods and materials are issued to authorised stakeholders and costs are transferred to their budget

Step 35 – Payment	
Step objective(s)	To make authorised payments to economic operators
Procurement officer actions	Procurement officers will need to: 1. Take no action at all where an accounts payable system is run by professionals 2. Help stakeholders by providing or obtaining advice on suitable payment procedures 3. Receive queries from accounts where economic operators have invoiced incorrectly 4. Contact economic operators to resolve invoice queries
Tools and templates used	None
Outputs	Authorised payment is made against ordered and accepted items

Step 36 – Performance review	
Step objective(s)	To review the performance of the works, supplies and services within the contracting authority against the quoted, specified and agreed criteria
Procurement officer actions	Procurement officers will need to: 1. Organise a meeting of stakeholders to review performance, with the aim of understanding how well the goods, works, materials or services have performed 2. Attempt to involve those who made the original assessment 3. Involve economic operators where appropriate 4. Record the results of the review 5. Internally discuss lessons learned for the next time 6. Discuss changes with economic operators Modules A4, B7 and G3 include more detail on performance measurement
Tools and templates used	The original business case and the documentation used to make decisions through the procurement process should be reviewed against actual performance
Outputs	An assessment of how proposed performance and actual performance compare, together with lessons learned for the next time

Step 37 – Continuous improvement	
Step objective(s)	To review the procurement process and the goods, works, materials and services bought, identifying areas for improvement that can be applied to future procurement
Procurement officer actions	Procurement officers will need to: 1. Organise a meeting of stakeholders and procurement colleagues 2. Attempt to involve those who made the original assessment 3. Record the results of the review 4. Propose changes to processes as an outcome of the review
Tools and templates used	Continuous improvement checklist linked to the procurement process
Outputs	Improvements to the procurement process based on the experience of the current procurement

Step 38 – Disposal	
Step objective(s)	To dispose of goods, works and materials in an ethical and environmentally friendly way, whilst ensuring value-for-money for the contracting authority
Procurement officer actions	Procurement officers will need to: 1. Do nothing where other competent departments manage this process 2. Ensure that no confidential data has been disclosed 3. Organise a competition of potential customers to purchase the items 4. Go through a process of ensuring the probity of the customers 5. Run the process fairly for all customers 6. Seek value-for-money 7. Ensure that payment is received before anything is released to customers
Tools and templates used	Standard forms and templates
Outputs	Disposal, with value-for-money

Step 39 – Close-out	
Step objective(s)	To complete all procurement steps and administrative actions relating to the contract, settle all disputes and make final payments
Procurement officer actions	Procurement officers will need to: 1. Complete any price revisions 2. Receive the contractor's final closing statement 3. Ensure that all indirect costs are settled 4. Ensure that all subcontracts are settled by the prime contractor (where appropriate) 5. Ensure that there are no outstanding change proposals 6. Identify excess funds for redistribution 7. Review contract data and confirm that all deliveries have been accepted Refer to module G1
Tools and templates used	Close out checklist
Outputs	Completed procurement process

SECTION 3
EXERCISES

EXERCISE 1
ATTRIBUTES OF A PROCUREMENT OFFICER

An "attribute" is defined as "a quality or feature as a characteristic or inherent part of someone or something". What are the attributes of a procurement officer? Weigh them up.

EXERCISE 2
COMPETENCIES OF A PROCUREMENT OFFICER

Take the information from the previous exercise and the document which forms section three of module B2 and make notes on what you feel are the key competencies of a procurement officer.

PROCESS MANAGEMENT	
FINANCIAL UNDERSTANDING	
CONTRACT SELECTION AND LEGAL	
CONTRACT MANAGEMENT	
SUPPLY CHAIN ANALYSIS	
SUPPLY BASE ANALYSIS	
RISK IDENTIFICATION & MANAGEMENT	
COMMUNICATION SKILLS	
STAKEHOLDER MANAGEMENT	

EXERCISE 3
STAKEHOLDERS

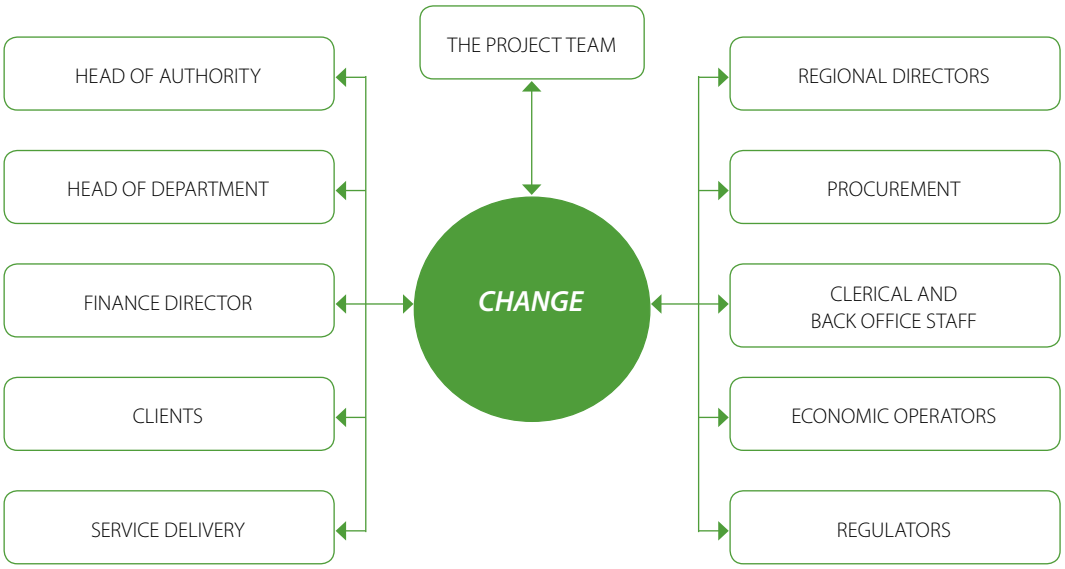
Stakeholders can be defined as "anyone who has an interest in something". In our context we are keen to identify stakeholders in the procurement process. Can you:

1. Identify who in your own organisation has a "stake" or "interest" in the process of procurement
2. Identify what it is that the stakeholders may want from the process and people like you who are deeply involved in the process.

No.	Stakeholder name	What the stakeholder wants
1		
2		
3		
4		
5		
6		
7		
8		
9		
10		
11		
12		

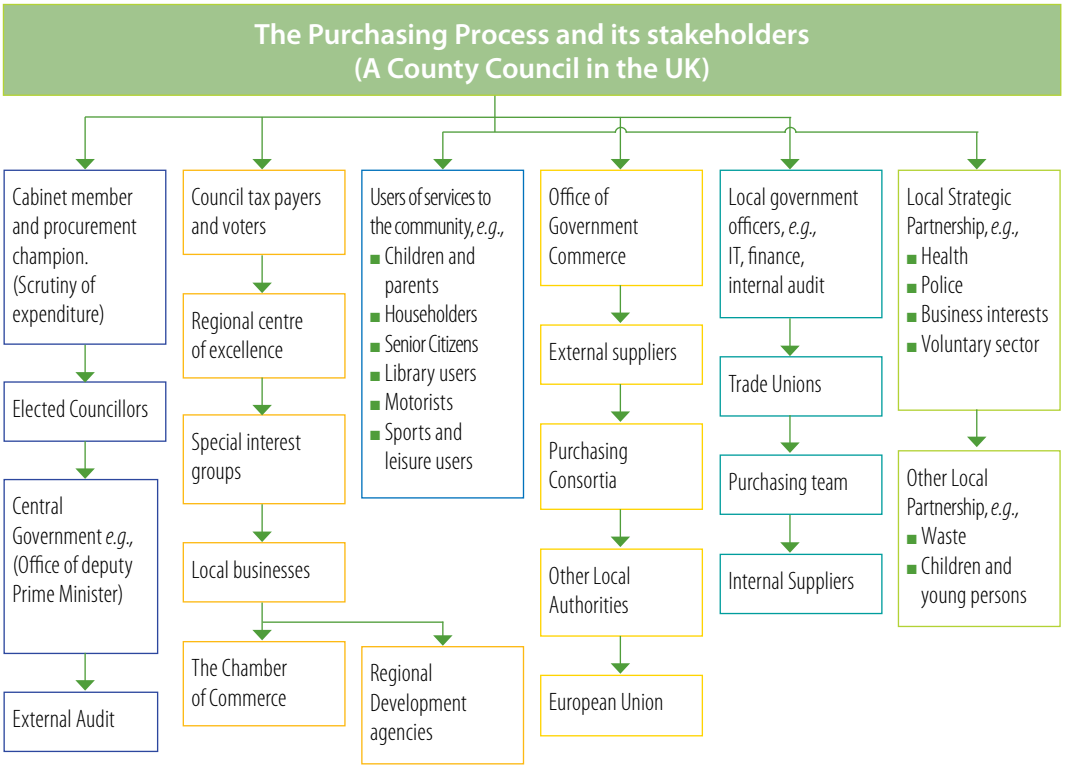
INFORMATION SECTION
STAKEHOLDER EXAMPLES

This group of stakeholders might be involved in a change project. It could be a project to introduce the EU procurement legislation to a contracting authority.



INFORMATION SECTION
STAKEHOLDER EXAMPLES

This is a real group of stakeholders from an English county council.



NB: The hierarchical sequence of the business functions in this chart is not meant to give prominence to one function over another, it is simply a convenient way of grouping stakeholders together in this environment. The author would like to thank Fiona Holbourn of Leicestershire County Council and Ken May of ESPO for their assistance in refining this diagram.

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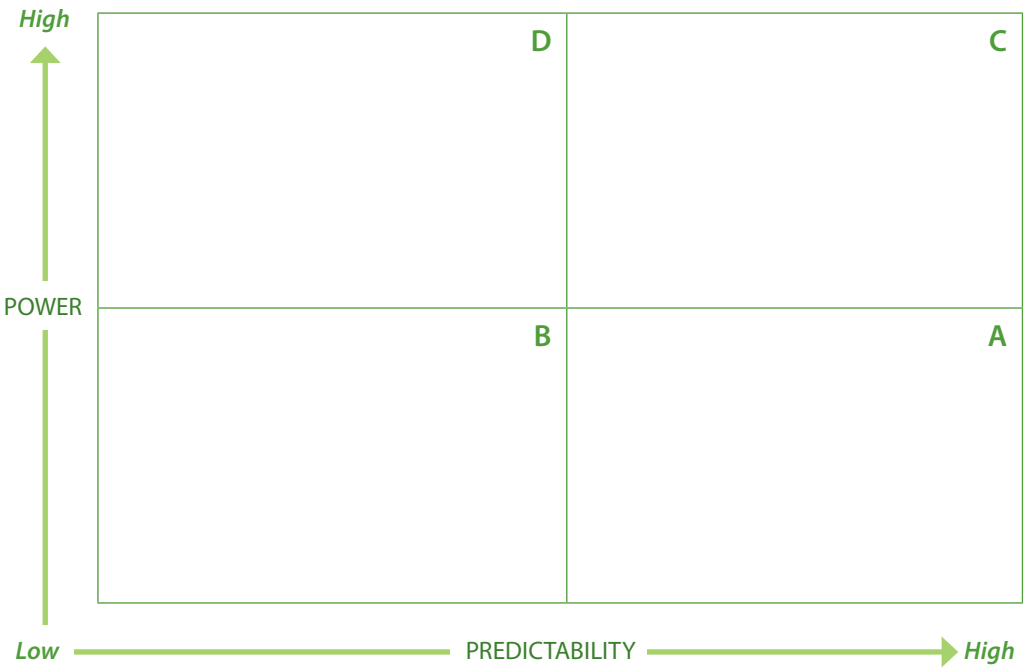
EXERCISE 4
POWER

Who has power in your organisation? The trainer will ask you to work in groups to answer some specific questions and draw up a list.

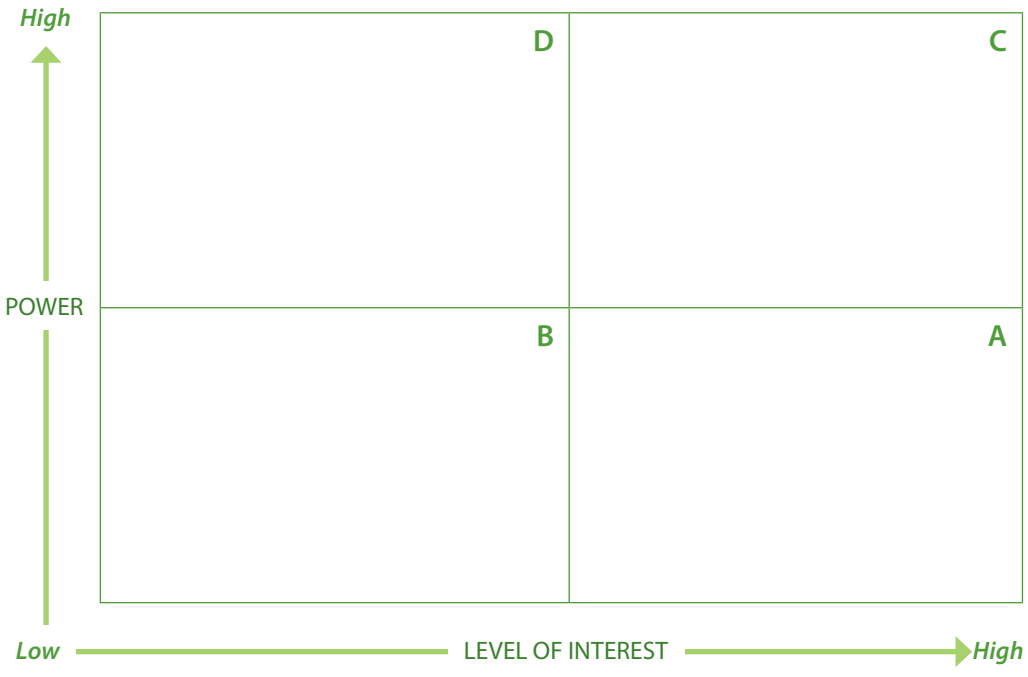
EXERCISE 5
STAKEHOLDER MAPPING

Assume you are making a major procurement in your organisation. Choose a requirement that you are familiar with, or assume a new computer system is to be procured. Identify the stakeholders and map them into the two matrices below. *There is no specimen answer to this exercise, as it is dependent on the organisation of the participant.*

Matrix One – Power and Predictability



Matrix Two – Power and Interest



INFORMATION SECTION

CASE STUDY – COMPETENT PEOPLE DELIVER RESULTS

Basic data about the institution

This case relates to a group of seven publicly owned hospitals spending several hundred million euros.

Introduction

Within the group of publicly owned hospitals there was difficulty with the expert surgeons and other key medical staff. One example of the difficulty was where the experts identified the X-ray machine from a given economic operator and instructed the procurement team to purchase "that" machine.

The course of the event(s)

The procurement staff pointed out that the machine would cost EUR 300 000 and that this was above the threshold requiring an OJEU notice. The view of the expert was, "You do what you like, but get me that machine."

The procurement team undertook a stakeholder analysis and discovered that other stakeholders did value the procurement process and understood the need for transparency, fairness and value-for-money.

These stakeholders were particularly interested when the procurement team explained the processes, risks and the consequences of simply awarding a EUR 300 000 contract to a given economic operator. As some of the stakeholders were very senior within the organisation, they were able to meet the experts and advise them that the solution proposed by the experts was not advisable and was not going to take place.

A briefing session using an independent trainer was then organised to make sure that the experts understood how procurement must be carried out to achieve value-for-money and follow good practices.

The experts have since accepted the procurement processes as the "right" approach and working within them. Some of them have become advocates of procurement within the group of hospitals.

Analysis of the event(s)

The stakeholder analysis tool enabled procurement people to obtain the support of decision makers who had the power to convince the experts.

Conclusion

Stakeholder analysis is vital at the start of the procurement process.

EXERCISE 6
ASPECTS OF GOOD RELATIONSHIPS

We must have relationships with the people who work for economic operators. What factors would you say make a "good" relationship?

EXERCISE 7
REPORTING

Assume that you are the head of procurement in a government department. You are aware that reports of activity are required under the directives; however, you want to demonstrate that you and your team are doing a brilliant job. Identify the information that you would provide to the governing board of your organisation to demonstrate this.

EXERCISE 8
THE ROLE OF THE PROCUREMENT OFFICER IN THE PROCUREMENT PROCESS

Your Task…

As directed by your tutor, take the steps of the procurement process allocated to you and identify:

- the objective of the step
- the actions that procurement officers need to take
- tools and templates that you would use
- outputs of the process.

Step number 2 – Determine the need	
Step objective(s)	
Procurement officer actions	
Tools and templates used	
Outputs	

Step number 05 – Specification	
Step objective(s)	
Procurement officer actions	
Tools and templates used	
Outputs	

Step number 06 – Performance measures	
Step objective(s)	
Procurement officer actions	
Tools and templates used	
Outputs	

Step number 07 – Terms and conditions	
Step objective(s)	
Procurement officer actions	
Tools and templates used	
Outputs	

Step number 11 – Prepare ITT	
Step objective(s)	
Procurement officer actions	
Tools and templates used	
Outputs	

Step number 14 – Handle questions	
Step objective(s)	
Procurement officer actions	
Tools and templates used	
Outputs	

Step number 15 – Receive tenders	
Step objective(s)	
Procurement officer actions	
Tools and templates used	
Outputs	

Step number 17 – Evaluation	
Step objective(s)	
Procurement officer actions	
Tools and templates used	
Outputs	

Step number 18 – Clarification	
Step objective(s)	
Procurement officer actions	
Tools and templates used	
Outputs	

Step number 19 – Award approval	
Step objective(s)	
Procurement officer actions	
Tools and templates used	
Outputs	

Step number 20 – Award contract	
Step objective(s)	
Procurement officer actions	
Tools and templates used	
Outputs	

Step number 22 – Internal communication	
Step objective(s)	
Procurement officer actions	
Tools and templates used	
Outputs	

Step number 23 – Engage with contractor	
Step objective(s)	
Procurement officer actions	
Tools and templates used	
Outputs	

Step number 26 – Expediting	
Step objective(s)	
Procurement officer actions	
Tools and templates used	
Outputs	

Step number 27 – Quality control	
Step objective(s)	
Procurement officer actions	
Tools and templates used	
Outputs	

Step number 34 – Performance review	
Step objective(s)	
Procurement officer actions	
Tools and templates used	
Outputs	

Step number 35 – Continuous improvement	
Step objective(s)	
Procurement officer actions	
Tools and templates used	
Outputs	

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. How would you describe the term "stakeholder" in a procurement context?
2. This module had a long list of issues about which a procurement officer should be a source of advice to stakeholders. Can you remember five of them?.
3. This module identified the competencies of a procurement officer. Process management was one of the nine identified. How many of the others can you remember?
4. The competency of process management had seven bullet points. Which of the bullets can you remember?
5. "Communicate" means to impart, participate, convey knowledge of or information about something, make known or to reveal by clear signs. To whom does a procurement officer need to communicate? (there were four directions)
6. Finish this sentence:

   "Irrespective of whom we are trying to communicate to, the communication must be…"
7. Relationships with people who work for economic operators may be characterised by seven points. Here are five of them; what two are missing?
   - Quality of information exchange
   - Openness in the relationship
   - Commitment to each other in the relationship
   - Risk assessment carried out by the parties
   - Risk management carried out by the parties
8. The nationality of the economic operator with which the contract or framework agreement has been concluded is one of the mandatory things that a contracting authority must report each calendar year by a given date. True or false?
9. Question 8 above only applies to framework agreements. True or false?
10. The text below relates to the actions of procurement officers during one step of the procurement process. What is that step?

    "Procurement officers will need to:

    1. Understand what performance options are available.
    2. Understand what other authorities have done on equivalent procurements.
    3. Advise the stakeholders on performance options.
    4. Ensure that a multidisciplinary team composed of appropriately competent people is available to set performance criteria. For complex projects, different technical specialists may need to be drawn together to evaluate different parts of the requirement."

Organisation at level of contracting authorities

MODULE B

Role of the evaluation panel / tender committee

PART 4

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this module are to make participants aware of:

1. The role of stakeholders in the procurement process
2. The specific role of the evaluation pane in evaluating economic operators' tenders
3. Information that can form the basis of their own guidance to stakeholders on their role within the procurement process

1.2 IMPORTANT ISSUES

Stakeholders are both customers of and contributors towards the success of the procurement process. Their keenness and involvement is vital to its success. However, their involvement must be channelled appropriately.

1.3 LINKS

Links to other modules appear throughout the text of this document, especially to modules B2 and B3; to some extent, the latter is a reciprocal of this module.

1.4 RELEVANCE

This module is relevant for all procurement officers, because they must all deal with stakeholders.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

This section will link to other areas referring more specifically to legal information.

LOCALISATION WILL NEED TO REFER TO SPECIFIC LEGAL DOCUMENTS

SECTION 2
NARRATIVE

OVERVIEW

This module B4 looks at the role of stakeholders in the evaluation of tenders, including the role and conduct of evaluation panels.

2.1 INTRODUCTION

A stakeholder can be defined as 'anyone who has a stake or interest in the process of procurement'. Persons who have been assigned roles in the end-user and in finance, legal and IT departments, as well as elected officials, will have a 'stake' in procurement.

To make this module as meaningful as possible, edited extracts of information provided by actual contracting authorities operating within the EU are included below. Modules E4 and E5 cover in more detail the setting of evaluation criteria, evaluation of tenders, and legal compliance.

2.2 THE OBJECTIVES OF EVALUATION

The objectives of evaluation include ensuring that:

- the solution meets (or exceeds) business aims, government policies, and technical requirements;
- potential economic operators are able to demonstrate the capacity and flexibility to meet changing business needs;
- the cost of the solution is within budget;
- the solution delivers significant savings wherever possible;
- potential economic operators meet all commercial and/or legal requirements;
- potential economic operators are able to successfully deliver against the defined service targets.

2.3 SELECTION OF THE EVALUATION PANEL

The evaluation panel should comprise a number of persons within the contracting authority who have a stake in the procurement and/or a stake in the process of procurement. In some countries, the requirements are regulated by national law. Even where this is the case, the following information will be of practical assistance. Localisation to describe this.

2.3.1 An example of governance guidance for stakeholders

One contracting authority has an instruction in its internal rules that states:

> "A tender evaluation panel will be established. Its composition will be determined by the value of the procurement.
>
> The composition of an evaluation panel will be determined by the value and complexity of the procurement. For low-value straightforward tenders, a panel may consist of two or more officers from the originating department working with a procurement officer. When more complex tenders require a range of expertise, the composition of the panel should reflect this."

2.3.2 A typical evaluation panel

Localisation: The exact nature of the evaluation panel will vary from country to country.

There is no single correct list of persons who should or who must be involved. A typical list could include the following:

- The procurement officer running the procurement: this person may have an opportunity to score the tenders or may simply serve as the facilitator or manager of the process;
- The budget-holder or most senior stakeholder in the procurement, or their nominee: this person (or persons) is the key customer and as such must have a role in evaluating the technical content of the economic operators' tenders;
- A technical specialist: this person is an employee within the contracting authority who has the in-depth technical capability to understand, comment on and query the economic operators' proposals;
- A consultant fulfilling the role of technical specialist;
- A commercial specialist: this person will evaluate the commercial aspects of the economic operators' tenders. This may be the role of a member of the procurement team or it may be another person who has been independent of the process;
- A financial specialist: this person is responsible for assessing the financial stability of the economic operators and possibly the financial and commercial aspects of the economic operators' tenders;
- A legal expert: this person is responsible for assessing the legal issues related to the economic operators' tenders;
- A person exercising a function that is not connected with the procurement: this person has the role of taking an independent view of the procurement on behalf of the whole contracting authority;
- A person from the governing body of the contracting authority: this person has the role of taking a strategic as well as independent view of the procurement on behalf of the whole contracting authority.

2.3.3 Involving the governing body

One contracting authority asked members of its governing body (the executive committee) to appoint persons to take part in the evaluation panel two months beforehand. Its request read:

> "Members are asked, therefore, to nominate two representatives from the Executive Committee to serve on the Tender Evaluation Panel. The commitment from Members would require the following:
>
> - Read the tender submission documentation for each economic operator (some procurement officer analysis of this information will be undertaken to assist this process)
> - Familiarise themselves with the tender evaluation methodology

- Attend the economic operators' presentations at (address deleted) on [date] and the Tender Evaluation Panel on [date]. These will probably be full working days, *i.e.* 9.00 a.m. to 5.00 p.m., dependent on the number of economic operators submitting tenders."

This contracting authority is flagging the time required from senior staff to attend the tender board.

2.3.4 A third example of guidance

Another contracting authority provides the following guidance for evaluation:

- "As a general principle, evaluation will always be undertaken by more than one person.
- For simple tenders the Director of the [contracting authority] or a delegated senior member of staff, and the [contracting authority]'s finance officer will normally evaluate the tenders.
- Complex and/or high value tenders will be evaluated by a panel of two or more [members], the Director of the [contracting authority], the finance officer and any other relevant senior member of staff. A representative and/or observer from an outside body may be invited to join the panel if applicable. Representatives will act as full panel members; observers will not take part in the decision process.
- All evaluation panel members will be fully aware of the procedures and criteria to be used throughout the selection process.
- All evaluation panel members will use the same ranking/evaluation forms.
- The chair of the panel will direct members as to the procedure to be applied."

2.3.5 A fourth example of guidance

A final example is given below:

"The evaluation panel comprises the following individuals:

- A facilitator. (Usually the person responsible for the tender process)
- Scorer 1. (Usually from the Department who will manage the contract)
- Scorer 2. (Usually from the Department who will manage the contract)
- Scorer 3. (Usually from the prime user of the purchase)
- Scorer 4. (A second user, who can be a union representative)"

2.3.6 Time, a vital consideration

The evaluation panel must allow enough time for evaluation. If short cuts are taken there will be risks of:

- not understanding what is tendered;
- uninformed decision-making;
- service delivery not meeting required needs;
- low value-for-money over the life of the contract.

Procurement officers need to determine the complexity of the evaluation, the number of stages, the number of economic operators, the composition of the evaluation panel, and the evaluation criteria.

Persons new to the evaluation process will require time to understand the process as well as the tenders.

2.3.7 A tabulated example

The following table is an example of the membership of an evaluation panel published on the Internet by one contracting authority (in this context 'commissioning' is equivalent to purchasing).

Name	Job Title	Role	Status on Project
All names have been removed	Commissioning manager universal services	Chair and project sponsor/ lead	Chair of board
	Commissioning officer home care	Vice chair and project sponsor / lead and technical support home care deliverability	Permanent panel member
	Procurement officer	Manage the tender project (recruited specifically to manage this tender)	Permanent panel
	Quality manager	Quality assurance	Permanent panel member
	Contract monitoring officer home care manager	Project support and technical support in relation to home care deliverability	Permanent panel member
	Support officer home care	Project administration	Permanent panel member
	Children's commissioning officer	Project support and technical project support in relation to specialist needs areas at the pre qualification and tender evaluation stage in relation to home care requirements for adults with mental health problems	Permanent panel member
	Specialist commissioning officer	Technical project support in relation to specialist needs areas at the pre- qualification and tender evaluation stage in relation to extra care sheltered, dementia, neuro rehab alcohol urgent care and other forms of adult specialist older people and physically disabled home care services	Occasional member as required
	Mental health commissioner	Technical project support in relation to specialist needs areas at the pre qualification and tender evaluation stage in relation to home care requirements for adults with mental health problems Occasional member as required	Occasional member as required
	Commissioner social care	Technical project support in relation to specialist needs areas at the pre- qualification and tender evaluation	Occasional member as required
	Contracts lawyer	Technical Legal Project Support	Occasional member as required

2.4 GROUNDS FOR EXCLUSION OF PERSONS FROM THE EVALUATION PANEL

Persons can be excluded from participating in the evaluation panel if:

- they have a conflict of interest, which means that, for example, they have:
  - a significant stake in one of the economic operators that are tendering;
  - previously worked for one of the economic operators;
  - a friend or relative who works for one of the economic operators;
  - a stated preference for one of the economic operators;
- they are not experienced enough to participate in the evaluation. However, the advantage of the independent evaluator might be his/her lack of experience;
- separation of duties is an issue, and in this event the end-user or the specifier could be asked to step down from the evaluation panel.

Localisation to reflect national/local law and codes of ethics.

2.5 TASKS FOR THE EVALUATION PANEL – A FUNDAMENTAL UNDERSTANDING

The members of the evaluation panel must have an understanding of the background to the procurement, including knowledge about the process that is being used to carry out the procurement, and they must have a clear understanding of the scoring mechanism that is to be used. They should also have an understanding of the legal issues and statutory requirements.

The evaluation panel members must understand the context, including:

- Overall business objectives of the contracting authority
- Objective(s) of this procurement
- Benefits that this procurement is likely to bring to the contracting authority
- Costs that are implicit in carrying out this procurement
- Principles of public procurement, as laid down in national procurement legislation

In relation to the procurement process, the evaluation panel members must understand:

- Process used to select potential economic operators
- Specification, in general terms at least
- Key deliverables based on the specification, as expressed in the evaluation criteria and weighting
- Fact that the evaluation criteria and weighting cannot be amended
- Fact that communication with economic operators must be directed through the procurement team

The evaluation panel members must understand the scoring:

- Process that is to be used for scoring the tenders by economic operators
- Fact that the same process and same scoring methodology must be used for all economic operators
- Need to exempt themselves from the decision process if they have a conflict of interest or otherwise feel unqualified or unable to commit to the process

One contracting authority included the following statement in its governance documentation:

"The whole purpose (of evaluation) is to ensure that the Council appoints a firm(s) capable of working with us to:

- Achieve our objectives as set out in the ITT.
- Contribute to a continuous improvement of service for end users.
- Establish a transparent and well-documented process that is fair and equitable."

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2.6 TASKS FOR THE EVALUATION PANEL – SPECIFIC 'MUST DO'S'

A structured approach to evaluation based on evaluation criteria and weightings is a vital part of a best-value approach to procurement.

The evaluation process focuses on how each economic operator proposes to deliver the contracting authority's requirement (quality issues) and the total cost of meeting that requirement (cost issues).

Each member of the evaluation panel must:

- understand the process and background to the procurement
- have time to play their role fully
- Fully read the documents that form the specification and the requirement
- Fully read each economic operator's tender
- Respect the confidentiality of the information to which they are given access
- Be prepared to attend economic operators' presentations and/or clarification meetings, where appropriate
- Be prepared to make visits to economic operators' sites or reference sites, where appropriate
- Make notes of questions on the tender that need to be clarified with other colleagues and/or economic operators
- Satisfy themselves that they are competent to carry out the evaluation that is requested of them. This places a requirement of an appropriate level of technical and other competence on some panel members; other panel members may defer to the technical competence of these specialists.
- Score each economic operator's tender against the evaluation criteria and weightings in accordance with the scoring methodology. On some occasions panel members will be requested to:
  - Score separately and then meet with the whole panel to arrive at a composite score
  - Score the part of the tender that relates to their speciality only
  - Read the documents and attend a meeting to score with other members of the panel
  - Evaluate a technical part of the tender without seeing the commercial elements of the tender (depending upon their speciality)
  - Evaluate a commercial part of the tender without seeing the technical elements of the tender (depending upon their speciality)

- Evaluate each tender on its merit and not in comparison to other tenders. While it is recognised that moderation will involve comparing the evaluation scores across tenders, evaluators should keep any such comparison to a minimum.
- Provide clear, succinct but comprehensive statements in support of scores awarded during the evaluation process. The rationale for the choice of an economic operator to be recommended for the award should be transparent and based on all of the supporting evaluation.
- Use only the information contained in the economic operators' tenders. Evaluators may not take into account information obtained from other sources outside the tender process. No extraneous views, suppositions or assumptions should influence the evaluation.
- Retain paper and/or electronic evaluation notes and material for audit purposes
- Act in accordance with the EU *acquis*
- Make an award decision on the basis of the lowest cost or MEAT (most economically advantageous tender)

2.7 SCORING

Evaluation panels must evaluate and score the tenders in accordance with the pre-disclosed criteria and weightings and using the agreed methodology. Modules E4 and E5 cover in detail the setting of evaluation criteria and the evaluation of tenders.

2.8 ACCOUNTABILITY OF THE EVALUATION PANEL

Members of an evaluation panel are accountable to their own contracting authority, the contracting authority is accountable to elected officials (where the authority is an elected body), and the elected officials are accountable to the general public. Localisation – there will not always be an elected official in every contracting authority.

Module B1 discussed the fact that accountability can be split into accountability for decisions and accountability to answer questions. The award of a contract at the end of a tender evaluation process is a major decision and questions may be asked about it. Procurement officers and stakeholders should ensure that the evaluation activity is closed with a report.

A sample of a report template taken from the website of the UK Office of Government Commerce (OGC) is attached to this document as Appendix A.

The report includes the following headings, which could be adapted to meet individual requirements:

- Executive summary: this summary describes the process followed to arrive at the decision
- Purpose: the purpose of the document is to present a recommendation
- Introduction: the introduction describes the contents of the document and who has compiled it
- Background: this section describes how the requirement was advertised, how many expressions of interest were obtained, how many tenders were received, and how shortlisting was carried out

- Evaluation process: this section describes how tenders were received and opened, how compliance was checked, the qualitative and commercial evaluation, the clarification, moderation meetings, economic operator presentations, site audits, and the use of e-auctions if appropriate
- Evaluation results: this section describes the qualitative and commercial evaluation of the tenders
- Overall score: this section summarises the overall scores of the economic operators
- Recommendation: this section indicates which economic operator(s) is proposed for the contract on the basis of the evaluation and which economic operators have been unsuccessful
- Approval: here the evaluation team seek approval of their decision from a senior person in the contracting authority
- Appendices: appendices can supply the necessary supporting data

2.9 SUMMARY

Stakeholders have a vital role to play in the procurement process. During the evaluation of tenders stakeholders need to be objective and to work hard at evaluating on behalf of the whole contracting authority, making sure that they understand the background of the procurement and that they are aware of the principles of public procurement as laid down in national procurement legislation. Where there is a conflict of interest, stakeholders should exclude themselves from the tender evaluation panel. Scoring should be carried out in a fair and transparent way, and stakeholders must realise that they are accountable for their actions for as long as they are members of an evaluation panel.

3. STAKEHOLDERS' ROLES THROUGHOUT THE PROCUREMENT PROCESS

3.1 INTRODUCTION

Stakeholders both contribute to the procurement process and have requirements of the process.

Typical stakeholders in public procurement include persons in the following roles:

- Governing body of the contracting authority
- Elected representatives
- Regulators
- Economic operators
- Technical specialists
- Internal customers (users of goods and services)
- Internal and external audit
- Finance
- Legal experts

The various stakeholders within the contracting authority will require:

- to be involved at different stages of the procurement;
- to be involved concerning issues that relate to their own particular departmental interest.

Procurement officers must plan the approach to a given procurement exercise so as to include time and communication with stakeholders who are relevant to the procurement in question.

You may notice that procurement officers are not included in the above list of stakeholders. In this module there is no text referring to their stake in the process, as this subject was covered in module B3. Also, you may refer to some of these stakeholders by different names and you may include additional stakeholders.

This section considers these stakeholders and how and when they need to be involved in the procurement process. The steps in the procurement cycle model introduced in module B2 and referred to in module B3 are referred to again in this section.

3.2 INDIVIDUAL STAKEHOLDERS

3.2.1 Governing body of the contracting authority

The governing body of the contracting authority has a stake in procurement best practice because it is accountable for the process of procurement. It does not want its decisions to be reported negatively in the press or contested by review bodies. It will be keen to ensure that:

- annual planning takes place
- reporting is maintained on the decisions made and processes followed, so that the governing body can be assured that the contracting authority for which it is responsible is operating properly
- members have little day-to-day involvement in the procurement process, although they may have a role to play in opening tenders (step 15) and in approving activities (steps 1, 8, 9, 19, 33 and 37)

- during the activities leading up to the publishing of a procurement notice, the persons working in both procurement and stakeholder areas follow best practice by:
  - using generic specifications
  - setting evaluation criteria and weightings
  - considering terms and conditions
  - considering performance measures
  - following the prescribed processes for publishing the notice
- during the procurement process:
  - internal and external legal processes are followed
  - evaluation decisions are made on merit and following the criteria and weighting previously set by the contracting authority
- during contract management, only in exceptional cases will members of the governing body be involved – usually when a contract management issue impacts on the contracting authority. Essentially they are probably satisfied to see periodic reports and to ask questions when necessary, although in some cases they may be involved in high-profile contracts.

3.2.2 Elected representatives

Elected representatives will demand less involvement than members of the governing body of the contracting authority. However, they will want to see reports or extracts that are sent to the governing body. They may also be a target of economic operators seeking information and may need to be briefed on processes and procedures. Elected representatives may also participate in evaluation panels.

3.2.3 Regulators

Each country will have a national body that will regulate the operation of public procurement and/or will be responsible for the implementation of public procurement policy. This regulation will be effected through the reporting described in module B3, and the regulators will expect to be informed of the procurement activity of the contracting authority. Localisation required here for the name of the body.

3.2.4 Economic operators

Economic operators have a stake in the procurement process. They are also a resource for contracting authorities, and economic operators normally wish to operate within the framework of the public procurement legislation and the EU *acquis*.

The focus of economic operators is on understanding what is required of them and on submitting a tender that will best meet the needs of the contracting authority, whilst allowing them to make a profit. Persons working with some economic operators will attempt to influence steps 1, 2, 3 and 5 of the process, resulting in a specification that relates more closely to their own offer(s). Procurement officers and other stakeholders must avoid this path, as it prevents fair competition, is not transparent and rarely delivers value-for-money.

Some persons working for economic operators will also attempt to receive favourable treatment during the tendering process and they may even seek to negotiate from the starting position provided by their tender. Procurement officers and other stakeholders must work within the framework of rules set out in the public procurement legislation and in the EU *acquis*.

Contract management may also provide an opportunity for economic operators to seek variations in parts of the requirement, which should be considered within the original scope of the procurement.

The above comments may appear to paint a bad picture of economic operators. The above three paragraphs should be regarded as a worst-case scenario. Many economic operators work in compliance with the public procurement legislation and the EU *acquis*.

3.2.5 Technical specialists

Technical specialists have a major part to play in a number of steps throughout the process of procurement. These steps are itemised below:

Step	Step name	Technical specialist involvement
1	Annual procurement plans	Technical specialists can advise on options and requirements to meet the business needs set out in the annual procurement plan.
2	Determining the needs	Technical specialists should be involved in the debate about the requirement with users, procurement officers and others in the contracting authority. Options and solutions result from these discussions and lead to specification.
5	Specification	Technical specialists should draft the generic specification with other stakeholders.
6	Performance measures	Technical specialists should contribute to determining performance requirements with other stakeholders.
8	Constructing business case	Technical specialists can assist in this step of the process.
14	Handling questions	Technical specialists must handle technical questions from economic operators (via procurement).
16	Selection (qualification) of economic operators	Technical specialists can play a key role in assessing the technical competence of economic operators.
17	Evaluation	Technical specialists must evaluate the technical elements of the economic operator's tender.
25	Engaging with contractor	Technical specialists may have a small role in this step of the process, where necessary.
29	Quality control	Where necessary, technical specialists will perform appropriate quality checks at the economic operator's site(s) or where a building is being built for the contracting authority.
32	Inspection	Where necessary, technical specialists will perform appropriate quality checks on goods, works, materials and services received.
36	Performance review	Technical specialists should be involved in a performance review of the goods and services to ensure that they meet the criteria laid down earlier in the process.
37	Continuous improvement	Technical specialists can play a role in working with other stakeholders on continuous improvement of goods and services.

3.2.6 Internal customers (users/recipients of goods, works, supplies and services)

Where procurement is practiced poorly, persons from areas of the contracting authority using the goods, works, supplies and services purchased for them are not involved in the procurement process.

Best practice is to involve staff from user departments as 'internal customers', at both manager and 'doer' levels, in a number of steps throughout the process. These steps are itemised below:

Step	Step name	Internal customer involvement
1	Annual procurement plans	Internal customers can advise on the specifics of their requirements for the coming year and work with technical specialists to set out the annual plan.
2	Determining the needs	Internal customers should lead the debate about the requirement with procurement officers and others in the contracting authority. Options and solutions result from these discussions and lead to specification.
5	Specification	Internal customers should review parts of the generic specification with technical specialists.
6	Performance measures	Internal customers should contribute to determining performance requirements with other stakeholders and technical specialists.
8	Constructing business case	Internal customers should be key players in this step of the process.
9	Approval	Internal customers may be asked questions about the business case and the need to purchase during the approval process.
14	Handling questions	Internal customers may need to handle questions from economic operators (via procurement officers).
16	Selection (qualification) of economic operators	Internal customers can play a role in assessing the technical competence of economic operators in some cases.
17	Evaluation	Internal customers must have a role in evaluating the economic operators' tenders.
25	Engaging with contractor	Internal customers will have a role in this step of the process.
29	Quality control	Where necessary, internal customers may be involved in quality checks.
32	Inspection	Where necessary, internal customers may be involved in quality checks on goods, works, materials and services received.

Step	Step name	Internal customer involvement
36	Performance review	Internal customers should be involved in a performance review of the goods and services to ensure that they meet the criteria laid down earlier in the process.
37	Continuous improvement	Internal customers can play a role in working with other stakeholders on continuous improvement of goods and services.
38	Disposal	Internal customers can play a role in the timely disposal of goods and materials no longer required.

3.2.7 Internal and external audit

The use of the term 'audit' refers to the operation of a professional audit function within a company and to any external auditors employed by the company.

Audit will be keen to check that processes and procedures have been demonstrably followed. There are international accounting standards http://www.iasb.org/IFRS+Summaries and local accounting standards, and both will impact on procurement processes, for example in the valuation of stocks. Localisation will be needed here.

Step	Step name	Audit involvement
1	Annual procurement plans	In some countries the annual procurement plan will set a limit on the procurement to be carried out during the following year, and where this is the case audit will want to check that procurement does not extend beyond this limit. Localisation will be needed here.
8	Constructing business case	Audit may wish to review the business case, if one has been constructed.
9	Approval	Audit will wish to check that the necessary approvals were made.
12	Publishing procurement notice	Audit will wish to ensure that the procurement notice was published in accordance with established procedures.
15	Receiving tenders	Audit will wish to check that tender approval processes were followed.
16	Selection (qualification) of economic operators	Audit will wish to review the checks and outputs of the qualification process.
17	Evaluation	Audit will wish to review the scoring and reporting process used to record the evaluation of tenders.

Step	Step name	Audit involvement
19	Award approval	Audit will wish to check that the necessary approvals are in place and signed for the contract to be awarded. Audit will also wish to review the separation of duties here. Where the annual procurement plan sets a limit for the procurement to be carried out during the following year, audit will want to check that procurement is within the limits of the annual plan. Localisation
22	Award of contract	Audit will wish to ensure that the award notice was published according to established procedures. This may be the first part of the three-way match.
26	Enabling ordering mechanisms	Audit will wish to check that the process to enable ordering is valid and that separation of duties is in place. This may also be the first part of the three-way match if a call-off order is used.
31	Receipt	Audit will wish to ensure that the receipt is made against a valid order and that separation of duties is in place, particularly if receipt results in a payment trigger.
32	Inspection	Audit will wish to ensure that appropriately qualified persons verify the fitness for purpose of the goods and services received.
34	Issuing to stakeholder	Audit will want to check the authorisation to issue stocked items to stakeholders.
35	Payment	Audit will wish to ensure that the three-way match is in place before payment is made.
38	Disposal	Audit will wish to ensure that value-for-money is achieved for items sold through a disposal process and that separation of duties is in place.

3.2.8 Finance

Finance will demand the probity of the procurement process and of the persons operating it. They will want to review processes and procedures to ensure, insofar as it is possible to do so, that no adverse comments will be received during the audit review of the processes. There are international accounting standards http://www.iasb.org/IFRS+Summaries and local accounting standards, and both will impact on procurement processes, for example in the valuation of stocks. Localisation will be needed here.

Specifically, finance will impact on the following steps;

Step	Step name	Finance involvement
1	Annual procurement plans	In some countries the annual procurement plan will limit the procurement to be carried out during the following year, and officers working in finance will want to be involved in constructing budgets to reflect the plan or will insist that internal customer areas construct a plan reflecting their budgets. Additionally, finance, like audit, will want to check that procurement does not extend beyond this limit where this is the case. Localisation will be needed here..
8	Constructing business case	Finance may be part of the team drawing up the business case and/or reviewing it.
9	Approval	Finance may be part of the approval process or will wish to check that the necessary approvals have been given.
16	Selection (qualification) of economic operators	Finance will wish to review the financial status of potential economic operators and may raise questions to which economic operators will need to respond.
17	Evaluation	Finance may wish to play a part in the evaluation of tenders.
19	Award approval	Finance may be part of the approval process or will wish to check that the necessary approvals have been given.
31	Receipt	Finance will wish to ensure that separation of duties is in place, particularly if receipt results in a payment trigger.
34	Issuing to stakeholder	As current assets are being issued from stocks to stakeholders, finance will want to ensure that a robust authorisation process is in place.

Step	Step name	Finance involvement
35	Payment	Finance has a prime role in ensuring that the invoice received is accurate and, where necessary, approved and that a three-way match is in place before payment is made.
38	Disposal	Finance will wish to ensure that value-for-money is achieved for items sold through a disposal process and that separation of duties is in place. They will insist that the payment for the goods or equipment is cleared before the items are released.

3.2.9 Legal experts

Persons working in the legal team of the contracting authority will want to ensure that the processes and procedures of the contracting authority follow the internal and external legal requirements. Specifically this will impact on the following steps:
Localisation will be needed here.

Step	Step name	Involvement of legal experts
1	Annual procurement plans	In some countries the annual procurement plan will limit the procurement to be made during the following year, and officers working in legal departments will want to ensure that these processes follow the local laws. Localisation will be needed here.
6	Performance measures	In some cases performance measures being considered by procurement officers may need to reflect custom and practice relating to both the requirement and the contract law of the country, e.g. some countries will not allow 'penalty charges'. Localisation will be needed here.
7	Contract terms and conditions	Legal resources in a contracting authority will help to write and maintain the terms and conditions of the contract and will be a key source of advice in developing or amending them. Advice on specific clauses in relation to setting conditions on specific purchases will also be provided. Localisation will be needed here.
16	Selection (qualification) of economic operators	Legal experts may need to be involved in this process and may raise questions to which economic operators will need to respond. Localisation will be needed here.
29	Quality control	Legal experts may need to advise on exactly when acceptance of developments or stages has or should have taken place in relation to the local laws. This may impact on payment. Localisation will be needed here.

Step	Step name	Involvement of legal experts
32	Inspection	Legal experts may need to advise on exactly when acceptance of inspection has or should have taken place in relation to the local laws. This may impact on payment. Localisation will be needed here.
38	Disposal	Legal experts may need to advise on specific legal terms and processes to dispose of sensitive equipment, data, or hazardous substances. Localisation will be needed here.

Localisation and production note. Names may need amending within this document and colour is used to separate guidance, the need to insert text and sample wording.

SECTION 3
EXERCISES

EXERCISE 1
ROLE-PLAY PREPARATION

Your trainer will run this session and ask a number of questions.

EXERCISE 2, PART 1
DISCUSSION – EXAMPLES OF GUIDANCE FOR TENDER PANELS

Example 1

One contracting authority has an instruction which states:

> "A tender evaluation panel will be established. Its composition will be determined by the value of the procurement.
>
> The composition of an evaluation panel will be determined by the value and complexity of the procurement.
>
> For low-value straightforward tenders, a panel may consist of two or more officers from the originating department working with a procurement officer.
>
> When more complex tenders require a range of expertise, the composition of the panel should reflect this."

Example 2
Involving the executive committee

Here, regard the executive committee as the top group of people in the organisation; they are its governing body.

This organisation asked members of its governing body (the executive committee) to appoint people to take part in the evaluation two months before the evaluation was scheduled. Their request read:

> "Members are asked, therefore, to nominate two representatives from the Executive Committee to serve on the Tender Evaluation Panel. The commitment from Members would require the following:
>
> - Read the tender submission documentation for each economic operator (some procurement officer analysis of this information will be undertaken to assist this process).
> - Familiarise themselves with the tender evaluation methodology.
>
> Attend the economic operators' presentations at (address deleted) on 27 April 2010 and the Tender Evaluation Panel on 29 April 2010. These will probably be full working days, i.e. 9:00 a.m. to 5:00 p.m., depending on the number of economic operators submitting tenders."

This organisation is flagging the time required from senior people to attend the tender board.

Example 3

Another organisation provides the following guidance for evaluation:

- "As a general principle, evaluation will always be undertaken by more than one person.
- For simple tenders, the Director of the Trust, or a delegated senior member of staff, and the Trust's finance officer will normally perform the evaluation of the tenders.
- Complex and/or high-value tenders will be evaluated by a panel of two or more Trustees, the Director of the Trust, the finance officer and any other relevant senior member of staff. A representative and/or observer from an outside body may be invited to join the panel if applicable. Representatives will act as full panel members; observers will not take part in the decision process.
- All tender panel members will be fully aware of the procedures and criteria to be used. The chair of the panel will direct members throughout the selection process.
- All tender panel members will use the same ranking/evaluation forms.

Example 4

A final example is given below:

"The tender panel comprises the following individuals:

- A facilitator. (Usually the person responsible for the tender process)
- Scorer 1. (Usually from the Department who will manage the contract)
- Scorer 2. (Usually from the Department who will manage the contract)
- Scorer 3. (Usually from the prime user of the purchase)
- Scorer 4. (A second user, can be a union representative)"

EXERCISE 2, PART 2
CASE STUDY – THE NEW IT SYSTEM

The scenario

You work for a city council and your organisation has decided to purchase a new IT system to bring it into the 21st century. A contract notice has been placed in OJEU and from tomorrow invitations to tender are being sent out to potential economic operators.

The new system will manage the administration of the council offices, the payroll, the collection of local taxes, the libraries and the publicity about council activities for the community. It will have Internet access, allowing mail to be received from and sent to councillors, businesses and residents.

The mayor is a strong advocate of the project and has approved the budget, the Director of finance is less sure of the merits of the project, and the local newspaper has just pointed out that the brother of the mayor runs a software company that devises systems like this one.

The head of IT at the council has been pushing everyone to implement a fully integrated system that does much more than this one. She used a system like this at her previous council and already has budget costs from that economic operator as an alternative solution.

Your council has yet to write procedure for who should be on the tender evaluation panel; as head of procurement, you feel that a fair and robust evaluation of the current ITT is essential.

Your tasks

1. Indicate the persons you would propose be on the tender evaluation panel. Provide their job titles
2. Indicate those you would suggest not be on the tender evaluation panel
3. For each person you have selected in point one above, indicate what you would expect them to evaluate

Use the next page for your answer.

Not on the panel

1	*Example: Mayor*	*Not on the evaluation panel – conflict of interest.*
2		

The panel could comprise

	Stakeholder	**What I would like them to evaluate**
1	*Example: Head of HR*	*To evaluate the payroll offering in the software*
2		
3		
4		
5		
6		
7		
8		
9		
10		

EXERCISE 3
STAKEHOLDER REQUIREMENTS

Your tasks

1. You will be split into teams for this exercise. On the pages below are some tables which have columns for:

   The procurement process step

   The procurement process step name

   The involvement of the given stakeholder

2. Your task is to work with others to identify the steps where you feel that the stakeholder you have been assigned will be involved, and what that involvement will be.

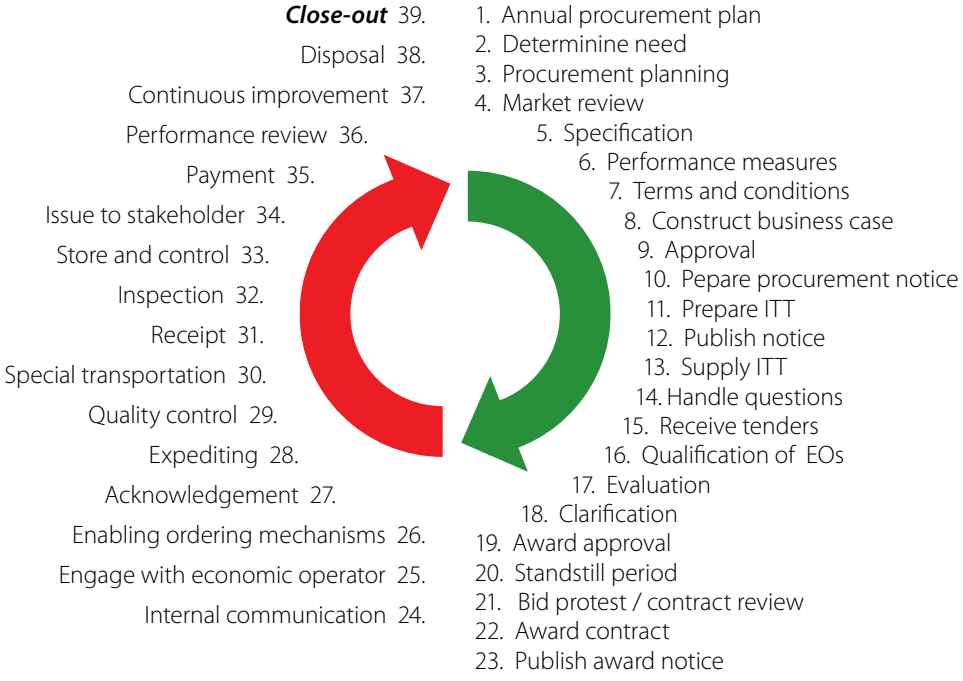
3. The stakeholders selected for this exercise are shown below. You may have other stakeholders you may wish to consider within your organisation.

   1. Technical specialists
   2. Internal customers (users of goods and services)
   3. Internal and external audit
   4. Finance
   5. Legal

NB1: "Involvement" will be both actions we can expect the stakeholder to take and outputs they may want from the procurement process.

NB2: To assist you, the procurement cycle model is reproduced below.

STEPS IN THE PROCUREMENT PROCESS



1. TECHNICAL SPECIALISTS

Technical experts have a vital role in the process of procurement

Step	Step name	Technical specialist involvement

2. INTERNAL CUSTOMERS (USERS OF GOODS, WORKS AND SERVICES)

Where procurement is practiced poorly, people from areas of the contracting authority who use the goods and services purchased for them are not involved in the procurement process. Best practice is to involve "internal customers", at both a manager and "doer" level, at a number of steps throughout the process.

Step	Step name	Internal customer involvement

3. INTERNAL AND EXTERNAL AUDIT

Audit will be keen to check that processes and procedures have been demonstrably followed.

Step	Step name	Audit involvement

4. FINANCE

Finance will demand probity from the procurement process and the people who operate it. They will want to review processes and procedures to ensure, insofar as it is possible to do so, that they receive no adverse comments when audit reviews the processes.

Step	Step name	Finance involvement

5. LEGAL

People working within the legal team of the purchasing organisation will want to ensure that the processes and procedures of the organisation follow the internal and external legal requirements.

Step	Step name	Finance involvement

INFORMATION SECTION
CASE STUDY – A LESSON WELL LEARNED

Basic data about the institution

A local hospital spending EUR 550 million

Introduction

Specialists in the hospital knew they needed to replace a fleet of ambulances and had the money in the budget, but did not plan ahead.

The course of the event(s)

1. The EUR 1 340 000 budget for ambulances was agreed at the end of the previous year and put into the procurement plan.
2. The department responsible for running the fleet was too busy to discuss the requirement in detail with procurement, and it was not until the last month of the financial year that it approached the procurement team to make the purchase.
3. The procurement team advised the head of department that time was needed to specify, place the notice and go through the normal good practice procedures. It would not be possible to award the business during this financial year.
4. Finance attempted to "claw back" the EUR 1 340 000 to help with overspends in other areas.
5. After much lobbying, it was agreed that the budget could be carried forward.
6. The chief executive of the hospital issued a note to all heads of department indicating that this was the first and last occurrence of its type.
7. At the start of the following financial year, heads of department contacted procurement to plan their requirements.

Analysis of the event(s)

The lack of planning or involvement of stakeholders almost meant that the procurement could not take place.

Conclusions

It is vital that procurement officers and stakeholders work together to plan the timing of procurement exercises to meet the needs of the people who will use the goods, works or services to be procured.

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS AND SUMMARY

1. This module presented six bullets as objectives of a tender evaluation. Two of them are shown below; can you remember the other four?
    - Potential economic operators can demonstrate the capacity and flexibility to meet the changing business needs
    - Potential economic operators can successfully deliver against the defined service targets
2. Who might be on a typical tender evaluation panel?

    If the law of your country prescribes who must be on the panel, then provide their roles for the answer.
3. Why is time a vital consideration in tender analysis?
4. If someone has a conflict of interest, they should be excluded from the tender evaluation panel. What is meant by "conflict of interest"?
5. The module indicated must-do's for the members of the tender evaluation panel and one of them is below; however, a rogue word has crept into the statement. Can you identify and delete the word?

    "Each member of the tender evaluation panel must not respect the confidentiality of the information they are given access to."
6. The text below is from the same list in the documentation, but this time a word is missing. Can you identify which word, and where it goes?

    "Use only the information contained in the economic operator's tender to evaluate. Evaluators may take into account information obtained from other sources outside the tender process."
7. What is the role of technical specialists in answering questions from economic operators?
8. What is the role of internal customers in determining the need for the procurement?
9. What will audit want to check at the receipt stage of the procurement process?
10. Sometimes a person who works for the contracting authority but has nothing to do with the procurement will be on the tender evaluation panel. What purpose does this serve?

RESOURCES

The following websites have been used in this module:

http://www.eastrenfrewshire.gov.uk

http://www.iasb.org/IFRS+Summaries

http://www.ogc.gov.uk/

APPENDIX A
TENDER EVALUATION REPORT TEMPLATE FROM THE UK OFFICE OF GOVERNMENT COMMERCE

Invitation to Tender:
Tender Evaluation Report Template
Version 0.1

Table of Contents

Guidance note: The Evaluation Report summarises the Evaluation Process, providing a detailed analysis of the outcome. This report would normally include recommendations to the [Senior Responsible Officer, Project Board, Contracting Authority, CPD Director], and provide assurance that the Evaluation has been undertaken in accordance with the pre-approved Evaluation Process and Methodology and present justification for the award of a Framework Agreement to selected Tenderers.

Although the [Senior Responsible Officer, Project Board, Contracting Authority, CPD Director] may be content to approve the recommendations based on a review of the hard or soft copy report; you should (if requested) be prepared to present the Tender Evaluation Report to the person(s) or Board from whom you are seeking approval.

This document is not designed to be prescriptive but rather provide useful direction for drafting your Tender Evaluation Report. Suggested wording and annexes should therefore only be used if considered appropriate to the specific procurement project. In particularly Section 6 onwards may need to be varied should an eAuction be used as part of the commercial evaluation process.

Note that guidance notes are in blue typeface, example wording is in black typeface and required insertions are in *[red italics]*.

MODULE B

Organisation at level of contracting authorities

PART 4

Role of the evaluation panel / tender committee

APPENDIX A

Tender evaluation report template from the UK Office of Government Commerce

1. Executive Summary

1.1. The procurement strategy for the project was to ensure that sufficient suitably qualified Potential Providers were invited to tender to meet the requirements of *[insert details of the names of the Contracting Authority and other collaborating contracting authorities]*. It was anticipated that a maximum number of *[insert number]* Framework Agreements would be awarded on a *[insert direct award, single / multiple provider or re-opening of competition multiple provider]* basis.

1.2. Following completion of the Pre-Qualification process, *[insert number]* Potential Providers were selected to receive an Invitation to Tender. The ITT was issued on *[insert date]* to: *[insert Potential Providers names]*.

1.3. A Tenderer's Conference was held on *[insert date]* to enable Tenderers to seek clarification relating to the requirement and ITT documentation.

1.4. *[insert number, divided into Lots if applicable]* Tender Responses were received at *[insert time]* on *[insert date]*.

1.5. Of those received *[insert number, divided into Lots if applicable]* Potential Providers submitted a compliant Tender Response. *[Insert number]* responses were considered non-compliant for the following reasons - *[insert name of Potential Provider and reason for non-compliance e.g. non-acceptance of the Framework Agreement Terms and Conditions]*.

1.6. Tender Response was not received from *[insert number]* of the [insert number] Potential Providers for the following reasons: *[insert name of Potential Provider and reason given for not submitting a Tender Response]*.

1.7. Tenders were evaluated in accordance with the approved Evaluation Process and Methodology. *[The evaluation was undertaken using a traditional paper based evaluation OR the evaluation was undertaken using an electronic evaluation tool [insert name of tool e.g. 'AWARD']]*. A copy of the Evaluation Process and Methodology documents are available on request from *[insert title e.g. Project Manager, Evaluation Manager], [insert name, telephone and email contact details]*.

1.8. The results of the Evaluation are as follows: *[insert Tenderer's names and scores]*

1.9. On the basis of the results in 1.8 the Tender Evaluation Team recommends a Framework Agreement be awarded to *[insert Tenderer's names]* subject to any challenges during the Alcatel period.

1.10. The Tender Evaluation Team seeks to obtain approval from the *[Senior Responsible Officer, Project Board, Contracting Authority, CPD Director]* to award a Framework Agreement to Tenderers identified in 1.9.

1.11. Subject to approval, a standard Award Letter covering Alcatel will be issued to Successful Tenderers and an Unsuccessful Letter covering Alcatel will be issued to unsuccessful Tenderers.

1.12. Both successful and unsuccessful Tenderers will be provided with the opportunity to receive a debrief in accordance with the ITT Debriefing Guidance

2. Purpose

2.1. The purpose of this document is to present a recommendation to the *[Senior Responsible Officer, Project Board, Contracting Authority, CPD Director]* for consideration and approval. The recommendation is based on the results of the Tender Evaluation carried out by the Tender Evaluation Team on the responses to the *[xxx services / supplies / supplies and services]* ITT.

3. Introduction

3.1. This report has been compiled on behalf of the *[insert project title]* Tender Evaluation Team following the completion of the evaluation of responses to the Invitation to Tender (ITT) for *[xxx services / supplies / supplies and services]*.

3.2. This document contains information that is Commercial in Confidence and is not in the public domain. The contents of this document must not be disclosed or discussed with any third party.

3.3. An Executive Summary has been provided, supplemented with supporting *[insert information data, evidence]*. Any further information or points of clarification should be addressed to the *[insert person's details from 2.7]*.

4. Background

4.1. The *[insert project title]* project advertised under the *[insert procedure e.g. Restricted]* procedure in the Official Journal of the European Union on *[insert date]* covers the [insert scope of the requirement including Lots if applicable].

4.2. The Contract Notice generated *[XX]* expressions of interest from a wide range of Potential Providers.

4.3. Following evaluation of the Expressions of Interest the following *[XX]* Potential Providers were short-listed to receive Invitation to Tender (ITT) documents: *[insert short-list of Potential Providers]*.

5. Evaluation Process

Guidance note: an overview of each stage should be provided, dependent on which stages have been followed during the Evaluation Process.

5.1. Tender Receipt and Opening

5.2. Compliance Check

5.3. Qualitative and Commercial Evaluation

5.4. Tender Clarification

5.5. Moderation Meeting(s)

5.6. Tenderers Presentation / Clarification Meeting

5.7. Site Audit

5.8. eAuction

MODULE B

Organisation at level of contracting authorities

PART 4

Role of the evaluation panel / tender committee

APPENDIX A

Tender evaluation report template from the UK Office of Government Commerce

6. Evaluation Results

Guidance note: an overview of the outcome of the qualitative (e.g. technical, delivery, quality) and commercial (e.g. price, cost, risk, legal) evaluation should be provided, with reference to Annexes as appropriate.

6.1. Qualitative Results

6.2. Commercial Results

Guidance note: The person(s) or Board responsible for approving the recommendations of the Evaluation Team must have access to a summary of each Tenderer's Response. This may include but is not restricted to:

- Name of Tenderer
- Summary of their qualitative response
- Key points relating to the site audit
- Key points relating to the Tenderer presentation / clarification meeting
- Summary of their commercial response including financials (reference to eAuction outcome if applicable) and identification of any issues and risks.
- Confirmation or acceptance / non-acceptance of the Terms and Conditions
- Pros and cons of the overall response
- Award recommendation

This information should be sufficient to provide a comprehensive debrief on request from a successful or unsuccessful Tenderer.

If the project has attracted a significant number of Tender Responses you may opt not to include this section within the main body of the Evaluation Report but rather attach it as an annex or even produce a separate document that is made available to the [Senior Responsible Officer, Project Board, Contracting Authority, CPD Director].

7. Overall Score

7.1. Following agreement of an overall score for each Tenderer and taking into consideration all qualitative and commercial elements of the responses, a high level summary sheet was completed. This can be found at *[insert Annex number / letter]*. A full evaluation matrix is available on request from the *[insert person's details from 2.7]*.

8. Recommendation

8.1. The recommendation of the Tender Evaluation Team is that a Framework Agreement be awarded to: *[insert name of Tenderer(s)]*, subject to any challenges during the Alcatel period.

8.2. Subject to approval, a standard Award Letter covering Alcatel will be issued to Successful Tenderers and an Unsuccessful Letter covering Alcatel will be issued to unsuccessful Tenderers.

8.3. Both successful and unsuccessful Tenderers will be provided with the opportunity to receive a debrief in accordance with the ITT Debriefing Guidance.

9. Approval

9.1. The Tender Evaluation Team seeks to obtain approval from the *[Senior Responsible Officer, Project Board, Contracting Authority, CPD Director]* to award a Framework Agreement to the Tenderer(s) identified in 9.1.

Recommendation Supported:

Signed: ..... Name: .....

Date: ..... Title: .....

Organisation at level of contracting authorities

MODULE B

Contribution from external consultants and experts

PART 5

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this module are to make participants aware of::

1. Valid reasons for using external consultants in the procurement process
2. The consultants' role(s) in advising their contracting authority and then stepping back to allow the contracting authority to make the decision
3. The advantages and disadvantages of using consultants in the procurement process
4. What to look for when using consultants successfully in the procurement process
5. Getting the best out of a consultant who is an expert resource

1.2 IMPORTANT ISSUES

While consultants can add great value, some public sector organisations overuse them in the procurement process and stifle the knowledge and growth of their own human resources.

1.3 LINKS

Links to other modules appear throughout the text of this document.

1.4 RELEVANCE

Procurement officers should seek the assistance of consultants only where they have to, due to the reasons given below.

SECTION 2
NARRATIVE

1. OVERVIEW

2.1 WHAT IS A CONSULTANT?

A consultant can be defined as 'one who gives professional advice or services: an expert'.

An expert can be defined as 'one with the special skill or knowledge representing mastery of a particular subject'.

There are times when a contracting authority will need professional advice and expertise in the procurement process.

Good practice note – consultants

Consultants are economic operators who supply a service. They are normally there to advise on the procurement process. Some consultants think that they 'know better' and may seek to take decisions. Remind them gently that they are 'trusted advisors'.

2.2 WHY HIRE EXTERNAL CONSULTANTS?

External consultants can be a bane or a blessing. Consultants should only be used when the contracting authority cannot operate without them. This may be because:

- Persons working with the contracting authority are overstretched and need additional manpower
- Persons working with the contracting authority do not have the expertise for the tasks in hand
- Time pressures necessitate additional resources
- Independent advice is needed

Some authorities do become over-reliant on consultants. It is possible to expand the four bullet points above, for it can be appropriate to hire consultants to:

- provide a strategic overview of the position of the contracting authority in its marketplace or environment, and thereby recommend mid-term to long-term strategic directions;
- provide an independent review of:
  - a situation or proposed course of action
  - the choice between two or more typically tactical decisions, based on their knowledge of how such decisions have been successful in other contracting authorities;
- catalyse change by recommending alterations to management processes and to the contracting authority. Often this will be in cases where the contracting authority has a clear idea of problems and solutions (however, possibly, though not necessarily, as the result of previous consultancy) but is unsure of 'how to get from A to B';

- strengthen a team. The contracting authority and consultancy may create a joint team to develop in-house capabilities, for example to manage a new process. The intention here is that, once strengthened, the in-house team can carry on without the consultants;
- achieve the implementation of a new system or process. Sometimes the implementation of a new system may be beyond the capacity of the contracting authority, not because of any lack of skills but because those skills are fully deployed in other tasks. If there is no longer-term justification for strengthening the in-house team, it may make sense to hand the implementation project over to consultants;
- be involved in the long-term operation of the contracting authority. It may be, particularly with information technology situations, that the most desirable management solution is to employ consultants on a long-term contract to manage particular processes or systems.

2.3 TWO DIFFERENT ROLES

Fundamentally, consultants may adopt one of two roles in relation to procurement:

1 If the consultant is hired to perform a line role within the contracting authority, he/she has the responsibilities of that role (e.g. procurement manager) and is expected to perform it for the duration as a staff member would. This includes taking the necessary decisions inherent to the delegated authority of the role.

2 The consultant may be hired, however, to provide specific advice based upon his/her experience, and perhaps to contribute as part of a multi-disciplinary team. In that case, the consultant has no delegated authority at all, and his/her role is to advise the staff of the contracting authority about appropriate courses of action and let them take the decisions, whether or not the consultant agrees with those decisions.

When a consultant is used for role two described above and starts taking decisions or undermining the decisions made by the staff of the contracting authority, he/she is overstepping the consultant role and should be warned and if necessary dismissed.

When a consultant is used for role one described above and does not take decisions, he/she should be dismissed.

2.4 ADVANTAGES OF USING CONSULTANTS

The advantages of using consultants should include:

- The ability to tackle situations and deliver unique solutions reflecting the particular circumstances and aspirations of the contracting authority
- Speed of action (because the consultancy team, unlike the in-house management, is not being constantly distracted by other tasks)
- An injection of knowledge of 'good practice' and effective solutions
- Exposure to expertise derived from other industries, sectors or countries
- Provision of specific technical skills that are either non-existent or in short supply in-house

- Skills transfer to in-house staff
- Freedom from bias. Consultants should offer independent advice. An exception may be if the consultant's expertise is needed in the selected solution only
- Change management skills, enhanced by the consultants' position as independent, objective and 'above the fray'
- The contract of a consultant can be terminated more quickly than that of a staff member **(Localisation check here)**

All of the advantages listed above should lead to 'value-for-money' from the consultancy assignment, demonstrated by the improved performance of the contracting authority.

2.5 DISADVANTAGES OF USING CONSULTANTS

Consultants can add value; however, there can be disadvantages in using them. These include:

- Cost: consultants will cost more than an employee.
- Consultants may say that they have the knowledge, but once in place they may not be able to deliver.
- Consultants may try to 'force' contracting authorities to do it their way (the consultants') way.
- Knowledge and/or experience of what has been done elsewhere may not be relevant for this contracting authority.
- Skills transfer to in-house staff may not take place. Some consultants work hard to avoid such a transfer.
- Contracting authorities may become over-reliant upon consultants.
- Consultants may be biased towards one solution. It may be that they have implemented the solution before and it has worked; however, whilst a solution may be appropriate somewhere else, it may not be appropriate for this contracting authority.

Good practice note – selecting consultants

There is a choice to be made between using a consultant who has 'done it before' and using someone whom you believe has the 'spark' to deliver a good job. Precisely because the consultant has 'done it before' he/she may deliver the same solution that was delivered before, which may or may not meet your needs. Equally, the person who has not done it before may not meet your needs; however, he/she may bring fresh vision that is worth its weight in gold. Make an assessment on a case-by-case basis.

2.6 WHAT TO LOOK FOR AND BE AWARE OF WHEN SEEKING CONSULTANTS

When seeking to appoint consultants, contracting authorities should:

- require consultants to state in writing any commercial arrangements that they may have with other parties that the assignment may bring them into contact with. This is particularly important if the consultants are required to recommend supplies and services for the use of the contracting authority;
- insist upon meeting the actual team that will deliver the consultancy before appointing them;
- check upon the technical knowledge of consultants; phone referees;
- provide a clear brief to the consultants and confirm that the consultants understand your requirements;
- ensure that the required expenditure has been understood and authorised through the total life-cycle of the consultancy spending;
- make sure that both the contracting authority and consultancy have clear expectations about roles, responsibilities, costs and benefits before the assignment starts;
- confirm the independence of the persons in the consultancy if an independent appraisal of a supply market or solution is needed;
- confirm the expertise of consultants if work on a given solution only is needed;
- ensure that the consultants adhere to the rules of engagement laid down in the tender process;
- ensure that the consultants know about:
  - all areas of work between their consultancy practice and the contracting authority – they should communicate this effectively within their practice
  - areas of work between other consultancy practices and the contracting authority – they should communicate this effectively within their practice
  - areas that are out of scope;
- require consultants to:
  - take a holistic approach to assignments with a contracting authority to assist economies of scale
  - place the interests of the contracting authority before their own earning opportunities
  - keep the scope of the project in line with its real complexity and not over-complicate it
  - talk about the practical needs of the contracting authority without jargon or pomposity
  - be honest about their strengths and only submit quotations in line with those capacities;
- run the procurement process for the appointment of consultants in accordance with the requirements of the EC directive and any local or national laws;
- be aware of the current European Court of Justice (ECJ) case law relating to the tender evaluation criteria that can be used, particularly with reference to consultancy and professional services (see modules E3 and E4).

Localisation required, particularly if there are different processes or laws that must be followed for the appointment of consultants.

2.7 USING CONSULTANTS SUCCESSFULLY

2.7.1 The consultant as an expert

Within a given procurement process, consultants can be used successfully as an expert resource to:

- advise at the earliest stage on the options available in the supply market and on the timing of a purchase so as to obtain maximum benefit;
- advise on EU processes;
- investigate and report on the technical fit of a given solution within the business environment of a contracting authority;
- undertake the role of the technical expert of a project in an area where the contracting authority has no expertise;
- use their experience to advise on the best way to bundle a requirement or group of requirements so as to attract the supply market;
- assess the basic requirements of the contracting authority and develop an independent generic specification;
- investigate and comment on the applicability of different solutions to the specification of the contracting authority;
- assess economic operator presentations and report on their suitability in the light of the needs of the contracting authority;
- review the current operation of the contracting authority and advise as to whether a purchase is necessary at all;
- assist in the development of evaluation criteria and weightings;
- assist in the evaluation of economic operators' tenders;
- assist in/lead the construction of a business case;
- assist in/lead the development of implementation plans on behalf of the contracting authority;
- assist in/lead the implementation on behalf of the contracting authority;
- evaluate what is received or delivered by economic operators on behalf of the contracting authority;
- participate in the performance review with staff from the contracting authority.

In these roles the consultants could be working 'full-time' for the period in which they are needed or used for short bursts of expertise during the process. It is in any case clear that their role in either of these scenarios is to advise and not to take decisions.

2.7.2 The consultant as part of the procurement team

Within a given procurement process, consultants can be used successfully as members of the procurement team to undertake any of the activities that the procurement team carries out with its stakeholders.

2.8 CONCLUSION

Buying the services of consultants should be treated in the same way as buying any other service. Frequently stakeholders seek to meet or introduce their 'favourite' individual or firm of consultants and in some cases they may have the power within the contracting authority that will allow them to do so. Frequently, however, the consultants who best meet the needs of the contracting authority will emerge from a selection process. Here their ideas, track record and approach to the contracting authority combine to put the selection team at ease with them.

Information: A consultant's code of conduct

A search of the Internet will reveal a number of codes of conduct for consultants. The one that follows is from ICON, an independent consultants' network in New York State, USA.

The mission statement of ICON is:

ICON, the Independent Consultants Network, is an organisation committed to enhancing contracting authority access to Ithaca-region consultants through promotion of consultant skills and expertise, via ICON programs and the ICON website, www.iconconnect.org. To this end, ICON offers local and regional businesses and contracting authorities the opportunity to find the right consultants, right now, and right here.

ICON is also committed to promoting professionalism, ethics, and excellence among consultant members and accomplishes these goals by providing opportunities for its members to network with other consultants. ICON hosts monthly meetings and other events where independent consultants can exchange ideas, expertise, and business contacts.

ICON Consultants Code of Conduct

As members of Independent Consultants Network (ICON) based in Ithaca, NY, we are guided by and agree to adhere to the following "Code of Ethics."

1. We keep the interests of our client as our highest priority and respond to these interests in a prompt and equitable manner.
2. We conduct consultations confidentially and on terms agreed upon with our clients. We protect and will not disclose any company information without the approval of our client and will not gain financially or take any other advantage based on this information.
3. We confer with our clients in sufficient detail to understand each concern or need and will match our service to our client's need.
4. We offer advice and accept only those assignments we are truly qualified to perform. We endeavor to provide results that have a real and lasting benefit to our clients.
5. We estimate and charge reasonable and consistent fees. We agree in advance on our fee or fee basis with our clients.

6. We write advertising, contract, guarantees, and other representations that are honest, truthful, and easily understood.
7. We refuse all assignments in which we have a conflict-of-interest or which might compromise our objectivity or professional independence. We promptly disclose any interest that may affect our clients, influence our judgment, or impair the equitable character of our services. We do not allow any outside interest to negatively affect the quality or results of our work.
8. We compete fairly and give appropriate credit for the work of others.
9. We recognize intellectual property rights and adhere to the laws meant to protect them.
10. We assume the responsibility for our employees' and subcontractors' compliance with this code.
11. We adhere to and maintain the professional standards required by our particular disciplines or areas of expertise including our respective professional ethical codes.
12. We obey all laws and accept total responsibility for our actions and we treat all contacts with fairness regardless of race, religion, sex, sexual orientation, age, or national origin.
13. We accept only those projects which are legal and are not detrimental to our profession.
14. We understand that the Independent Consultants Network (ICON) shall review complaints or violations of this code made either by clients or member consultants and that ICON maintains the authority to take appropriate sanctions with respect to ICON membership and its privileges.

Revised October 25, 2005

SECTION 3
EXERCISES AND CASE STUDY

EXERCISE 1
WHY USE CONSULTANTS?

Can you provide five good reasons for using the services of a consultant?

It can be appropriate to hire consultants to:	
1	
2	
3	
4	
5	

INFORMATION SECTION
CASE STUDY – THE HONEST CONSULTANT

Basic data about the institution

The regional authority purchased EUR 125 million in goods and services using a range of different processes across a physically diverse area.

Introduction

The authority sought external expertise to map the processes and then take decisions on making improvements.

The course of the event(s)

A regional authority asked for proposals to map its procurement processes and make recommendations for improvements. Seven consulting organisations expressed interest and received the full tender.

Six of the consultant organisations submitted tenders offering complex business solutions, including their own models and in some cases software. These solutions did not meet the requirement expressed by the authority.

The seventh organisation indicated that it had the capability to flowchart the business processes and then present the regional authority with options for development. The problem there was that their resources were fully stretched on other projects, and the authority required an "immediate start".

The authority chose the seventh provider and started "immediately", but allowed the provider a window to work on other projects and their project at the same time.

Analysis of the event(s)

The stakeholder analysis tool enabled procurement people to obtain the support of decision makers who had the power to convince the experts.

Conclusion

Stakeholder analysis is vital at the start of the procurement process.

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. How would you define the term "consultant"?
2. Can you finish this sentence?

   Consultants should only be used …
3. One valid reason for using consultants is given as:
   - "People within the contracting authority do not have the expertise for the tasks at hand"

   What are the other three reasons that were given?
4. Fundamentally, consultants can adopt one of two roles in relation to procurement. What are they?
5. Nine reasons are given as advantages for using consultants – here are four of them. Can you remember the other five reasons?
   1. The ability to tackle situations and deliver unique solutions reflecting the particular circumstances and aspirations of the purchasing organisation
   2. Speed of action (because the consultancy team, unlike the in-house management, is not constantly being distracted by other tasks)
   3. An injection of knowledge of "best practice" and effective solutions
   4. Exposure to expertise derived from other industries, sectors or countries
6. Read this sentence and then answer the question below:

   "There is a balance between using a consultant who has 'done it before' and using someone who you believe has the 'spark' to deliver a good job."

   Provide an example of when you would want "someone who has done it before" rather than a "spark".
7. Consultants can add value; however, there can be disadvantages to using them. Seven points were referred to in the text. Three of them are below. Can you remember the others?
   1. Cost. Consultants will cost more than an employee
   2. Consultants may say they have the knowledge and then once in place not be able to deliver
   3. Consultants may try and "force" contracting authorities to do it their way (the consultant's way)

8. When seeking to appoint consultants, contracting authorities should:
   - Make sure that both the contracting authority and consultancy have clear expectations about roles, responsibilities, costs and benefits before the assignment starts

   True or false?

9. When seeking to appoint consultants, contracting authorities should insist upon meeting …

   Can you complete the above sentence?

10. When seeking to appoint consultants, contracting authorities should agree to pay monthly in advance

    True or false?

Resources

http://iconconnect.org/members/?q=node/35

Organisation at level of contracting authorities

MODULE B

Measuring performance

PART 6

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this module are to explore, explain and understand:

1. Why performance measurement at different levels within a public procurement system is an important and even necessary activity
2. How performance measurement – in particular, the methodology employed – can be exercised at the contracting entity level within a procuring organisation, but also at a national level
3. The preconditions for creating and implementing a supporting environment for performance measurement
4. What contributions a well-designed and well-managed performance measurement system can make to improving procurement operations and, more generally, to efficient delivery of public services

1.2 IMPORTANT ISSUES

The most important issues are understanding:

- That performance measurement is key to improving a procurement system and should be a priority area in public procurement reform
- The need for a systematic and collaborative approach to designing and implementing performance measure frameworks at the various levels of the procurement system
- The interdependency of procurement standards and measures between the different levels of a national public procurement system

1.3 LINKS

There is a particularly strong link between this module, and

- Module A4 on the economics of public procurement
- Module B2 on the responsibilities of the contracting entity
- Module E1 on preparing tender documents
- Module G1 on contract management

1.4 RELEVANCE

This module is important for all procurement professionals involved in public procurement, but especially for those managing contracting entities and heads of procuring organisations.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

This module is not governed by any specific legal requirement. However, indirectly, the principles and objectives laid down in the EC Directives and the Treaty for the role and conduct of public procurement provide strong arguments for making performance measurement a priority area.

SECTION 2
NARRATIVE

2.1 INTRODUCTION

This narrative will discuss the issue of measuring performance in public procurement operations, in particular in contracting authorities but also at national level. It needs to be stressed that the EU *acquis* does not cover the way in which performance is measured in public procurement operations (although there are requirements for reporting on procurement activity – see module E6).

It is therefore entirely a matter for each individual EU Member State to take initiatives to establish policies and methodologies for the performance measurement of public procurement. Methodologies for assessing the standard or performance of public procurement systems have also been developed and put into practice by a number of international organisations, including the World Bank and OECD/SIGMA. This module summarises some of these experiences and knowledge, which can be regarded as 'good practice'.

Three different levels of performance measurement are broadly identifiable:

1. **National Level – Assessing the performance of the national public procurement system**
2. **Contracting Authority Level – Assessing the performance of the procurement organisation and operations**
3. **Contract Management Level – Assessing the performance of the delivery of an individual contract (this level is covered in modules G1 and G3)**

There are close links between these three levels of performance measurement in terms of performance interdependence. However, the objectives and methodologies for measuring performance may well differ. The design of the regulatory framework at the national level will affect the operational environment at the level of the contracting authority as well as all follow-up activities.

Analyses indicate that the market for procurement contracts within the European Union exceeds 1.5 billion EUR or the equivalent of more than 16% of all EU Member States' Gross Domestic Product (GDP). The high public procurement share of GDP – although based on very rough estimations – further suggests that a considerable amount, perhaps more than 30% of the public expenditure budget of member states, is allocated for the purchase of goods, services and works. The potential for savings is significant, but equally the potential for waste and inefficiency is also considerable.

The recent EC Directives reflect the need for modernisation, more flexibility and simplification of the legal framework in order to adapt to a decade of extensive technological and commercial developments, as well as a continuous evolution in the provision and organisation of public services.

The overriding objective of a member state's public procurement system is to deliver efficiency and 'value-for-money' in the use of public funds, whilst adhering to the EU acquis as well as to national laws and policies. Performance measurement is about trying to answer the fundamental question of whether the procurement system and operations ultimately deliver efficiency or 'value-for-money' (see modules A1 and E4 in particular for further discussion of the concept of 'value-for-money').

2.2 SOME KEY ISSUES

It is easy to subscribe to the idea of efficiency/effectiveness or 'value-for-money' as being the ultimate objective of a public procurement system. However, at the same time there are a number of significant difficulties associated with applying the concept of efficiency in public procurement, including:

- **Problems with measuring efficiency:** Firstly, it is difficult to objectively conclude whether a public procurement system actually delivers efficiency or not. Efficiency is often expressed in terms of budget or cost savings, but the basis for the calculation of those savings is based on non-common grounds, *e.g.* an accountancy standard. A contracting authority lacks the clear-cut instruments that private firms have at their disposal to measure efficiency in terms of economic outcome. A private firm's profitability is shown on the bottom line of a balance sheet, which provides the ultimate feedback on the soundness of the total operations of the firm, including the efficiency of its purchase operations.

  A contracting authority has, in a traditional sense, no 'revenue' side in terms of invoiced turnover for services delivered (unless it is a public sector company, but even in that case tariffs and fees are often decided by the government).

  At the contract execution level, efficiency is usually measured in terms of whether the outcome is 'within budget and on time' so as to determine whether the objectives of the project have been met. However, if the underlying assumptions of the objectives are wrong (for example, if these assumptions do not reflect optimal speed and the most cost-effective project implementation), a validation problem remains.

- **No agreed definition of 'efficiency':** Secondly, the international community has not agreed on a single definition for 'efficiency' in public procurement. The term 'efficiency' is widely used in these contexts to define the primary goal of public procurement, but it is applied without any reference to a commonly understood or agreed definition. For example, the concept of 'efficiency' is unlikely to have the same meaning for a legislator at the European Union level as for policy-makers at the national government level or for the purchaser at the contracting authority level. The concept of the efficiency of public procurement may be interpreted in different ways and practised at various levels within a public procurement system. Therefore, decision-makers may operate with different sets of priorities and policy objectives.

- **Conflicting goals and objectives act as constraints:** Thirdly, the wide range of inconsistent policy goals and objectives in public procurement may act as a constraint on opportunities to maximise the economic outcome and efficiency of public procurement operations. Other important principles governing public procurement systems also play a significant role in determining the soundness of the system, such as transparency, non-discrimination, fair treatment and integrity, as well as the need, where permissible, to take into consideration environmental and social policy objectives.

Subsequently, any attempt to measure the 'efficiency' of a public procurement system faces a combination of difficulties. Public sector decision-makers at different levels and in various capacities should nevertheless benefit from a performance measurement system that is designed to measure the standard of public procurement operations.

The underlying question that needs to be answered is: "Does our public procurement system or operation deliver 'value-for-money' in accordance with the objectives and targets set and how and when do we know this to be or not to be the case?" Performance measurement is a vital activity, not only in the area of public procurement but in all public sectors. Without measuring performance and obtaining the results of these measurements, there is no basis for increasing efficiency and, importantly, for ensuring accountability.

2.3 CHARACTERISTICS OF A SOUND AND EFFICIENT PUBLIC PROCUREMENT SYSTEM

Public procurement is currently part of a major transformation process in all EU Member States, but not only because of the introduction of new legislative instruments and the wider use of electronic techniques. Public procurement is also increasing in importance in terms of the fulfilment of political goals and policy objectives on short and long-term bases. Procurement has a key function in delivering a wide spectrum of a government's priorities in a variety of public sectors, such as health, education, transportation, and the whole range of public infrastructure. Procurement is a means of achieving value-for-money in the delivery of those public services in a sustainable way. The concept of 'value-for-money' definition-wise goes beyond pure economic factors, such as price and other cost-related factors, and relates equally to the quality of the services and products provided and to the extent to which other goals are met, such as environmental and social objectives, where permitted.

Performance in procurement operations is ultimately measured at the transaction level – the market interaction between purchasers and suppliers – where the result of the acquisition process, economically and otherwise, is determined. The legal and central institutional frameworks, including other influential factors, set the basic conditions for the way in which procurement may be undertaken procedurally, the results that can be expected, and the potential efficiency gains that can be achieved. Within this environment, the professionalism and experience of procurement officers in managing the procurement process and in taking full advantage of competition in the market are decisive for the outcome in terms of 'value-for-money'.

The main indicators of a sound and efficient public procurement system can be defined as:

- National legislation in compliance with the EC Directives and appropriate procurement policies and rules concerning the effective, efficient and proper use of public resources, whether or not the Directives apply;
- Clear strategies and policies for the allocation of responsibility and structures for public procurement decisions, for the accountability for public expenditure, and for increasing efficiency and ensuring integrity in procurement processes;
- Well-developed central institutional structures and sufficient administrative capacity for the effective implementation of laws and other national policies, including the preparation and dissemination of information and the provision of guidance and training to stakeholders in the system, such as purchasers, economic operators, review bodies and auditors;
- Appropriate means to monitor the effectiveness of policy and legal frameworks, taking into account the need to strike the right balance between control and discretionary power so that the decision-maker can be held accountable for decisions made;
- Professionalisation of the procurement function at all levels of the public sector, which would cover not only individual purchasers and the operational side of procurement. Equally important, the concept of professionalisation should guide the government in all of its decisions and actions in terms of the organisation and handling of procurement processes, such as procedures for decision-making, co-ordination and collaboration within the administration at various levels, control and audit, complaints review, budget planning and execution, and contract management.

The indicators of a sound and efficient public procurement system, as outlined above, could serve as the principal standards in the design of a performance measurement system, with the objective of determining whether these standards have been met. Once these standards or benchmarks have been set, it is of course important for decision-makers at various levels to also consider the techniques for measuring achievements in relation to the agreed goals and policy objectives.

The benefits of a system of performance measurement vary depending on the level within the procurement system. As mentioned above, three different levels are easily identifiable, namely the national level, the contracting authority level, and the contract delivery level. Measuring contract delivery is actually part of the contracting authority's responsibilities, but for pedagogical reasons this level is discussed separately in module G3.

2.4 BENEFITS OF PERFORMANCE MEASUREMENT

The benefits of performance measurement may vary between the three levels, and they depend very much on the differences in objectives and responsibilities. Set out below is a summary of the key justifications for developing and implementing systems of performance measurement.

2.4.1 National level

The principal benefit of a performance measurement system at national level is that the aggregate output resulting from the application of the system generates a more solid platform of information upon which to base policy decisions. This information enables governments to improve the quality of decision-making and to take constructive and long-term actions that will most effectively develop their public procurement systems (*e.g.* in terms of procurement policy and regulatory reform, institutional development and capacity strengthening). Furthermore, it is important for policy-makers to possess a good understanding of how various policy goals may interact and how the overall performance of the procurement system may be affected – positively or negatively – by the implementation of certain measures, depending on objectives and priorities.

Additional benefits of a performance measurement system at national level:

- Governments may have stronger incentives to improve their public procurement systems.
- Performance measurement may help to set priorities for reform actions in the area of public procurement and to monitor progress against the objectives set.
- Performance measurement may provide supporters of reform with clear arguments for change and help to focus political attention and mobilise commitment.
- The output of the performance measurement system for public procurement, as an integral part of the public financial system, would also provide valuable information for the assessment of the public expenditure system.

Comment: Measuring performance at national level

Peer reviews carried out by SIGMA reveal that EU Member States generally pay limited attention to initiatives aimed at measuring the performance of public procurement systems at national level in terms of aggregated outputs and efficiency. Performance measurement of public procurement systems focuses instead on input issues (resource allocations) and on compliance of the regulatory framework and institutional arrangements with the EU *acquis* and other national requirements.

Performance measurement in efficiency terms is more frequently conducted at the level of the contracting authorities, triggered by control and monitoring actions decided by parliament, the government or the contracting authorities themselves. Performance control of contracting authorities is often exercised by external audit institutions or by ministries of finance, but few attempts are made to answer the fundamental question: *What is the **overall** standard or quality of our national public procurement system?* Maybe it is an impossible question to answer correctly, but in any case there are contexts where it becomes necessary to assess a national procurement system, with the objective of answering just that question, at least indicatively.

In that context, SIGMA undertakes, on behalf of the European Commission, regular assessments of public procurement systems in EU candidate and potential candidate countries and conducts peer reviews of procurement and concession systems in those countries.

Also important in this regard is the project being carried out by the OECD/DAC (Development Co-operation Directorate) and the World Bank Roundtable, which in recent years has developed a performance measurement system composed of baseline and performance indicators. This system is meant to enable both external assessments and self-assessments or a combination thereof, and it is aimed to generate guidance concerning the required standards of a national procurement system. This performance measurement system could in turn serve as a basis for decision-making by the donor community concerning the extent and conditions for donor financing of a national procurement system, whether this financing be channelled as budget support or allocated directly for particular projects and programmes. Furthermore, the assessment system would provide a roadmap for public procurement reform work in a particular country.

Defining a national public procurement system

The first important task in designing a performance measurement system at national level is to define the system and its main coverage.

In principal, a public procurement system may be defined as the totality of all those elements affecting the final outcome and effectiveness of an individual procurement operation. A complete analysis of a public procurement system would then by necessity cover a large number of aspects with a varying degree of inter-dependency and impact on the execution of public procurement.

In order to make the assessment of a public procurement system on a national level manageable, it is necessary to identify and include areas directly associated with public procurement and to deliberately exclude areas of less direct influence on public procurement processes. In addition, the assessment should focus on factors that are perceived to play a significant role in terms of the quality and efficiency of the national public procurement system, and it should include only indicators that are reasonably easy to observe and measure.

Such an assessment will be predominantly based on macro-variables, which do not necessarily reflect the standard at the level of contracting entities. The areas subject to assessment tend also to coincide with the normal scope of application of a public procurement law. This leads to a comparatively strong focus on the tendering process and to a lesser focus on other important elements of the procurement process, such as procurement planning and preparation, internal management and decision-making systems, contract administration, and *ex post* financial control and audit.

Defining the performance areas

The following four key areas (pillars) have been identified, at least in broad terms, as constituting the basic components of a national public procurement system. Under these pillars a number of baseline indicators have been defined.

Pillar I. Legislative and Regulatory Framework

1. The country's legislative and regulatory framework for procurement complies with applicable obligations derived from national and international requirements (such as EU law).
2. The country has appropriate regulations, documentation, and tools to support the implementation of its legislative and regulatory framework.

Pillar II. Institutional Framework and Management Capacity

3. The public procurement system is mainstreamed and well integrated into the public sector governance system.
4. The country has a functional central normative/regulatory/ advisory body.
5. The country has institutional development capacity.

Pillar III. Procurement Operations and Market Practices

6. The country's procurement operations and practices are efficient.
7. The country's public procurement market functions well.
8. The country has contract administration and dispute-resolution provisions.

Pillar IV. Integrity of the Public Procurement System

9. The country has effective control and audit systems.
10. The country has an efficient appeals mechanism.
11. The public has broad access to information.
12. The country has ethics and anti-corruption measures in place.

The main indicators listed above, which also contain a large number of sub-indicators, are intended to to serve in the evaluation of procurement systems at a fairly high level, *i.e.* they do not dig down very far into the details, but are designed to give a broad, global overview of the strengths and weaknesses of the system concerned. Another important feature of the indicators is that a simple 'yes' or 'no' cannot answer most of the questions. In general, the questions are complex and professional judgment is required to provide an answer that fairly and objectively rates performance, *e.g.* the quality of a national procurement training system against the point rating scale proposed as the performance measure. The successful application of certain indicators requires access to accurate and reliable statistical information and other data, even where the indicators themselves are not numerically based. The quality of the information system underpinning a procurement system is thus of prime importance and should itself be part of the evaluation process.

OECD/DAC (Development Co-operation Directorate) assessment methodology

One key activity is to prepare a baseline against which performance will be measured with respect to each main area of performance indicators as well as to sub-indicators. The baseline represents a desirable 'quality standard' under each indicator against which the assessment is made. In addition, for each sub-indicator an 'assessment key' provides guidance on the level of achievement that needs to be reached in order to qualify for a specific degree of acceptability. The assessment is carried out by an assessment team, composed of senior procurement experts (external and internal), which prepares a report for review and approval by the relevant institutions. The assessment is based on interviews, review of documents, and analyses of procurement statistics. For further information on the OECD/DAC model, consult www.oecd.org/dac/effectiveness/procurement.

Other means of measuring procurement performance at national level

The comprehensive assessment methodology described above is normally not feasible for national implementation unless there are clear guarantees of the full independence of the assessment team and consensus regarding the design of the performance indicators and of the baseline for determining acceptability. However, other means and methods are available to a government for assessing the functionality of the public procurement system at national level. Some of these methods are described below.

1. Regulatory Impact Assessment (RIA)

The role of a regulatory impact assessment (RIA) is to provide a detailed and systematic appraisal of the potential impacts of a new law or regulation in order to assess whether the regulation is likely to achieve the desired objectives. In the area of public procurement, an EU Member State is bound to implement EC Directives, where those apply, in the public procurement law and to ensure that all other specific national provisions comply with the fundamental principles of the EC Treaty. However, within these limitations, a member state is free to design its regulatory framework, and in practice a vast majority of all contracts will be awarded under nationally designed policies and rules. Consequently, those rules and procedures will have a significant impact on the execution of public procurement in the country. The need for RIA arises from the fact that regulation commonly has numerous impacts, which are often difficult to foresee without detailed study and consultation with affected parties. Economic approaches to the issue of regulation also emphasize the high risk that regulatory costs may exceed benefits. The RIA is first of all meant as an action to be taken before the adoption of new legislation, but there is no hindrance to using an RIA on existing legislation as a means of initiating regulatory reform. Both the European Commission and the OECD have published guidance documentation on the use of RIA.

2. Peer reviews

A peer review is an instrument for diagnosing public sector operations, including public procurement, which has been developed and used by the OECD for a long time. It has certain similarities with the assessment methodology described above, but there is a major difference in terms of objectives and the point of ownership. A peer review is always decided and implemented in co-operation with the partner country. The peer review team consists of international senior experts with extensive background and expertise in the area subject to review. The purpose is to identify strengths and weaknesses (performance review) in the procurement system, with special focus on the main components, such as legislative and institutional frameworks, procurement organisations in terms of capacity and capability, and markets. Based on the analysis and conclusions, the peer review team provides recommendations for improvements where needed, but it is entirely a matter for the country to decide on the actions to be taken following the recommendations.

3. Stakeholder surveys

Another complementary measure for collecting information regarding the status of the procurement system could be to carry out regular surveys addressing important areas and issues connected to the performance of the public procurement system. The survey should be disseminated to a selection of contracting authorities, business associations and individual economic operators, audit institutions, universities and other important stakeholders with an interest in public procurement. The survey could be prepared and managed by the public procurement office of the country. If the survey is carried out on a regular basis, there is a possibility of capturing the differences in opinions from one year to another. The results of the surveys should be used by the government as a basis for considering changes in the procurement system in areas where problems have been identified.

4. Establishing a consultation forum

A forum for consultation, composed of representatives of the main stakeholders of the national procurement community, is also a means for a government to receive information and indications of critical features (performance and non-performance) of the procurement system. The results of the surveys above, as an example, could be the subject of discussion in the forum. An official from the public procurement office could chair the forum.

5. External audit institutions

External audit institutions have important tasks, on an ex post basis, in the identification of strengths and weaknesses in the execution of public procurement operations at the level of contracting authorities. These audits aim to determine the extent of compliance or non-compliance with laws and regulations as well as the performance and achievements that have been made in relation to the objectives and targets set for a procurement activity.

6. Academic institutions

Universities and other research institutions may play an important role in developing new knowledge on the functionality of the public procurement system.

2.4.2 Contracting authority level

The principal benefit of a performance measurement system adapted to the needs of individual contracting authorities is that they would be in a better position to determine the degree of efficiency and effectiveness of their procurement operations as a whole, but also at the level of individual projects, such as major infrastructure projects.

Additional benefits of a performance measurement system at contracting authority level:

- The contracting authority can more easily identify strengths and weaknesses in its procurement operations.
- The information can be used to monitor progress over time, as well as assisting in setting the correct priorities and in taking the appropriate actions to improve weak areas.
- The performance measurement system would form an integral part of long-term strategic and operations planning, including the annual budget process, management and staff development, thus providing an excellent basis for the effective implementation of the contracting authority's operational goals and strategies.
- The performance assessment process would constitute an important 'learning exercise' within the procurement organisation for all those taking part in purchase operations. This process would offer an opportunity to provide constructive guidance on where and how improvements could be made in order to meet the various targets of the contracting authority.
- In conclusion, with a better understanding of the mechanisms affecting the performance of public procurement, identification of the key success and failure factors, and a deeper knowledge of the contracting authority's comparative strengths and weaknesses, decision-makers would be in a better position to take appropriate decisions and actions to further improve their public procurement systems and operations.

2.4.3 Measuring performance of procurement operations in a contracting authority

The model set out in this section has been prepared with the objective of providing a 'good practice' basis for **contracting authorities** on how to measure the performance of their procurement operations. Governments may also use the data emanating from the performance assessment at this level for the purpose of monitoring and evaluating public procurement operations and with a view to drawing conclusions on the impacts of the legal and institutional frameworks. The results of a performance measurement system at the contracting authority level may provide valuable input to national aggregate achievements, such as budget savings and general quality improvements in the delivery of public services.

3.1 STRUCTURE OF THE PERFORMANCE MEASUREMENT SYSTEM FOR CONTRACTING AUTHORITIES

3.1.1 Introduction

The performance measurement system is designed to measure the performance of the **procurement organisation/department** of a contracting authority against the objectives and targets that have been set and against the baseline that has been determined for procurement operations in both short and long-term perspectives.

The performance measurement system may include the following key components:

- Determining performance areas
- Selection of performance indicators
- Determining baselines
- Performance measures
- Setting performance targets
- Reporting of achievements/results
- Performance measurement organisation

This section looks first at each of the above key components and then goes on, in section 3.2, to address how the performance measurement system works in practice.

3.1.2 Selection of performance areas and indicators

Performance areas

In this model six main performance areas have been identified and are proposed to be included in the performance measurement system. These six main performance areas are listed below in section 3.2. The performance areas have been selected with the aim of encompassing the critical components of the internal procurement system of a contracting authority. It is always open to debate whether the performance areas listed truly reflect the essence of procurement operations and are relevant for the individual contracting authority. There will always be a need for contracting authorities to customise the performance areas by taking into account their specific circumstances and operational conditions, but at the same time, for the purpose of comparability, it is essential to maintain a high degree of uniformity. The areas (and indicators) set out below are generally considered to be relevant to the typical procurement operations of a contracting authority.

Performance indicators

Within the six main performance areas, a number of performance indicators have been identified. Usually, the selection of performance indicators is associated with ***output indicators***, where quantifiable factors are used to a large extent to measure the performance of a system. Output indicators show whether a system works in accordance with a given standard set of factors, but they do not attempt to explain why a certain result is achieved. For this purpose, a diagnostic study is required. ***Typical examples of output indicators are found in the field of economics, such as changes in GDP, unemployment statistics, and national debt ratios. An example in the procurement field is the value of monetary indicators, such as savings and efficiency improvements.***

However, relying solely on output indicators is not a sufficient method to measure the standard and progress of a public procurement system. In fact, it has been found to be equally important to also include ***input or process indicators*** since they lay the foundation for the generation of economic output within a public procurement system. It is very important to be able to control and/or understand how this output has been achieved in order to encompass the additional high-priority goals within public procurement, such as transparency, non-discrimination, fair treatment, and accountability. The instruments to secure these goals are traditionally associated with the design of the legislative and regulatory framework, the institutional set-up, and the mechanisms for control and complaints. Input indicators can only be assessed by means of ***'subjective criteria'*** based on qualified judgments by independent procurement professionals. ***Typical examples of input indicators are various procurement statistics (e.g. proportional share of the use of the open procedure and number of annual complaints) and perception indexes (e.g. user-satisfaction index).***

As for the six performance areas, there will always be a need for contracting authorities to customise the performance indicators by taking into account their specific circumstances and operational conditions, but at the same time, for the purpose of comparability, it is essential to maintain a high degree of uniformity.

3.1.3 Determining baselines

One key activity is to prepare a baseline against which performance will be measured with respect to each main performance area and to individual indicators. The ***baseline*** represents a chosen standard under each indicator against which the assessment will be made and compared. In principle, the baseline represents the level of performance (acceptability or outcome) that should be achieved at a certain point in time. It also constitutes the starting point for measuring the degree of progress over a specific period, *e.g.* one calendar year.

If the baseline is considered to be the desirable threshold for acceptability, there is also a need to define the ***minimum level*** below which performance is considered to be unacceptable.

3.1.4 Performance measures

Performance can be measured by different means, depending on the nature of the indicator used. Output indicators can normally be measured by means of a numerical system (*e.g.* savings achieved in euros), while input indicators, such as the quality of the procedural framework, normally require a systematic assessment by qualified assessors, which may be complemented by surveys and similar data-gathering tools. The main challenge is to determine the baseline and the assessment key for the chosen indicator (what is good and what is bad).

Example

Each indicator is measured against a four-point numerical scoring.

	SCORING
Baseline fully achieved (FA)	(4)*
Baseline substantially achieved (SA)	(3)*
Baseline partially achieved (PA)	(2)*
Baseline not achieved (NA)	(1)*

*Whether an alphabetical or numerical system should be used is irrelevant for the determination of performance. However, for the construction of the composite index, the numerical system is easier to use.

3.1.5 Performance targets

The final component of the assessment system is the setting of performance targets for each performance area as well as performance indicators in words or figures and/or a combination thereof. The government will set some of these targets as part of the overall objectives for public sector development and budget implementation, for example in terms of financial savings and efficiency improvements in public service delivery. Such nationally set goals will have to be implemented by contracting authorities, while operational goals that are exclusive to the contracting authority will be set by the management of that authority.

The performance targets used should have the following qualities:

- **Relevant** to what the organisation is aiming to achieve;
- **Attributable** – the activity measured must be capable of being influenced by actions that can be attributed to the organisation, and it should be clear where accountability lies;
- **Well-defined** – with a clear, unambiguous definition so that data will be collected consistently and the measure will be easy to understand and use;
- **Timely**, producing data regularly enough to track progress and quickly enough so that the data is still useful;
- **Reliable** – accurate enough for its intended use and responsive to change;
- **Comparable** with either past periods or similar programmes elsewhere;
- **Verifiable**, with clear documentation behind it, so that the processes producing the measure can be validated.

Note on benchmarking

Benchmarking – by making comparative studies or analyses of successful procurement systems of all or a number of contracting authorities – could be an excellent method of assisting with the definition of performance targets. Benchmarking data may also be made available nationally to ensure the use of a uniform performance measurement system throughout the country, which may also facilitate comparisons at a national level.

Benchmarking is also a method by which a contracting authority may compare its own operations in various aspects with comparable external undertakings, such as a similar contracting authority known for its excellence. Benchmarking can also be used for various other comparisons, such as prices or service levels.

3.1.6 Performance measurement organisation

The organisation of performance measurement activities is one of the critical factors for the successful implementation of the system. Furthermore, the introduction of the system will need strong central support and guidance at national level, and it will need to include guidance documentation and a broad information campaign led by an organisation with a clear mandate.

Within contracting authorities, the introduction of the system has to be decided by the management at the highest level and to be given its full support. Most likely such a decision will have to be prepared by the procurement organisation through the formation of a special working group assigned the task of proposing a functional performance measurement system, including performance indicators, performance targets, measures, baselines and internal assessment organisation. Since the measurement of many of the performance areas will require a 'judgment methodology', it is advisable, for the purposes of objectivity and independence, to assign an external assessment team.

3.2 PRACTICAL IMPLEMENTATION OF A PERFORMANCE MEASUREMENT SYSTEM

As mentioned above, the implementation of a performance measurement system on a wider scale is likely to require a policy decision by the government to the effect that performance in public procurement should be measured by contracting authorities. Such a decision would need to be followed by concrete obligations on the part of contracting authorities as to the performance to be met and how it will be measured. It is further likely that performance measurement is not restricted to the procurement area but is a natural component of public administration governance.

Based on the performance and indicator areas chosen above, **an outline of an assessment methodology is presented below** as a basis for discussion in the procurement training programme, together **with examples** of possible baselines and performance measures. The practical introduction of the methodology in contracting authorities requires a firm commitment by the management of those entities. A step-by-step approach is recommended, by introducing a few indicators as a start instead of implementing a fully-fledged system from the outset.

MODEL PERFORMANCE MEASUREMENT SYSTEM FOR A CONTRACTING AUTHORITY

Performance Area 1. The Procurement Process

The assessment is to reflect the standard of the procurement process from the stage of planning and preparation to the stage of completion of a procurement activity upon the closing of the file of the specific operation.

Indicator 1.1 Planning and preparation of tender proceedings

The contracting authority should have established effective procedures and routines for the planning and preparation of its tender proceedings. The overall performance of procurement operations relies heavily on the standard of the preparatory phases.

Baseline: a) The average period for planning and preparation should not exceed X days.

b) The average cost for the planning and preparation of tenders should not exceed X EUR).

c) Amendments to tender documents should be kept to a minimum and should in no case exceed X% of the total number of tenders issued by a contracting authority during a calendar year.

Indicator 1.2 Choice of tender procedures and contract arrangements

The choice of competitive tender procedures that correctly reflect the size, nature and complexity of the contract is crucial, in terms of both compliance and efficiency.

Baseline: a) Competitive procedures, such as the open and restricted procedures, including competitive procedures below EC thresholds, should be used in no less than X% of the total number of procedures (and X% where the threshold(s) exceed X EUR).

b) Non-competitive procedures, such as the negotiated procedure without prior publication of a contract notice (and direct awards), should be kept to a minimum and should not exceed X% of the total number of procedures.

c) The use of framework agreements should exceed X% of the total value of the contracts concluded by the contracting authority.

Indicator 1.3 Participation in tender proceedings and award data

The contracting authority must ensure sufficient and genuine competition in conjunction with tender invitations, including consideration of the specific needs of small and medium-sized enterprieses (SMEs) where appropriate. The publication of notices is the recommended method of advertising.

Baseline: a) The average participation rate in connection with open invitations during a calendar year should not be fewer than X tenderers or applicants.

b) The number of contracts awarded to SMEs should normally not be fewer than X% of the total number of contracts awarded during a calendar year.

Indicator 1.4 Extent of complaints

Complaints may be a serious non-performance signal to the contracting authority with regard to the management of the procurement process, in particular concerning the design of tender documentation and the setting and application of selection and award criteria. The number of complaints should be kept as few as possible.

Baseline: a) The number of complaints during a calendar year should not exceed X% of the total number of tender procedures conducted

Indicator 1.5 Extent of claims and disputes during contract execution

The proper choice of contracting strategy and contract conditions as part of the preparation of tender proceedings and the efficient management of the contract are essential for the successful performance and outcome of the procurement process.

Baseline: a) The number of claims should be kept to a minimum and should in no case exceed X% of the total number of contracts concluded.

b) The number of disputes leading to formal dispute settlement (arbitration, adjudication, etc.) should not exceed X in number.

Performance Area 2. Organisational Capacity and Capability

This section indicates the basic capacity and capability of the procurement organisation to undertake its duties and responsibilities efficiently in terms of management capacity, organisational clarity, budget resources, number of staff, and staff competence.

Indicator 2.1 Organisational clarity

Baseline: a) The procurement function should be clearly described in terms of objectives, organisational structure, job descriptions, and decision-making power.

Indicator 2.2 Capacity and operational resources

Baseline: a) The number of procurement staff and the cost of operating the procurement function should reflect the annual number and value of the contracts awarded during the calendar year, and they should be comparable to those of contracting authorities with similar operations and structures.

Indicator 2.3 Procurement staff skills

Baseline: a) The percentage of procurement officers with an appropriate procurement qualification should not be less than X% of the total number of procurement staff.

Performance Area 3. Systems and Methodology

This section measures the standard and sophistication of administrative systems and routines, including the extent of IT and e-procurement applications, as well as the availability and standard of supporting documentation, such as model tender documents, evaluation formats, model contract tender and award notices, and model contract conditions for works, goods and services.

Indicator 3.1 Availability of IT and Internet-based systems for tendering, contract management and record-keeping

Baseline: a) Key administrative processes are IT-based, such as for the publication of contract notices, release of tender documents, inspection of deliveries, payment of invoices, and filing.

Indicator 3.2 Extent of e-procurement

Baseline: a) The percentage of e-procurement should be no less than X% of the total number of tenders during a calendar year, starting from X year.

Performance Area 4. External and Internal Relations and Collaboration

This performance area demonstrates the standard of external and internal relations pursued by the procurement organisation, as perceived in particular by suppliers and internal clients of the contracting authority, but it also attempts to evaluate the relationships with other contracting authorities.

Indicator 4.1 Supplier relationships

Baseline: a) An annual **Supplier Satisfaction Survey** aims to ensure that the majority of suppliers are satisfied with the co-operative collaboration with the contracting authority.

Indicator 4.2 Internal client relationships

Baseline: a) An annual ***Internal Customer Survey*** aims to ensure that the majority of internal clients are satisfied with the services of the procurement organisation.

Indicator 4.3 External collaboration

Baseline: a) Procurement spending that is channelled through a collaborative framework contract/agreement issued by the contracting authority should not be less than X% of the total procurement volume.

Indicator 4.4 Internal compliance (to identify maverick spending)

Baseline: a) Procurement spending that is carried out by means of 'maverick spending' (by contracting suppliers that are not covered by a framework contract/ framework agreement) should not exceed X% of the total framework contract volume.

Performance Area 5. Efficiency and 'Value-for-Money'

This key area reflects the efficiency and effectiveness of the procurement organisation, which is measured with respect to its ability to meet performance goals in terms of economic targets, implementation deadlines, favourable prices, cost-effective purchasing contractually and logistically, as well as the innovative and developmental strengths of the contracting authority. This performance area could be considered in summary as a conception of "best value-for-money".

Indicator 5.1 Annual cashable savings

Baseline: a) Based on a representative ***basket of contracts*** with an identical composition (product or service-wise and in number) that ensures consistent calculation over time and is not subject to rapid specification changes, the price and cost development are determined with reference to year 1. The outcome is to be applied to the whole procurement volume for goods and services that do not fluctuate with the market.

b) For goods and services that are subject to rapid price fluctuations and specification changes, such as IT and utilities, ***individual price analyses*** should be carried out for those contracts, with reference to the baseline year, in order to determine the extent of savings or losses.

Indicator 5.2 Annual cashable efficiencies in the procurement function (other than price)

Baseline: a) The procurement function produces the same or improved results with fewer resources, transforming efficiency gains, through improvements either in output (*e.g.* technology improvements) or input (*e.g.* collaboration, logistics, processes), into verifiable, cashable savings by carrying out comparative cost/benefit analyses from year X to year Y.

Indicator 5.3 Project/contract implementation efficiency

Baseline: a) For one-off projects, such as capital investment and infrastructure projects, the feasibility study (business case), together with a detailed set of performance targets including costs and implementation deadlines, constitutes the baseline against which the performance of the project is to be measured.

b) The number of contracts with cost overruns may not exceed X.

c) The number of contracts with time overruns may not exceed X.

Performance Area 6. Accountability – External and Internal Control

This indicator measures the quality and credibility of external and internal control procedures and associated information systems, with the purpose, among others, of ensuring financial accountability.

Indicator 6.1 Quality of the statistical base of the contracting authority

Baseline: a) The management information system, including the procurement reporting and filing system, and the accounting system of relevance to the procurement function should provide the necessary information and data that are comprehensive enough to elaborate key statistical and economic data on the status of procurement operations.

Indicator 6.2 Quality of internal and external audit

Baseline: The assessment of the control and audit standard in public procurement is based on the following factors and refers to the control exercised by the government in accordance with relevant legislation.

a) A satisfactory legal and regulatory basis for financial control and audit of procurement operations, in line with international standards, should be in place.

b) Organisation and procedures for internal and external control and audit of public procurement operations at all levels in the public administration should follow acceptable international practices and requirements.

c) The supreme audit institution should conduct external audit, giving balanced attention to the needs of both compliance audit and performance audit.

Indicator 6.3 Claiming financial accountability

Baseline: a) On the financial side, external audit should annually attest to the reliability of the information provided in the contracting authority's financial reports and to the quality of the overall internal control systems (including the quality of internal audit), with the aim of giving reasonable assurance that the funds entrusted to the organisation have been spent in compliance with the regulations in force. On the performance side, external audit should focus on the efficiency and effectiveness of the procurement system as a whole, with the aim of fostering procurement operations in line with best practices.

3.2.1 Reporting of achievements and results

The performance areas or indicators are not all of the same importance for the management of the contracting authority in the assessment of the public procurement system. Where there is an interest to develop a **composite index**, with an aggregate result of the measurements that have been conducted under the various performance areas, it may be left to the discretion of the individual authority to introduce a **weighting of indicators** in order to better reflect its own priorities with regard to its procurement policy requirements. A composite index may offer certain advantages since it may produce a clear and immediate message concerning the standard or status of the procurement system, including individual performance areas and indicators, which is less confusing about how the results should be interpreted, thereby making it easier to measure progress or lack of progress over time. However, the subjectivity element of the process, in particular with regard to indicators requiring a judged assessment, would entail a serious validation problem.

The results and findings should be presented in an annual report and made accessible within the public administration for comparative and benchmarking purposes, as well as to the general public. With reference to the fundamental objectives set for the operations and procurement measurement system, the report should (i) describe the main findings in terms of **strengths and weaknesses** of public procurement operations, and (ii) define a list of **recommended actions for improvement** of the system. The results should form part of the management strategic planning in the short and medium terms.

SECTION 3
EXERCISES AND CASE STUDY

EXERCISE 1
CLASS CASE STUDY

Your department has been asked by the top management team to analyse performance in terms of cost and price savings on certain crucial items that your contracting authority purchased during a period of three years against the baseline year 1.

Strong concerns have been raised by the user departments over the correctness of the prices they have had to pay for the products and services provided by the contracting authority. They are considering running future procurement processes themselves.

Your task will be the following:

(a) To prepare a basket of representative products of your organisation, on the basis of which you should determine the price developments in nominal terms as well as in real terms (taking into account inflation). What would be the most appropriate items to include in such an analysis?

(b) You should further benchmark your own results against market development for the same products by undertaking a simple market analysis. How could such a market analysis be carried out?

(c) You should prepare a brief report (1-2 pages) on your findings to be sent to the top management team. What is the main content of such a report?

EXERCISE 2: INDIVIDUAL CASE STUDY

You have been asked by your manager to prepare an Internal Customer Survey. He/she is interested in receiving information and feedback from the users of the department's services, which could serve as a platform for improving the quality and performance of the procuring organisation. The top management is not satisfied with the general efficiency of the overall organisation, and has launched a "Performance Improvement Programme 2011".

Your task will be to:

a) Prepare a draft survey with objectives, a table of contents, and key questions

b) Prepare an action plan for the implementation of that survey

c) Present the results of the survey to the class (10 minutes)

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. How would you define the term "consultant"?
2. What is a baseline?
3. State the main reasons why performance measuring of procurement operations is such an important activity.
4. What is a performance indicator?
5. What are the differences between an output and input performance indicator?
6. What are the main performance areas that should be measured?
7. What is benchmarking?

MODULE C

PUBLIC PROCUREMENT TRAINING FOR IPA BENEFICIARIES

Preparation of procurement

Preparation of procurement

MODULE C

Procurement planning

PART 1

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this module are to make participants aware of:

1. The vital need for planning, and what happens if planning does not take place
2. A sample procurement plan, which participants can mould to the needs of their own contracting authority
3. The role of stakeholders during planning
4. The need to research the supply market
5. The advantages of networking with other procurement officers
6. The need to relate requirements to budgets
7. Options for packaging requirements, to encourage competition from economic operators

1.2 IMPORTANT ISSUES

Harvey MacKay said, "Failures don't plan to fail; they fail to plan."

Planning is a vital part of a procurement officer's activity. The amount of planning undertaken is one of the distinguishing characteristics between good procurement professionals and others.

1.3 LINKS

Links to other modules appear throughout the text of this document. There is, however, an especially strong link to:

- Module B2 on the procurement cycle
- Module B3 on the role of the procurement officer
- Module B4 on the role of stakeholders
- Module E1 on specifications

1.4 RELEVANCE

Procurement officers need to understand the concepts and benefits of procurement planning in order to do their job effectively.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

This section will link to other areas referring more closely to legal information.

LOCALISATION WILL NEED TO REFER TO SPECIFIC LEGAL DOCUMENTS

SECTION 2
NARRATIVE

OVERVIEW

This module looks at the need for procurement planning in the context of both annual procurement plans and individual procurement plans. A sample process linked to the budgeting round is provided, and an assessment has been made of the advantages of procurement planning and the consequences of not undertaking procurement planning. The role of stakeholders during the planning stage is considered, and the need to actively research the supply market is explored. During planning activities, the advantage of networking with other procurement officers is described, and the advantage of packaging requirements to encourage competition is also reviewed. Finally, comments are made related to planning for the procurement of works.

2.1 INTRODUCTION

This section describes the procurement officer's involvement in procurement planning. It covers:

- 2.2 Need for procurement planning
- 2.3 Annual procurement planning, a sample process linked to the budgeting round, and advantages of undertaking procurement planning (and consequences of not planning)
- 2.4 Individual procurement plans
- 2.5 Role of stakeholders during the planning stage
- 2.6 Need to research the supply market
- 2.7 Advantages of networking with other procurement officers
- 2.8 Options for packaging requirements to encourage competition from economic operators
- 2.9 Planning for the procurement of works

2.2 NEED FOR PROCUREMENT PLANNING

Procurement planning is defined as both:

- A process used by contracting authorities to plan purchasing activity for a specific period of time
- A plan for the purchase of a specific requirement

To achieve both definitions, procurement officers will need to be closely involved with budget-holders and other stakeholders. Procurement planning applies to the procurement of works, supplies and services.

Harvey MacKay said that "failures don't plan to fail; they fail to plan". Planning is a vital part of a procurement officer's activity. The amount of planning undertaken is one of the distinguishing characteristics between good procurement professionals and others.

Following a decision to proceed with the procurement of works based upon a business case procurement (described in module B2, where it constitutes step eight of the procurement process and an example of business case contents is included), other procurement planning activities before proceeding with the project may include a feasibility study, a more detailed project plan, and an environmental impact assessment.

To a large extent the procurement becomes a project and is managed using project management techniques. For example, a project initiation document and sophisticated software may be required to plan hundreds of individual actions involved in a construction project. A specialist project manager may manage the project and these actions, but procurement will also be involved, as described below.

2.3 ANNUAL PROCUREMENT PLANNING

The first definition in the section above refers to step 1 of the procurement process, the annual procurement plan, which is linked to the budgeting cycle of the contracting authority, where departments are required to request budgets for staff, expenses, and purchases. An annual procurement plan may be a requirement under local laws or local procedures.

The annual procurement plan is also the first step in the procurement planning process. Ideally, the relationship that procurement officers have with stakeholder departments should be so close that they are involved at an early stage of the budgeting round and asked for their view of the likely cost of given purchases to feed into the budget. It is recognised that in some cases the budgeting cycle may be bi-annual.

2.3.1 Sample process and timeline linked to the budgeting round

In one contracting authority, where the budget year ran from January to December, the process for requirements – irrespective of whether they were works, supplies or services – worked like this:

- Early September: The department heads received purchasing proposals from staff on their teams. These proposals were debated and an agreed initial target list was put forward.
- End-September: The procurement specialists linked to each department and other stakeholders used their experience to put initial budget figures to the agreed initial target list.
- Mid-October: A meeting with the head of department, the procurement specialists and others as necessary refined the list in the light of initial and further work on likely costs to produce a draft budget to send to finance (to achieve this, parallel work streams took place).
- By the end of October two activities had to be completed in parallel. Firstly, the finance department reviewed all of the budget requests submitted and pruned the requests as it considered appropriate. Secondly, the procurement team reviewed the purchase content of all budgets to check for economies of scale, combining the requirements of various departments and making recommendations accordingly.

- In early November the actual budgets were finalised and by mid-November the governing body of the contracting authority was asked to approve the budget. Once this was complete, the procurement team and the stakeholders could proceed with early planning on purchases for the coming January.

The above process was sometimes hectic and on some occasions it felt rushed, but everyone involved agreed that it was a worthwhile use of time and energy.

Your contracting authority may have a different calendar year and it may also have a different timetable. Adjust the above timetable to suit your needs and involve all of the necessary contributors in the preparation of the annual procurement plan.

Localisation – plans may run for a different calendar year and there may be different or mandatory timetables and processes.

2.3.2 Advantages of the procurement planning process

The advantages of the procurement planning process are as follows:

- Links are forged between the stakeholders, finance department and procurement team from the earliest notion of there being a requirement. Procurement officers are then alerted for any information on the potential requirements.
- Economies of scale are gained by uniting the requirements of different areas.
- There are no surprises when requirements manifest themselves in later months.
- Requirements can be timed to the year-end of economic operators that may be tendering so as to achieve better deals.
- Everyone can plan and schedule resources for the coming year more effectively.
- Periodic indicative notices can be published on the basis of the procurement plan (these are not obligatory but can help competition by pre-warning economic operators of new opportunities).
- Co-operation with other contracting authorities is more fruitful.
- The procurement plan is linked to the strategic plan of the contracting authority.

2.3.3 Consequences of not undertaking procurement planning

By not undertaking such a planning process:

- Stakeholders, the finance department and the procurement team would work in isolation, unaware of each others' needs.
- Requirements received by the procurement team would be surprises, for which no pre-planning would have been possible.
- Procurement officers would miss information on the potential requirements because they would not know they existed.
- Economies of scale would be lost because the requirements of different areas would be processed separately.
- Requirements would not be timed to the year-end of potential economic operators and so better deals could not be achieved.
- Resource scheduling would be difficult.

- Periodic indicative notices would not be published as easily.
- Co-operation with other contracting authorities would be more difficult as visibility of future needs would be limited.
- There would be no procurement plan linked to the strategic plan of the contracting authority.

Good practice note – stakeholder budgets

In one case in the contracting authority referred to above, an obstructive senior stakeholder refused to share information on his budget with procurement at the september meeting. "It was too confidential", he said. The procurement officer concerned approached the finance department, obtained the budget information and made cost-saving proposals at the mid-october meeting. An argument ensued, the cost-saving proposals were accepted, and the senior stakeholder was removed from office two months later by the head of the contracting authority, who could not understand the stakeholder's attitude.

Here, the lesson for procurement is to be persistent and not to be put off by obstructive people.

The primary concept of procurement is that advanced planning, scheduling and joint projects will result in cost savings, more efficient and effective processes, and therefore increased value-for-money. Procurement planning also links the strategy of the contracting authority to procurement activity and individual purchases.

Appendix 2 contains the City of Cork's (Eire) procurement plan for 2008-2010.

2.4 INDIVIDUAL PROCUREMENT PLANS

2.4.1 Introduction

Examples of individual procurement plans are provided in Appendix 1 below.

- Appendix 1, section A.2 contains a plan that is annotated with boxes referring to the tabulated notes in this section
- Appendix 1, section A.3 contains a raw plan with no annotation. This plan is intended to be copied and used by participants in their own contracting authority
- Appendix 1, section A.4 contains a sample completed procurement plan

2.4.2 Note on completing the procurement plan in Appendix 1, section A.2

This text starts on the next page.

COMPLETING THE PROCUREMENT PLAN

Introductory comments

1. The procurement plan presented to you in the annotated procurement plan is not a fixed document. You must adapt it to meet the needs of your contracting authority and the needs of the requirement being purchased.
2. A common mistake is to try to use the same format for every purchase made. The essence of success is to have the same template plan with some essential elements, which is adapted to suit the specific job in hand.
3. Completing a procurement plan is not a five-minute job. It requires time, investigation, and working with others. The first activity of the procurement officer should be to organise the way in which the plan will be completed and who will be involved in the task.
4. This plan and the planning that it involves should be undertaken once a procurement need has been identified or once it has been decided to commence planning for a requirement that is included in the annual procurement plan. The activity will start at step 2 of the procurement cycle and, for straightforward requirements, could almost be completed at that stage. However, for substantial procurement the plan will require the work of several persons over a period of time and will probably involve activities up to and including step 9 of the procurement process (approval). There is no single right or wrong approach.
5. Each of the text boxes and tables in the plan should be expanded as necessary; sometimes the total length of the plan will exceed 10 pages. The template is a tool, not a straightjacket.
6. The procurement plan is an important document. At the top of the document should appear the contracting authority logo.
7. In the table below a number has been provided for each box on the annotated procurement plan; each box includes recommended contents, notes on the contents, and an indication of who should be responsible for completing it. This table has been based on how procurement practitioners use this sort of document. If you wish to adapt the boxes to the needs of your contracting authority, feel free to do so.
8. It is presumed that a multi-disciplinary team, led by a procurement officer, will complete this document. This team is comprised of the persons referred to in box 3 below.

Box	Recommended contents	Notes on contents	To be completed by
1	Contracting authority name, name of requirement, requirement reference number, author's name and contact details, date of plan, version number, budget, target date of procurement and other basic information as necessary in your contracting authority	This box needs adapting and probably breaking down into subheadings or a table to reflect your contracting authority, your department names and your style of operation. Budget and cost information could be included here, although actual cost information may also be an output of market research. The key point about this box is that it contains all of the relevant basic information to allow anyone reading the plan to understand the essence of the document that follows.	The procurement officer running the procurement
2	This table indicates who the key stakeholders are in this procurement exercise and their department(s). It also includes a space for them to 'sign off' the plan when it is completed.	Identifying stakeholders is an important part of preparing a procurement plan. The stakeholders identified in this table will include: ■ heads of department, who will use the requirement once it is procured ■ budget-holders ■ heads of finance ■ technical specialists ■ legal representatives These stakeholders are the decision-makers who will approve the plan once it has been completed. They may second other people who work for them to complete the plan, but they will sign the document allowing the project to go ahead.	The procurement officer running the procurement in conjunction with the persons named in the boxes The persons named to sign off the document

Box	Recommended contents	Notes on contents	To be completed by
3	This table indicates the names of the 'worker stakeholders' within this procurement exercise and their department. The term 'worker stakeholders' denotes persons playing an active role in the development of the plan. It also has space for them to sign the plan when it is completed.	It is important for the senior stakeholders in the contracting authority to be able to understand who has been involved in the preparation of the procurement plan: ■ If they see that a specific person or department has not been included, they may want this person or department to be involved and to sign off the plan before they themselves sign it off. ■ If a named person who was involved in preparing the document has not signed the document, a senior person may refuse to sign the document until that other person has signed it. The contents of this box should include the name of every person who has a responsibility to be involved in the procurement.	The procurement officer running the procurement in conjunction with the people named in the boxes The persons named to sign off the document
4	Names of others consulted	This area of the document can be used to demonstrate that the core team involved in the requirement have consulted others in the contracting authority. Any external consultants or experts consulted would be noted here.	The procurement officer running the procurement in conjunction with the persons named in box 3
5	Requirement summary	This box should summarise the requirement being purchased. It needs to contain enough detail to describe the requirement and convey its essence, but should not be unnecessarily long. Where the budget is a real issue, it could be referred to here.	The technical specialist stakeholder and/or the other members of the team
6	Areas affected by this requirement	This box is used to record the names of persons in areas of the contracting authority who are affected by the requirement. It acts as a reminder to the team that it needs to consult these areas. Persons signing off in box 2 will want to ensure that everyone affected by the requirement has been consulted.	The procurement officer running the procurement in conjunction with the persons named in box 3

Box	Recommended contents	Notes on contents	To be completed by
7	Constraints	This box is where the team indicates the constraints. These may be specific technical issues or generic items, such as the budget, time or space. Where the budget is smaller than would ideally be sought, this could be considered as a constraint and included here.	The procurement officer running the procurement in conjunction with the persons named in box 3
8	Market analysis	Procurement officers should make an attempt to ascertain the state of the market for their requirement and inform the team. It may be competitive or monopolistic, or it may be suspected that the market is controlled by a cartel. This information will assist in planning the procurement. Market research may be conducted using a variety of sources. One output of market research is the determination of likely costs and the relation of those costs to the budget.	The procurement officer running the procurement in conjunction with the persons named in box 3
9	SWOT analysis (Strengths, Weaknesses, Opportunities and Threats) – from the point of view of the contracting authority	The box invites the team to attempt to identify the strengths, weaknesses, opportunities and threats that it faces in carrying out this procurement. The strengths and weaknesses are normally internal to the contracting authority and the opportunities and threats are usually external. ■ Strengths could include the fact that there is a purchase to make that will attract economic operators. ■ Weaknesses could include not having the desired budget size or suspecting that persons from the economic operator have good contacts in the contracting authority and know about the requirement. ■ Opportunities could include the shortage of work that some economic operators may currently have. ■ Threats could include the busy state of the market and the unattractiveness of the requirement. Be honest when completing these entries; do not pretend that a situation is better than it is!	The procurement officer running the procurement in conjunction with the persons named in box 3 and others as necessary

Box	Recommended contents	Notes on contents	To be completed by
10	SWOT analysis – from the point of view of the economic operator	The box invites the team to attempt to identify the strengths, weaknesses, opportunities and threats that economic operators may face in submitting a tender for this procurement. The strengths and weaknesses are normally internal to the economic operator and the opportunities and threats are usually external. ■ Strengths could include the fact that the economic operator team knows the contracting authority and its staff well, and feels that it understands the way in which the authority works. Equally, it could be that the economic operator team is convinced that it offers the best solution. ■ Weaknesses could include neither knowing the contracting authority and its staff well nor knowing how it works or having failed previously when working for the contracting authority.. Equally, it could be that the team believes that it does not have the best solution to offer here. ■ Opportunities could include the fact that this business is placed in competition when other economic operators are not competing for the work. ■ Threats could include the fact that there will be several competitors competing for this work and that the economic operator team must be sharp in quoting this requirement. Be honest when completing these entries; do not pretend that a situation is better than it is!	The procurement officer running the procurement in conjunction with the persons named in box 3 and others as necessary

Box	Recommended contents	Notes on contents	To be completed by
11	Knowledge gaps to fill and actions taken to fill the gap	This is an area where poor procurement officers will assume that there is nothing to find out and prudent procurement officers will realise that there are things that they don't know and need to find out. Be honest when completing these entries; do not pretend that a situation is better than it is! These gaps may be apparent from the SWOT and market analyses or from questions that the team may consider. Typical gaps can include: ■ Stakeholder requirements and priorities ■ Requirement characteristics, features, and possible variations with the requirement ■ Technologies involved – possible choices and options ■ Supply market characteristics ■ Supply chain characteristics and cost-drivers ■ Economic operators' pricing policies (which impact on the cost for the contracting authority) ■ Economic operators' roadmaps ■ Current economic operator's capabilities ■ Current economic operator's performance for similar contracts ■ Other (be inventive!!) At the start of the plan there may be many gaps, but as the plan develops the gaps should be closed. Some contracting authoritiesy make this area in the plan a separate task, assigning responsibilities to the team members and then presenting a summary in the document.	The procurement officer running the procurement in conjunction with the persons named in box 3 and others as necessary
12	Risk management	Some contracting authorities include a risk management matrix at this stage of the procurement process. They identify the risks, set out plans to mitigate the risks, and allocate responsibilities and time schedules.	The procurement officer running the procurement in conjunction with the persons named in box 3 and others as necessary

Box	Recommended contents	Notes on contents	To be completed by
13	Deliverables	Deliverables can be an early version of the tender award criteria, but at this stage they do not have to be specific. The vital action here is to oblige the team to make a statement about what the benefit of procuring this requirement will be. In the final version of the plan it may be that the award criteria are included. Delivering within the iron triangle may be referenced here (see notes below for information on the "iron triangle").	The procurement officer running the procurement in conjunction with the persons named in box 3 and others as necessary
14	Strategy to deliver deliverables	This box should summarise the strategy that the team is going to adopt for this requirement and the tactics that it is going to use to get there. This strategy should state: ■ which of the public procurement procedures are going to be adopted for this requirement - open, restricted, negotiated procedure with prior publication of a notice, or competitive dialogue ■ which of the tools will be used, such as framework agreements, electronic auctions, dynamic purchasing systems or a central purchasing body	The procurement officer running the procurement in conjunction with the persons named in box 3 and others as necessary
15	Action plan	This box should identify the outline timing of the procurement exercise in the form of a plan detailing who will be responsible for each part. A Gantt chart could be useful here, as could budget monitoring and a project plan for works developments.	The procurement officer running the procurement in conjunction with the persons named in box 3 and others as necessary

2.5 ROLE OF STAKEHOLDERS DURING THE PLANNING STAGE

The role of stakeholders in the procurement process is covered in module B4. Additionally, sections 2.3 and 2.4 of this document have covered the role of stakeholders in the annual planning exercise and in the completion of the specific procurement plan. The brief notes in this section add to the other information provided.

Stakeholders' prime function is to carry out their normal duties, be it as an IT manager, a maintenance engineer, a catering manager or a tax collector. Their involvement in procurement is for them a means to an end. Procurement officers must treat stakeholders as customers (this topic was covered in module B2).

Bearing all of this in mind when considering procurement planning, procurement officers must work with stakeholders to encourage them to consider the process as a convenient means of achieving their objectives. The role of stakeholders in the procurement planning process can be summarised as:

- Identifying the requirements they need to procure
- Providing input to the annual procurement plan
- Examining options for the goods, services and works required with procurement
- Working with other stakeholders and procurement officers to combine requirements to achieve economies of scale
- Considering packaging options for the requirements with procurement and other stakeholders
- Developing requirement specifications
- Considering the analyses within individual procurement plans with procurement officers and other stakeholders
- Timing their needs

2.6 NEED TO RESEARCH THE SUPPLY MARKET

2.6.1 The contribution of supply market research

One of the major contributions that procurement officers can make to stakeholders is market research. The Internet makes research a much easier option than it was previously.

Supply market research involves understanding the full range of current and potential economic operators, current and potential products and services, and the nature and dynamics of the local and global markets involved.

Procurement officers must not be limited to local country markets; they must extend their research so as to obtain regional and global views.

This research complements current knowledge and experience held by the contracting authority, which may be incomplete, fragmented or out-of-date. It aims to build a systematic, in-depth and comprehensive view of the whole market for the requirement in question.

This process can require a substantial commitment of time and resources depending on the starting position, but it is essential to continuously monitor and update the information gathered.

Research is an ongoing task – it is important to understand how economic operators and the market are changing in order to spot opportunities and build potential strategies for developing the market.

Procurement officers and technical specialist stakeholders can aspire to understanding their economic operators as well as the contracting authorities understand themselves, and to knowing more about the supply market than any individual economic operator. Knowledge is power.

2.6.2 Objectives of supply market research

The objectives of supply market research include:

- Supporting the creation of annual and individual procurement plans and strategies through an understanding of how markets operate
- Clarifying where the leverage points and opportunities exist in the marketplace
- Visualising and understanding the marketplace from the economic operators' perspective
- Influencing economic operators through a better understanding of their playing field, strengths, weaknesses and opportunities

2.6.3 Sources of information

Sources of information include:

- Patents
- Press and industry associations
- Company reports and brochures
- Plant tours and visits to economic operators
- History, contracts, agreements
- Formal enquiries
- Planned interviews
- Former employees
- Financial analysts
- Economic operators and their competitors
- Colleagues
- Other procurement officers
- Internet

2.6.4 Information to be gathered

The information to be gathered can include:

- History
- Market profiles
- Dynamics
- Diversity
- Niches
- Economic operators and their supply chain

History

- Previous purchases, volumes, shares, economic operators
- Price changes by economic operator over time, patterns of change, by niche
- Patterns of technology introduction
- Changes in market share

Market profile

- Market size, quantities, local, regional or international nature
- Commodity make-up
- Number of economic operators, market share of each
- Niches and specialist areas

Market dynamics

- Market cycles, natural and induced
- Life cycles and how they are changing
- New segments being created or old ones dying
- Impact of current and future technology
- Growth or decline, segment differences
- Profitability changes

Market diversity

- Fundamentals of supply and demand in the market
  - Changes in capacity – past, present and future
  - Changes in demand – past, present and future
- Cost-drivers:
  - Impact of transportation, energy, raw material cost shocks, labour costs, low-cost country sourcing
  - Possible technology changes and cost impacts

- Substitutes and allied products available
- Other products available that are not currently used
- Value-added – what is available?
- New/ better options or uses being created by innovation and technology
- Location of key global geographic centres and currency and duty impacts
- Geopolitical impacts, historical and future
- Barriers to entry

Niches

- Determining the niches existing in the market place, how they are populated with products and economic operators, and what are the important dynamics and drivers in the niches that are relevant to us:
  - How do channels to the market act as niches?
  - Compare economic operators and products/services within niches, and niches with each other, on the basis of price, cost, technology, added-value and dynamics
  - How does a service or product offering change in value and price from one niche, industry or channel to another?

Economic operators and the supply chain

- Who are the economic operators? What is their size? Breadth of line? Niche focus? Relationship with us?
- Who are the major buyers? By niche and product/service? For what purpose do they use the product/service? Relationship with us?
- Who supplies the economic operator? The cost breakdown of the goods and services?
- What are the key components of cost that drive those goods/services and markets?

2.7 ADVANTAGES OF NETWORKING WITH OTHER PROCUREMENT OFFICERS

Module B2 refers to co-operating with other contracting authorities.

The aim of this activity is to exchange good practice. **Good practice does not include exchanging specific costs, prices and performance of economic operators**, but it does include:

- Approaches to contract formulation
- Approaches to bundling requirements
- Terms and conditions that have worked
- Generic tactics being tried by economic operators on contracting authorities
- Solutions to problematic issues

Information must be exchanged at a high generic level; however, the essence of networking is that someone else may have solved the problem you face.

One advantage that public procurement officers have in this area is the fact that they are not in competition, and therefore persons working with other contracting authorities will feel freer to share information with them.

2.8 PACKAGING REQUIREMENTS TO ENCOURAGE COMPETITION

The golden rule of attracting competition is to specify in a generic way. This aspect of the procurement process is dealt with in module E1. However, even a generic specification may not always attract many economic operators. The following notes aim to act as guidance on making the bundle of the requirement to be advertised as 'attractive' to as wide a range of economic operators as possible. These notes should be read in conjunction with module A4, which looks at the economic issues related to the packaging of contract opportunities. This is part of the procurement planning process, and as you will see there is no single correct approach.

- In some cases even a generic specification for a tiny requirement or a requirement in a remote location will not attract economic operators. One solution here is to include the requirement in a larger package of similar work or to work with other contracting authorities to create a more attractive requirement in the supply market.
- The opposite of the above example is where the requirement is huge, reflecting a major expenditure and a national requirement. As such, this requirement may only be supplied by one or two large economic operators. Here a solution is to divide the requirement into smaller packages, either geographically or by their nature. An example would be the supply of IT hardware as one contract, installation as another and maintenance as a third contract. This solution may promote competition, but it may also deny economies of scale and create management problems.
- Issuing a Prior Information Notice (PIN) to ensure that interested economic operators have as much time as possible to prepare for participation is another way of increasing attractiveness to the supply market.
- Holding 'meet the buyer' days, where a number of public sector procurement officers are available to meet persons from prospective economic operators, is another option.
- Prospective economic operators could consider developing and providing a good information pack about the proposed project. The pack should ideally include an insight into your contracting authority's business, its vision, objectives and business constraints, a clear performance specification and the flexibility around the time frames for the proposed work, making clear any mandatory deadlines.

2.9 PLANNING FOR THE PROCUREMENT OF WORKS

Localisation to reflect requirements, such as budgetary approval

The size, risk, impact and overall cost of works means that procurement officers need to be involved in additional activities when procuring works, although the purchase of complex services and equipment may also benefit from some of the steps identified below.

2.9.1 The business case

For the procurement of works, the following information should be included in the business case:

- The outline capital and operating budgets for the works over their expected lifetime, which will include capital construction costs and operating revenue necessary to maintain the completed structure
- Quantification of the benefits that the works are likely to deliver to the contracting authority or to the community at large over its lifetime
- How the works will be financed
- Risk assessment of the cost, time and performance, examining the probability, impact and duration of risks if they materialise. Supporting assistance of specialist consultants may be useful here.
- Outline programme for the construction
- Indication of the procurement procedure to be used (open, restricted, competitive dialogue, negotiated procedure with prior publication of a contract notice)
- Resources that will be required from the contracting authority

Many of these points are interrelated and it may be necessary for the persons who are running the procurement to trade off benefits and costs. The business case will test the feasibility of the project in cost, resource and commercial terms, but technical feasibility studies may also be required.

2.9.2 Technical feasibility studies

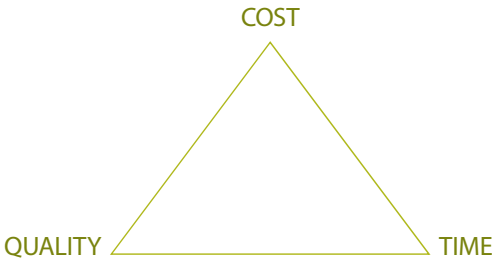
A technical feasibility study may be necessary to ascertain whether the project is technically feasible, even if the time, resources and budgets are available. A city may wish to build a bridge over a river at a given point, but geological surveys may reveal that the underlying land is too marshy to support a structure. Equally it may be possible to support the structure, but the cost of the additional piling may break the budget and a different location may need to be sought. Examples of areas where technical feasibility are used include:

- Construction projects (buildings, bridges, airports)
- Computer system integration projects (integrating new and existing system components)
- Updating complex equipment (seeking new engines for a fleet of 500 railway engines)
- Telephony (integrating a new exchange with existing equipment)

It will be necessary to indicate the ground on which a building or bridge is to be built or the existing interior of buildings that are to be renovated.

2.9.3 The 'iron triangle'

Procurement officers experienced in works projects talk of a concept called the 'iron triangle'. The three points of the triangle, as shown below, are cost, time and quality.



The vital consideration behind the iron triangle is that a change in one component will impact on the others, and therefore:

- An attempt to reduce the cost may impact on and reduce the quality of the works as delivered.
- An increase in cost arising from the technical feasibility study (which has determined, for example, that the foundations of the building must now be five metres rather than three metres) will impact on the cost. Even if quality is not to be affected, additional costs and additional time will be necessary to excavate the
- If time must be reduced, then additional costs may be required, or reducing the scope may impact on quality.
- If quality is to be increased or if a reduction of scope is to be avoided when there is a potential budget overrun, then there will be an impact on cost.

The iron triangle is 'iron' because it is difficult to move!

2.9.4 An example of how these factors impact on a works procurement

The following examples of how aspects from the business case and from the iron triangle shaped the public procurement for a desalination plant are given below:

- Capital budget of €30m was agreed
- Operating costs were budgeted at €1m per year
- Construction would take 24 months
- The project would end water shortages and avoid the necessity of building a €100 dam and piping system
- Proven processes from elsewhere were to be selected
- The quality was to be such that the plant would last in excess of 25 years
- Water processing targets in litres per hour were agreed
- The city council would finance the project from local taxation
- The site chosen was fixed and had a low environmental impact
- Latency for expansion was to be considered up to 20% of the specified capacity
- A restricted procedure was selected and incentivisation clauses were to be included to ensure on-time delivery

The project was completed in 22 months.

NB: Incentivisation relates to additional payments to economic operators to encourage the delivery of improved service (in this case an earlier handover date) and reduced payments for poorer service (in this case a later handover date).

2.9.5 Detailed planning

For works projects procurement officers may be involved in detailed planning with the project manager. On some occasions the contracting authority may also have a project manager. This activity may involve concepts such as critical path analysis and the use of Gantt charts to plan and monitor the progress of the project. Here, procurement officers are required to work closely with the project manager or project team to:

- assist in the development of the detailed plan
- activate specific sub-purchases within the plan and within the time frame
- monitor progress and ensure arrival/delivery to time schedule
- handle any detailed project questions or issues with economic operators delivering various parts of the project
- handle any detailed questions or issues that economic operators may have in delivering various parts of the project

2.9.6 Environmental impact assessment

Works procurement may involve an environmental impact assessment (EIA).

Note on Environmental Impact Assessments:

For certain types of public and private projects it is obligatory to undertake an Environmental Impact Assessment (EIA). This obligation does not derive from the procurement Directives but from Directive 85/337/EC (as amended), "the EIA Directive". Where a project is of a type which is subject to the EIA Directive, then the contracting authority must carry out an EIA in advance so that the authority has all relevant information which enables it to take a decision in the full knowledge of the environmental impact of that decision. The types of project covered are set out in the EIA Directive and can include, for example, oil refineries, power stations, major infrastructure projects and waste disposal installations.

Where an EIA is produced then this may have an effect on the subject matter of the contract and/or on the performance clauses.

For further information on the EIA Directive see: europa.eu'environmental/eia

An EIA should include the following elements:

- A summary, overview and description of the purchase
- A description of the environment at the site
- An indication of the alternatives covered
- A description of the impacts on the environment of the options considered
- Steps taken to mitigate the impact upon the environment
- The selected option

Brief notes on each of the above elements follow.

A summary, overview and description of the purchase

The purchase or project must be described to give a clear understanding of its objectives and benefits. This should include:

- A description of the actual project and a site description
- Dissecting the works development into its key components, i.e. construction, operations, decommissioning
- A list of all of the sources of environmental disturbance for each component
- Identification of the inputs and outputs, *e.g.* air pollution, noise, hydrology

A description of the environment at the site of the works development

The EIA should describe all aspects of the environment that may be effected by the works development. This can include:

- Local population
- Fauna
- Flora
- Air
- Soil
- Water
- Landscape
- Cultural heritage

This analysis is frequently carried out with the help of local experts, e.g. in the UK if a wind farm would have an impact on the bird population, the RSPB would be involved.

LOCALISATION – use the name of a special interest group in the country concerned.

An indication of the alternatives covered

This part of the EIA should describe the alternative solutions examined and how they attempt to minimise the impact. Examples could include:

- Diverting the course of the road
- Providing a tunnel under the road for frogs to use to avoid being run over
- Sourcing fuel locally to reduce the carbon footprint
- Delaying the construction to avoid the mating season
- Doing nothing

A description of the impacts on the environment of the options considered

This part of the EIA should describe the impact of the alternative solutions examined. Examples could include:

- Diverting the road would avoid the project's impacting on the frogs but would cost an additional €3.82m.
- The tunnel would cost €4,500, but 40% of the frogs would still use the road and 50% would be run over by cars.
- Local fuel would cost 20% more but reduce the carbon footprint by 'x' tons as coal was not sourced in Siberia.
- The project would incur additional costs by delaying its start until June, but the rare birds would be able to mate as normal.
- Doing nothing would mean that 80% of the frogs crossing the new road would be squashed by vehicles using it. The population would be reduced by 90% in five years.

One method used to quantify impact is the Leopold Matrix, which identifies the potential impact of a works development on the environment. The Leopold Matrix consists of columns representing the various activities of the works development and rows representing the various environmental factors to be considered. The intersections are filled in to indicate the magnitude (from -10 to +10) and the importance (from 1 to 10) of the impact of each activity on each environmental factor.

Steps taken to mitigate the impact upon the environment

The previous analysis leads to an understanding of where the impact is the greatest so that plans can then be made to:

- avoid negative impacts in the planning and execution of the works development
- work with economic operators to design detail into the works to accommodate a favourable impact on the environment
- avoid negative impacts in the operation of the developed facility
- brief the general public on the actions being taken
- learn lessons for future projects

The selected option

Throughout the works development and subsequent operation, information should be available to the public on the continuing environmental management of the site and on improvements made to the site. Learning from the development can also be circulated to others embarking on similar developments and the actions taken can contribute to future research.

SECTION 3
EXERCISES

EXERCISE 1
THE ANNUAL PROCUREMENT PLANNING PROCESS

Assume that you have moved to a new contracting authority, one that has not used an annual planning process before. The financial year is January to December. Assume that the Director of Finance has asked you to propose a planning process involving:

- Heads of departments and the people who work for them
- Technical specialists
- The finance department.

The Director of Finance indicates that she feels that the process should start in September and be complete by mid-November.

Your task

Your task is to draw a flowchart of the process. A spare sheet of paper is provided.

EXERCISE 1
FLOWCHART

EXERCISE 2
THE ANNUAL PROCUREMENT PLAN

What are the advantages of constructing an annual procurement plan? Write your suggestions in the box below.

What might be the consequences of not undertaking an annual procurement plan? Write your suggestions in the box below.

EXERCISE 3
AN INDIVIDUAL PROCUREMENT PLAN

The following list contains 18 items that might be in an individual procurement plan. Three of them are incorrect. Can you identify which three comments are incorrect and then place all remaining items in the proper sequence within the plan?

There is no absolutely "right" sequence; however, it *is* logical to place some items before others in the plan. To add to the challenge, one of the wrong items *might* be right.

Item	Description of item	Sequence within plan
A	A list of areas within the contracting authority impacted by the requirement	
B	A list of stakeholders and people who should sign off the plan	
C	A list of worker stakeholders and people who will be involved in constructing the procurement plan from different departments	
D	A market analysis of the supply market for the procurement	
E	A summary of the requirement	
F	An analysis of the economic operator's tender	
G	An analysis of the strengths, weaknesses, opportunities and threats faced by the contracting authority in procuring this requirement	
H	An analysis of the strengths, weaknesses, opportunities and threats faced by the economic operator in supplying this requirement to the contracting authority	
I	Basic information about the requirement and its stakeholders	
J	Constraints that may be faced by the team working on the procurement	
K	How the economic operator can implement the requirement	
L	Knowledge gaps – things not known by the procurement team or stakeholders	
M	Names of other people consulted in the construction of the plan	
N	Risk management issues	
O	The action plan of who will do what and when	
P	The deliverables of the procurement if it is made	
Q	The name of your preferred economic operator	
S	The specification of the requirement	
T	The strategy and tactics to be used to approach the supply market to procure this requirement	
U	The terms and conditions you wish to use	

EXERCISE 4
THE CONTENTS OF AN INDIVIDUAL PROCUREMENT PLAN

Your tutor will provide you with handouts for this exercise.

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. How would you define procurement planning?
2. What are the advantages of procurement planning?
3. "Selecting the economic operator" is one of the 8 actions of a stakeholder in procurement planning.

   True or false?
4. Working with other stakeholders and procurement officers to combine requirements to achieve economies of scale" is one of the 8 actions of a stakeholder in procurement planning.

   True or false?
5. Complete this sentence:

   One of the _____ _____that procurement officers can make for stakeholders is market research.
6. What are the objectives of market research as part of procurement planning?
7. This module identified 13 sources of information for market research. Can you identify five of those?
8. What information from "history" should assist us in market research?
9. In networking with other procurement officers, is it appropriate to share prices and performance data from economic operators?
10. If a procurement officer has a national contract to place that she feels may only attract one or two economic operators, how can she make the requirement open to more competition?

WEBSITES

Information on the Leopold matrix and its use in environmental impact assessments can be obtained from

http://www.fao.org/docrep/005/v9933e/v9933e02.htm

APPENDIX 1
THE PROCUREMENT PLAN

SECTION A.1
INTRODUCTION

This section contains a sample procurement plan in three forms:

- Section A.2 contains a plan that is annotated, with boxes referring to the tabulated notes in section 2.4
- Section A.3 contains a raw plan with no annotation, which is intended to be copied and used by participants in their own contracting authority
- Section A.4 contains a sample completed procurement plan

SECTION A.2
PROCUREMENT PLAN – ANNOTATED VERSION

This document follows on the next page.

YOUR LOGO

PROCUREMENT PLAN

BOX 1

BASIC INFORMATION

BOX 2

STAKEHOLDERS		
Name	Department	Sign-off

BOX 3

PLAN PREPARED BY		
Name	Department	Signature

BOX 4

NAMES OF OTHERS CONSULTED	
Name	Department

BOX 5

REQUIREMENT SUMMARY

PROCUREMENT PLAN

Page 2

BOX 6

AREAS AFFECTED BY THIS REQUIREMENT

BOX 7

CONSTRAINTS

BOX 8

MARKET ANALYSIS

BOX 9

SWOT ANALYSIS FROM THE CONTRACTING AUTHORITY'S VIEWPOINT	
Strengths	Weaknesses
Opportunities	Threats

PROCUREMENT PLAN

Page 3

BOX 10

SWOT ANALYSIS FROM THE ECONOMIC OPERATOR'S VIEWPOINT	
Strengths	Weaknesses
Opportunities	Threats

BOX 11

KNOWLEDGE GAPS		
No.	Knowledge gap	Information to fill the gap
1		
2		
3		
4		
5		

BOX 12

RISK MANAGEMENT				
No.	Risk description	Mitigation action	Action by	Time frame
1				
2				
3				
4				
5				

BOX 13

DELIVERABLES

PROCUREMENT PLAN

Page 4

BOX 14

STRATEGY

BOX 15

ACTION PLAN			
No.	Action	Action by	Time frame
1			
2			
3			
4			
5			
99			

SECTION A.3
PROCUREMENT PLAN – RAW VERSION

This document follows on the next page.

YOUR LOGO

PROCUREMENT PLAN

BASIC INFORMATION

STAKEHOLDERS		
Name	Department	Sign-off

PLAN PREPARED BY		
Name	Department	Signature

NAMES OF OTHERS CONSULTED	
Name	Department

REQUIREMENT SUMMARY

PROCUREMENT PLAN

Page 2

AREAS AFFECTED BY THIS REQUIREMENT

CONSTRAINTS

MARKET ANALYSIS

SWOT ANALYSIS FROM THE CONTRACTING AUTHORITY'S VIEWPOINT	
Strengths	Weaknesses
Opportunities	Threats

PROCUREMENT PLAN

Page 3

SWOT ANALYSIS FROM THE ECONOMIC OPERATOR'S VIEWPOINT	
Strengths	Weaknesses
Opportunities	Threats

KNOWLEDGE GAPS		
No.	Knowledge gap	Information to fill the gap
1		
2		
3		
4		
5		

RISK MANAGEMENT				
No.	Risk description	Mitigation action	Action by	Time frame
1				
2				
3				
4				
5				

DELIVERABLES

PROCUREMENT PLAN

Page 4

STRATEGY

ACTION PLAN			
No.	Action	Action by	Time frame
1			
2			
3			
4			
5			
99			

SECTION A.4
PROCUREMENT PLAN – COMPLETED WITH SAMPLE DATA

This document follows on the next page.

K CITY COUNCIL - PROCUREMENT PLAN 2010/07

Plan number 2010 – 07 Version 2.5 Updated 12 January 2010
PProject name – IT System for Tax Collection
Procurement department – K City Council
Originated by AB Procurement Manager Tel Ext 1234
Target implementation date November 2010
Budget €6m

STAKEHOLDERS		
Name	Department	Sign-off
T. F.	Head of taxation	
A. B.	Head of finance	
C. B.	CEO	
H. F.	Head of legal	
T. B.	Head of IT	

PLAN PREPARED BY		
Name	Department	Signature
Y. L.	Taxation specialist	
C. L.	Senior accountant	
O. K.	IT consultant	
Y. T.	Taxation lawyer	
A. S.	Procurement manager	
R. Da C.	Procurement officer	

NAMES OF OTHERS CONSULTED	
Name	Department
T. S.	Customer liaison officer
I. G.	Network communications specialist
A. F.	City councillor
Z. L.	IT manager

REQUIREMENT SUMMARY

K City Council plans to purchase software to enhance its ability to collect local taxes. The system will integrate with other finance and accounting systems and national banks. The software should allow individuals in the region to pay their taxes online via the Internet. The software must be capable of operating on the existing hardware and software platforms operated by K City Council.

PROCUREMENT PLAN

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AREAS IMPACTED BY THIS REQUIREMENT
Taxation, tax collection, finance, banking, IT, IT maintenance, taxpayer liaison department, debt collection, procurement

CONSTRAINTS
Our current software platform is the X system. Our current hardware platform will not constrain a solution. Our current network is N1234. The budget is €6m, which includes all contingencies. This project must be implemented by January 2011.

MARKET ANALYSIS
The market is competitive. It has segments that include prestigious applications and basic applications, most of which can run on the X system. Local economic operators and national offices of international software vendors should be interested in this procurement opportunity.

SWOT ANALYSIS FROM THE CONTRACTING AUTHORITY'S VIEWPOINT	
Strengths	Weaknesses
We have a €6m budget, we have a definite approved project and we have the world's most common system as a software platform	Our track record on implementing these projects is poor, last time there was a €400k overrun
Opportunities	Threats
The opportunities presented by the software in the market should allow us to collect tax more efficiently and pursue tax dodgers more effectively. We will also need less people with this automated system. Forecasting the income of the council will be improved by the integration with financial applications	If we cannot find an economic operator to deliver this requirement on time, then the performance of the council will be more ineffective in 2010.

PROCUREMENT PLAN

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SWOT ANALYSIS FROM THE ECONOMIC OPERATOR'S VIEWPOINT	
Strengths	**Weaknesses**
K City Council has up-to-date IT applications and is a 'go-ahead' council. They have implemented the latest version of Oracle Financials in 2008. Our software will integrate with Oracle Financials.	Our budget may not be sufficient to procure the most advanced software solutions.
Opportunities	**Threats**
We may be able to use K as a reference site.	There will be a lot of competition, particularly from software written in India.

KNOWLEDGE GAPS		
No.	**Knowledge gap**	**Information to fill the gap**
1	Integration with existing applications rather than interfacing	Economic operators will specifically be asked this in the tender. We know someone at Y Town Council, which has done something similar, and are going to network with him.
2		
3		
4		
5		

RISK MANAGEMENT				
No.	**Risk description**	**Mitigation action**	**Action by**	**Time frame**
1	Project overrun	LM is going on a project management training programme.	LM	Feb 2010
2	Non-integration	Research and questioning of economic operators and others	PQ	Jan 2010
3				
4				
5				

DELIVERABLES
The implementation of tax collection software and associated processes working on our existing software platform, which will integrate with other key financial functions, reduce tax collection costs, and add effectiveness to tax collection processes in K, all for the benefit of its residents

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STRATEGY
A period of indicative notice was placed for this requirement in December 2009 and it is in the procurement plan published in December 2009 for 2010. The taxation, finance and IT representatives will produce a generic performance specification that will be tendered to the market using the open procedure. MEAT will be the evaluation criteria.

ACTION PLAN			
No.	Action	Action by	Time frame
1	Specification complete	Team	Feb 2010
2			
3			
4			
5			
99			

Preparation of procurement

MODULE C

Contract terms

PART 2

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. The basic aspects of a contract
2. Risks in commercial contracts
3. The layout and contents of some standard contracts for the procurement of supplies
4. The layout and contents of some standard contracts for the procurement of works
5. The layout and contents of some standard contracts for the procurement of services

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- The risks that may arise under a contract
- How the contract can share those risks between parties
- The features of commonly used standard contracts

1.3 LINKS

There is a particularly strong link between this chapter and the following modules or sections:

- Module C1 on procurement planning
- Module C5 on social and environmental considerations
- Module E1 on preparing tender documents
- Module E2 on advertisement of contract notices
- Module E3 on selection (qualification) of candidates
- Module E4 on setting contract award criteria
- Module E5 on contract evaluation and contract award
- Module G1 on contract management
- Module G3 on measuring performance in public procurement

1.4 RELEVANCE

This information will be of particular relevance to those procurement professionals responsible for procurement planning, for the development of projects, and for the preparation of contract documents. It is also relevant for those involved in project implementation, including contract management.

It will moreover be of particular relevance to those persons that, within the line management of the organisation of a contracting authority, have responsibilities and decision-making powers – including delegation powers – with regard to procurement (for example, decisions on the allocation of risk).

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

Adapt for local use

Directive 2004/18/EC

In this context it is helpful to look at both the recitals to the Directive and the relevant articles:

- Recital 1: context for the new Directive
- Article 23: technical specifications
- Recital 28: involvement of shelters for disabled people
- Recital 29 and Article 23: technical specifications, environmental characteristics and accessibility criteria for people with disabilities
- Recital 32: involvement of small companies through subcontracting
- Recital 33: vocational training and recruitment of long-term jobseekers and disabled persons
- Recital 34: cross-border employment of workers
- Recital 43: national legislation on the environment or on equal treatment of workers
- Recital 44: evidence of economic operator's technical abilities – environmental management measures
- Recital 46 and Article 53: award criteria to be listed

Regulation (EC) N°593/2008 ("Rome 1") on choice of applicable law

United Nations Convention for the International Sale of Goods ("Vienna Convention" 1980)

SECTION 2
NARRATIVE

2.1 BASICS OF A CONTRACT

What is a contract?

A contract is an agreement giving rise to obligations that are enforced or recognised by law.

Adapt for local use

Within a commercial environment, a contract for the supply of goods is an agreement by which the supplier (known as an "economic operator" under **Directive 2004/18/EC**) transfers or agrees to transfer the property in the goods to the buyer (known as the "contracting authority" under **Directive 2004/18/EC**) for money consideration, called the price. Similarly, a contract for the supply of works or services is an agreement by which the supplier provides or agrees to provide the works or services to the buyer in return for the agreed price.

For an agreement to be reached there must be an offer and an acceptance of that offer. The offer expresses willingness by the party making the offer to contract on certain terms with the intention that the offer shall become binding as soon as it is accepted by the party receiving the offer.

The offer can be withdrawn at any time prior to acceptance by the other party unless it stated that it would remain valid for a fixed period of time.

The acceptance must be a final and unqualified expression of assent to the terms of the offer. In general, the acceptance has no effect until it has been received by the party making the offer. The acceptance must reach the party making the offer within the time stated in the offer or if none is stated, within a time which is reasonable under the circumstances. In some circumstances, the conduct of the recipient of the offer is deemed to be acceptance.

A response that seeks to vary the terms of the offer may fail to take effect as an acceptance. Such a reply may constitute a counter-offer.

When the parties carry on lengthy negotiations there may be several counter-offers, and it can be difficult to determine exactly when and on what terms agreement was reached. In some cases, the parties may continue negotiations on an important point after they have agreed on all other matters of principle. This frequently occurs in the construction industry, when a project developer (the contracting authority) may issue a "letter of intent" setting out terms under which construction work is expected to begin, pending agreement on all other terms and the signature of a complete package of contract documents. It is not rare for the complete package of contract documents to never be signed, and in such an event a court may have to determine whether a contract existed for the whole of the works and to determine the terms of that contract. In other cases, the parties themselves may disagree as to whether they had ever agreed at all. In such cases, the court must look at the record of the negotiation in order to decide whether an agreement has been reached, and determine the terms of that agreement.

The "Battle of Forms"

Problems can arise when each party purports to contract with reference to their own set of standard terms, and the two sets conflict. If, throughout the process of offer and counter-offer, each party consistently refers to their own set of standard terms, no agreement will ever be reached. If a party alleges that an agreement was eventually reached, the court will have to determine whether at some stage one of the parties conceded the point in conflict in a communication or through their conduct.

When the parties believe that an agreement has been reached, it is usual for the agreement to be recorded in writing. In many countries, a contract can be made orally without ever being recorded in writing and there may never be any dispute over the terms of the agreement. However, to avoid disputes and in the interests of enforceability, it is preferable for the parties to set down precisely the terms of the entire agreement.

Contracts for the supply of goods, works or services of significant value will contain detailed terms set out in many clauses, the purpose being to safeguard the interests of each of the parties by clearly allocating responsibility for the risks to which the parties may be exposed by virtue of the contract. For transactions of lesser value, the contract may be shorter and less detailed because the financial impact, should a risk event occur, will be far less significant. Furthermore, the transfer of risk has an effect on price. When the goods, works or services are relatively minor, it could be uneconomic for the buyer to transfer risk to the seller via a complex and detailed contract.

The use of a standard form of contract – such as one of the FIDIC[1] suite of contracts for works of construction or the ICC[2] Model International Sale Contract for the supply of goods – can limit the volume of drafting work and negotiation, but the choice of standard form and the definition of particular conditions must be given careful thought.

The question to be constantly borne in mind when drafting and negotiating all contracts should be "What if …?"

Consideration

Under English law, a promise to do something (or not to do something) is generally not enforceable as a contract unless it is either made under seal or is supported by "consideration". In other words, "something of value in the eye of the law" must be given. This "consideration" may be some detriment to the promisee or some benefit to the promisor. Usually this detriment and benefit are the same thing looked at from the different viewpoints of the parties. Thus delivery of goods by the seller (which is to his detriment and to the benefit of the buyer) is good consideration for the buyer's promise to pay. Having suffered a detriment upon delivering the goods, the seller can enforce the buyer's promise to pay the price. The amount of the detriment or benefit is irrelevant because it is not consideration for the contract (it does not have to equal the value of the goods) but consideration for the promise. The promisee may give good consideration for the promise merely by doing something that they were not otherwise legally required to do.

[1] Féderation International des Ingénieurs de Conseil – a worldwide organisation based in Geneva that represents consulting engineers (see later section).

[2] International Chamber of Commerce – a worldwide organisation based in Paris that represents businesses.

2.2 RISKS IN A COMMERCIAL CONTRACT (SEE ALSO MODULE A4)

The applicable law of a contract allocates the risks envisaged in that contract to the contracting parties, and it is the function of the contract to affirm that allocation, or to redistribute these risks from one to the other contracting party, or to spread them to third parties.

If a risk is not allocated to one of the contracting parties either by the applicable law of the contract or by the terms of the contract itself, then it would be expected that the courts will ask the following questions when they are required to adjudicate the issues arising:

- Which party can best foresee the risk?
- Which party can best control the risk?
- Which party can best bear the risk?
- Which party most benefits or suffers if the risk eventuates?

It is impractical if not useless to allocate a risk to a party who cannot bear its consequences unless that party is able to shift or spread its allocated risk to others who can. This shift or spread is usually done through insurance.

In preparing any contract for the procurement of supplies, works or services, the main areas of risk to be considered are the following:

- the proper specification of the supplies, works or services to be provided;
- compliance with the specification (quality assurance; inspection; rectification of defects; guarantees and warranties; acceptance);
- timing (commencement; programme; delivery/completion; delay);
- price and payment (definition of price; amount of payments; timing of payments; method of payment; delayed payment);
- damage and Injury (to supplies or works during transport or during erection; to employees; to third parties; intellectual property; insurances);
- social and environmental issues;
- failure to perform (delay damages; performance damages; default; termination; security);
- "boilerplate clauses" (law of the contract; language of the contract; order of precedence; severability; waiver; assignment; amendment; notices);
- resolution of disputes.

2.3 THE PROPER SPECIFICATION OF THE WORKS, SUPPLIES OR SERVICES

It is usual practice for the supplies, works or services to be defined within a document or series of documents forming part of the contract and known as the technical specification(s).

Annex VI, **Directive 2004/18/EC** states that:

> "technical specification", in the case of public works contracts, means the totality of the technical prescriptions contained in particular in the tender documents, defining the characteristics required of a material, product or supply, which permits a material, product or supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority. These characteristics shall include levels of environmental performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling and production processes and methods. They shall also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve;

and

> "technical specification" in the case of public supply or service contracts, means a specification in a document defining the required characteristics of a product or service such as quality levels, environmental performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures.

What does **Directive 2004/18/EC** require of a technical specification?

1. "Technical Specifications should take into account accessibility criteria for disabled people" [art. 23.1];
2. "They should not have the effect of creating unjustified obstacles to free competition" [art. 23.2];
3. "Without prejudice to mandatory national rules (*e.g.* earthquake resistance requirements), they shall be formulated either
    a. By reference to technical specifications as defined in Appendix VI and in order of preference:
        - national standards transposing European Standards,
        - European Technical Approvals,
        - Common technical specification,
        - International standards,
        - other technical reference systems established by European standardisation bodies or
        - national standards, national technical approvals or national technical specifications.

    Each reference must be accompanied by the words 'or equivalent'

b. in terms of precise performance or functional requirements

c. in terms of performance or functional requirements as stated in b) with reference to the specifications mentioned in a)

d. in terms of a combination of technical specifications and performance or functional requirements." [art. 23.3]

4. "Technical specifications must not in general refer to a specific make or source, or to trade marks, patents etc. with the effect of favouring or eliminating certain products. Such references are permitted exceptionally when a precise description of the product in other terms is not possible but in such event the reference must be accompanied by the words 'or equivalent'" [art. 23.8].

   It may seem evident that the party procuring the works, supplies or services (the "Contracting Authority" in **Directive 2004/18/EC**) should properly specify the works, supplies or services that it is seeking to procure. However, the proper description of the supplies, works or services can go well beyond purely technical aspects or the choice of European or national standard. These other aspects may be addressed in parts of the contract other than the technical specification, *e.g.* in the conditions of contract, or may influence the form of the contract itself.

For example, in relation to a contract for public works, who will prepare the design: the contracting authority (the "contracting authority/employer") or an "engineer" on their behalf, or the economic operator (the "contractor")? Are all materials to be provided by the contractor, or will some materials be provided by the contracting authority/employer or another economic operator chosen by them (a "nominated supplier")? Will the contractor have exclusive occupation of the site and undertake all of the works, or will other contractors be present carrying out parts of the works? If the latter, how are the interfaces to be defined?

Will a fully detailed technical specification be provided, or will the supplies, works or services be defined in terms of performance criteria, permitting the contractor some flexibility in the choice of equipment to be installed, provided that the performance criteria are met? What will be the input of the contracting authority/employer with respect to the approval of the design? Will they seek to approve or comment upon every detail throughout the design and construction phases, or will their involvement be limited to checking that the completed works comply with the performance specification?

With respect to the technical specification itself, is a one-off document to be prepared or is a standard document available for reuse? Does the standard document apply fully or does it need to be adapted to the particular circumstances? Serious problems can arise when the technical specifications are composed from a number of documents without careful co-ordination.

The answers to questions such as these may influence the contracting authority/employer to opt for a turnkey contract using a standard contract form such a the FIDIC "Silver Book" (under which the contractor undertakes to design and construct the works and carries most of the risk, but under which the contracting authority/employer is allowed only little involvement until the Works are almost complete). Or conversely, the contracting authority/employer may choose a form of contract that allows them much greater involvement, such as the FIDIC "Red Book" for works designed by the contracting authority/employer.

When defining the supplies, works or services that are to be provided, it is important for the contracting authority to precisely and accurately state all of their requirements but without infringing rules of free competition. This requires input from personnel with relevant experience, including in the technical, contractual and procurement aspects.

It should be remembered that in the event of an unclear description, the contract is generally to be interpreted against the drafting party (the "contra-proferentem" rule in common law countries) or against the party who stipulated the obligation (the "contra-stipulatorem" rule in civil law countries, *e.g.* article 1162 of the French Civil Code).

2.4 COMPLIANCE WITH THE SPECIFICATION

Having defined the works, supplies or services that are to be provided, the contracting authority will wish to ensure that the supplies, works or services that are actually provided do comply with the definition. The technical specification may have required quality assurance measures, tests or inspections, and for a small contract these provisions may suffice. However, for more substantial procurement contracts, it is commonplace for the contracting authority to allow themselves wide-ranging powers to ensure conformity. This is particularly so for major public works contracts, for which a failure to identify nonconformity at an early stage may result in prohibitively high rectification costs at a later date.

Thus the contract should provide for:

- vetting of materials and workmanship before use on site (*e.g.* testing of welders, independent testing of materials);
- inspection of major equipment during manufacture and/or before shipment to site;
- the establishment of a QA/QC system by the contractor with audits by the contracting authority/contracting authority/employer, their engineer or an independent third party;
- checking of designs by the contracting authority/employer, their engineer or an independent third party;
- authority for the contracting authority/employer to reject defective materials or workmanship prior to completion of the works, with power to employ others to rectify the defects should the contractor fail to do so within a reasonable time;
- final checking of the works prior to them being taken over by the contracting authority/employer;

- a period following takeover of the works during which the contractor must rectify any defects that become apparent (often referred to as the "defects notification period", the "defects liability period" or the "maintenance period");
- no approval is being considered final except for the performance certificate or similar issued upon completion of rectification of defects that become apparent during the stipulated period following takeover of the works.

In addition, the contracting authority/employer may wish to further protect themselves or the final end user against the risk of future defects via a guarantee provided by the contractor, often supported by an insurance policy (a ten-year guarantee is usual in many civil law countries) or via a system of collateral warranties. (See also module C3 for general commentary on the guarantee/warranty period.)

A collateral warranty is a guarantee issued by one party in favour of another party, without there being any direct contractual link between them. Thus, the contract may require the contractor to provide the contracting authority/employer or the end user of the works with a warranty from the supplier of waterproofing materials to cover defects appearing in the waterproofing during a period of 20 years from the date of handover of the works.

A major building project may involve dozens of collateral warranties, each with a different warranty period. These warranty periods are usually longer than the general guarantee period or the defects notification period. It is common practice for them to be fixed by the technicians who draft the detailed technical specifications, which can often extend to thousands of pages. This can lead to the warranty periods being overlooked by one or both of the contracting parties, until a problem arises. In the interests of dispute avoidance, it is good practice to include within the contract a summary table of all such warranty periods.

In relation to the sale of goods, it is often indicated that the goods do not conform with the contract unless:

- they are fit for the purpose for which similar goods are ordinarily used;
- they are fit for the particular purpose that was expressly or impliedly indicated to the seller at the time the contract was concluded, except where it can be shown that the buyer did not rely on or it was unreasonable for them to rely on the skill and judgment of the seller;
- they possess the qualities of goods presented by the seller to the buyer at the time as samples or models;
- they are packed in the manner usual for such goods or, where there is no such manner, in a manner adequate to protect the goods.

2.5 TIMING

The subject of timing is usually one of the three matters of fundamental importance in a procurement contract, the others being quality and price. Budgets must be established taking account of when the supplies, works or services will be provided. A multitude of other decisions and actions may depend upon the date of delivery. For example, if a piece of hospital equipment is delivered late, it may be necessary to transport patients to another facility for treatment until the new equipment is available. Conversely, if it is delivered ahead of schedule, it may be necessary to organise off-site storage in special conditions. All such measures will increase the costs to the contracting authority. It is thus of paramount importance that the contract carefully address timing: when the contract is to take effect; when the economic operator is to begin his activities; when the contracting authority is to take action required of him; when delivery is to take place; what will happen in the event of delay by a) the contracting authority or b) the economic operator; whether there are any intermediate milestone dates to be met; whether delay damages will be charged in the event of failure to meet the intermediate milestone dates or the date for completion, and if so how much and on what basis; whether there will be any incentive payments for early completion.

It should also be remembered that the timing will affect the price demanded by the economic operator. If they are to provide supplies, works or services within a very short period, they will charge a premium because they may have to reschedule supplies to other clients, increase their resources in order to meet the deadline, or pay additional transport costs. On the other hand, if from the outset they know that they will be unable to proceed as quickly as they would like because of constraints imposed by the contracting authority, they may have to allow in their price for additional overheads and cost increases due to inflation. In general, the more time constraints are placed upon the economic operator, the greater will be the price that they charge to the contracting authority.

A balance must be found between protecting the contracting authority against the risk of delays and exposing them to a higher price because of unnecessarily severe time constraints on the economic operator. This is a task that must be shared between the technicians and legal draftsmen with the relevant experience.

Timing is often defined by means of a programme, showing graphically the order in which certain activities will take place and their durations in order to meet contractual deadlines. Under the FIDIC forms of contract for works, such programmes are not included as contract documents. This is because the FIDIC forms of contracts were originally based on an English form and under English law, if a programme is included as part of the contract, it must be followed precisely. In other words, if either party deviates from the programme, that party will be in breach of the contract. In view of the fact that the main purpose of a programme is to serve as a working tool that allows the parties to see how adjustments can be made to the organisation of activities in order to recover lost time or otherwise, it is generally viewed as bad practice to rigidly impose every detail of the programme as a binding contractual requirement.

2.6 PRICE AND PAYMENT

The third matter of fundamental importance in any procurement contract is of course the price and, related to this, the method of payment. Among the questions that the drafter of the contract needs to consider are:

- Is there to be a single purchase or a series of purchases?
- Is there to be a single lump-sum price, or a series of unit prices to be applied to the actual quantity delivered?
- What does the price (or prices) cover? Are there exclusions from the price? Who is to pay for transport, insurance, import duties and charges for imported supplies?
- Is the price (or prices) to be fixed for the duration of the contract, or is there to be adjustment to take account of inflationary increases (or decreases)? If the prices are to be adjusted, how is the adjustment to be determined?
- In which currency or currencies are payments to be made, and who shall bear the risk of exchange rate fluctuation?
- Is payment to be made by cheque, bank transfer or by documentary credit?
- Is payment to be made immediately upon delivery or within a defined period after delivery?
- Is there to be an advance payment, stage payments (sometimes called "interim payments"), or a single payment? How are the amounts of these payments to be determined? If there is an advance payment, how is account to be taken of this advance payment in calculating the amount of subsequent payments?
- Is part of the payment to be withheld for a period to cover the risk of defects (known as "retention" or "retention money"), or can this risk be covered by a bank guarantee from the economic operator? (See module C3 for more on bonds and retention money.)
- Is the contracting authority to provide a guarantee of payment?
- What is to be done in the event of late payment? Will the economic operator be paid interest and, if so, on what basis? Will the economic operator be entitled to slow down or suspend performance until they are paid overdue amounts? Will they be entitled to terminate the contract?
- If the contracting authority wishes to modify the supplies, works or services, what will be the procedure and how is the new price to be determined?
- If the supplies, works or services do not fully comply with the specification, can the price or prices be reduced and, if so, on what basis?

The answer to each of these questions will have an impact on the offers (referred to as "tenders" in **Directive 2004/18/EC**) received from economic operators (referred to as "tenderers" or "candidates" in **Directive 2004/18/EC**).

Every response that increases the burden upon tenderers, or puts them at risk, will increase the amount of the tenders. In most circumstances, it is more economical for the contracting authority to share the risk and thereby to obtain lower prices.

When a contract is between two private entities (such as a property developer and a construction company), it is commonplace for many of these matters to be negotiated – for example, the amount of the advance payment, the payment periods, interest on late payment, a bank guarantee instead of retention, a price adjustment formula, and allowance for exchange rate fluctuations. However, within the context of a procurement contract within the European Union to which a public body is a party, there is much less scope for such matters to be negotiated.

Recital 46 of **Directive 2004/18/EC** states:

> Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: 'the lowest price' and 'the most economically advantageous tender'.
>
> "To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation – established by case-law – to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of the contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders ……"

Article 53 of **Directive 2004/18/EC** requires the criteria to be listed in the contract notice or the contract documents, together with the relative weighting attached to the criteria:

1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:
   (a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject matter of the public contract in question – for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or
   (b) the lowest price only.
2. Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a), the contracting authority shall specify in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting it gives to each of the criteria chosen to determine the most economically advantageous tender. …

Thus, if the amount of advance payment is to be open to proposals from tenderers, this must be listed among the criteria together with an indication of the importance attached to that aspect. Upon receiving the tenders, the contracting authority must evaluate the effects of the advance payments requested by tenderers, and take this evaluation into account in determining which tender is the most economically advantageous. (See module E4 for more on award criteria.)

2.7 DAMAGE AND INJURY

Another area of risk that must be considered by the contract drafter is that of damage, whether to the subject matter of the contract or to other property, and related to this the risk of injury to those involved in the contract or to third parties.

In relation to a contract for supplies, the contract drafter must consider the risk of damage during the transport of the supplies, the risk of environmental damage, and the risk of injury to those using the supplied products.

In relation to a contract for works, they must consider the risk of damage to third party property as a result of the execution of the works (including for example the risk of damage to roads and bridges leading to the site). They must also consider the risk of environmental damage during the execution of the works or due to their design. They must take account of the risk of damage to the works themselves prior to completion, whether by causes for which the contractor is responsible or by external causes over which the contractor has no control (war, terrorism, forces of nature, etc.). They must consider the risk of injury to the contractor's employees and others engaged on the construction of the works, to the contracting authority's/employer's own personnel visiting the site or working there, and to third parties.

Particularly in relation to a contract for services but possibly in relation to a contract for supplies or works, they must consider the risk of infringement of intellectual and industrial property rights.

They will deal with these risks in three ways:

(a) by imposing safety procedures and the like in order to minimise the risk of damage or injury,

(b) by limiting the liability of one party through indemnities issued by the other party (as far as legally possible) in the event that damage or injury is caused by the other party and

(c) by insuring against the risk directly or by obliging the economic operator to subscribe to a policy to cover the risk on terms stated in the contract.

2.8 SOCIAL AND ENVIRONMENTAL ISSUES (see module C5 for a detailed explanation)

Directive 2004/18/EC encourages contracting authorities to integrate environmental protection measures into their procurement activities. It also encourages a certain number of social measures.

Recital 28 states that Member States may reserve the right to participate in public contracts to workshops providing sheltered employment for people with disabilities.

Recital 29 refers to the possibility for contracting authorities to lay down environmental characteristics within technical specifications and to use eco-labels. It also calls for technical specifications to take account of accessibility criteria for disabled persons.

Recital 32 encourages the involvement of small and medium-sized undertakings through provisions on subcontracting.

Recital 33 allows for contract performance specifications intended to favour on-site vocational training, to encourage the recruitment of long-term jobseekers or to recruit more handicapped persons than are required under national legislation.

Recital 34 mentions the possible exclusion from the procedure for the award of public contracts of economic operators who fail to respect legislation applicable to cross-border situations, where workers from one member state provide services in another member state.

Recital 43 states that a final conviction for failure to respect national environmental legislation may be considered an offence concerning the professional conduct of an economic operator, or grave misconduct. The same is stated with respect to a failure to observe national provisions concerning equal treatment of workers. Under article 45.2, the commission of such an offence or such grave misconduct may result in the economic operator being excluded from participation in the contract.

Recital 44 foresees the possibility of environmental management measures being required of the economic operator.

Such issues are also addressed by some standard forms of contract. The FIDIC suite of contracts used commonly for public works includes provisions within the general conditions dealing with rates of wages, working hours, worker accommodation, feeding and transport, health and safety, worker supervision, etc. The version of FIDIC contracts that has been adapted for use by multilateral development banks includes provisions prohibiting the use of child labour and forced labour, and requiring contractors to take steps to limit the spread of HIV/AIDS among their workers.

Although the contract drafter should not modify these general conditions because of copyright considerations, within the particular conditions or the technical specifications he can make these provisions more onerous for the economic operator, in the direction suggested by **Directive 2004/18/EC**. In doing so, he must bear in mind that there will be an impact on price, particularly if the risk associated with the more onerous provisions is difficult for tenderers to establish.

2.9 FAILURE TO PERFORM (DELAY DAMAGES, PERFORMANCE DAMAGES, DEFAULT, SUSPENSION, TERMINATION, SECURITY

Whenever a contracting authority enters into any but the most minor of contracts, he should be concerned about the risk that the chosen economic operator fails to perform. This failure to perform may be in one or more ways. For example, an economic operator who is close to being insolvent will not have the funds available that are needed to maintain normal progress. As a result he will miss deadlines, may not produce work of the required quality, and may be unable to refund the advance payment at the due time. In such a case, the contracting authority would incur additional costs due to the delay, may have to pay others to rectify defects, and may be unable to recover the advance payment made to the economic operator.

With these possible consequences in mind, the contract drafter should seek to protect the contracting authority as much as is economically viable – that is, to the extent that the resulting increase in the price demanded by tenderers does not exceed the benefit.

The range of measures available to the drafter includes:

- Tender bond issued by a bank (or insurance company) on behalf of a tenderer to ensure that the tenderer does not refuse to abide by his tender if this is accepted by the contracting authority. If he does refuse to be bound by his tender and refuses to sign the contract, the bank must pay the contracting authority the amount of the tender bond. The bonds are released by the contracting authority when the successful tenderer has signed the contract.
- Advance payment bond, by which the issuing bank must pay the contracting authority if the bank's client, the economic operator, fails to reimburse the advance payment. The amount of the bond is initially equal to the amount of the advance payment, but may be reduced in proportion to any reimbursement that is made by the economic operator. The bond is released only when the advance payment has been fully reimbursed to the contracting authority.
- Performance bond, which is issued by a bank on behalf of the economic operator to guarantee performance of his obligations under the contract. The amount of the bond is usually expressed as a percentage of the accepted contract price. The bond is sometimes released in stages but more usually is held by the contracting authority until it is satisfied that all obligations of the economic operator have been fulfilled.
- Parent company guarantee, which is issued by the mother company of which the economic operator is a subsidiary. In the event that the economic operator fails to perform, the mother company is obliged under the terms of the parent company guarantee to step into the place of the defaulting subsidiary and perform the unfulfilled obligations.
- Delay damages (often referred to as "liquidated damages" and expressed as an amount per day of delay or as a percentage of the price per day of delay).
- Performance damages, which cover a failure to meet performance criteria such as energy consumption levels or the required levels of production.
- The right to suspend further performance until the default has been rectified.
- Termination provisions that allow the contracting authority to terminate the contract with the defaulting economic operator, particularly in the event of their insolvency, bankruptcy, etc. Such provisions usually allow the contracting authority to appoint another party to fulfil all remaining obligations and to set off the cost of doing so against amounts that would otherwise be due for payment to the defaulting economic operator. (In the interests of a balanced contract, it is usual for the economic operator to have a similar right to terminate in the event of insolvency, bankruptcy, etc. of the contracting authority.)

Many standard form contracts include all of these measures, but the applicable amounts must be decided by the contracting authority. This is a matter for careful thought, because if the contracting authority seeks an unusually high level of protection, that will be reflected in the tenders that he receives. One possible consequence is that contracting authority receives no tenders at all. For example, many major European construction companies will not submit tenders for works for which the contracting authority seeks a performance bond in excess of 15% of the contract price.

When the expression "liquidated damages" is encountered in a contract it is usually in relation to delay, but it is sometimes encountered in relation to a failure to achieve specified levels of performance. The expression refers to an amount set out in the contract that is intended to compensate one party in the event of a breach by the other party. The amount is said to be a genuine pre-estimate of the loss that is likely to be suffered by the innocent party if the breach occurs. In the event of the stated breach, the innocent party is entitled to the liquidated damages regardless of the actual loss incurred. If the actual loss is less than the liquidated damages, the party in breach cannot have the amount of the liquidated damages reduced – but conversely, if the actual loss is greater than the liquidated damages, the innocent party cannot usually claim more. The advantage to the parties is that from the outset they know the limits of the risk being taken.

It should be noted that the concept of liquidated damages is rooted in common law. A court in a common law jurisdiction will apply the liquidated damages provision in almost all cases of breach without modifying the rate of damages fixed in the contract, even if the breach has caused no actual loss. In civil law countries, the position is not always the same. In some countries, liquidated damages clauses will not be applied unless there has been actual loss. In some countries, the courts will modify the rate of the liquidated damages. In some countries the innocent party will lose their entitlement to liquidated damages unless they follow specific procedural rules that are not always mentioned in the contract.

It is therefore important to check the position of liquidated damages under the law applicable to the contract.

2.10 "BOILERPLATE CLAUSES"

A number of other matters of a legal nature that are often included in commercial contracts are collectively known as "boilerplate clauses". They are intended to limit the risk of future disagreement and include matters such as:

- the law of the contract
- the language of the contract
- the order of precedence
- severability
- waiver
- assignment
- amendment
- notices
- retention of title
- limit of liability
- resolution of disputes

Each of these matters is explained below except for the resolution of disputes, which is treated separately in the following section.

2.10.1

The law of the contract

When the contract is purely domestic – that is, between a contracting authority and an economic operator from the same country – it is not usually necessary for the contract to stipulate the country whose laws will govern the contractual relationship. Indeed, in some countries the parties have no freedom to choose the law governing a domestic contract. However, when it is likely or possible that the economic operator comes from a country different from that of the contracting authority, it is necessary for the contract to specify the country by whose laws the contract must be interpreted. The parties may agree that the relationship should be governed by the laws of the state from which one of the parties comes, but they may agree instead that the laws of a third country should apply.

Within the European Union, the freedom to choose the law of the contract is expressly stated in Regulation (EC) No. 593/2008, known as the "Rome 1 Regulation":

> "A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract" [art. 3.1].
>
> "To the extent that the law applicable to the contract has not been chosen in accordance with Article and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:
>
> (a) A contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
>
> (b) A contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
>
> (c) A contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;
>
> (d) …." [art. 4.1]
>
> "Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected." [art. 4.4]

The choice of law can be critical. For example, an English court will not revise the amount of liquidated damages for delay that has been agreed between the parties even if the actual loss suffered because of the delay is much less or much more than the amount of liquidated damages. The amount of the liquidated damages may even exceed the amount of the contract if no limit is fixed in the contract. However, a French court will revise the amount and in general will not allow a percentage in excess of 20% of the contract amount.

On the other hand, an English court will not apply a penalty clause – liquidated damages are not considered a penalty and must correspond to an estimate, made before signing the contract, of the damage that is likely to be suffered in the event of a default by the other party, such as delay. Under French law, contractual penalties are allowed and one often sees contracts that allow one party to fine the other for failing to attend meetings, breaches of the safety plan, etc.

In recent years, there has been a surge in privately financed infrastructure works, often with funds sourced from banks in the City of London. These banks have insisted that the lending agreements be governed by English law. To minimise their risks, the concession companies have chosen English law as the governing law in their relationships with the large construction contractors (often foreign to the country where the works are located). However, the large construction contractors have been obliged to accept local law as the basis for their contracts with subcontractors. Such duality of legal systems can create problems. For example, the subcontractor might be able to have his works declared as complete under the local law, whereas the main contractor may not be able to do so under English law.

Although the parties may choose the country whose laws are to govern their contractual relationship, they cannot entirely avoid the law of the country in which the works are to be constructed or the supplies to be used:

> Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement." [art. 3.3 of Rome I Regulation]

and

> Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. … [art 9.3]

Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests – such as its political, social or economic organisation – to such an extent that they are applicable to any situation falling within their scope.

Thus, a building in Warsaw must be constructed in accordance with Polish building standards and Polish safety regulations, even if the contract is to be interpreted in accordance with English law. In the past, problems often arose when contracts allowed the use of technical standards from different countries. It was commonplace for contracts to state, for example, that works were to be executed in accordance with BS[3] standards from the United Kingdom, DIN[4] standards from Germany, or NF[5] from France, whichever were the more stringent. Because of differences between the national standards, long discussions could occur at the design stage with consequent delays to completion of the works. With the advent of European standards, such problems occur much less frequently and under **Directive 2004/18/EC**, a contracting authority is obliged to accept an equivalent technical standard and must be able to provide a reason for any decision that equivalence does not exist in a given case (recital 29). However, difficulties can still arise when a national standard differs from European standards – for example, with respect to wind or snow loads on a building – which are highly dependent upon geographic location. Thought must be given to these aspects when drafting the technical specification.

[3] BS = British Standard.
[4] DIN = Deutsches Institut für Normung.
[5] NF = Normes Françaises.

2.10.2 The language of the contract

When the contracting parties come from different countries, it is also important for the contract to define the governing language. It is possible that two or more languages will be used in communications, but in order to deal with translation problems the contract should clearly state which language shall take precedence over the other.

The contract relating to the execution by a French contractor of a building project in Moscow was in both Russian and French. A dispute arose during the construction of the works and the French contractor could not understand the position of his Russian client. After obtaining two separate translations of the relevant clause of the contract, it was found that the Russian version could be translated into French in two different ways. As the contract stated that Russian would be the governing language, the French contractor had to concede the argument.

2.10.3 The order of precedence

The order of precedence applicable to the contract documents should also be carefully defined. In some cases, all relevant documents are bound into the contract; in other cases, some documents may form part of the contract simply by a reference to them. Frequently, the contract is composed of several documents (*e.g.* contract agreement, general conditions of contract, particular conditions of contract, sample forms of bond, general specification, particular specifications, drawings, bills of quantities, minutes of negotiation meetings, invitation to tender, tender bulletins, contractor's tender, etc.). For a complex contract such as one for public works, these documents together may extend to thousands of pages and it is almost impossible to avoid conflicts between some of their contents. A defined order of precedence can be of great assistance in overcoming these conflicts – but an order of precedence that has been drafted with insufficient attention can make matters worse. This can often be the case when there are circular references within documents or when the same document can be found in two places, for example as an annexe to another document (see example overleaf). Sometimes one can find two different orders of preference in the same contract. This is usually because the contract has been drafted by several people – a technician prepared the specifications, where they included "their" order of precedence, while a jurist prepared the conditions of contract in which they inserted "their" order of precedence.

If no order of precedence is defined, the courts will apply a number of rules in interpreting conflicting provisions:

- Particular provisions will take precedence over general provisions.
- A specific document will take precedence over a non-specific document (*e.g.* a standard form contract).
- Handwritten provisions will take precedence over printed provisions.
- Later documents will take precedence over earlier documents.
- An unclear provision will be interpreted against the party drafting the provision.
- An unclear provision will be interpreted in favour of the party carrying the burden of the obligation under the provision.

A PRECEDENCE NIGHTMARE

The following extracts come from a contract for building works in Indonesia, between an Indonesian investor advised by consultants from US and New Zealand, and a contractor from Australia. Unravelling the order of precedence became a major source of headaches.

Conditions of Contract

- The order of precedence for the Contract Documents shall be as follows:
  - The Form of Agreement
  - The Letter of Intent
  - Contractor's letter of 22 March
  - Conditions of Contract
  - Contract Drawings
  - Contract Specifications
  - Contract Bills

Articles of Agreement (not referred to as "Form of Agreement" mentioned in the Conditions of Contract")

- The following documents are hereby incorporated by reference:
  - Form of Tender
  - Conditions of Contract
  - Specifications
  - Bills of Quantities
  - Final Summary
  - List of Contract Drawings Addendum
  - Contract Drawings

Letter of Intent (not listed in the Articles of Agreement)

- The following documents shall form the basis of and shall be incorporated into the formal Contract Document:
  - The Tender Document and the Bill of Amendment
  - The Tender
  - Tender Queries 1 to 9
  - Letter issuing the Bill of Amendment
  - Contractor's letter of 22 March

Bills of Quantities

- The Contract Documents shall comprise:
  - Letter of Invitation to Tender, Instructions to Tenderers and the Form of Tender
  - The Articles of Agreement
  - The Conditions of Contract
  - The Specifications
  - Bills of Quantities
  - Contract Drawings
  - All correspondence exchanged prior to the award of the Contract
  - The Letter of Intent

Appendix F to the Contract

- Correspondence forming part of the Contract Documents
  - Tender Queries 1 to 9
  - Letter issuing the Bill of Amendment
  - Letter issuing revised pages for the Bill of Quantities
  - Contractor's Tender clarifications and qualifications
  - Tender Summary
  - Contractor's letter of 22 March
  - The Letter of Intent

2.10.4 Severability

A severability clause in a contract allows the terms of the contract to be independent of one another, so that if a term in the contract is deemed unenforceable by a court, the contract as a whole will not be deemed unenforceable. If there were no severability clause, the whole contract could be deemed unenforceable because of one unenforceable clause. An example of a severability clause is as follows:

> "In the event that any one or more of the provisions contained herein shall, for any reason, be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions of this agreement, but this agreement shall be construed as if such invalid, illegal or unenforceable provisions had never been contained herein, unless the deletion of such provision or provisions would result in such a material change so as to cause completion of the transactions contemplated herein to be unreasonable."

The last part of the severability clause is intended to prevent the nature of the contract being fundamentally modified by the deletion of the problem clause.

2.10.5 Waiver

A so-called waiver clause is in fact a "non-waiver clause", for it is intended to prevent one party from arguing that the other party, through their actions or inaction, has abandoned a right that they had under the contract:

> "No failure or delay on the part of any party to exercise any right, remedy, power or privilege under the contract or course of dealing between the parties shall operate as a waiver thereof, or of the exercise of any other right, remedy, power or privilege."

In some contracts, there is a provision to the opposite effect – that is, a party is not allowed to deny an action taken by them when as a result the other party acted to their detriment. Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods, also known as the Vienna Convention (1980), states:

> A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct. [Emphasis added]

2.10.6 Assignment

Assignment refers to the ability (or not) of a party to a contract to transfer their rights and obligations under that contract to a third person. Sometimes the contract does not permit either party to assign their rights and obligations; sometimes assignment is allowed provided that the party wishing to assign seeks the prior agreement of the other party; sometimes only one party is permitted to assign (usually the contracting authority). Contracting authorities are reluctant to allow economic operators the right to assign because they are concerned that, in return for a fee, the economic operator who has been carefully chosen may transfer the contract to an operator, who has not been vetted.

It should be noted that assignment (which concerns the whole of a contract) is not the same as subcontracting (which concerns parts of a contract). However, in contracts that do not permit assignment, in order to ensure that assignment does not take place under cover of a right to subcontract, it is usual practice to include a rider within the subcontracting clause stating that the subcontracting of the whole of the works or services is not permitted.

2.10.7 Amendment

The amendment clause sets out the means by which the parties may amend the contract – usually by a document, signed by authorised representatives of both parties, possibly in front of witnesses.

2.10.8 Notices

The notice clause defines the means by which the parties are to communicate on important matters. It will state whether electronic communications are permitted or whether all important communications must be by physical delivery of a letter to a stated address, possibly against a receipt.

2.10.9 Retention of title

A "retention of title" clause is a provision in a contract for the sale of goods that allows the seller to retain the title to the goods until certain obligations (usually payment of the purchase price) have been fulfilled by the buyer. The main purpose of such a clause is to ensure that where goods are supplied on credit, if the buyer subsequently goes into bankruptcy, the seller can repossess the goods. However, this may not be possible when the goods have already been modified by the buyer or mixed with similar goods, or when they have already been resold to a third party.

In some jurisdictions, such clauses are not enforceable.

2.10.10 Limitation of liability

"Limitation of liability" clauses are quite common, particularly in contracts for the provision of services but also in other procurement contracts. They are intended to limit the liability of the parties to a stated amount – often equal to the contract price (or a percentage of this price) and/or they seek to exclude liability for certain categories of loss, such as loss of revenue, loss of profit and consequential damage. Courts tend to examine such clauses closely and there are numerous examples of these clauses being struck down, particularly when they seek to limit liability for latent defects. In some jurisdictions, they are not enforceable. In others, the limitation must not be so severe that the clause is, in effect, an exclusion of liability.

Other boilerplate clauses commonly found include confidentiality clauses and entire agreement clauses.

2.11

RESOLUTION OF DISPUTES
(see module G2 for more on this topic)

The provisions dealing with the resolution of disputes can range from a simple statement that all disputes will be referred to the court at a stated location, to a complex description of a stepped procedure which might include: a formal effort to reach an amicable settlement between senior executives; mediation; expert opinion; dispute adjudication; arbitration; and litigation. In the latter case, it is usual for a strict timetable for each step to be set out in the contract. The contract can contain provisions concerning the choice of mediator, adjudicators and/or arbitrators, the procedure to be followed in each process, the body that will administer the proceedings, the location of the proceedings, the language to be used, etc.

Thus in relation to an arbitration, the contract might state that an arbitration will be administered by the Japanese International Arbitration Centre, with three arbitrators from Australia, sitting in Singapore, applying the procedural rules of the International Chamber of Commerce, the law of the contract being Vietnamese and the language being English. It is evident that with such complicated arrangements, it is possible for the parties to have different interpretations of the contract. It is therefore of paramount importance for the dispute resolution provisions to be carefully drafted.

Many problems have arisen in the past because of poorly worded dispute resolution clauses; therefore, the main administering bodies propose standard wording if the contract is to provide for their services to be used. Such is the case for the International Chamber of Commerce, based in Paris, which suggests standard wording (in more than 30 languages):

> All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

It should be noted that the timetable for resolving disputes that is stated in the contract must be consistent with limitation periods (prescription periods) imposed by the law of the contract.

2.12 STANDARD CONTRACTS FOR THE SUPPLY OF GOODS

2.12.1 The ICC Model International Sale Contract
Manufactured goods intended for resale

The International Chamber of Commerce (ICC) is a body that seeks to represent businesses in every part of the world. It has member companies and associations in more than 130 countries. Its declared aim is to promote an open international trade and investment system and the market economy worldwide. To do so, it establishes rules that govern the conduct of business across national borders. Among these rules is the ICC Model International Sale Contract (the "Model Contract").

The Model Contract is destined for use primarily in relation to the supply of finished goods for resale to third parties, *i.e.* where the buyer is a distributor, importer or wholesaler. It was not intended for use in relation to custom-made goods for sale to the end user, for which the authors recommend the use of other forms – such as the Orgalime Standard Conditions, which covers the supply of mechanical, electrical and associated electronic products. This being stated, the authors of the Model Contract do not seek to prevent its use in relation to sales other than those primarily targeted but recommend that in such circumstances the parties take care to satisfy themselves that all the terms of the Model Contract are appropriate.

The Model Contract is composed of two parts: Part A sets out the specific conditions applicable to the particular contract of sale, and Part B sets out the general conditions applicable to all contracts incorporating the ICC General Conditions of Sale. Although parties would normally use both parts, they are free to incorporate into their contract only Part B, in which case any specific terms must be set out within the body of the particular contract.

Applicable law

In the absence of a contrary agreement between the parties, the Model Contract is subject to the United Nations Convention for the International Sale of Goods (also known as the Vienna Convention of 1980), which is annexed to the Model Contract. The Model Contract was drafted on the basis that the Vienna Convention would apply, and for questions not covered by the Vienna Convention the applicable law would be that of the country where the seller has their place of business. The parties have the possibility to choose domestic law but are discouraged from doing so.

Modifications

The Model Contract requires that any modification to the Contract must be in writing (art. 1.5 of Part B). However, a party may be precluded from invoking the requirement of writing if they have agreed to a modification orally or by conduct and the other party has relied on this oral agreement or conduct.

Shipment & delivery

The Model Contract allows the parties to choose the conditions for shipping the goods based on the trade terms to be found under INCOTERMS (see below).

INCOTERMS 2000 published by the ICC	
EXW = EX WORKS (place)	"Ex works …" means that the seller delivers the goods when he puts them at the disposal of the buyer either at his premises or another named place – not yet loaded, not cleared for export.
FCA = FREE CARRIER (named place)	"Free Carrier …" means that the seller delivers the goods to the carrier nominated by the buyer at the named place, cleared by the seller for export. If the named place is the seller's premises, the seller is responsible for loading otherwise loading is the responsibility of the buyer.
FAS = FREE ALONGSIDE SHIP (named port)	"Free Alongside Ship …" means that the seller delivers the goods when they are placed alongside the vessel at the named port of shipment – cleared by the seller for export.
FOB = FREE ON BOARD (named port)	"Free On Board…" means that the seller delivers the goods when they pass the ship's rail at the named port of loading, cleared by the seller for export – only suitable for transport by water.
CFR = COST AND FREIGHT (named port of destination)	"Cost and Freight …" means that the seller delivers the goods when they pass the ship's rail in the port of shipment at which time the risk of loss or damage passes to the buyer (including the cost of unforeseen events) but the seller must pay the cost of transporting the goods to the port of destination and must clear them for export – only suitable for transport by water.
CIF = COST, INSURANCE AND FREIGHT (named port of destination)	"Cost, Insurance and Freight …" means that the seller delivers when the goods pass the ship's rail in the port of shipment at which time the risk of loss or damage passes to the buyer (including the cost of unforeseen events), but the seller must pay the cost of transporting the goods to the port of destination, must clear them for export and must take out and pay for minimal insurance cover – only suitable for transport by water.

INCOTERMS 2000 published by the ICC	
CPT = CARRIAGE PAID TO (named place of destination)	"Carriage paid to …" means that the seller delivers the goods when they reach the first carrier named by him at which time the risk of loss or damage passed to the buyer, but the seller must pay the cost of transport to the named destination. The seller must clear the goods for export.
CIP = CARRIAGE AND INSURANCE PAID TO (named place of destination)	"Carriage and insurance paid to …" means that the seller delivers the goods to the carrier named by him at which point the risk of damage passes to the buyer but the seller must pay the all the costs of bringing the goods to the named destination and must take out and pay for minimal insurance cover. The seller must clear the goods for export.
DAF = DELIVERED AT FRONTIER (named place)	"Delivered at Frontier …" means that the seller delivers the goods when they are placed at the disposal of the buyer on arrival at the named point and place at the frontier, cleared for export, but not yet unloaded, not yet at the customs border of the adjoining country, nor cleared for import.
DES = DELIVERED EX SHIP (named port of destination)	"Delivered Ex Ship …" means that the seller delivers the goods when they are placed at the disposal of the buyer on board the ship at the port of destination but not yet cleared for import. The seller bears all the costs and risks in bringing the goods to the port of destination before unloading – only suitable for transport by water.
DEQ = DELIVERED EX QUAY (named port of destination)	"Delivered Ex Quay …" means that the seller delivers when the goods, not yet cleared for import, are placed at the disposal of the buyer on the quay at the named port of destination, at which point the risk passes to the buyer. The seller bears all the costs incurred in bringing the goods to the port of destination and unloading them, including the cost of insurance cover. The buyer is responsible for clearing the goods for import and pays all the associated costs – only suitable for transport by water.

INCOTERMS 2000 published by the ICC	
DDU = DELIVERED DUTY UNPAID (named place of destination)	"Delivered duty unpaid …" means that the seller delivers the goods to the buyer at the named place of destination but not cleared for import and not yet unloaded from the means of transport. The seller bears the costs and risk of transporting the goods to the place of destination but no costs associated with the import of the goods, nor the costs or responsibility for delay in clearing the goods for import.
DDP = DELIVERED DUTY PAID (named place of destination)	"Delivered Duty Paid at …" means that the seller delivers the goods to the buyer at the named place of destination, cleared for import but not yet unloaded from the arriving means of transport. The seller bears all costs and risks involved in bringing the goods to the named place including the costs and risks of import clearance.

Given that manufactured goods are normally loaded into containers at terminals – either inland or close to ports – rather than being loaded directly on board ships (as are raw materials and large items of equipment), the Model Contract encourages parties to avoid shipping terms such as FAS, FOB, DES and DEQ and terms that require transferable transport documents such as CIF or CFR, normally used for goods that may be resold or pledged during transit. It recommends the use of terms such as EXW, FCA, CPT, CI, DAF, DDU or DDP.

Although INCOTERMS define responsibility for transport costs and risk, they do not always address the matter of insurance. It is therefore for the parties to agree who will take out the appropriate insurance cover and pay the costs. Other INCOTERMS make no mention of responsibility for terminal handling charges, leaving this matter to the parties to agree.

Time of delivery

Under the Model Contract, the time of delivery refers to the moment when the seller must fulfil his delivery obligations under the chosen INCOTERM. It does not define the date at which the goods must reach the buyer's premises. According to the INCOTERM agreed upon, this could for example be the moment when the goods are available to the buyer at the seller's premises (EXW), or the moment when they are ready for loading on board ship (FAS), when they are unloaded from the ship (DEQ), or when they arrive at the buyer's premises (DDP). Clearly, in fixing the time of delivery the parties must pay careful regard to the details of the chosen shipping term. This time of delivery can be a fixed date or at the end of a fixed period that starts from a defined date such as signature of the contract. If a period is agreed, the seller can deliver at any time before the end of the agreed period.

Payment

The Model Contract allows the parties to agree the means and timing of payment. The means can be bank transfer, cheque or documentary credits such as a letter of credit. Timing, for example, can be by advance payment (all payment must arrive at the seller's bank before they despatch the goods); by letter of credit issued before shipping, which allows the buyer to recover the corresponding funds upon presentation of the proper shipping documents (see below); or by a cheque or bank transfer upon delivery of the goods to the buyer or within a defined period (such as 60 days) after delivery or receipt of invoice. If payment is to be made by bank transfer, the parties must indicate all the relevant details concerning the seller's bank account. In the event of late payment, the Model Contract provides for interest to be paid by the debtor at a defined rated.

Documents to be provided

It is common practice in relation to international sales for the seller to provide the buyer with certain documents that are needed by them for insurance purposes, customs clearance and the release of payment. These documents include invoices, transport documents, quality certificates, insurance documents, etc. Within the Model Contract, the parties can insert the details of the documents that are to be provided. In doing so, they should pay attention to two aspects:

- Which documents are required as a result of the choice of INCOTERMS?
- Which documents are required to obtain release of payment under a letter of credit?

Such documents can include:

- Bill of lading – transferable document that allows the buyer to pledge or sell goods during transit; used for water transport or multimodal transport.
- Multimodal transport document – also called combined transport bill or container bill of lading; covers transport by at least two different methods.
- Seawaybill – also called non-negotiable bill of lading or cargo quay receipt – buyer can change delivery instructions during transport (unless there is a NO DISP clause), but cannot pledge or sell the goods.
- Mate's receipt – provides proof of delivery to sea carrier, often tendered to buyer instead of bill of lading.
- Air waybill – used for transport by air, sometimes called air consignment note.
- Consignment note – used for land transport, sometimes called CIM consignment note or waybill for rail or CMR consignment note or waybill for road.
- Warehouse warrant – used for sea or land transport when the goods are to be stored in a warehouse awaiting collection by buyer.
- Freight-forwarder's document – used for all modes of transport.
- Packing list – used for sea, land or multimodal transport; records details of goods packed into crate, container or lorry; may be used as proof of delivery but it is important to check who issues list and when.

Retention of title

The parties may agree under the Model Contract that property in the goods remains with the seller until they receive full payment. However, the seller needs to verify that such retention of title is permitted under the applicable law.

Warranty to consumers

The Model Contract is designed for use primarily in relation to manufactured goods. Such goods are often covered by a warranty against defects given by the manufacturer in favour of the end user or consumer. The warranty takes effect at the date of purchase by the end user, who in the event of a defect can take action either against the manufacturer under the warranty or against the party selling him the defective goods, under his contract of sale. To deal with these circumstances, the Model Contract allows the seller (who may be the manufacturer of the goods) and the buyer (who may be the party who sells the goods to the consumer) to set out how they will co-operate. For example, the buyer may undertake to repair or replace the goods on behalf of the seller.

Limitation of liability

The Model Contract permits the parties to fix a limit of liability for default by the seller. It provides for liquidated damages at 0.5% of the price of the goods for each week of delay in delivery of the goods, up to a limit of 5% of the price of the delayed goods. In the event that the buyer terminates the contract because of excessive delay, they are entitled to recover proved damages up to a maximum of 10% of the price of the goods, in addition to the above liquidated damages. Whereas the buyer does not have to prove that they have suffered loss before being entitled to liquidated damages, they do have to prove the loss claimed as a result of termination due to excessive delay.

In the event that the supplied goods are defective, the buyer has three options: they can seek replacement of the defective goods; they can accept them against a reduction in price; or they can terminate the contract and claim a refund of amounts paid. If the replacement of the defective goods is not completed within the original time for completion, the buyer is entitled to liquidated damages due to the delay up to a maximum amount of 5% of the price of the delayed and/or defective goods. If the buyer opts to accept the defective goods against a reduction in price, the Model Contract limits the reduction to 15% of the price of conforming goods. If the buyer opts to terminate the contract, they are entitled to claim reimbursement of amounts paid for the goods, plus delay damages, plus additional damages that can be proved up to a maximum of 10% of the price of the non-conforming goods.

The above formulae were considered by the authors of the Model Contract to strike a reasonable balance between the interests of buyer and seller, but the parties are free to modify these formulae should they wish to do so.

Termination

The Model Contract allows the buyer to terminate the contract for default by the seller under three circumstances:

- when the seller fails to deliver the goods by the cancellation date stated in the contract;
- five days after the receipt by the seller of a notice of termination due to his liability for liquidated damages for delay having reached the maximum amount allowed by the contract (normally after ten weeks), the seller having been previously given a notice of delay;
- ive days after the receipt by the seller of a notice of termination, due to his failure to replace or rectify defective goods when his liability for damages for defective goods and/or delay has reached 5% of the price of the non-conforming goods.

Force majeure

The Model Contract permits a party to suspend execution of its obligations (except payment of amounts already due) in the event of force majeure, subject to proper notice being issued to the other party. If the circumstances continue for six months, either party may terminate the contract.

Resolution of disputes

The Model Contract allows the parties to choose between litigation and arbitration for the resolution of disputes. In both cases, they are invited to state the place of litigation or arbitration. In the event that the parties are silent as to their chosen method for resolution of disputes, the Model Contract assumes that it will by arbitration conducted under the ICC Rules and suggests the standard arbitration clause recommended by the ICC.

2.12.2 The Vienna Convention

The Convention is divided into four parts:

- Part 1 deals with the scope of application and contains general provisions;
- Part 2 deals with the formation of contracts for international sale of goods;
- Part 3 deals with the rights and obligations of the parties under the contract;
- Part 4 contains the final clauses relating to the application of the Convention itself.

The articles under Part 1 define the circumstances that fall within the scope of the Convention and those that are expressly excluded (*e.g.* consumer sales, contracts for the supply of labour to assemble products from materials supplied by the buyer of the products, etc.). The scope of the Convention is limited to the formation of the contract of sale and the rights and duties of the parties arising from the contract. It does not cover aspects such as the liability of the seller for death or injury that might be caused by the goods to a user or other third person.

The Convention allows the parties to exclude the application of the Convention to their contract or to derogate from or vary some of its provisions. The exclusion could be expressly stated or could come about through the choice of a domestic law as the law applicable to the contract.

As far as possible, in the event of dispute and in the absence of an express mention of the particular matter within the Convention, courts are encouraged to settle the issue in accordance with the general principles on which the Convention is based.

Part 1 of the Convention also includes provisions dealing with the interpretation of statements made by the parties and of their conduct. The parties may be bound by custom observed within the particular industry or trade to which the contract refers.

Article 11 provides that no written agreement is necessary for the conclusion of the contract, but if the contract is in writing and requires that any modification should also be in writing, article 29 provides that the contract cannot otherwise be modified. However, a party may be precluded by their conduct from relying upon the lack of writing, if the other party has relied on that conduct. States that require contracts of sale to be in writing can opt out of Clauses 11 and 29.

Part 2 addresses a number of questions that may arise in relation to the formation of the contract by offer and acceptance: the nature of the offer, the date of its effect, withdrawal, revocation, rejection, acceptance, counter-offer, time for acceptance, withdrawal of acceptance, conclusion of the contract, etc.

Part 3 sets out the obligations of the seller to deliver conforming goods at the date for delivery, to hand over the documents required by the agreed terms of the contract and to transfer property in the goods free of third party rights. In connection with the seller's obligation to deliver conforming goods, the buyer is under the obligation to inspect the goods as soon as is practicable and to notify the seller of any non-conformity without delay. The obligations of the buyer are much less extensive; they are to pay the price for and take delivery of the goods as set out in the contract.

In respect of each set of obligations, the remedies for breach of contract are set forth. The aggrieved party may require performance of the defaulting party's obligations, may claim damages or may void the contract. In addition, the buyer has the right to reduce the price when they accept non-conforming goods. The buyer can only require delivery of substitute goods if those delivered were in such a condition that the buyer was deprived of that which they were entitled to expect, and the result was not foreseen by the seller and could not have been foreseen by a reasonable person of the same kind in the same circumstances – referred to as a "fundamental breach". This is an important limitation on the rights of the buyer.

A further limitation on the rights of the parties is that a party cannot recover damages that they could have mitigated by taking proper measures. This is in fact an express statement of the position to be found within many jurisdictions.

Within any contract for the sale of goods, it is important to be able to determine the exact moment when the risk of loss or damage passes from the seller to the buyer, and the Convention sets forth a set of rules to deal with the situation where the contract does not contain an express provision or does not refer to a recognised trade term (*e.g.* EXW, FOB, etc.). In doing so, the Convention deals with two situations: a) where the contract involves the carriage of goods and b) where the goods are sold in transit. In all cases, the risk passes to the buyer when that party takes over the goods or when they were put at the buyer's disposal but the buyer failed to take delivery, whichever is the earlier. In order to be placed at the buyer's disposal, it must be possible to distinguish the particular goods from a mass of similar goods (*e.g.* the sale is for a quantity of grain that is to be found within the hold of a ship containing a greater quantity of the same grain).

The Convention contains special rules in relation to anticipatory breach and suspension of performance – that is, the right to suspend performance or to void the contract when it becomes apparent that the other party will not perform a substantial part of their obligations or will be in fundamental breach.

Part 3 also contains a provision that exempts a party from liability for damages in the event of failure to perform an obligation due to an impediment that they could not reasonably have foreseen and which they could have avoided or overcome. The exemption may also arise when the failure is due to a failure of a third party engaged to perform the whole or part of the contract (*e.g.* a carrier of the goods).

The Convention places an obligation on both parties to take care of the goods in their possession that belong to the other party. Under certain circumstances, one party may sell the goods and to retain from the proceeds of sale an amount equal to the reasonable expense of preserving the goods and of selling them, the balance being payable to the other party.

Part 4 deals with the application of the Convention, adoption by signatory states and the possibility to opt out of certain provisions.

2.13 STANDARD CONTRACTS FOR WORKS

There are several standard contracts available that have been drafted to cover the execution of works. The choice of a particular standard contract will depend on a number of factors:

- Is the contract to be domestic (both parties from the same country) or international (at least one of the parties does not come from the country in which the works are to be situated)?
- What is the size of the works – can they be categorised as "minor" or "major", or are they of medium size?
- Is the economic operator (the "contractor") to be responsible only for the construction of the Works, for the design and construction of the works or are the works to be undertaken on a turnkey basis?
- What is the nature of the works – building, civil engineering, industrial?

If the contract is to be international in nature, the contract can be chosen, for example, from among the FIDIC suite of contracts, the "ICC Model Turnkey Contract for Major Works", or the "ICC Model Contract for the Turnkey Supply of an Industrial Plant".

The FIDIC Suite of Contracts

"Conditions of Contract for Construction for Building and Engineering Works Designed by the Contracting Authority/Employer" – known as the Red Book;

"Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant and for Building and Engineering Works Designed by the Contractor" – known as the Yellow Book;

"Conditions of Contract for EPC/Turnkey Projects" – known as the Silver Book;

"Short Form of Contract" – known as the Green Book;

"Conditions of Contract for Design, Build, Operate Projects" – known as the Gold Book

If the contract is to be a domestic contract, the country in which the works are to be constructed (and from which the parties come) may have its own standard form or forms. In the United Kingdom, for example, parties can choose a contract from the suite of contracts published by the Institution of Civil Engineers, from the suite published by the Joint Contracts Tribunal, or the suite published by the Institution of Chemical Engineers. In France, the parties might use a contract based on the "*Cahier des Clauses Administratives Générales de Travaux*".

It can be seen from the above titles that certain standard documents are suitable for works executed on a turnkey basis (where the contracting authority or "contracting authority/employer" has little involvement between signature of the contract and completion of the works); others are suitable for works designed and constructed by the contractor (but where the contracting authority or "contracting authority/employer" is closely involved); and others are to be chosen on the basis of the size of project. (The ICC Model Contract for Major Works is clearly intended for large projects; the FIDIC Short Form of Contract is intended for small projects that do not require a complex contract document.)

2.13.1 The FIDIC suite of contracts

The "Fédération International des Ingénieurs de Conseil" (FIDIC) is an organisation based in Geneva, whose members are national associations of consulting engineers. Its main objective is to represent worldwide the majority of firms providing technology-based intellectual services for the built and natural environment. FIDIC, in the furtherance of its goals, publishes international standard forms of contracts for works and for clients, consultants, sub-consultants, joint ventures and representatives, together with related materials such as standard pre-qualification forms.

2.13.1.1 Background to FIDIC contracts

In their original format, the FIDIC conditions were the "Conditions of Contract (International) for Works of Civil Engineering Construction". The first edition was published in August 1957. In the forty years following this first edition, three more editions of the contract were published, but each tended to follow practice in the United Kingdom of using general conditions together with "conditions of particular application" that were actually suggestions for subjects upon which the parties were required to make their own agreements.

As with the English ICE conditions there was also a form of tender and appendix, and a form of agreement. The FIDIC conditions themselves contemplated the existence of drawings and specification and bills of quantities as contract documents. The role of "engineer" was assumed, who was to undertake functions such as certification and other determinations. It was implied that the engineer would act impartially in making decisions required of them by the contract. The form also followed the English basis of re-measurement of the quantities actually executed, together with the system of nomination of subcontractors.

From the beginning it had been presumed that the design would be provided to the contractor by the contracting authority/employer or his engineer. The civil engineering basis for the FIDIC conditions had derived from the anticipated infrastructure projects of the nature of roads, bridges, dams, tunnels and water and sewage facilities.

Thus the standard terms in the Red Book were less than satisfactory for contracts where major items of plant and alike were manufactured away from site. Focusing on this aspect led to the first edition of the FIDIC Yellow Book for mechanical and electrical works in 1963, with its emphasis on testing and commissioning and more suitable for the manufacture and installation of plant.

In the mid-1990s FIDIC responded to the increasing popularity of projects being procured on a design and build or turnkey premise, and published the Orange Book, namely the Conditions of Contract for Design-Build and Turnkey.

The Orange Book reflected a significant move away from the earlier FIDIC forms, which had adopted the traditional role of the engineer. The Orange Book dispensed with the engineer entirely and provided for the "contracting authority/employer's representative". The requirement to be impartial was also relinquished, although when determining value, costs or extensions of time, the contracting authority/employer's representative had to "determine the matter fairly, reasonably and in accordance with the Contract".

To assist in the resolution of disputes, an independent Dispute Adjudication Board (DAB) was introduced, consisting of either one or three members appointed jointly by the contracting authority/employer and the contractor at the commencement of the contract, with the cost being shared by the parties.

Shortly afterward, the existing Red, Yellow and Orange Books were modified substantially so that the choice of contract would be based on responsibility for design rather than whether the works were to be of a civil engineering nature or mechanical/electrical engineering nature.

Final publication of these new contracts was in 1999:

- Conditions of Contract for Construction for Building and Engineering Works Designed by the Contracting authority/employer: the 1999 Construction Contract (the so-called "Red Book");
- Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant and for Building and Engineering Works, Designed by the Contractor – the 1999 Plant and Design/Build Contract (the so-called "Yellow Book");
- Conditions of Contract for EPC/Turnkey Projects: the 1999 EPC Turnkey Contract (the so-called "Silver Book");
- 1999 Short Form of Contract (the so-called "Green Book").

Under the 1999 Red Book, the contractor is paid on the basis of measurement of works actually constructed according to a design supplied by others (usually by a consulting engineer on behalf of the contracting authority/employer); and under the 1999 Yellow Book and Silver Book, the contractor is paid on a lump-sum basis for providing works to his own design (the actual design may still be carried out by a consulting engineer, but on behalf of the contractor).

2.13.1.2 Structure of FIDIC contracts

2.13.1.2.1 GENERAL

Each of the 1999 contracts includes general conditions together with the second part – guidance for the preparation of the particular conditions – and in the third part, the letter of tender, contract agreement and dispute adjudication agreements.

The guidance is for those preparing the particular conditions, and (to a limited extent) those preparing the other documents for issue to tenderers. Some sample texts are included.

The general conditions are intended to be used unchanged for every project. The particular conditions are prepared for the particular project; they include any changes or additional clauses to suit the local and project requirements.

The general conditions generally include the "appendix to tender", which gives essential project information – some of which must be completed by the contracting authority/employer before issuing the tender documents, together with certain information that must be added by the Tenderer.

In each of the 1999 editions, the general conditions comprise twenty clauses, covering similar subject matter in all three contracts with the exception of the following three clauses:

Red Book	Cl. 3 – the engineer; Cl. 5 – nominated subcontractors; Cl. 12 – measurement and evaluation
Yellow Book	Cl. 3 – the engineer; Cl. 5 – design; Cl. 12 – tests after completion
Silver Book	Cl. 3 – The contracting authority/employer's administration; Cl. 5 – design; Cl. 12 – tests after completion

13.1.2.2 GROUPS OF CLAUSES

The main clauses of the general conditions can be considered in groups dealing with related subjects:

1: General provisions – covers subjects that apply to the contract in general, such as definitions, the applicable language and law, the priority of the different documents that make up the contract and the use of the different documents.

2 - 5: The contracting authority/employer; the engineer; the contractor; nominated subcontractors – deal with the duties and obligations of the different organisations that play a part in the execution of the works. It is significant that the contractor's clause contains more sub-clauses than all the others added together.

6, 7: Staff and labour; plant, materials and workmanship – deal with the requirements for the items of personnel and materials that the contractor brings to the site in order to execute the project.

8 - 11: Commencement, delays and suspension; tests on completion; contracting authority/employer's taking over; defects liability – follow the sequence of events during the construction of the project.

12 - 14: Measurement and evaluation; variations and adjustments; contract price and payment – give the procedures for the contracting authority/employer to pay the contractor for his work.

15, 16: Termination by contracting authority/employer; suspension and termination by contractor – are logically at the end of the construction sequence.

17: Risk and responsibility – relates to the project as a whole and includes sub-clauses that are only used rarely, together with matters critical to the parties' responsibilities, and that overlap with the requirements of other important sub-clauses.

18: Insurance – includes important procedures, which must be implemented at or before the commencement of the works.

19: Force majeure – is a general clause that will only be used when the particular problem occurs.

20: Claims, disputes and arbitration – will probably be the most frequently used clause in the whole conditions of contract. It includes procedures, such as the submission and response to contractor's claims, which must be used when a problem has arisen. It also includes the procedures for the appointment of the dispute adjudication board, which must be used at or before the commencement of the works.

Similarly, the structure of the general conditions can be summarised as:

General	Definitions
	Descriptions of the principal actors
Execution	Staff and labour
	Materials, equipment and workmanship
Time	Time for completion
	Taking over
	Defect notification period
Money	Measurements
	Payments
	Variations
Contractual	Termination
	Risk
	Insurance
Force majeure	
Claims & disputes	Claims
	DAB
	Arbitration

2. 13.1.2.3 FORMS

Forms of security and forms of letter of tender, contract agreement and dispute adjudication agreement are included in each of the 1999 editions. There are sample texts for six forms of securities, which are available in electronic form. In the Red Book and Yellow Book, the appendix to tender provides a checklist of all the essential data required for the various sub-clauses:

- Parent company guarantee
- Tender security
- Performance security, with alternative examples
- Advance payment guarantee
- Retention money guarantee, and
- Payment guarantee by contracting authority/employer.

At the end of all the 1999 editions, the dispute adjudication agreements incorporate (by reference) the general conditions of dispute adjudication agreement appended to the general conditions.

2.13.1.3 Contract preparation

2.13.1.3.1 CONDITIONS OF CONTRACT

The FIDIC conditions of contract do not just give the rights and obligations of the parties, to be used for resolve disputes, in isolation from the other documents that make up the contract. They include project management procedures, which are considered to be essential for the administration of the project.

The conditions of contract on their own are not complete; certain information must be provided in other documents in order to make them complete. Information must be co-ordinated with the other documents in order to ensure that the contract, as a whole, will serve its intended purpose. In order to prepare the contract documents for a project using the FIDIC procedures, it is necessary to incorporate the FIDIC general conditions unchanged, together with the general conditions of dispute adjudication agreement and the annex – procedural rules.

In order to use these conditions, each contract's conditions of contract should be defined by wording inserted in the foreword to that contract:

> The Conditions of Contract comprise the "General Conditions", which form part of the "Conditions of Contract for..." First Edition 1999 published by the Federation Internationale des Ingénieurs-Conseils (FIDIC), and the following "Particular Conditions", which include amendments and additions to such General Conditions.

The general conditions include numerous references to information that is given in other documents:

- Appendix to tender
- Particular conditions
- Specification, and in the contract

Therefore:

- Insert essential information in the appendix to tender, which is printed near the end of the FIDIC publication. The contracting authority/employer must insert some of the information required in order to complete the general conditions. Other information will be inserted by the tenderer. Each item in the appendix to tender relates to a sub-clause in the general conditions.
- Prepare particular conditions to suit the contracting authority/employer's requirements for the particular project.
- Check the sub-clauses that refer to information in the specification.
- Check the sub-clauses that refer to information that may be included elsewhere in the contract.
- Consider the need for a contract agreement: the FIDIC standard agreement may need to be modified to suit the contracting authority/employer's requirements, but the information that is contained in the FIDIC form must be included.
- Decide whether to require a one-person or three-person dispute adjudication board and whether to nominate potential members. Any amendments to the general conditions of dispute adjudication agreement or the annex – procedural rules must be included in the particular conditions.
- Consider the use of FIDIC Annexes A to G for the forms of securities that are referred to in the general conditions and the appendix to tender. The FIDIC contracts may need to be modified to suit the contracting authority/employer's requirements and the applicable law.
- Consider the use of a standard letter of tender for use by tenderers when submitting their tender. The information given in the FIDIC standard form must be included and if the FIDIC standard form is not used, then the instructions to tenderers should include the requirement that the tenderer confirm these details.
- In the preparation of the particular conditions there are cross-references with the appendix to tender and specifications. It is essential to have no contradictions.
- FIDIC recommends having particular conditions reviewed by a lawyer.

2.13.1.3.2 PARTICULAR CONDITIONS

Ideally a contract is an agreement freely negotiated between two parties of equal bargaining power with equal access to legal advice and assistance. Where there is an imbalance of bargaining power between the parties, there is a danger that the terms and conditions of the contract become unbalanced.

The general conditions of the construction contract may be modified in consideration of the actual project circumstances and requirements by adding particular conditions. If modifications introduced for a particular project alter to a large extent the originally contemplated risk distribution and the risks allocated to the contractor become excessively high, the following problems may occur:

- Higher bid price;
- Bid failure and disruption of project implementation;
- Non-participation in the bid of conscientious and capable contractors;
    - Contract award to a bidder who fails or was not capable of estimating the risks properly;
    - Poor construction quality and delay to the progress of the work due to lack of risk contingency;
    - Undermining of the relationship of mutual trust and respect between the contracting authority/employer and the contractor;
    - Repetition of groundless claims from the contractor;
    - Frequent disputes between the contracting authority/employer and the contractor;
    - In an extreme case, termination of the contract.

2.13.1.3.3 APPENDIX TO TENDER

Appendix to tender provides two types of information:

(i) Non-financial

(ii) Financial

Why is the "Appendix to Tender" important? – It is important because various clauses refer to information that is to be stated in the appendix to tender. There are also clauses that are not applicable if there is no information related in appendix to tender.

2.13.2 The ICC Model Turnkey Contract for Major Works

2.13.2.1 Background

The aim of the International Chamber of Commerce in producing the Model Turnkey Contract for Major Works was to provide a balanced contract for the parties to turnkey construction projects, recognising the need for proper allocation of risks and providing certainty with respect to scope of the works to be provided and the price to be paid for them. The contract was intended to address several legal issues that are likely to arise in a clear and succinct manner in order to minimise resort to national laws.

The basic concept of the Model Turnkey Contract is that the contractor shall provide the works ready for use by the contracting authority/employer, at the agreed price. While it is often said that the contracting authority/employer has little involvement in such a turnkey project, the ICC recognised that some contracting authority/employers do want to be actively involved at all stages.

2.13.2.2 Structure of ICC Model Contract

2.13.2.2.1 GENERAL

The structure of the ICC Model Contract is very similar to that of the FIDIC suite of contracts. Whereas the FIDIC contracts are composed of a contract agreement, general conditions of contract, particular conditions of contract, appendix to tender, guidance notes and a number of annexes, the ICC Model Contract is composed of a main contract agreement, conditions of contract, schedule of contract amendments (Appendix 1) and a number of other appendices. Whereas the annexes to the FIDIC guidance notes provide standard wording for the various guarantees to which the general conditions of contract refer, the appendices to the ICC Model Contract are wider in scope and include the following:

Appendix 1. Sample schedule of contractual amendments (equivalent to FIDIC's particular conditions)

Appendix 2. Payment and milestone schedule guidance notes

Appendix 3. Payment application format

Appendix 4. Contractor's access after taking over

Appendix 5. Guidelines relating to performance tests

Appendix 6. Contracting authority/employer's requirements

Appendix 7. Sample advance payment guarantee

Appendix 8. Sample performance guarantee

2.13.2.2.2 GROUPS OF CLAUSES

The clauses of the general conditions are grouped under a series of subjects:

- 1 - 12: General and preliminary articles – cover subjects that apply to the contract in general, such as definitions, coming into force of the contract, the applicable language and law, changes in law and regulations and the priority of the different documents that make up the contract. Unlike FIDIC, this section also deals with "good faith", assumptions on which the parties entered into the contract and the making of claims on bonds.
- 13 - 19: Obligations of the parties – deal with the duties and obligations of the different organisations that play a part in the execution of the works, such as provisions of the site, proof of the contracting authority/employer's ability to pay, co-operation with others, quality assurance, staff and labour, duty to notify.
- 20 - 31: Execution of the contract – deals with matters such as the scope of the contract price and works, information for use by the contractor, unexpected physical conditions, safety, public convenience, environmental protection, services/supplies to be provided by the contracting authority/employer, ownership of goods, materials and equipment.
- 32 - 35: Design responsibility and management; variations – deal with the allocation of responsibility for design, the design review process, changes to the design, intellectual property rights.
- 36 - 39: Commencement; the time to taking over, scheduling and progress – deal with the start date, extensions of time and additional costs, delay damages and bonuses, contractual dates, the time schedule and reporting of progress.
- 40 - 44: Contract price and payment – deal with payment of the contract price, applications and procedure for payment, VAT/GST or similar consumption taxes, financing charges.
- 45 - 48: Completion and taking over of the works – deal with completion, commissioning and performance tests, taking over/provisional acceptance.
- 49: Defect correction period – deals with liability for defect correction, inspection procedures, price abatement (a discount in lieu of remedial work), final acceptance.
- 50 - 55: Allocation of risk and responsibility and exclusions from liability – deal with passing of responsibility, liability for damage to third party property, limitations on liability, extension of limitations and exclusions, warranty against claims from future users in favour of the contractor.
- 56 - 57: Force majeure and termination – deal with force majeure and consequences, suspension and termination.
- 58: Insurance – works insurance, contracting authority/employer's liability and worker's compensation insurance, automobile insurance, third party liability insurance.
- 59 - 65: Miscellaneous provisions: confidentiality, bribery, entire agreement, severability, amendments, waiver, joint & several liability, subcontractors, assignment, communications/notices.
- 66: Claims, dispute resolution and arbitration

Although the FIDIC contracts and the ICC Model Turnkey Contract for Major Projects are broadly laid out in terms of both structure and allocation of risk, there are differences. Therefore, as with any contract, the details should be studied carefully.

2.13.3 The ICE conditions of contract – Minor works

2.13.3.1 Background

The Institution of Civil Engineers (ICE) is a professional body representing civil engineers that counts 60 000 members in the United Kingdom and 10 000 members in other countries. For many years, it has drafted standard conditions of contract for use in relation to civil engineering works. Among these, one finds a contract for construction of works designed by the contracting authority/employer, a contract for works designed and constructed by the contractor, a contract for long-term or repeat work (such as maintenance work), a "target cost" contract (under which the parties share the profit or loss that results from the works), the "NEC" suite of contracts (which are drafted in simpler English and are designed to encourage greater co-operation between the parties) and the minor works contract.

The Minor Works Contract was drafted for use in relation to projects where:

- the risks for both the contracting authority/employer and the contractor are considered to be small;
- the works are simple and straightforward in nature;
- the contractor has no responsibility for design unless there is some design of a specialist nature to be undertaken by them or their subcontractors;
- the design of the works is complete before tenders are invited, except for any specialist design work that the contractor is to undertake;
- nominated subcontractors are not used (that is, the contracting authority/employer does not impose any subcontractors on the contractor);
- the contract value does not exceed EUR 300 000 and the period for completion is less than six months (unless payment for the works is made on the basis of Dayworks[6] rates or on a "cost + fee" basis).

2.13.3.2 Structure of the Minor Works Contract

The Minor Works Contract is composed of:

- an agreement,
- a contract schedule – which lists all documents forming a part of the particular contract (drawings, schedule of rates or bill of quantities, Dayworks schedule, etc.),
- the conditions of contract, and
- an appendix to the conditions of contract – which lists all important data and features.

The standard contract form is accompanied by a set of guidance notes.

[6] "Dayworks" refers to work carried out on the basis of daily or hourly rates. Labour and equipment is paid for on the basis of the time spent on the work multiplied by these rates. Materials are paid for on the basis of actual cost + a mark-up, often about 15%.

2.13.3.3 **Clauses**

The conditions of contract contain only 13 clauses, although some contain several sub-clauses. The subjects of the clauses are as follows:

1. Definitions
2. The engineer
3. General obligations
4. Starting & completion
5. Defects
6. Additional payments
7. Payment
8. Assignment and subcontracting
9. Statutory obligations
10. Liabilities and insurance
11. Disputes
12. Application to Scotland & Northern Ireland
13. Construction (design and management) regulations 1994

It can be seen immediately from the above that the Minor Works Contract does not contain many of the so-called "boilerplate clauses" except for Clause 8, dealing with assignment, and Clause 11, which deals with the resolution of disputes. This is because the Minor Works Contract is intended for "low-risk situations" where the parties are unlikely to become embroiled in complex contractual arguments.

As the Minor Works Contract was not intended for use in an international context, it is assumed that the contract will be interpreted in accordance with local laws. As within the United Kingdom the laws of Scotland and the laws of Northern Ireland are slightly different from the laws of England and Wales, Clause 12 has been inserted to deal with this position.

Although the subjects of the other clauses closely match the groups of clauses found under the ICC Model Turnkey Contract for Major Works, the content of each clause within the Minor Works Contract is very brief compared to the content of corresponding clauses under the ICC Model Turnkey Contract. For example, the definitions clause within the Minor Works Contract gives only five definitions whereas the corresponding clause in the ICC Model Turnkey Contract lists 66 definitions.

The Contract recognises that in relation to minor works, the parties and the engineer are unlikely to put in place a large management team. Therefore, it is anticipated that the engineer will be a named individual rather than a firm (for larger projects, a firm is often named as the "engineer" rather than an individual). Clause 3.4 requires the contractor to give the names of individuals who are empowered to receive instructions from the engineer, because the Contractor is unlikely to have a manager on site on a full-time basis.

The guidance notes also draw attention to the fact that a small contractor may not be able to insure the works without a very high "excess", which means that a large portion of any loss will be borne by the contractor rather than his insurers. The conclusion to be drawn from this note is that the contracting authority/employer should consider taking out the insurance instead of placing the risk on the contractor.

The guidance notes also state that the defects correction period should normally be six months and in no case should exceed 12 months. In comparison, for larger projects the standard contracts normally impose a defects period of at least 12 months and sometimes the contracting authority/employer requests much more. This reduces the risk on the contractor.

In the same way, the guidance notes suggest that retention money should be limited to an amount between 2.5% and 5% of the final contract amount, whereas for larger projects it is usual to retain between 5% and 10%. Retention money is the only financial guarantee foreseen by the Minor Works Contract – there is no requirement for the contractor to provide a performance guarantee or a parent company guarantee.

It can be seen from the above that under the Minor Works Contract, the contracting authority/employer accepts much more of the risk than they would under a standard contract form for larger projects.

This voluntary acceptance of risk is particularly evident when the Contracting authority/employer decides to use the possibility foreseen under the Minor Works Contract to pay on a Dayworks basis.

In accepting to pay the contractor on such a basis, the contracting authority/employer bears a large part of the risk related to the pricing of the works.

The contractor will be paid for the number of workers actually used. They do not need to estimate the number of workers, and provided that they correctly determined the hourly rates, they will be unconcerned about budget and waste. Thus the contracting authority/employer must ensure that the contractor does not over-man and that the workers are productively employed.

In the same way, the contractor will be reimbursed the actual cost of materials used plus a mark-up. Therefore they have no incentive to avoid wastage.

In seeking to control the amount of manpower and materials used, the contracting authority/employer must bear in mind that it will be difficult to hold the contractor liable for delay if the contractor wanted to increase the number of workers but the contracting authority/employer refused.

2.14 STANDARD CONTRACTS FOR THE PROVISION OF SERVICES

2.14.1 Basic contents

There are many standard contracts available covering the provision of services. Often these are related to a specific industry. For example, within France the geological investigation industry has a recognised system defining, by means of codes, the various scopes of work that might be undertaken by those providing such services. Thus, those procuring a geological investigation service may order a G11 investigation and both parties know the precise extent of this investigation. It will merely be necessary to complete this definition of the scope with details of the particular mission that is to be accomplished (names of parties, price, timing, location of investigation, etc.).

Any contract for the provision of services should include the following:

- The names and addresses of the service provider and of the buyer of those services;
- Details of the services to be provided;
- The status of the service provider as independent contractor or otherwise;
- Payment terms and frequency of payments;
- Liability and insurances;
- Provisions related to breaches of contract;
- Date of commencement, duration, and any deadlines;
- Renewal of the contract;
- Termination of the contract;
- "Boilerplate clauses" such as confidentiality; law and language; severability; amendment; assignment; waiver; notices; resolution of disputes.

In many cases, there should also be a clause dealing with intellectual property rights and possibly a clause dealing with insurance.

Example: The FIDIC Client/Consultant Model Services Agreement (known as the "White Book").

Similarly to the FIDIC contracts for works, the FIDIC White Book proposes an agreement, a set of general conditions, a set of particular conditions and a set of appendices.

The agreement, which is intended to be signed by both parties, identifies the buyer of the services (the client) and the provider of the services (the consultant), briefly describes the services to be provided, and lists documents forming part of the agreement.

It states that:

> In consideration of the payments to be made by the Client to the Consultant … the Consultant hereby agrees with the Client to perform the Services in conformity with the provisions of the Agreement
>
> The Client hereby agrees to pay the Consultant in consideration of the performance of the Services such amounts as may become payable under the provisions of the Agreement at the times and in the manner prescribed by the Agreement.

The general conditions include sections entitled:

- Definitions
- Obligations of the consultant
- Obligations of the client
- Personnel
- Liability and insurance
- Commencement, completion, alteration and termination of the agreement
- Payment
- General provisions

2.14.2 Obligations of the consultant

Within the obligations of the consultant is the basic requirement for the consultant to perform the services which are detailed in Appendix A and which are broken down into:

- Normal services defined as such in Appendix A;
- Additional services defined as such in Appendix A or otherwise agreed by the parties to be additional;
- Exceptional services which are not normal or additional but which are necessarily performed by the consultant. Clause 28 states that the need for such exceptional services would arise in the event of certain changed circumstances, suspension or resumption of the services, etc.

There is also a requirement under Clause 5 for the consultant to exercise reasonable skill, care and diligence in the performance of their obligations under the agreement. The reasonableness of their actions is to be judged by the standard of performance of a fellow professional providing a similar service. This is the standard normally required of a professional service provider in a common law country. There is no guarantee of "fitness for purpose". Within civil law countries, the service provider is often stated to be under an obligation to provide the necessary means, but not an obligation to produce the desired result.

Since the consultant under a contract based on the FIDIC White Book is often to undertake the role of the engineer, under a FIDIC contract for works, Clause 5 also requires the consultant:

- to exercise any duties and powers required of them under a contract between the client and a third party (the contractor) in accordance with the said contract;
- when required by that contract to certify, decide or exercise discretion, to do so fairly, not as an arbitrator but as an independent professional using their skill and judgement; and
- if authorised to vary the obligation of the third party, to do so after obtaining the prior approval of the client of any variation that might have an important effect on costs, on time or on quality.

2.14.3 Obligations of the client

Among the client's obligations are those to avoid delay to the services by providing within a reasonable time all relevant information that is within the client's power to obtain and all necessary decisions. The client is also to do all in their power to assist the consultant and his personnel in relation to:

- visas,
- import and export of personal belongings,
- repatriation in emergencies,
- access to information and
- the provision of the authorities necessary for the import of foreign currency for the services and personal use, and for the export of money earned in relation to the services.

The client is also to provide the equipment and facilities, to select and delegate personnel in their employment, and to arrange for the services of others, all in accordance with Appendix B and all free of charge to the consultant. The consultant shall not be responsible for the said service providers or for their performance.

2.14.4 Personnel

Under the section dealing with personnel, all personnel sent by the consultant to work in the country of the project must have been physically examined and found to be fit and must hold qualifications acceptable to the client. If the client cannot supply the personnel and/or services required of them under Appendix B, the consultant shall arrange the supply as an additional service. If it is necessary to replace any person, the party responsible for the appointment shall immediately arrange for replacement by a person of comparable competence.

2.14.5 Liability and insurance

Under the liability and insurance provisions, in the event that the consultant is in breach of his obligation to exercise reasonable skill and care they shall be liable to compensate the client. Likewise, the client shall be liable to the consultant if they are found to be in breach of their duty towards the consultant. The amount of the compensation shall be limited to the amount of reasonably foreseeable loss and damage, but will be limited to the amount stated in the particular conditions. This maximum amount is applicable to all claims taken together.

Any claim must be made before the expiry of the relevant period stated in the particular conditions.

If either party makes a claim against the other that is found to be unfounded, they shall entirely reimburse the costs of the other party incurred as a result of the claim.

To the extent that the applicable law permits, the client shall indemnify the consultant against all claims arising out of the agreement, including claims by third parties made after the end of the period stated in the particular conditions, except insofar as they are covered by insurances taken out by the consultant at the request of the client. This indemnity and the limit of liability do not apply to claims that do not arise in connection with the services or that arise from deliberate default or reckless misconduct.

The client may request that the consultant insures against his liabilities under the agreement on terms acceptable to the client, but the cost of the insurance shall be at the expense of the client.

2.14.6 Commencement, completion, alteration and termination

The agreement takes effect upon receipt by the consultant of the client's letter of acceptance of his proposal or the latest signature needed to complete the formal agreement, whichever is the later.

The services are to be commenced and completed at times stated in the particular conditions.

The agreement can be varied by written agreement of the parties. If requested by the client, the consultant shall submit proposals for altering the services, the preparation of such proposals being additional services for which the client must pay. If the duration of the services must be extended because of impediment or delay by the client or his contractors, the increase shall be regarded as additional services.

If circumstances for which the consultant is not responsible make it impossible or irresponsible for them to perform the services such that certain services have to be suspended, they shall be entitled to an extension of time plus a reasonable period for resumption of the services.

The client may, after giving the appropriate notices, suspend the services or terminate the agreement either for convenience or because of the consultant's default. The consultant may, after giving the appropriate notices, suspend the services or terminate the agreement due to overdue payment or suspension of the services in excess of 182 days.

2.14.7 Payment

The client must pay for normal services in accordance with details stated in Appendix C and pay for additional services at rates and prices given in or based on those in Appendix C, or otherwise agreed. Unless otherwise agreed, the client shall pay for exceptional services the same as for additional services in respect of extra time spent by the consultant's personnel plus the net cost of all other extra expense incurred by the consultant. Payments must be made promptly and the consultant shall be compensated for late payment at the rate stated in the particular conditions. Payments shall be made in the currencies stated in the particular conditions.

If during the performance of the services the conditions in the client's country prevent or delay the movement of local or foreign currencies, restrict the availability or use of foreign currency, or impose taxes or differential rates of exchange such as to inhibit the consultant in the performance of the services, the consultant shall be entitled to suspend or slow down the performance of the services, with the option to terminate the agreement should the suspension exceed 182 days.

Except where specified in the particular conditions or Appendix C, the client is to arrange the granting of exemptions for the consultant and expatriate personnel from taxes, duties, etc. in relation to their remuneration, imported goods (other than food and drink) and documents. If the client is unable to arrange the exemptions they must reimburse the consultant for payments properly made.

If any part of a consultant's invoice is contested, the client shall notify the consultant promptly and shall not delay payment of the undisputed portion.

The consultant is to maintain records clearly identifying the relevant time and cost expended, and these records shall be available for audit by a reputable firm of accountants during normal working hours, subject to a minimum of seven days' notice.

2.14.8 General provisions

This section includes provisions dealing with languages and law; changes in legislation; assignment and subcontracting; copyright; conflicts of interest, corruption and fraud; notices; publications. Interestingly, whereas the "changes in legislation" provisions under the FIDIC works contracts deal only with changes in the country where the works are located, the provisions under the White Book deal with changes in any country in which the services are to be performed, except that of the consultant's principal place of business. Many European consultants now have offices worldwide where the services can be undertaken, and under these provisions would be entitled to compensation for changes in the laws in the country where the services are undertaken provided it is not their principal place of business.

2.14.9 Settlement of disputes

The settlement of disputes is to be by a stepped procedure: attempt at amicable settlement; mediation; non-binding opinion of the mediator; arbitration.

SECTION 3
EXERCISES

EXERCISE 1

What is the major risk that you foresee in the following situation, and how would you provide for it in setting up the works contract?

A new factory is to open in a town isolated by mountains. The factory will be very welcome in the area, which suffers from high unemployment. To get the finished goods to markets, lorries must use a long winding road through the mountains and cross an old bridge that is in very poor condition. It has been decided to construct a road tunnel 22 km long to shorten the road to the town and to avoid the use of the old bridge.

EXERCISE 2

Which INCOTERM would you use in each of the following situations? Give alternatives in descending order of precedence.

a) You require 2 500 tonnes of salt from an Algerian company for use on roads during winter.
b) You require a turbine for a new power station, which is to be manufactured to a particular specification that can only be obtained from the United States.
c) You wish to place a fairly large order for computer equipment directly with the manufacturer in China.
d) You urgently need a spare part from a manufacturer in Japan.
e) You wish to buy some building materials from a local manufacturer.

EXERCISE 3

What risks do you see in the following situation? What questions would you ask before drafting or agreeing to the contract?

You wish to appoint a catering company to provide a small buffet for 30 people, to take place in a town 120 km away in relation to a visit by a government committee.

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. List at least six areas of risk that must be considered when drafting a contract.
2. How should national standards be handled when preparing a technical specification under Directive 2004/18/EC?
3. Can the drafter of a Technical Specification under Directive 2004/18/EC list approved manufacturers of products to be supplied under the contract?
4. In a contract of works, what are the main risks of damage or injury that must be considered by the drafter?
5. How can the drafter of a contract deal with the risk of damage of injury?
6. In a contract for supplies, what are the four criteria commonly used to determine whether goods supplied conform to the contract?
7. How can the drafter protect the contracting authority against a failure to perform by the economic operator? List at least five measures.
8. Under Rome 1 Regulation, how is the governing law determined if the contract is silent on this matter?
9. List six subjects covered by "Boilerplate clauses".
10. What is a severability clause?
11. What is a limitation of liability clause?

Preparation of procurement

MODULE C

Financial instruments and safeguards

PART 3

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. The different forms of non-financial safeguards
2. The different forms of financial safeguards
3. The financial instruments used to provide such safeguards

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- The purposes of the safeguards
- The cost implications of using financial safeguards
- The various means of providing safeguards

This means that it is critical to understand fully:

- The difference in the functions of the financial safeguards
- The legal nature of the financial instruments
- The practical aspects of securing such financial instruments
- The advantages and disadvantages of requiring safeguards from tenderers

1.3 LINKS

There is a particularly strong link between this chapter and the following modules or sections:

- Module C1 on procurement planning
- Module E1 on preparing tender documents
- Module G1 on contract management

1.4 RELEVANCE

This information will be of particular relevance to those procurement professionals who are responsible for procurement planning, as well as those involved in the preparation of tender documentation (including the organisation of the tender) and in contract administration.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

It would be useful to refer to the Practical Guide (PRAG) and its Annexes.

[Localise: where such provisions exist in XXX: reference should be made to XXX]

SECTION 2
NARRATIVE

2.1 INTRODUCTION

As indicated in module A1, the Directives do not provide a complete procurement code. Rather, they set up minimum conditions that must be met throughout the Community for the maintenance of a single procurement market. EU Member States may continue to apply their own procurement rules provided that these are adapted to reflect the terms of the Directives. Similarly, it is for the member states to regulate, if they wish, the practical or organisational aspects of the procurement process. The Directives do not seek to pre-empt these considerations.

Some member states have traditionally regulated procurement and contain many supplementary provisions of an organisational nature. Others provide little in the way of practical detail and leave this up to the contracting authorities. These organisational or practical issues might include, for example, provisions on tender submission (form and means of submission) or tender opening procedures (whether public or not). Another important issue concerns the use of financial instruments to guarantee various aspects of the tendering process.

Guarantees or securities and the financial instruments that support them figure highly in the procedures of the International Financial Institutions (*e.g.* EBRD, World Bank). They also appear in the UNCITRAL Model Procurement Law, which has influenced and informed the development of procurement laws in a number of the newer EU Member States.

When the Commission itself acts as a contracting authority using the general budget or where beneficiary countries receive funds from the general budget or the European Development Fund (EDF), they must apply the Practical Guide (PRAG) for the procurement. The PRAG also contains a series of guarantees and supporting financial instruments, examples of which are provided in Section 4.

[Localise: if they are used in XXX, refer to the relevant texts]

In this module we will first consider one very important non-financial safeguard (tender validity), which is also supported, at least in part, by a financial instrument (tender security).

We will then consider two other financial safeguards, namely performance securities and advance payment guarantees, including the various means of providing them.

Finally, brief reference will be made to other safeguards of a contractual nature.

2.2 TENDER VALIDITY

In some countries, the instructions to tenderers contained in the tender documents might well contain provisions relating to tender validity. Essentially, this provision requires tenderers to guarantee the terms and conditions of their tenders, including prices, for a certain period of time. That period of time will generally be the time it is estimated that it will take the contracting authority to reach its award decision. During that period, the tenderer guarantees that it will honour the offer made in its tender.

As well as providing sufficient time for the evaluation of the tenders to be completed, the requirement for maintaining valid tenders, together with the tender securities, ensures that only serious tenderers participate so that the contracting authority may be sure that it will waste no time in evaluating tenderers that are not in a position to perform the contract.

It also enables tenders to be evaluated on a comparable basis since the tender validity will include validity of the prices quoted. The tenders will be required to remain valid for the number of days after the deadline for the submission of tenders indicated on the tender form. The period of validity is something of a balance. Whilst it needs to be short enough to accommodate a forecast of the market and other conditions applying to the tenders, it must also be realistic enough to take account of the complexity of the contract, notably in the case of works, and of the time likely to be required for obtaining references, clarifications, clearances and approvals and for notification of the award. Long validity periods, however, will normally imply an increase in costs, since the degree of uncertainty on price forecasts is increased for economic operators that will need to factor this into the tendered price.

It is not always possible, for various (legitimate) reasons, for the contracting authority to finalise the evaluation process within the tender validity period. In those cases and prior to the expiry of the original tender validity period, the applicable law will generally allow the contracting authority to request that the tenderers extend the period of validity for a specified additional period. A tenderer that refuses to extend the tender validity period may be eliminated but will not, however, forfeit its tender security (see next section). At the same time, tenderers agreeing to extend the period are not, as a result, required or entitled to modify their tenders in any way. It is simply an extension of the time period.

Example of tender validity clause taken from the PRAG:

2.8.5 Period of validity

Tenderers are bound by their tenders for the period specified in the letter of invitation to tender and/or in the tender dossier. This period should be sufficient to allow the Contracting Authority to examine tenders, approve the contract award proposal, notify the successful tenderer and conclude the contract. The period of validity of tenders is fixed at 90 days from the deadline for the submission of tenders.

In exceptional cases, before the period of validity expires, the Contracting Authority may ask the tenderers to extend the period for a specific number of days, which may not exceed 40 days. The successful tenderer must maintain the validity of the tender for a further 60 days. The further period of 60 days is added to the validity period irrespective of the date of notification.

2.3 TENDER SECURITIES

Partly to strengthen the tender validity period, the provisions might also enable a contracting authority to require a tender security of some sort. It may be a tender security or guarantee, a tender bond or even earnest money, paid in cash or by banker's certified cheque, cash warrant or demand draft.

The main purpose of the tender security is twofold – to ensure:

(1) that no tenderer withdraws its tender during the period of validity of the tender; and

(2) that the successful tenderer enters into the contract following award and furnishes the required performance security.

The reason for the tender security is to avoid wasting time and valuable resources in the evaluation of tenders that are unaccountably withdrawn or those submitted by tenderers that subsequently refuse to sign contracts. They may have legitimate reasons for doing so. They may also have less legitimate reasons for doing so, and the submission of such tenders has sometimes been used as a means of operating cartels and other forms of collusion. In any event, the purpose of the security is to provide the contracting authority with some financial protection (in the form of compensation) against such defaulters as well as protecting the authority from its own withdrawal or failure to sign.

Note
There is sometimes confusion between the tender security and the performance security. The tender security relates only to the tender itself and guarantees that it will remain valid and that the successful tenderer will sign the contract. The performance security is there to guarantee the performance of the contract and will be of a value significantly higher than the tender security.

In the event of withdrawal before the end of the tender validity period or in the event of the failure of the successful tenderer to either sign the contract or provide the required performance security, the tender security of that tenderer will be forfeited. The contracting authority will thus receive some compensation for the time spent evaluating a bogus or withdrawn tender.

The period of validity of the tender security would normally extend beyond the period of validity of the tender itself in order to take account of those eventualities. There must be sufficient time within which to conclude the contract and obtain the performance security. In addition, should the successful tenderer fail to sign the contract, the contracting authority may further need time, in those systems that allow it, to approach the second-ranked tenderer, where appropriate.

The tender securities of the unsuccessful tenderers will be discharged/returned promptly after the award of the contract and, in any event, within the period of validity of the security.

The amount of the tender security tends to vary between jurisdictions but is ordinarily fixed as a percentage value of the contract, amounting to usually 1 to 2 per cent of the tender price for the contract. In terms of timing, this implies that the amount of the tender security will only be known at the end of the tender preparation stage. It poses some practical difficulties since the tender price will often be a last-minute decision, making it difficult to negotiate the security with the provider.

This may be feasible for smaller-value contracts but, in the case of very large contracts with a value exceeding, for example, 100 million GBP, tender securities of over 1 million GBP are generally not needed. It should be recalled that the purpose is to provide compensation to the contracting authority for any wasted effort. The tender security will also act as a deterrent, but the intention is not usually to impose large penalties or to provide the contracting authority with windfall profits.

It should also be recalled that the costs to the tenderers of obtaining such securities are far from negligible and will inevitably be taken into account by the tenderer in its tender price. In the case of high-value contracts, therefore, the tender security may often be based on an arbitrary or maximum figure for any contract above a certain value.

Practice Note

In some countries, there may be other reasons for preferring a fixed tender security that is not based on the estimated value of the contract in question. Where the banking system is undeveloped or where there is distrust among contracting authorities and tenderers as to the guarantee of confidentiality, there may be concern that the value of tender securities may be disclosed to the tenderers. If the tender security is based on a fixed percentage of the tender price, it is a simple calculation to determine the price of the tender. In appropriate circumstances, therefore, the tender security may be determined by the procuring entity as a fixed sum calculated as a percentage of the total estimated cost. This would also have the benefit of allowing tenderers to calculate and obtain a tender security earlier in the tender preparation process.

However, where fixed amounts are used in this way, the contracting authority would be well advised to make it clear that the estimated total cost is a hypothetical figure used only for the purpose of establishing the required level of tender security and does not reflect the detailed expectations of the procuring entity with regard to the tender prices to be submitted. A further alternative is simply to require a tender security of 'not less than' a fixed percentage of the tender price. Tenderers would then be at liberty to offer higher securities in relation to their tender prices, thereby preventing the accurate calculation of their tender prices by tenderers who have succeeded, in one way or another, in obtaining confirmation of the levels of the other tenderers' tender securities.

The costs involved for tenderers in obtaining tender securities are not negligible. They will include administrative fees as well as, normally, a cost based on a percentage of the credit obtained. There are less tangible costs also, such as the effect that any outstanding security may have on the tenderer's credit line with its bank. The requirement to provide tender securities may well act as a deterrent to many companies, particularly SMEs, especially where the value of the contract being let is relatively low. The charges incurred by the tenderers in obtaining the securities will also, in one way or another, be passed on to the contracting authority by way of increased tender prices. Care needs to be taken, therefore, in deciding whether tender securities are necessary.

They may be advisable in the case of large works contracts where the time involved in conducting an open tendering process is so costly that the untimely and unjustified withdrawal of a tenderer would have significant time and cost implications for the contracting authority. They may also be advisable in the case of tenders that are open to international competition (by definition, mostly higher-value contracts), where contracting authorities are less inclined to trust the potential, largely unknown, tenderers. Where tender securities are required when they are, in reality, unnecessary, the consequences may be fewer tenderers and increased costs for the contracting authority. Few of the older EU Member States apply tender securities in any systematic way; where they do, this tends to be only for large-value works contracts.

They are much less frequently used in the case of selective tendering and in the procurement of consultancy services. They are inadvisable in the case of low-value contracts.

2.4 PERFORMANCE SECURITIES

The contracting authority may well need to protect itself from the effects of the failure of the economic operator to perform its obligations, as well as against the risk of non-performance due to bankruptcy or other financial difficulties of the economic operator.

If the procurement procedure has been conducted well based on the appropriate use of technical specifications, qualification and selection criteria, the danger of non-performance is reduced. The application of the provisions on abnormally low tenders (see module E5), which include the possibility of checking the capacity and capability of the economic operator to complete and execute the contract as expected, will also provide some guarantee of satisfactory performance.

Nevertheless, especially in the case of large-value or complex works contracts, the contract terms and conditions will often contain a requirement for the provision of a performance guarantee.

The purpose of providing a guarantee for performance is to ensure that the beneficiary receives the services, including materials, that it contracted for and that it receives these services within the time limit stipulated in the contract. The undertaking by the guarantor is directly related to and makes express reference to the underlying contract.

Retention monies (the practice of retaining or withholding part of the payment due to the economic operator under the terms of the contract) are sometimes regarded as security for complete and exact performance of the contract. The disadvantage with retention monies, however, is that they accrue only as and when the economic operator becomes entitled to progress payments. Thus an economic operator may have run into financial difficulties preventing the proper performance of the contract before the retention fund has reached a size sufficient to serve as protection. Additional security measures are therefore needed as safeguards to performance.

As with tender securities, performance 'securities' may be given in various forms, but most usually in the form of a performance 'bond' or 'guarantee'.

2.5 ADVANCE PAYMENT GUARANTEES

In the case of some contracts, it is sometimes customary to provide the economic operator with an advance payment. This may happen in the case of the supply of major equipment, for example, where advance payment may be made before the seller puts the goods at the buyer's disposal. An advance payment is also common in construction contracts, where payment is made either before or at the time that the economic operator sets up its on-site camp, delivers its equipment and assembles its work force; it is usually referred to as a mobilisation advance. The economic operator is entitled to payment before it has actually produced any benefits to the contracting authority commensurate to the amount of the mobilisation advance.

Such an advance is often recovered through deductions from monthly bills received from the economic operator. Contracting authorities might take the additional precaution of deducting from the monthly bill a small percentage in order to build up a 'retention fund'. The purpose of the retention fund is to make sure that the contracting authority is not overpaying the economic operator in the early phase of the work and also to build up a reserve to secure fulfilment of the economic operator's maintenance obligations.

However, the retention fund implies a loss of interest for the economic operator and, possibly, a negative cash flow. Bearing in mind possible high interest rates, the retention monies represent an important cost element in the overall price, and the tendering documents should therefore be explicit concerning the amount of retention and the time at which the retention fund will be returned to the economic operator.

Where an advance payment is made, many contracting authorities require the successful economic operator to provide them with an advance payment guarantee, which is equivalent to the amount of the advance payment. This prevents situations where unscrupulous economic operators fail to complete the contract and walk away with the advance payment.

In some cases, advance payments are repaid through retention monies even where there is an advance payment guarantee. To avoid excessive costs, the value of the advance payment guarantee should be reduced in line with the repayments, although this does not always happen in practice. It is a cumbersome procedure, but any other action, where these instruments are combined, exposes the economic operator to increased costs, which will need to be recovered from the contracting authority. It is not unknown for advance payments to be interest-bearing. This defeats the object of providing a mobilisation advance and would again impose a disproportionate cost burden on the economic operator.

2.6 MEANS OF PROVIDING SECURITIES

Securities may be issued in a number of forms. In addition to the simple practice of using 'earnest money' referred to above, which can be paid by various means, such as in cash or by banker's certified cheque, cash warrant or demand draft, securities are most often issued in the form of a 'bond' or 'guarantee'. A bond is generally issued by an insurance company and a guarantee by a bank. In practice, the difference between these instruments can be quite large.

2.6.1 Bonds

A performance bond usually leaves the guarantor the options of remedying a specific default by the economic operator, performing the contract in its place, or paying the beneficiary what it costs to have the contract performed – up to a certain monetary limit. Sometimes the monetary limit in a performance bond corresponds to the amount of the contract, and sometimes the level is slightly lower.

Given the fact that acute problems rarely arise in the early stages of contract execution, a protection at the level of 50% of the contract value is generally sufficient to protect the beneficiary. It provides the guarantor with an incentive to carry out the contract rather than to pay the beneficiary for having the contract performed.

The wording of the performance bond is normally not very specific with regard to the circumstances under which the bond will come into operation. In practice, the bonding company will be approached as soon as the economic operator is in default, and the beneficiary and the guarantor will discuss with the economic operator what steps are to be taken to remedy the default. If the beneficiary does not obtain satisfaction, it will require the bonding company to complete the contract.

How the bonding company elects to complete the contract is a matter for it to decide. The most common course of action is for the original economic operator to finish the job with financial assistance from the bonding company. The guarantor may also decide, however, to put the remaining work out for competitive tender and to select a new economic operator to take over the work.

Bonds constitute a useful 'pre-qualification' in the selection of the economic operators that are interested in tendering for a contract. Furthermore, the cost of the bond is relatively small compared with the potential losses due to non-performance of a major construction or installation contract.

The disadvantages of bonds from the beneficiary contracting authority's point of view is that the circumstances under which the bonding company can be called upon to perform are either specified in favour of the economic operator and guarantor or are not specified at all. As a result, the beneficiary may find it difficult to obtain speedy remedial action.

Despite their relatively low cost, however, bonds are not universally obtainable and in particular smaller companies with little experience may have difficulty in qualifying for them.

2.6.2 Guarantees

Performance guarantees are issued by banks and similar financial institutions.

One attractive feature of performance guarantees is their 'triggering' mechanism, *i.e.* whether they are called on demand or whether the beneficiary needs to prove in some form that the economic operator is in default under the main contract. Commercial banks, as a matter of business policy, do not like to pass judgment on the performance of economic operators or to assess whether the buyer is entitled to a contractual remedy or not. When commercial banks issue performance guarantees, therefore, they prefer to pay against documentary evidence, much as in the case of letters of credit.

The simplest form of evidence is a letter from the beneficiary to the bank demanding payment, perhaps adding an allegation by the beneficiary (the contracting authority) of default by the principal (economic operator). No proof of default is required.

This 'on demand' type of security is obviously contentious and has prompted calls for guarantees to be payable only against production of documentary evidence, such as engineer's reports or arbitral decisions certifying an actual failure to perform. Given their nature, performance guarantees are more expensive, in percentage terms, than performance bonds in relation to the maximum of the guarantee amount.

2.7 OTHER SAFEGUARDS

In addition to performance securities, recourse may also be had to warranties, whereby the economic operator undertakes to remedy latent defects that appear during a specific period (usually a year) after delivery of the goods or completion of the works.

Additionally, the contract may also include clauses that will entitle the contracting authority to liquidated damages, notably in the event of delays in performance. Such clauses give the buyer the right to deduct a certain amount of money from the price payable under the contract for each day or week of delay as compensation for losses. The amount is often expressed as a percentage of the value of the contract or of those goods and services exposed to delay.

Despite the frequency of such clauses, their enforceability is subject to some dispute. In common law jurisdictions, for example, such a clause is not enforceable unless it represents a genuine pre-estimate of the damage likely to occur as a result of the delay. The usual construction of the clause in terms of a percentage of the contract value sits uneasily with the idea of genuine pre-estimate.

SECTION 3
EXERCISES

EXERCISE 1
INTERNET SEARCH

Using the Internet:

1. Find sample tender securities and performance securities for EBRD and World Bank.
2. Compare these with the examples set out in Section 4:
   (a) What are the differences?
   (b) What are the similarities?
   (c) Are there practical differences?

EXERCISE 2
GROUP DISCUSSION ON TENDER SECURITIES

Split into groups of no more than six for a debate on the use of tender securities.

Half of the groups will take the position that tender securities should be used for all contracts.

The other half will take the position tender securities are only appropriate for highly complex or high-value works contracts.

Issues to be addressed include (but are not limited to):

- the need to protect the interests of the contracting authority purchaser;
- the costs of obtaining the securities;
- the effects that this may have on price.

Each group is to present their arguments and conclusions in turn. A vote is to be taken at the end.

SECTION 4
EXAMPLES OF FINANCIAL SAFEGUARDS TAKEN FROM THE PRAG

4.1 TENDER GUARANTEE FORM

Works contract

(To be completed on paper bearing the letterhead of the financial institution)

For the attention of

(Address of the Contracting Authority

referred to below as the "Contracting Authority"

Title of contract: <Title of contract>

Identification number: [Publication reference

We, the undersigned, [name and address of financial institution], hereby irrevocably declare that we will guarantee, as primary obligor, and not merely as a surety on behalf of [Tenderer's name and address], the payment to the Contracting Authority of [amount of the tender guarantee], this amount representing the guarantee referred to in article 11 of the Procurement Notice.

Payment shall be made without objection or legal proceedings of any kind, upon receipt of your first written claim (sent by registered letter with confirmation of receipt) if the Tenderer does not fulfil all obligations stated in its tender. We shall not delay the payment, nor shall we oppose it for any reason whatsoever. We shall inform you in writing as soon as payment has been made.

We note that the guarantee will be released at the latest within 45 days of the expiry of the tender validity period, including any extensions, in accordance with Article 15 of the Instructions to Tenderers [and in any case at the latest on (1 year after the deadline for submission of tenders)][1].

The law applicable to this guarantee shall be that of <enter Belgium or the name of the country of the Contracting Authority if this is not the European Commission / country in which the financial institution issuing the guarantee is established>. Any dispute arising out of or in connection with this guarantee shall be referred to the courts of (enter Belgium or the name of the country of the Contracting Authority if this is not the European Commission)

The guarantee will enter into force and take effect from the submission deadline of the tender.

Done at....., ... /... /...

Name and first name: ..... On behalf of: .....

Signature: .....

[stamp of the body providing the guarantee]

[1] This mention has to be inserted only where required, for example where the law applicable to the guarantee imposes a precise expiry date

4.2 PERFORMANCE GUARANTEE

Specimen performance guarantee

(To be completed on paper bearing the letterhead of the financial institution)

For the attention of

(Name and address of the Contracting Authority)
referred to below as the "Contracting Authority"

Subject: Guarantee No…

Performance Guarantee for the full and proper execution of contract (contract number and title) (please quote number and title in all correspondence)

We, the undersigned, [name, and address of financial institution], hereby irrevocably declare that we guarantee, as primary obligor, and not merely as a surety on behalf of [Contractor's name and address], hereinafter referred to as "the Contractor", payment to the Contracting Authority of [amount of the performance guarantee], representing the performance guarantee mentioned in Article 15 of the Special Conditions of the contract (contract number and title) concluded between the Contractor and the Contracting Authority, hereinafter referred to as "the Contract".

Payment shall be made without objection or legal proceedings of any kind, upon receipt of your first written claim (sent by registered letter with confirmation of receipt) stating that the Contractor has failed to perform its contractual obligations fully and properly or that the Contract has been terminated. We shall not delay the payment, nor shall we oppose it for any reason whatsoever. We shall inform you in writing as soon as payment has been made.

We accept notably that no amendment to the terms of the Contract can release us from our obligation under this guarantee. We waive the right to be informed of any change, addition or amendment to the Contract.

We note that the guarantee will be released in accordance with article 15.8 of the General Conditions to the Contract [and in any case at the latest on (at the expiry of 18 months after the implementation period of the Contract)][2] .

[The whole paragraph should be deleted when the Contracting Authority is the Commission:

Any request to pay under the terms of the guarantee must be countersigned by the Head of Delegation of the European Commission. In case of a temporary substitution of the Contracting Authority by the Commission, any request to pay will only be signed by the representative of the Commission, namely whether the Head of Delegation, or the authorised person at headquarters' level.]

The law applicable to this guarantee shall be that of <enter Belgium, or the country of the Contracting Authority if this is not the European Commission / country in which the financial institution issuing the guarantee is established>. Any dispute arising out of or in connection with this guarantee shall be referred to the courts of <enter Belgium, or the name of the country of the Contracting Authority if this is not the European Commission >.

The guarantee shall enter into force and take effect upon its signature.

Done at....., ... /... /...

Name and first name: ..... On behalf of: .....

Signature: .....

[stamp of the body providing the guarantee]

[2] This mention has to be inserted only where required, for example where the law applicable to the guarantee imposes a precise expiry date

4.3 ADVANCE PAYMENT GUARANTEE

Specimen prefinancing payment guarantee

(To be completed on paper bearing the letterhead of the financial institution)

For the attention of

(Name and address of the Contracting Authority)

Referred to below as the "Contracting Authority"

Subject: Guarantee No…

Financing Guarantee for the repayment of pre-financing payable under contract (Contract number and title) (please quote number and title in all correspondence)

We the undersigned, [name, and address of financial institution], hereby irrevocably declare that we guarantee as primary obligor, and not merely as surety on behalf of [Contractor's name and address], hereinafter referred to as "the Contractor", the payment to the Contracting Authority of [indicate the amount of the pre-financing], corresponding to the pre-financing as mentioned in Article 46 of the Special Conditions of the contract (Contract number and title) concluded between the Contractor and the Contracting Authority, hereinafter referred to as "the Contract".

Payment shall be made without objection or legal proceedings of any kind, upon receipt of your first written claim (sent by registered letter with confirmation or receipt) stating that the Contractor has not repaid the pre-financing on request or that the Contract has been terminated. We shall not delay the payment, nor shall we oppose it for any reason whatsoever. We shall inform you in writing as soon as payment has been made.

We accept notably that no amendment to the terms of the Contract can release us from our obligation under this guarantee. We waive the right to be informed of any change, addition or amendment of the Contract.

We note that the guarantee will be released in accordance with the article 46.7 of the General Conditions. [and in any case at the latest on (at the expiry of 18 months after the implementation period of the Contract)][3].

[The whole paragraph should be deleted when the Contracting Authority is the Commission:

Any request to pay under the terms of the guarantee must be countersigned by the Head of Delegation of the European Commission. In case of a temporary substitution of the Contracting Authority by the Commission, any request to pay will only be signed by the representative of the Commission, namely whether the Head of Delegation, or the authorised person at headquarters' level.]

The law applicable to this guarantee shall be that of <enter Belgium, or the country of the Contracting Authority if this is not the European Commission / country in which the financial institution issuing the guarantee is established>. Any dispute arising out of or in connection with this guarantee shall be referred to the courts of (enter Belgium or the name of country of the Contracting Authority if this is not the European Commission).

The guarantee will enter into force and take effect on receipt of the pre-financing payment in the account designated by the Contractor to receive payments.

The guarantee shall enter into force and take effect upon its signature.

Done at....., ... /... /...

Name and first name: ..... On behalf of: .....

Signature: .....

[stamp of the body providing the guarantee]

[3] This mention has to be inserted only where required, for example where the law applicable to the guarantee imposes a precise expiry date.

SECTION 5
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. What is a tender validity period?
2. Why is it necessary to have one?
3. How does a tender security reinforce the tender validity period?
4. What other purposes does a tender security serve?
5. Explain how knowledge of the value of a tender security could distort competition.
6. Is a tender security always necessary?
7. What is the difference between a tender security and a performance security?
8. What is the purpose of a performance security?
9. Explain the purpose of an advance payment guarantee.
10. What is retention money?
11. Distinguish between bonds and guarantees.
12. Give 2 examples of other safeguards.

Preparation of procurement

MODULE C

Procedures and tools

PART 4

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. The types of procurement procedure
2. Similarities and differences between the procedures
3. When to use the procedures
4. How each procedure works in practice
5. Techniques to be used in delivering successful outcomes
6. The very limited circumstances where a competitive procurement process may not be required

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- When and how each of the procurement procedures can and should be used
- When and how each of the procurement techniques can and should be used
- How to identify the rare circumstances under which competitive procurement may not be required?

This means that it is critical to understand fully:

- The advantages and disadvantages of each of the procedures and techniques
- The need for thorough preparation and clarity as to the desired outcomes of the process
- The legal constraints

If these points are not properly understood, the choice and conduct of the procedures or the techniques may be flawed or may not deliver the required outcomes. This could mean that the tender process is challenged; or that it needs to be cancelled and restarted; or that the best tender is not selected. If a decision is made not to use a competitive process and that decision is incorrect, the result could well be a successful legal challenge.

1.3 LINKS

There is a particularly strong link between this chapter and the following modules or sections:

- Module A1 on the basic principles of public procurement
- Module C1 on preparation for procurement which steers you through the contract specific issues which must be resolved before you start a procurement
- Modules E3 and E4 on selection and evaluation

1.4. RELEVANCE

This information will be of particular relevance to those procurement professionals who are responsible for procurement planning, specifically in the preparation of contract notices of tender documentation including specifications, and to those involved in the evaluation process. It will also be of particular relevance to those persons who, within the line management of a contracting authority, have the responsibilities and decision-making powers – including delegation powers – to make procurement decisions (*e.g.* to approve the launch of a tender process, make award decisions, sign contracts, etc.).

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

Adapt for local use

The legal requirements relating to the type of procedures are set out in **Directive 2004/18/EC** at Chapter V, articles 28 to 34:

- Article 28 sets out the basic assumption that the open or restricted procedures are preferred and that competitive dialogue and negotiated procedures may only be used where specific conditions are met
- Article 29 sets out the conditions for use of the competitive dialogue procedure, and how to conduct that procedure
- Article 30 sets out the conditions for use of the negotiated procedure with prior publication of the contract notice, and how to conduct that procedure
- Article 31 sets out the conditions for use of the negotiated procedure without prior publication of the contract notice
- Article 34 sets out special rules applying to public works contracts for subsidised housing schemes
- Articles 56 to 61 cover the rules applying to works concession contracts
- Article 62 covers the rules applying to contracts awarded by concessionaires that are contracting authorities
- Articles 63 to 65 cover the rules applying to contracts awarded by concessionaires that are not contracting authorities
- Articles 66 to 74 cover the rules applying to design contests

Numerous other articles in the Directive set out more detailed provisions on how the procedures are conducted, including how to advertise, statutory timescales, the minimum number of economic operators to be invited to tender, and how to select economic operators and award tenders.

The legal requirements relating to the types of procurement technique are set out at:

- Article 32 on framework agreements
- Article 54 on electronic auctions
- Article 33 on dynamic purchasing systems

Utilities

A short note on the key similarities and differences applying to utilities is set out at the end of Section 2.

SECTION 2
NARRATIVE

Note: Except where specified or the context indicates otherwise, the narrative in this module C4 discusses the rules applying to contracts that are of a certain type and value, which means that they are subject to the full application of Directive 2004/18/EC ('the Directive'), and the term 'contract' should be interpreted accordingly. For commentary on contracts falling outside the application of the Directive or only partially covered by the Directive, see module D3. For low-value (sub-threshold) contracts, see below.

INTRODUCTION

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology. Delete references to competitive dialogue if not allowed for under local legislation.

The basic presumption in public procurement is that contracts will be procured using an advertised, competitive procedure that is open, fair and transparent, ensuring equality of opportunity and treatment for all candidates and tenderers. There are only limited circumstances where a procedure without advertised competition is permitted.

The main competitive procurement procedures available under the Directive are the open procedure, restricted procedure, competitive dialogue procedure, and negotiated procedure with prior publication of a contract notice. There are also special procedures set out in the Directive, which can be used for the procurement of works contracts for subsidised housing schemes, public works concessions and design contests.

The Directive sets out the processes to be followed by a contracting authority when using each of these competitive procedures. The level of detail set out in the Directive differs according to the procedure.

The Directive also includes provisions covering procurement tools that a contracting authority may choose to use in conjunction with the competitive procedures, where permissible. These are framework agreements, electronic auctions and dynamic purchasing systems.

Where a contracting authority wishes to award a contract without competition, using what is known as the 'negotiated procedure without prior publication of a contract notice', then it can only do so if specific conditions set out in the Directive are met. The European Court of Justice (ECJ) had confirmed that these conditions were narrowly interpreted and that the award of a contract without competition should only occur in exceptional circumstances.

OVERVIEW OF CONTENT

Change overview to reflect local content.

Section 2.1 covers the various types of competitive procurement procedures available to a contracting authority for contracts subject to the full application of the Directive. It includes:

- a broad overview of how each procedure operates;
- the circumstances in which each of the main types of competitive procedures may be used;
- a more detailed analysis of how each of the procedures works in practice;
- a description of the less commonly used procedure for design contests, including looking at when that procedure can be used and how it operates in practice;
- a short description of the special procedures available for works concessions and works contracts for subsidised housing schemes.

Section 2.2 looks at three public procurement tools specifically covered by the Directive. These are:

- **Framework agreements:** which allow a contracting authority or a number of contracting authorities to enter into arrangements with a single economic operator or a number of economic operators and which permit the repeated award of contracts to the selected economic operator(s) over a specified time limit, subject to a number of legal constraints.
- **Electronic auctions:** which can be used as a method of receiving final or refined tenders using an online competition, subject to a number of legal constraints.
- **Dynamic purchasing systems:** which are completely electronic systems for making commonly used purchases and which are open to economic operators to join at any stage, subject to a number of legal constraints.

Section 2.3 looks at the very limited circumstances where a contracting authority may be able to use the negotiated procedure without publication of a notice.

Sub-threshold contracts

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology. Briefly set out the requirements of the local legislation for sub-threshold contracts.

Where local legislation or local requirements for contracts below the EU thresholds are based on or are the same as EU procurement procedures, as is sometimes the case, then this should be specifically referred to in this section.

This module describes the requirements for contracts of a certain type and/or value, which means that they must be advertised using a contract notice published in the *Official Journal of the European Union - OJEU* (see module D for more information on the types of contract covered and the financial thresholds).

In practice, contracting authorities award many contracts that are not subject to the requirement to advertise in the *OJEU*. This is the case because, for example, they are a type of contract that is not subject to those obligations or they are of small value and therefore do not meet the required thresholds (they are 'sub-threshold' contracts).

The Directive does not set out specific rules that apply to the award of these types of contracts, but the basic general law and Treaty principles, including the requirements for transparency, non-discrimination and equal treatment, do apply to the procurement process followed by the contracting authority in procuring those contracts.

EU Member States may opt to introduce their own rules for sub-threshold contracts and other contracts that are not subject to the detailed procurement requirements of the Directive. Individual contracting authorities may also be permitted or required to publish and follow their own internal purchasing rules. Add special notes if the country has decided to apply EU procedures to contracts below the EU financial thresholds.

Examples of processes that may be required under local law for sub-threshold contracts and other contracts that are not subject to the procedural requirements of the Directive include:

- Direct invitations
- Competitive quotes or requests for proposals from a specified number of economic operators
- Local advertising and a local competitive process

Many of these procedures for sub-threshold contracts do include a competitive element. When the contracting authority runs a competitive process, although it does not have to comply with the detailed rules set out in the Directive, it must run the process in a transparent way so as to ensure that all economic operators are treated in an equal and non-discriminatory manner.

SECTION 2.1
COMPETITIVE PROCEDURES

2.1.1 WHAT ARE THE MAIN TYPES OF COMPETITIVE PROCEDURES AVAILABLE FOR CONTRACTING AUTHORITIES TO USE?

Overview

Delete references to competitive dialogue if not allowed for under local legislation.

There are four main competitive procedures:

- Open procedure
- Restricted procedure
- Competitive dialogue procedure
- Negotiated procedure with prior publication of a contract notice

These procedures are shown in flow charts on the next page.

Key features of each of the four main competitive procedures are as follows:

- Open procedure: this is a 'single-stage' competitive procedure that can be used for works, supplies and services contracts without having to fulfil any special conditions.
- Restricted procedure: this is a 'two-stage' competitive procedure that can be used for works, supplies and services contracts without having to fulfil any special conditions.
- Competitive dialogue procedure: this is a 'two-stage' competitive procedure that can be used only for particularly complex works, supplies and services contracts, subject to fulfilling certain conditions.
- Negotiated procedure with prior publication of a contract notice: this is a 'two-stage' competitive procedure that can be used for some works, supplies and services contracts, subject to fulfilling narrowly prescribed conditions that vary depending on whether the contract concerns works, supplies or services.

The key distinction between a single-stage procedure and a two-stage procedure is that in the single-stage open procedure economic operators submit both selection information and tenders at the same time. In two-stage procedures economic operators first submit selection stage (pre-qualification) information and then the contracting authority invites only selected economic operators to submit tenders or to participate in the competitive dialogue or negotiation stage.

There are other competitive procedures that are permitted for more specialised use:

- Subsidised public housing contracts procedure: this is a competitive procedure with no detailed requirements relating to the number of stages to be used, which can only be used for specified types of contracts relating to the procurement of subsidised public housing schemes.
- Works concessions procedure: this is a competitive procedure with no detailed requirements relating to the number of stages to be used, which can only be used for works concession contracts.

- Procedures for contracts awarded by concessionaires: these are competitive processes with no detailed requirements relating to the number of stages to be used, which can only be used for contracts awarded by concessionaires.
- Design contest procedure: this is a competitive procedure that involves the use of a jury to judge the designs submitted. There are no detailed requirements relating to the number of stages to be used. This procedure can only be used for the design of public works.

Good practice note: The importance of thorough preparation before advertising

The flow charts below start with the advertisement that marks the formal commencement of the procurement procedure. Full preparation prior to the publication of the advertisement is critical to the success of a procurement procedure. In practice, the advertisement should only be dispatched once the contracting authority has undertaken all of the necessary preparatory work. Some documents are required under the provisions of the Directive, and those documents must be complete and comprehensive. If a contracting authority rushes to advertise without undertaking a full and thorough preparation, the process is likely to fail.

See module C on the preparation for procurement and modules E3 and E4 on selection criteria and award criteria.

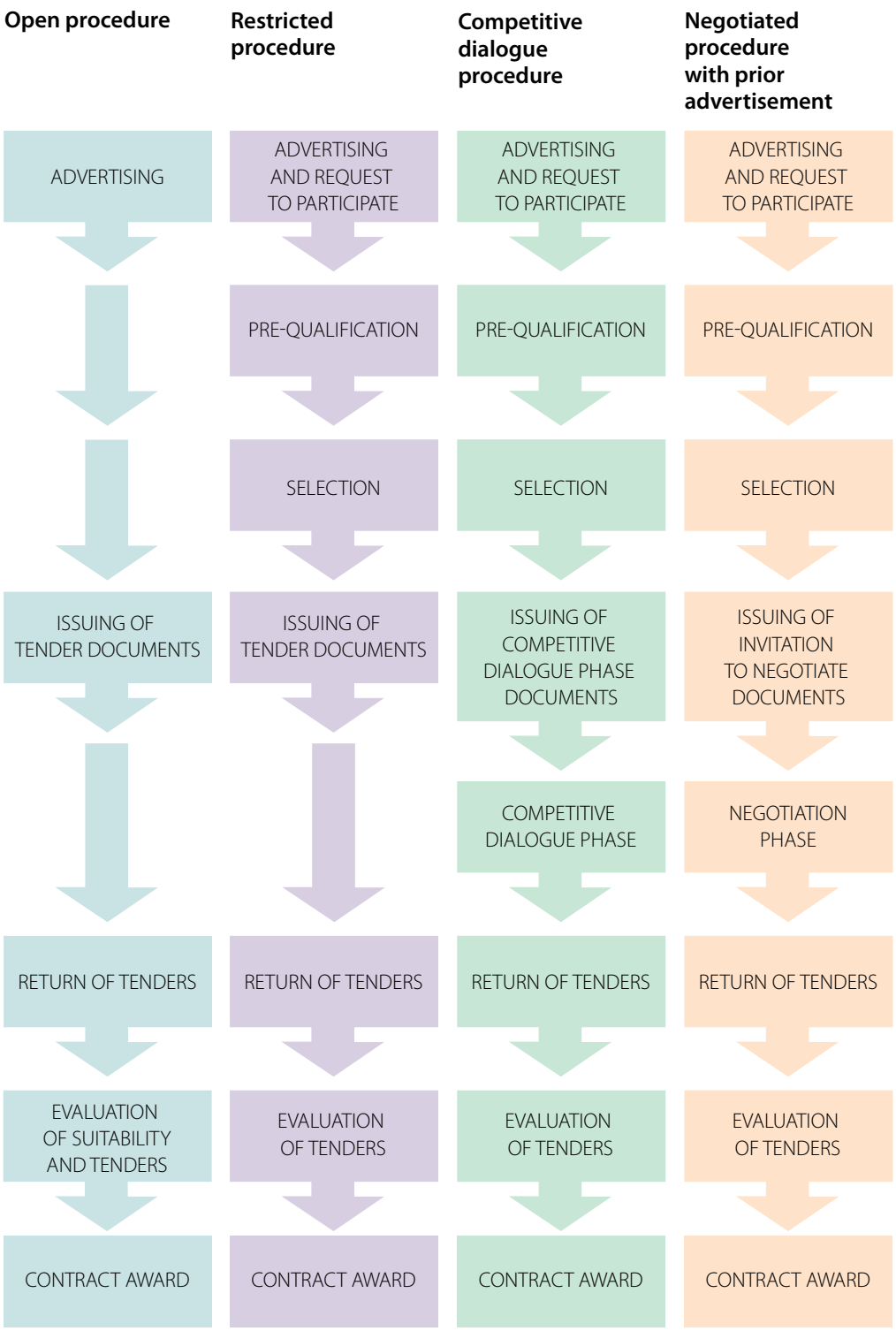
Good practice note: Statutory time limits

In the detailed narrative covering each of the competitive procedures there are references to the statutory time limits that apply to the various stages of the procurement process.

When preparing a tender timetable, the contracting authority must ensure that the statutory time limits are complied with.

The statutory time limits specify the minimum time limits that must be allowed for particular stages of the procurement process. The contracting authority should use the statutory time limits as a starting point for the tender timetable, and it should then consider whether longer time limits would be more appropriate. Time limits should always be based on the nature, complexity and size of the contract in order to allow economic operators sufficient time to prepare pre-qualification and selection stage information and a competitive and correct tender.

2.1.2 Flowchart 1: The four main competitive procedures



The four main competitive procedures can be summarised as follows

Open procedure

The open procedure is a single-stage process. A contracting authority advertises the contract opportunity and then issues full tender documents, including the specification and contract, to all economic operators that request to participate. Economic operators submit both selection (qualification) information and tenders at the same time in response to the contracting authority's advertised requirements. The contracting authority may receive a large number of tenders; it cannot control the number of tenders that it receives, but not all of those tenders will necessarily be considered. Only tenders from suitably qualified economic operators that have submitted the required documents and that meet the selection criteria are considered. Tenders can be evaluated on the basis of either the lowest price or the most economically advantageous tender. No negotiations are permitted with economic operators, although contracting authorities may clarify aspects of the tender with tenderers.

Restricted procedure

The restricted procedure is a two-stage process. The contracting authority advertises the contract opportunity, and the economic operators first submit selection stage (pre-qualification) information, which is used by the contracting authority to establish whether the economic operators are qualified to perform the contract and to select the economic operators that are to be invited to tender. The contracting authority is permitted to limit the number of economic operators that it invites to tender and to draw up a shortlist of economic operators. This means that not all of the economic operators that qualify have to be invited to tender. The contracting authority issues the full invitation to tender documents, including the specification and contract, to the economic operators that it has selected or shortlisted. This means that, unlike the open procedure, the restricted procedure allows the contracting authority to limit the number of tenders that it receives. Tenders can be evaluated on the basis of either the lowest price or the most economically advantageous tender. No negotiations are permitted with economic operators.

Competitive dialogue procedure

Delete this section if competitive dialogue is not permitted under local legislation.

The competitive dialogue procedure is a two-stage process. The contracting authority advertises the contract opportunity, and the economic operators first submit pre-qualification and selection stage information, which is used by the contracting authority to establish whether the economic operators are qualified to perform the contract and to select the economic operators that are to be invited to tender. The contracting authority is permitted to limit the number of economic operators that it invites to tender and to draw up a shortlist of economic operators. The contracting authority issues the invitation to participate only to the economic operators that it has shortlisted, and it then enters into a competitive dialogue phase with those economic operators. During the competitive dialogue phase, all aspects of the project can be discussed with the economic operators and the number of solutions can be reduced as part of the process. Once the contracting authority is satisfied that it will receive proposals that will meet its requirements, it declares the competitive dialogue phase closed and invites tenders. Under this procedure, tenders can only be evaluated on the basis of the most economically advantageous tender.

Negotiated procedure with prior publication of a notice

The negotiated procedure with prior publication of a notice is a two-stage process. The contracting authority advertises the contract opportunity, and the economic operators first submit pre-qualification and selection stage information, which is used by the contracting authority to establish whether the economic operators are qualified to perform the contract and to select the economic operators that are to be invited to tender. The contracting authority is permitted to limit the number of economic operators that it invites to tender and to draw up a shortlist of economic operators. The contracting authority issues the invitation to negotiate only to the economic operators that it has shortlisted. It receives initial proposals and then enters into negotiation with the shortlisted tenderers in respect of those proposals. Tenders can be evaluated on the basis of either lowest price or most economically advantageous tender.

2.1.3 WHEN CAN EACH OF THE MAIN COMPETITIVE PROCEDURES BE USED?

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology. Delete references to competitive dialogue if not allowed for under local legislation.

Articles 28 to 30 of the Directive cover the circumstances where the main competitive procedures can be used.

Open and restricted procedures: A contracting authority is free to choose between the open procedure and the restricted procedure. No legal conditions apply to the circumstances where either of these two procedures may be used, and a contracting authority is not required to use one procedure in preference to the other and therefore has complete freedom of choice.

Comment

Open or restricted? Choosing which procedure to use

As part of the procurement planning process, the contracting authority should carefully consider which of the procedures is the most appropriate for the particular procurement. In the majority of cases it will be a choice between the open procedure and the restricted procedure.

For more complex procurement, the contracting authority may need to consider whether it can use the competitive dialogue procedure or the negotiated procedure with prior publication of a contract notice. For specialised procurement, the other procedures described later on in this section may be appropriate.

Advantages of the open procedure: The open procedure provides for the maximum amount of competition possible. It is also the most transparent procedure, as there is no discretion in selecting providers. The potential for corruption, with a particular economic operator being favoured, is lower. In general, collusion between economic operators is less likely.

The statutory time limits are also shorter than under the restricted procedure.

Disadvantages of the open procedure: The overall costs to the contracting authority when using the open procedure can be high, as the contracting authority must issue full tender documents to all parties (although these costs can be significantly reduced if the documents are available electronically). The contracting authority may have to evaluate many applications if there are a large number of interested economic operators, which can be costly and time-consuming. In addition, economic operators may be less keen to participate in an open procedure if the contract is more complex, and as a result the tender documents are not routinely prepared and require high levels of input. The cost of preparing a full tender can be a disincentive to participation where the likelihood of success is lower due to the high level of competition.

Advantages of the restricted procedure: By restricting the number of economic operators participating at the tender stage, the contracting authority's costs can be lower and the time spent in evaluation may be less than under the open procedure. The restriction in the number of tenderers can assist in avoiding unnecessary costs related to economic operators that are not suitable. This can also result in more interested economic operators that submit better quality tenders, thereby facilitating more effective competition.

Disadvantages of the restricted procedure: There is more potential for corruption under this procedure due to the greater exercise of discretion, and the possibility of collusion may be higher. The statutory time limits are also longer than for the open procedure.

Good practice

The open procedure is generally suitable to be used for routine, straightforward and commodity-type purchases.

The restricted procedure can also be used for routine, straightforward and commodity-type purchases where the contracting authority is of the view that there will be benefits derived from limiting the number of tenderers. The restricted procedure is particularly suited to more complex procurement and to non-routine purchasing.

In determining which procedure to use, the contracting authority needs to weigh a range of factors, including the costs of running the procedure, the benefits of full, open competition, the advantages of restricting competition, and the likely risk of corruption and/or collusion.

This choice of procedure is part of the procurement planning process covered in module C1.

Competitive dialogue and negotiated procedure with prior publication of a contract notice: The competitive dialogue and negotiated procedure with prior publication of a contract notice can only be used where specific conditions are met. These conditions are set out in article 29 (for the competitive dialogue procedure) and article 30 (for the negotiated procedure with prior publication of a notice). There are no legal provisions in the Directive requiring a contracting authority to use one of these procedures in preference to the other.

Comment

Competitive dialogue procedure or negotiated procedure with prior publication of a contract notice?

There are no legal provisions in the Directive requiring a contracting authority to use one of these procedures in preference to the other. However, the European Commission, in its *Explanatory Note - Competitive Dialogue – Classic Directive (CC 2005/04)* explaining the introduction of the competitive dialogue procedures, emphasises that the use of the negotiated procedure with prior publication of a contract notice is 'limited solely to the cases listed' in the Directives. This implies that the competitive dialogue process is more easily available than the negotiated procedure with prior publication of a contract notice.

Explanatory notes issued by the Commission are not legally binding, but they do provide a useful indicator of the thinking behind the drafting of the legislation. Some EU Member States have chosen to adopt an approach that steers contracting authorities to use in preference the competitive dialogue procedure. For example, the UK Government has published a guidance note confirming that for complex projects contracting authorities will generally be expected to use the competitive dialogue procedure.

When can the competitive dialogue procedure be used? To use the competitive dialogue procedure, there are two conditions, both of which must be met. These conditions are set out in article 29:

Condition 1: The contract to be awarded must fall within the definition of a 'particularly complex contract', which is set out in article 11(c):

… a public contract is considered to be 'particularly complex' where the contracting authorities:

- are not objectively able to define the technical means… capable of satisfying their needs or objectives, and/or
- are not objectively able to specify the legal and/or financial make-up of a project.

The European Commission's Explanatory Note referred to above also explores in some detail the factors that constitute a particularly complex contract. See section 4, 'The Law', for further discussion of this issue.

Condition 2: The contracting authority must consider that the use of either the open procedure or the restricted procedure would not enable the award of the contract.

For further information, see section 4, 'The Law'.

Good practice note

It is important to prepare a clear, written audit trail demonstrating that the contracting authority has carefully considered the two conditions and showing how those conditions have been met for the particular contract.

When can the negotiated procedure with prior publication of a contract notice be used? Article 30 of the Directive sets out the limited circumstances where this procedure may be used and the conditions that apply. The circumstances, which are summarised below, can be divided into circumstances where (1) there has been a prior competitive procedure that has failed, and (2) there has been nendo prior competitive procedure. The circumstances and conditions can be summarised as follows:

Prior competitive procedure, where:

- *Irregular and unacceptable tenders are received*
  - applies to works, supplies and services contracts;
  - where irregular or unacceptable tenders are received as a result of an open, restricted or competitive dialogue process;

Example

A contracting authority in the health sector runs a restricted procurement process for a contract for an x-ray machine. Four tenders are submitted and evaluated, but all four tenders include minor variations, which are not permitted.

The contracting authority decides to advertise a negotiated procedure, inviting the four economic operators that had submitted the original tenders to submit new tenders, but still using the original terms of the contract.

  - where the subsequent negotiated procedure with prior publication of a contract notice does not substantially alter the original terms of the contract.

No prior competitive procedure, where:

- *Prior overall pricing is not possible*
  - applies to works, supplies and services contracts;
  - where prior overall pricing is not possible due to the nature of the works, supplies or services or the risks attached thereto;

Example

A local authority wishes to award a contract for the construction of a new office building in the centre of a town where it is known that there are likely to be archaeological remains that 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 the protection of the archaeological remains on the cost and timing of construction. This issue will require negotiation with the economic operators.

  - this procedure may only be used 'in exceptional cases'.

- *Services contract specifications cannot be prepared with sufficient precision*
  - applies to services contracts only;
  - where services contract specifications cannot be prepared with sufficient precision, to permit the award of a contract by selection of the best tender according to the rules governing open or restricted procedure.
- *The contract is a works contract for research, testing or development purposes*
  - applies to works contracts only;
  - where the contract is for works that are performed solely for purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs.

This narrative now examines in more detail each of the four main competitive procedures.

2.1.4 Open procedure

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology, including statutory time limits and publication requirements.

ADVERTISING

Advertising at the start of contract-specific procurement marks the formal commencement of the procurement process.

The contracting authority must use the standard form contract notice and dispatch this to the *Official Journal of the European Union* in accordance with the procedures set out in the Directive. See module E2 for further information on advertising requirements.

Economic operators that wish to participate in the process can request the tender documents from the contracting authority or may access them from the website specified in the contract notice, if that form of electronic procurement is being used.

Statutory time limits apply for the period from the dispatch of the contract notice to the return of tenders. The contracting authority must allow 52 days from the date of dispatch of the contract notice to the deadline date for the receipt of tenders. This 52-day time limit can be reduced in a number of ways:

- The 52-day time limit can be shortened by seven days where the *OJEU* contract notice is prepared in the standard format and dispatched electronically (article 39(5)).
- The 52-day time limit can be further reduced, by five days, where the contracting authority offers unrestricted and full, direct access by electronic means to the contract documents and to any supplementary documents as from the date of publication of the *OJEU* contract notice.
- The 52-day time limit can also be reduced where a prior information notice has been published (see module E2 for further information about prior information notices). Where a prior information notice was sent for publication between 52 days and 12 months prior to the date on which the contract-specific notice was sent, then the 52-day time limit can be shortened, as a general rule, to 36 days. It may be possible to reduce this time limit even further, but in no circumstances may the time limit be reduced to fewer than 22 days.

See the note below on extending the time limit if the specifications and supporting documents or if the additional information are not provided within specified time limits or if economic operators need to undertake site visits or on-the-spot inspections in order to prepare their tenders

ISSUING OF TENDER DOCUMENTS	Comment: Tender documents issued to economic operators will often include: instructions to tenderers, the specification and supporting documents, together with contract documents as well as the request to submit a tender. Where the specification and supporting documents are not available by electronic means on the date of publication of the contract notice, then they must be sent to economic operators within six days of receipt of the request to participate, provided that the request was made in good time prior to the date of submission of tenders (article 39(1)). Where the specification and supporting documents are not made available within the six-day time limit or where tenders can only be made after a visit to the site or after on-the-spot inspection, then the time limit for receipt of tenders must be extended so that all economic operators concerned may be made aware of all of the information they need for preparing their tenders (article 38(7)).
RETURN OF TENDERS	Economic operators return all documents and forms fully completed by the specified date.
EVALUATION OF SUITABILITY AND TENDERS	The information received from tenderers is evaluated. Firstly, the selection-related information is evaluated against the set selection criteria in order to determine the economic operators that are qualified to perform the contract. Secondly, the tender information is evaluated on the basis of either (1) the lowest price, or (2) the most economically advantageous tender, using the pre-disclosed award criteria and weightings.
CONTRACT AWARD	Where the evaluation process results in the decision to award the contract to the successful economic operator, the decision is notified in accordance with statutory requirements, including compliance with the statutory standstill period. See module F1 for further discussion of the statutory standstill requirements.

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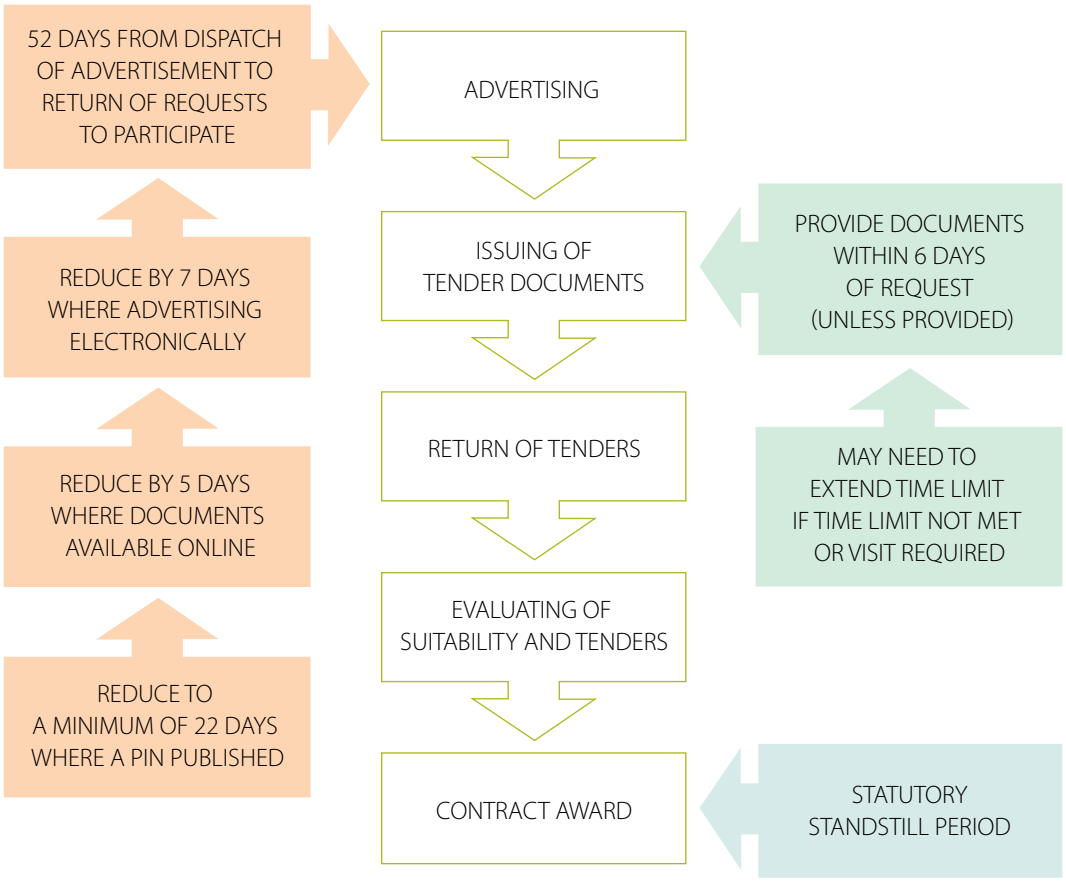
Flowchart 2
Open procedure – statutory time limits: summary



2.1.5 Restricted procedure

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology, including statutory time limits and publication requirements

ADVERTISING AND REQUEST TO PARTICIPATE	Advertising at the start of the contract-specific procurement marks the formal commencement of the procurement process. The contracting authority must use the standard form contract notice and dispatch this to the *Official Journal of the European Union* in accordance with the procedures set out in the Directive. See module E2 for further information on advertising requirements. Economic operators that wish to participate in the process and to submit a tender are required to inform the contracting authority by means of a request to participate. Statutory time limits apply for the period from the dispatch of the contract notice to the return of requests to participate (article 38). Under the restricted procedure, the contracting authority must allow 37 days from the date of dispatch of the contract notice to the deadline date for the receipt of requests to participate. The 37-day time limit can be shortened by seven days where the *OJEU* contract notice is prepared in the standard format and dispatched electronically.
PRE-QUALIFICATION	
SELECTION	Economic operators provide selection stage information to the contracting authority, as requested in the advertisement. The contracting authority may choose to use a pre-qualification questionnaire (PQQ) to request the selection stage information (see module E3 for further discussion on the use of PQQs). The contracting authority evaluates the selection stage information against the set selection criteria to determine the economic operators that are qualified to perform the contract, and it may then select a limited number of economic operators. The contracting authority must invite a minimum of five economic operators to submit tenders, provided that there are five suitably qualified candidates (article 44(3)). The number of economic operators invited to participate must be sufficient to ensure genuine competition and so in certain circumstances five candidates may not be sufficient.

ISSUING OF TENDER DOCUMENTS

The contracting authority issues the invitation to tender to the selected economic operators.

Statutory time limits apply for the period from the dispatch of invitation to tender to the return of tenders (article 38). The contracting authority must allow 40 days from the date of dispatch of the contract notice to the deadline date for the receipt of tenders.

The 40-day time limit can be reduced by five days where the contracting authority offers unrestricted and full, direct access by electronic means to the contract documents and to any supplementary documents as from the date of publication of the *OJEU* contract notice.

The 40-day time limit can also be reduced where a prior information notice has been published (see module E2 for further information on prior information notices). Where a prior information notice was sent for publication between 52 days and 12 months prior to the date on which the contract-specific notice was sent, then the 40-day time limit can be shortened, as a general rule, to 36 days. It may be possible to reduce this time limit even further, but in no circumstances may the time limit be reduced to fewer than 22 days.

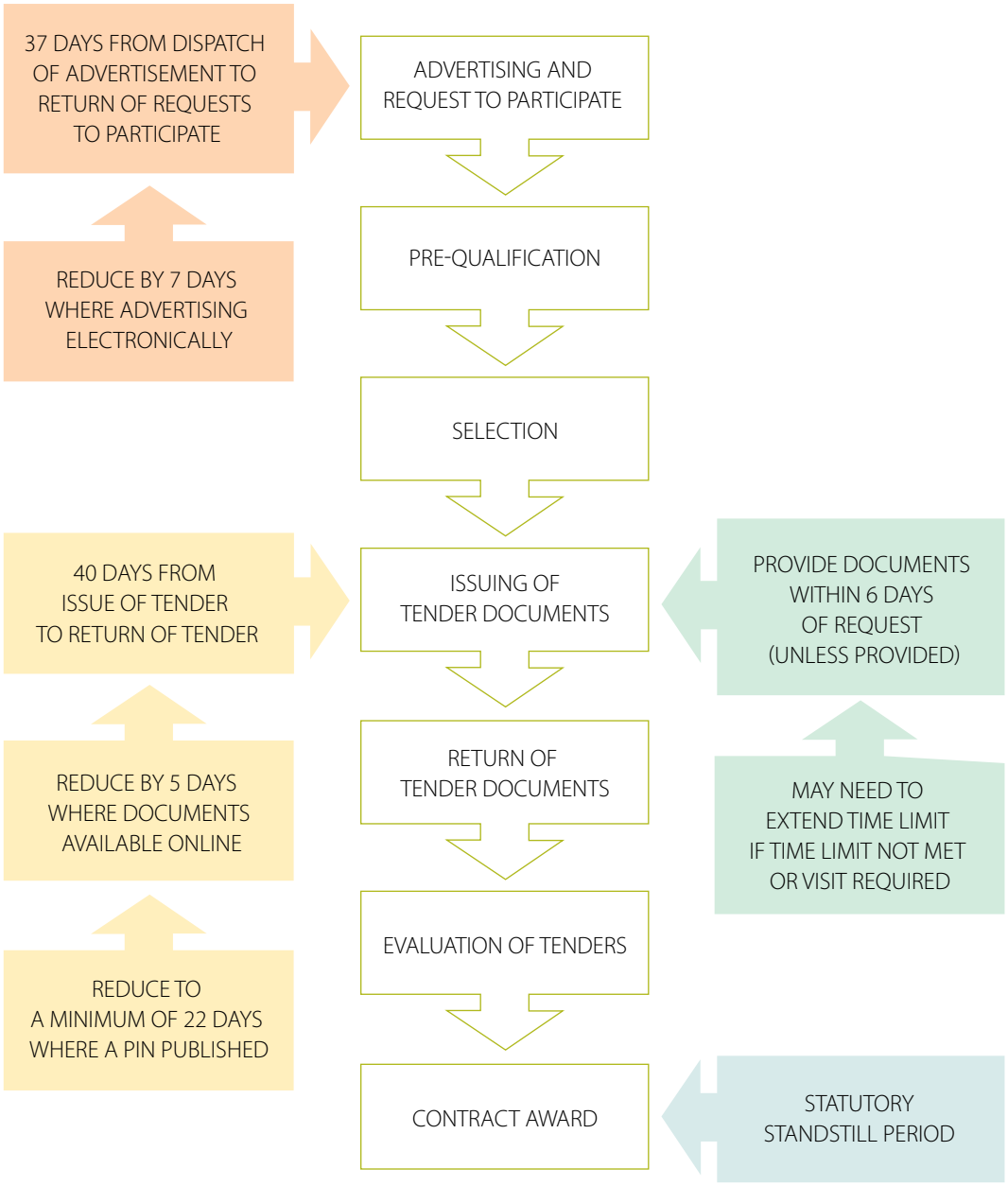
See the note below on extending the time limit if the specification supporting documents or additional information are not supplied within the specified time limits or if economic operators need to undertake site visits or on-the-spot inspections in order to prepare their tenders.

The invitation to tender must be in writing and must include, at least (article 40(5)):

- a reference to the contract notice published;
- the deadline for receipt of tenders;
- the address to which tenders must be sent;
- the language of the tender;
- a reference to any adjoining documents to be submitted in support of declarations provided at the selection stage or to supplement that information;
- the weighting of criteria for the award of the contract (and, in practice, the criteria as well) or, where appropriate, the descending order of importance of those criteria if they are not set out in the contract notice or specification (although it is good practice to repeat the information in the invitation to tender if the information was provided in the contract notice or specification);
- a copy of the specification plus any supporting documents or a reference to where those documents can be accessed by electronic means (articles 40(1) and 40(2)).

RETURN OF TENDERS	Economic operators return tenders within the specified time limits and in the format specified by the contracting authority. Comment: Tender documents issued to economic operators often include: the specification and supporting documents, together with contract documents, and a request for qualification information as well as a request to submit a tender. Where the specification and supporting documents are not available by electronic means on the date of publication of the contract notice, then they must be sent to economic operators within six days of the date of receipt of the request to participate, provided that the request was made in good time before the date for the submission of tenders (article 39(1)). Where the specification and supporting documents are not made available within the six-day time limit or where tenders can only be made after a visit to the site or after on-the-spot inspection, then the time limit for the receipt of tenders must be extended so that all economic operators concerned may be made aware of all of the information they need for preparing their tenders (article 38(7)).
EVALUATION OF TENDERS	The contracting authority evaluates the tenders on the basis of either (1) the lowest price, or (2) the most economically advantageous tender, using the pre-disclosed award criteria and weightings.
CONTRACT AWARD	Where the evaluation process results in the decision to award the contract to the successful economic operator, the decision is notified in accordance with statutory requirements, including compliance with the statutory standstill period. See module F1 for further discussion of the statutory standstill requirements.

Flowchart 3
Restricted procedure – statutory time limits: summary



2.1.6 Competitive dialogue procedure

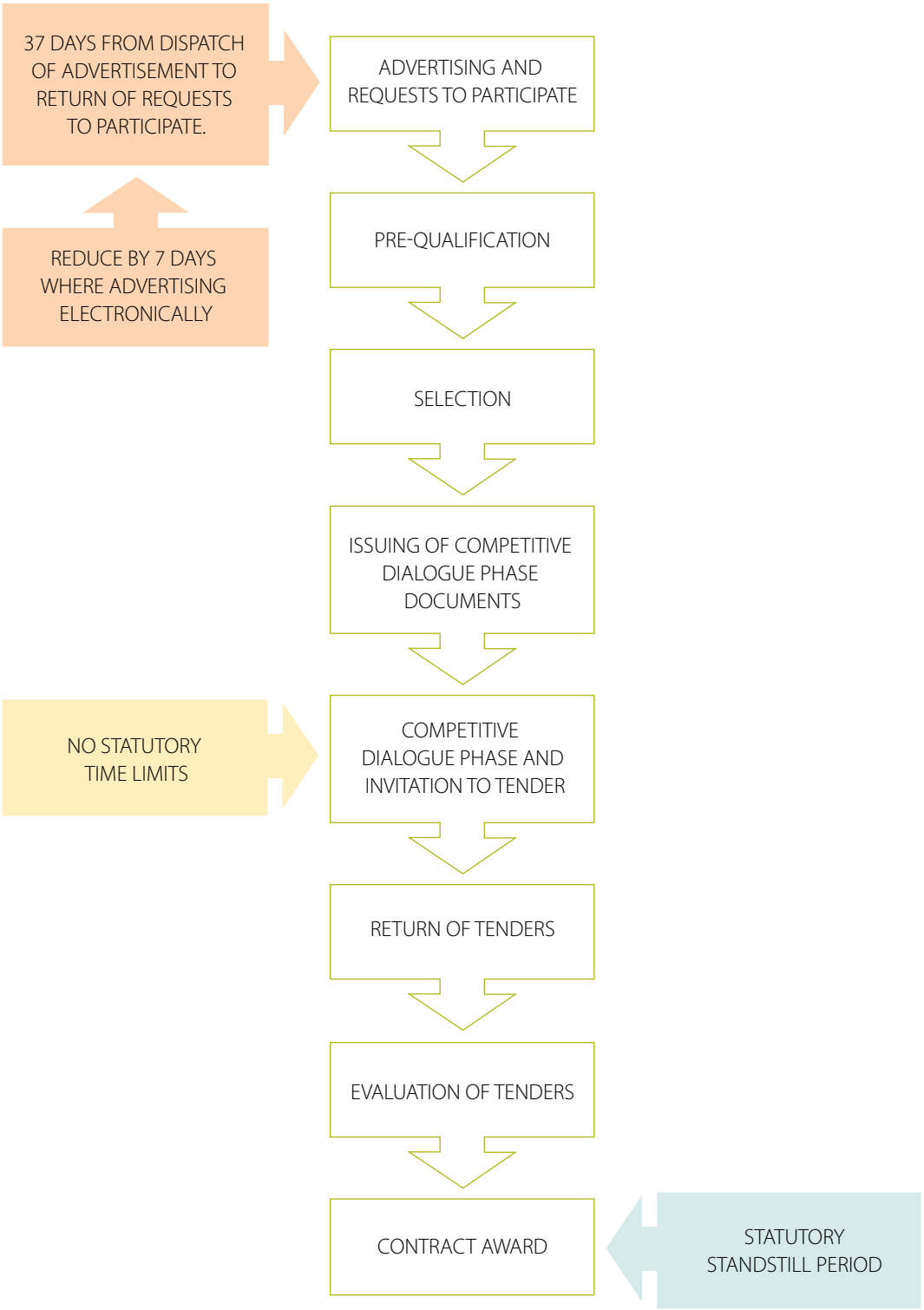
Delete this section if competitive dialogue is not permitted under local legislation.

ADVERTISING AND REQUEST TO PARTICIPATE	Advertising at the start of the contract-specific procurement marks the formal commencement of the procurement process. The contracting authority must use the standard form contract notice and dispatch this notice to the *Official Journal of the European Union* in accordance with the procedures set out in the Directive. See module E2 for further information on advertising requirements. Economic operators that wish to participate in the process and to submit a tender are required to inform the contracting authority by means of a request to participate. Statutory time limits apply for the period from the dispatch of the contract notice to the return of requests to participate (article 38). Under the restricted procedure, the contracting authority must allow 37 days from the date of dispatch of the contract notice to the deadline date of receipt of requests to participate. The 37-day time limit can be shortened by seven days where the *OJEU* contract notice is prepared in the standard format and dispatched electronically (article 39(5)).
PRE-QUALIFICATION	
SELECTION	Economic operators provide selection stage information to the contracting authority, as requested in the advertisement. The contracting authority may choose to use a pre-qualification questionnaire to request the selection stage information (see module E3). The contracting authority evaluates the selection stage information against the selection criteria to determine the economic operators that are qualified to perform the contract and selects a limited number of economic operators. The contracting authority must invite a minimum of three economic operators to participate in the negotiation, provided that there are three suitably qualified candidates (article 44(3)). In each negotiation the number of candidates invited to participate must be sufficient to ensure genuine competition, and so it may be necessary to invite more than three economic operators to participate.

ISSUING OF COMPETITIVE DIALOGUE PHASE DOCUMENTS	The contracting authority issues an invitation to participate in the competitive dialogue and provides the related documents to the selected economic operators. There are no statutory time limits for the period from the issue of the invitation to participate in the dialogue to the return of tenders. The invitation to participate in the competitive dialogue must be in writing and must include, at least (article 40(5)): ■ a reference to the contract notice published; ■ a reference to any possible adjoining documents to be submitted in support of declarations provided at the selection stage or to supplement that information; ■ the weighting of criteria for the award of the contract (and, in practice, the criteria as well) or, where appropriate, the descending order of importance of those criteria if they are not set out in the contract notice or specification (although it is good practice to repeat the information in the invitation to tender if the information was provided in the contract notice or specification); ■ a copy of the specification or of the descriptive document, as well as any supporting documents or a reference to where those documents can be accessed by electronic means (articles 40(1) and 40(2)).
COMPETITIVE DIALOGUE PHASE AND INVITATION TO TENDER	The contracting authority can discuss all aspects of the proposed solutions with the economic operators. The numbers of solutions can be reduced during this phase. Once the contracting authority is satisfied that it will receive suitable tenders, it formally declares the dialogue phase closed and invites tenders. Article 39 does not contain detailed rules about how a contracting authority is to run the competitive dialogue phase, but it does provide that during this phase the contracting authority can discuss all aspects of the proposed solution or solutions with the tenderers and reduce the number of solutions (and therefore in practice often also reduce the number of tenderers). The contracting authority is responsible for deciding how the competitive dialogue phase is to be conducted, subject to ensuring that the process is conducted in a manner that complies with the general law and Treaty principles, in particular by ensuring that it is an open, fair and transparent process, with all tenderers treated equally. The following specific requirements apply to the competitive dialogue phase. Contracting authorities must: ■ ensure equal treatment and in particular not provide information in a discriminatory manner; ■ not reveal solutions; ■ set out in advance the award criteria, weightings or order of importance in the contract notice or the descriptive document. The competitive dialogue phase must continue until the contracting authority identifies a solution or solutions capable of meeting its needs. The invitation to tender must be in writing and must include, at least (article 40(5): ■ the deadline for receipt of tenders; ■ the address to which tenders must be sent; ■ the language of the tender.

RETURN OF TENDERS	Economic operators return tenders within the specified time limits and in the format specified by the contracting authority.
EVALUATION OF TENDERS	The contracting authority evaluates the tenders on the basis of the most economically advantageous tender (the lowest price criterion is not permitted under the competitive dialogue procedure), using the pre-disclosed award criteria and weightings. Following conclusion of the competitive dialogue phase, there are limits on any further discussion with tenderers. See section 4, 'The Law' for further information
CONTRACT AWARD	Where the evaluation process results in the decision to award the contract to the successful economic operator, the decision is notified in accordance with statutory requirements, including compliance with the statutory standstill period. See module F1 for further discussion of the statutory standstill requirements.

Flowchart 4
Competitive dialogue procedure – statutory time limits: summary



See previous section for full details.

Commentary on the competitive dialogue procedure

The competitive dialogue procedure is a relatively new procedure, which was introduced for the first time in the Directive (2004/18/EC) to address the specific needs of projects such as private finance initiative (PFI) projects, public-private partnerships (PPPs), and other contracts with complex requirements.

The competitive dialogue procedure was introduced in response to practical problems faced by contracting authorities when procuring these projects. In some EU Member States, negotiation was regarded as a necessary and essential part of the process in order to ensure that the best outcome was achieved. The open and restricted procedures were felt to be too limited, as they did not permit negotiation with tenderers. However, there were concerns that the negotiated procedure, which was increasingly used as a matter of course for major procurement in some member states, provided too much room for unrestricted negotiations and raised the potential for inappropriate practices and unfair treatment.

It was generally accepted that this was an unsatisfactory situation, and so a long running debate ensued about how best to cater for the requirements of complex projects. The outcome of the lengthy negotiations was the inclusion in the Directive of a new and additional procedure – the competitive dialogue procedure, which codifies some elements of negotiation, permitting discussions with economic operators. The aim is to provide a method of procurement that balances the commercial need for flexibility and negotiation, enabling the development of one or more solutions jointly with tenderers, with the procurement need to ensure a transparent competitive process that treats all tenderers equally.

2.1.7 Negotiated procedure with prior publication of a contract notice

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology, including statutory time limits and publication requirements.

Note on the negotiated procedure with prior publication of a contract notice where procurement has previously failed:

The procedure outlined in the flow chart below applies to the circumstances where the negotiated procedure is being used and where there has been no prior competitive process. Where there has been a prior competitive process, which failed due to irregular or unacceptable tenders, no new selection process is required. A contract notice is required, but this notice merely alerts the marketplace to the fact that a negotiation will take place. New economic operators are not invited to participate in the subsequent process. There is no expression of interest and no selection stage.

Localisation: Where local legislation distinguishes between 'irregular' and 'unacceptable' tenders and, in particular, where the effects are different, this note will need to be expanded to reflect local circumstances.

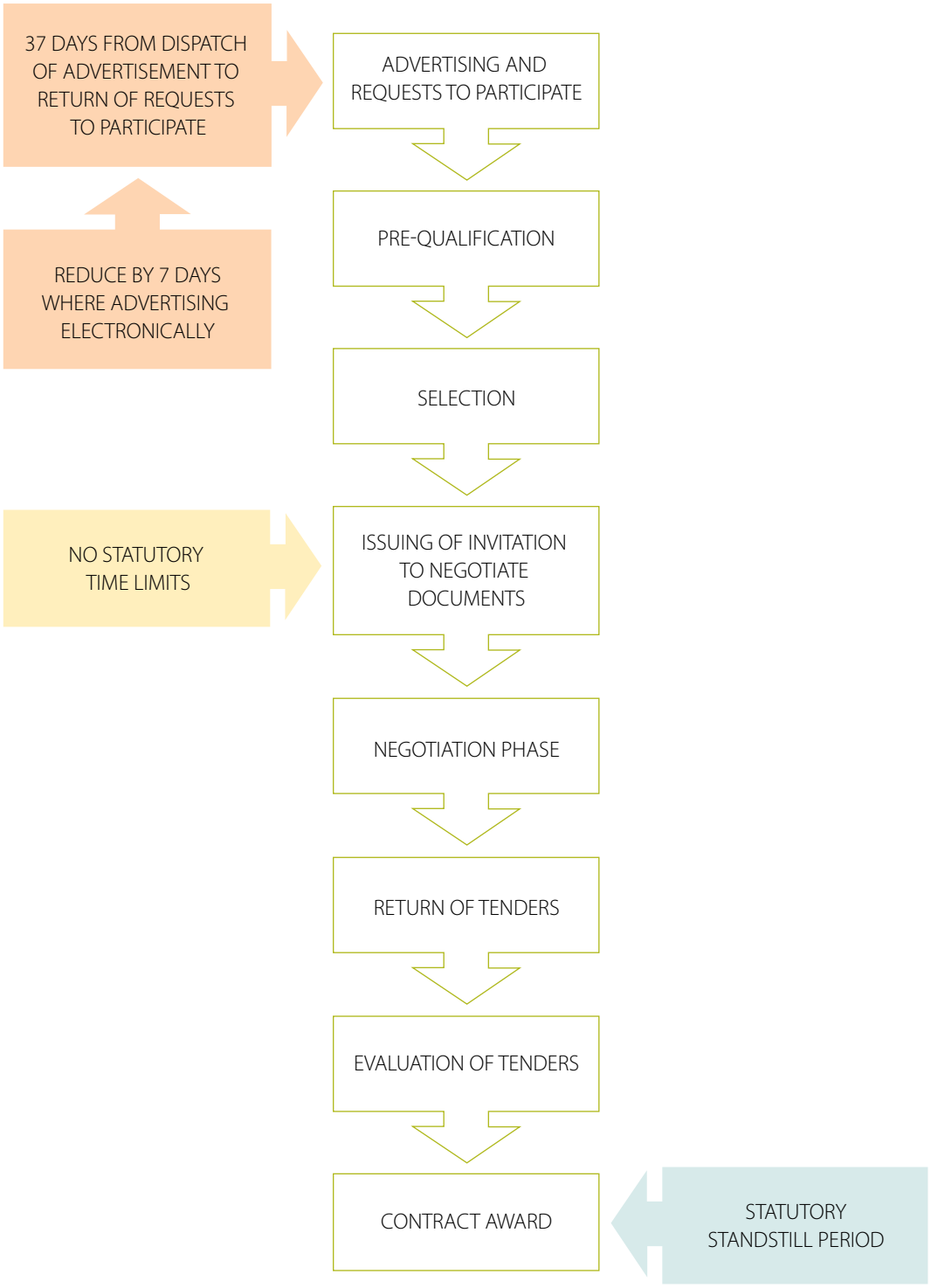
Article 30(1) of the Directive confirms that a contracting authority is permitted to publish a contract notice and then to enter into negotiation with the tenderers that had submitted tenders during the prior open or restricted procedure or competitive dialogue. This negotiation must involve all of and only those tenderers in the negotiation, and the original terms of the contract must remain substantially unaltered.

Article 30(2) provides that in these circumstances a contracting authority is to negotiate with tenderers the tenders that they have submitted in order to adapt them to the requirements that the contracting authority has set out in the contract notice, specification and additional documents, with the aim of seeking out the best tender. The contracting authority must ensure the equal treatment of all tenderers.

ADVERTISING AND REQUEST TO PARTICIPATE	Advertising at the start of the contract-specific procurement marks the formal commencement of the procurement process. The contracting authority must use the standard form contract notice and dispatch this notice to the *Official Journal of the European Union* in accordance with the procedures set out in the Directive. See module E2 for further information on advertising requirements. Economic operators that wish to participate in the process and to submit a tender are required to inform the contracting authority by means of a request to participate. Statutory time limits apply for the period from the dispatch of the contract notice to the return of requests to participate. Under the restricted procedure, the contracting authority must allow 37 days from the date of dispatch of the contract notice to the deadline date of receipt of requests to participate. The 37-day time limit can be shortened by seven days where the *OJEU* contract notice is prepared in the standard format and dispatched electronically (article 39(5)).
PRE-QUALIFICATION	
SELECTION	Economic operators provide selection stage information to the contracting authority, as requested in the advertisement. The contracting authority may choose to use a pre-qualification questionnaire to request the selection stage information (see module E3). The contracting authority evaluates the selection stage information against the selection criteria to determine the economic operators that are qualified to perform the contract, and it selects a limited number of economic operators. The contracting authority must invite a minimum of three economic operators to participate in the negotiation, provided that there are three suitably qualified candidates (article 44(3)). In each negotiation the number of candidates invited to participate must be sufficient to ensure genuine competition, and it may therefore be necessary to invite more than three economic operators to participate.

ISSUING OF INVITATION TO NEGOTIATE DOCUMENTS	The contracting authority issues the invitation to negotiate and related documents to the selected economic operators. There are no statutory time limits for the period starting with the issue of the invitation to negotiate and ending with the return of tenders. The invitation to negotiate must be in writing and must include, at least (article 40(5)): ■ a reference to the contract notice published; ■ the deadline for receipt of tenders; ■ the address to which tenders must be sent; ■ the language of the tender; ■ a reference to any possible adjoining documents to be submitted in support of declarations provided during the selection stage or to supplement that information; ■ the weighting of criteria for the award of the contract (and, in practice, the criteria as well) or, where appropriate, the descending order of importance of those criteria if they are not set out in the contract notice or specification (although it is good practice to repeat the information in the invitation to tender if the information was provided in the contract notice or specification); ■ a copy of the specification or of the descriptive document, as well as any supporting documents or a reference to where those documents can be accessed by electronic means (articles 40(1) and 40(2)).
NEGOTIATION PHASE	See note above on the conduct and purpose of the negotiation phase where the procedure is being used because of a prior failed competitive procedure (article 30(1)). In other cases the Directive does not contain detailed rules about how a contracting authority is to run the negotiation phase. The contracting authority is responsible for deciding how the competitive dialogue phase will be conducted, subject to ensuring that the process is conducted in a manner that complies with the general law and Treaty principles, in particular ensuring an open, fair and transparent process that treats all tenderers equally. In all cases, article 30(3) confirms that during the negotiations contracting authorities are to ensure the equal treatment of all tenderers. Article 30(4) confirms that the procedure can take place in successive stages in order to reduce the number of tenders, provided that the option to do so was set out in the contract notice or in the specifications. When reducing the number of tenders, the award criteria set out in the contract notice of the specifications must be used.
RETURN OF TENDERS	Economic operators return tenders within the specified time limits and in the format specified by the contracting authority.
EVALUATION OF TENDERS	The contracting authority evaluates the tenders on the basis of either the lowest price or the most economically advantageous tender, using the pre-disclosed award criteria and weightings.
CONTRACT AWARD	Where the evaluation process results in the decision to award the contract to the successful economic operator, this decision is notified in accordance with statutory requirements, including compliance with the statutory standstill period. See module F1 for further discussion of the statutory standstill requirements.

Flowchart 5
Negotiated procedure with prior publication of a notice – statutory time limits: summary (see section above for full details)



2.1.8 Reducing statutory time limits

Adapt this section for local use – check whether this is permitted and whether there are local statutory time limits.

Accelerated restricted procedure and accelerated negotiated procedure with publication of a notice

In certain circumstances it is possible to reduce the statutory time limits described above for the restricted procedure and for the negotiated procedure with prior publication of a contract notice.

Article 38(8) provides that 'where urgency renders impracticable' the normal time limits, then the contracting authority may reduce the normal time limits.

In the case of the restricted procedure and the negotiated procedure with prior publication of a contract notice:

- **the time limit between the dispatch of the *OJEU* contract notice and the receipt of requests to participat**e may be reduced to not fewer than 15 days or to not fewer than 10 days where the notice was sent by electronic means and in the required format.

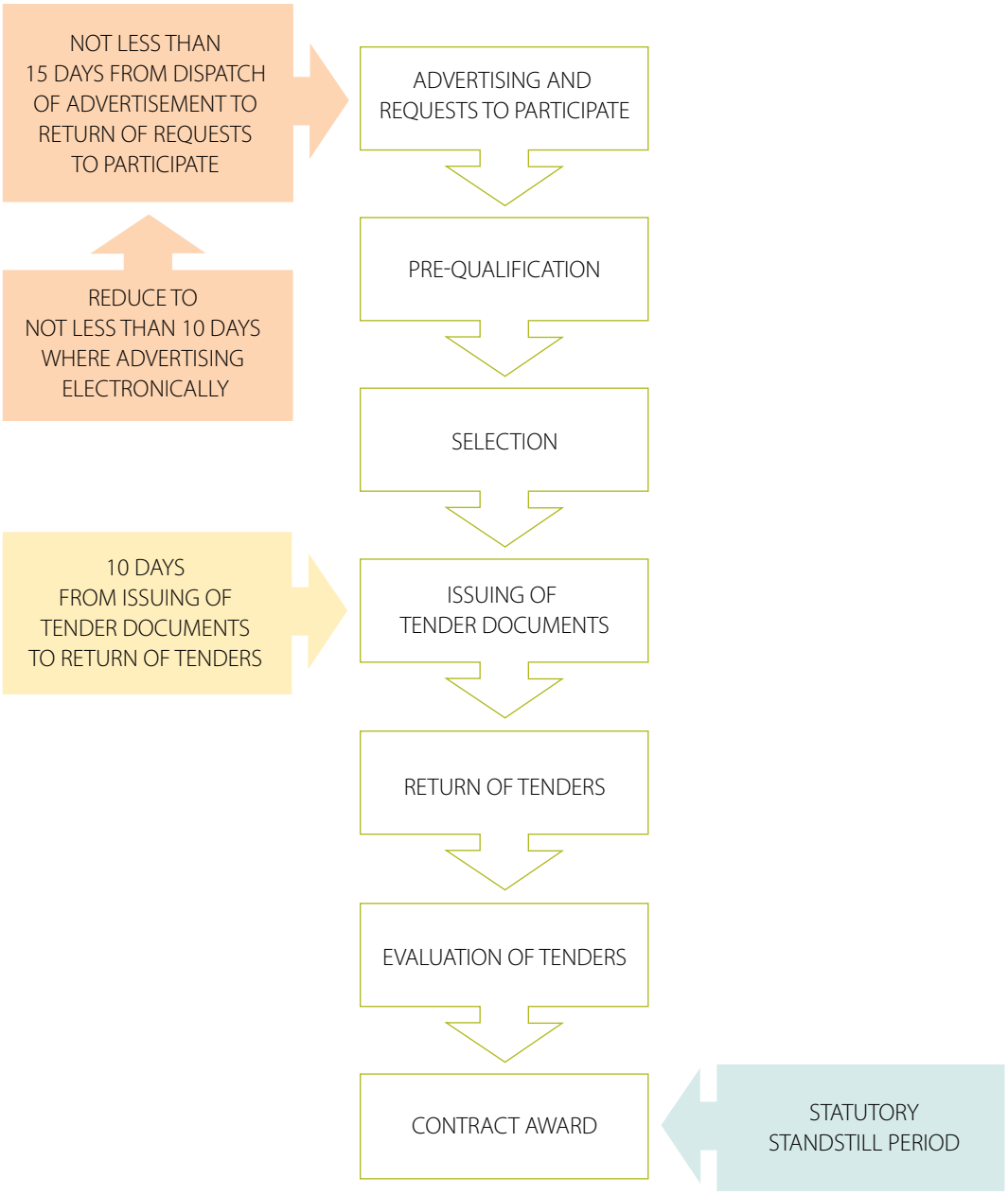
In the case of the restricted procedure:

- **the time limit between the dispatch of the invitation to tender and the return of tenders** may be reduced to not fewer than 10 days.

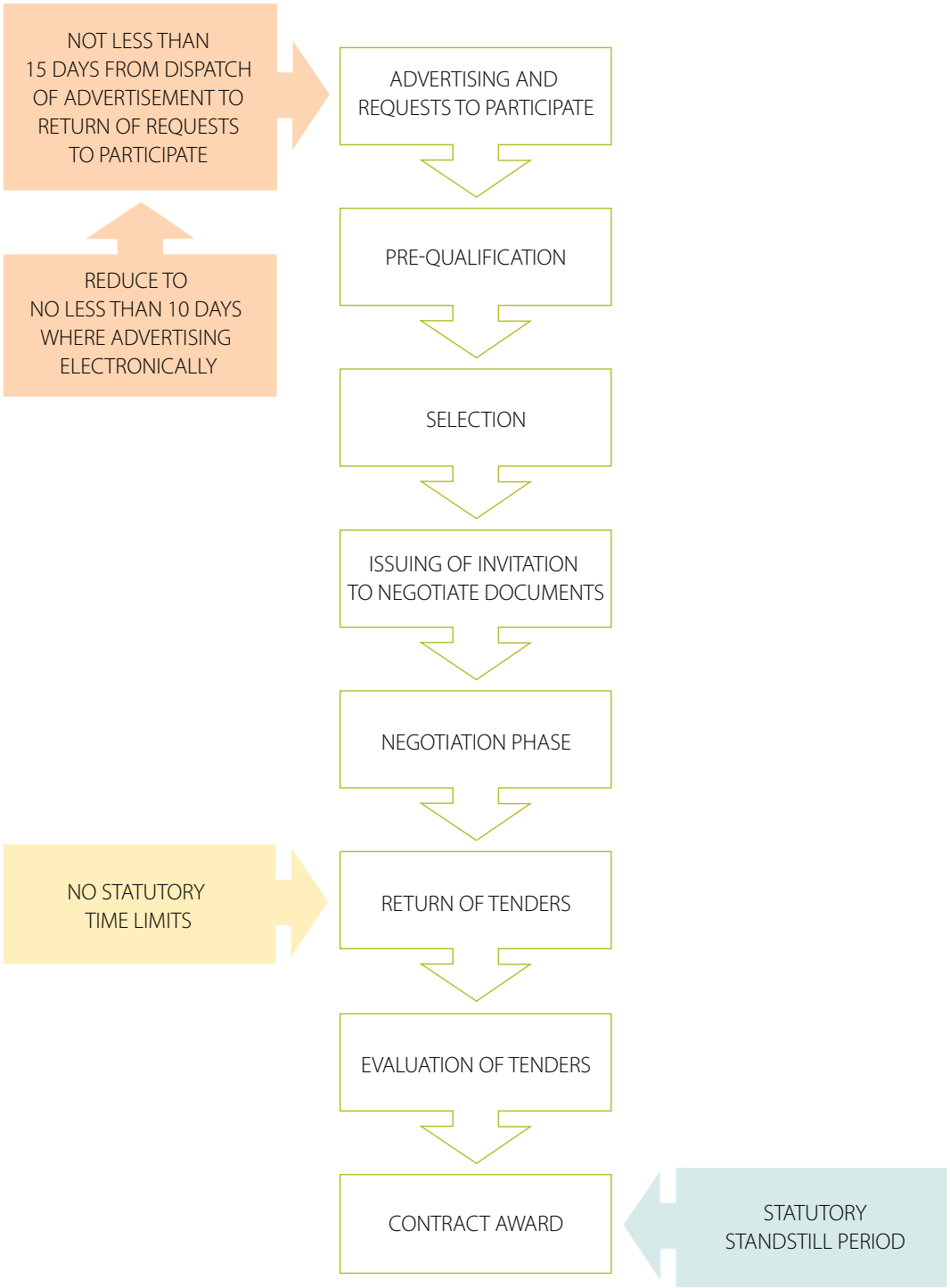
The statutory standstill time limit still applies.

The contracting authority is required to indicate its reasons for using an accelerated procedure in section IV.I.1 of the standard form contract notice.

Flowchart 6
Accelerated restricted procedure – statutory time limits: summary



Flowchart 7
Accelerated negotiated procedure with prior publication of a notice – statutory time limits: summary (see section above for full details)



Comment and practice note

The justification for use of accelerated procedures must be based on circumstances "where urgency renders impracticable" the normal time limits.

The Directive is silent as to what may constitute appropriate urgent circumstances, but it is assumed that the reason must be genuine and, ideally, externally driven rather than, for example, merely due to the contracting authority's own failure to plan well in advance. It is advisable to keep a clear, written audit trail that demonstrates why the normal time limits are impracticable. When deciding whether or not to use an accelerated procedure, it is also important to consider the ability of the economic operators to respond within the accelerated time limits.

In December 2008 the European Commission issued a statement (IP 08/2040) that appears to relax the rules on justifying the use of the accelerated restricted procedure in some circumstances. In summary, this statement indicated that, in the light of the economic climate, a faster procurement process would benefit economies by providing a quicker distribution of public funds into markets. The Commission considered that the use of the accelerated restricted procedure for major projects would enable this to happen. The relaxation of the rules governing the procedure applied throughout 2009 and continue to apply in 2010. This statement is an interesting illustration of the way in which the accelerated restricted procedure can be justified.

This narrative now examines three special types of procedures that can be used in specified circumstances:

- Design contests
- Public works contracts for subsidised housing schemes
- Public works concessions

2.1.9 DESIGN CONTESTS – ARTICLES 66 TO 74

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology, including statutory time limits and publication requirements.

A design contest is defined in article 11(e) of the Directive as a process that enables the contracting authority to acquire a plan or a design as a result of a competition. This process is mainly, although not exclusively, used in the field of town and country planning, architecture and engineering. It is used particularly for the procurement of landmark buildings, where design is a very important element, in which case the contracting authority often chooses to award the design contract separately from the works contract, rather than combining these two elements.

The contracting authority advertises the design contest, using a standard form contract notice, in the *Official Journal of the European Union* and then conducts the process in accordance with articles 66 to 74 of the Directive. There are no detailed provisions covering matters such as time limits, the contents of the documents inviting candidates to participate, or criteria for selection and evaluation, and therefore those aspects of the process are governed by the basic principles requiring the process to be conducted in a transparent manner, ensuring equal treatment and non-discrimination.

The contracting authority appoints a jury, which selects the plan or design. When considering the design contest proposals, the jury does not know who has submitted each of the proposals and so the decision is made anonymously.

The design contest process may lead either to the award of a service contract to implement the design in full or to the award of prizes and/or payments.

Example

A local authority requires a new state-of-the-art theatre and performance space on a city centre site close to a number of historic buildings. This building will have significant local and national importance, as it will provide a new home for the national dance theatre company. The local authority would like to have a building that excites interest but that also fits in with the local surroundings. As it wishes to seek a range of creative solutions, it decides to run a competition for the design of the building. The authority intends to award the design contract to the winner of the design contest.

The local authority will then run a separate tender process for the construction works and require the works economic operator to use the designs prepared by the winner of the design contest.

Overview of articles in the Directive covering the conduct of design contests

Articles 66 to 74 of the Directive set out the rules applying to the conduct of design contests. These articles specify the scope of design contests and cover the issue of financial thresholds. They also set the requirements for advertising and for the conduct of the competitive process, including how juries are set up, operate and make their decisions.

The articles are summarised as follows:

Article 66 requires design contests to be run in accordance with the rules set out in articles 66 to 74.

It further provides that the admission of participants is not to be limited by reference to territory or to part of a territory of an EU Member State or by the laws of a member state requiring participants to be natural or legal persons.

Article 67 contains provisions relating to the scope of design contests. First of all, it specifies the types of contracting authorities and the financial thresholds that apply. Secondly, it refers to the types of contracts and the way in which the financial thresholds are to be calculated. The financial thresholds are different for different types of contracting authorities. The provisions covering the calculation of the financial thresholds specify that the total value of both prizes/payments and any potential public service contract must be taken into account.

Article 68 sets out the exclusions from the scope of design contests.

Articles 69 and 70 cover the requirements to advertise by using an *OJEU* contract notice, both to advertise the opportunity to participate in the competition and following the appointment of the successful participant(s).

Article 71 contains provisions covering the means of communication, including the electronic receipt of plans and projects.

Article 72: Selecting participants

A contracting authority may choose to limit participants and where it does so, it must lay down clear and non-discriminatory selection criteria. The minimum number of participants is not specified, but there must be a sufficient number of participants to ensure genuine competition.

Articles 73 and 74: The jury and conduct of the evaluation

- The jury must be comprised of individuals who are independent from the participants in the competition.
- The number of members of the jury is not specified.
- Where the contest requires participants to be from a particular profession, then at least one-third of the members of the jury must have that qualification or an equivalent qualification.
- The anonymity of the candidates must be preserved until the jury has reached its opinion or decision.

- The jury must:
  - be autonomous in its decision-making;
  - examine the plans and projects submitted by the candidates anonymously;
  - examine those plans and projects solely on the basis of the criteria indicated in the contest notice;
  - record its ranking of projects in a report that is signed by its members. The report must include the jury's remarks and any points that need to be clarified.
- Where the jury has concluded its report and has recorded questions or points of clarification, then the candidate may be invited to answer those questions or points of clarification; complete minutes must be drawn up of the dialogue between the jury and those candidates.
- When the opinion or decision has been made (*and the successful candidates announced*), the contracting authority must publish a contract award notice in accordance with the requirements of article 37.

See section 4, 'The Law', for further details.

2.1.10 PUBLIC WORKS CONTRACTS FOR SUBSIDISED HOUSING SCHEMES – ARTICLE 34

Adapt all of this section for local use and delete if not allowed for under local legislation.

The Directive includes specific provisions that govern the way in which contracts for the design and construction of subsidised housing schemes are awarded (article 34). However, the Directive does not provide a definition of a subsidised housing scheme.

Comment

The previous Works Directive had similar provisions, which applied to 'public housing scheme works contracts'. These contracts related to the design and construction of public housing.

In the Directive these types of works are referred to as 'subsidised housing schemes', but it does not appear that this change in terminology was intended to indicate substantive changes.

It is therefore reasonable to assume that the definition covers works contracts that require the involvement of economic operators in both the design and construction of subsidised housing schemes.

Article 34 allows a contracting authority to use a special award procedure for selecting an economic operator where the size and complexity of a subsidised housing scheme as well as the estimated duration of the works require close collaboration, from the outset, of the members of the team, comprising representatives of the contracting authority, experts, and the economic operator.

Practice note

It is sensible to assume that the availability of this procedure will be narrowly interpreted. Contracting authorities should therefore prepare a robust audit trail, which demonstrates that:

- the project is a subsidised housing scheme;
- the scheme is of a sufficient size, complexity and length;
- close collaboration of team members is genuinely required.

The way in which the special procedure is carried out is not specified in detail, particularly for the tender evaluation stage. Contracting authorities are nevertheless required to comply with various provisions in the Directive (see below), and care must therefore be taken to ensure that the way in which the process is carried out is carefully planned in advance.

The special procedure must also comply with the general legal principles and Treaty principles.

Advertising: When a contracting authority uses a special procedure under article 34 it must publish a contract notice in the normal way in the *Official Journal of the European Union* by using a standard form contract notice (see module E2 for details concerning contract notices). Article 34 requires the contracting authority to include in that notice a description of the works to be carried out so as to enable interested economic operators to form a valid idea of the project. The contract notice must also set out the qualitative selection criteria in terms of personal, technical, economic and financial conditions to be fulfilled by candidates (see module E3 on selection criteria).

Carrying out the special procedure: The special procedure does provide the contracting authority with flexibility in the way in which it carries out the process, particularly in the tender evaluation stage. However, there are still significant constraints, as article 34 requires contracting authorities to comply with the following other articles:

Article 2 Principles of awarding contracts – to treat economic operators equally and non-discriminatorily and to act in a transparent way

Article 35	Publication of a contract notice
Article 36	Form and manner of publication of notices
Article 39	Open procedure – additional documents and information
Article 41	Informing candidates and tenderers when decisions are made on selection and on tender award
Article 42	Rules applicable to communication
Article 43	Content of reports
Articles 45 to 52	Criteria for qualitative selection

Public works concessions – Articles 56 to 65

Adapt all of this section for local use and delete if not permitted under local legislation.

The Directive includes specific provisions that govern the way in which contracts for public works concessions are awarded (articles 56 to 65).

The Directive defines a public works concession contract as follows:

> A 'public works concession' is a contract of the same type as a public works contract except for the fact that consideration of the works to be carried out consists either solely of the right to exploit the work or of this right together with payment.
>
> (Article 1(3) of the Directive)

An example of a public works concession contract is where a contracting authority enters into a contract with an economic operator, which then builds a bridge across a river. The economic operator collects tolls from the public paying to use the bridge. The economic operator is therefore exploiting the works (the construction of the bridge) by charging tolls to cross the work (bridge). For further discussion on the definition and nature of public works concessions contracts, see module D3.

Overview of articles 56 to 65

Where a contracting authority proposes to award a public works concession contract of a certain type and value, which means that it is subject to articles 56 to 65 of the Directive, then the contracting authority must advertise that opportunity in the prescribed manner and in accordance with specified time limits.

There are very few detailed requirements as to how the contracting authority runs the tender process. The contracting authority must ensure that it runs the process in accordance with the basic principles of transparency and equal treatment and that it treats economic operators in a non-discriminatory way.

The Directive does specify that the contracting authority must either require the concessionaire to award a minimum of 30% of the total value of the works to third parties (the percentage can be higher, at the option of the concessionaire) or to require candidates for concessions to specify in their tender the total value of the works that they intend to assign to third parties. The Directive further requires the concessionaire to award the contracts to third parties using competitive processes. In the case of a concessionaire that is a contracting authority, it must use one of the standard competitive processes provided for in the Directive. Where the concessionaire is not a contracting authority, the concessionaire must follow the process specified in articles 63 to 65.

This section now examines the requirements in more detail.

When are works concessions contracts subject to the advertising and competition requirements set out in articles 56 to 65? The requirements in articles 56 to 65 apply to works concession contracts that exceed the specified financial threshold. The financial threshold is the same as the threshold for works contracts (article 56). For further information on financial thresholds, see module D5.

Certain types of works concessions contracts are excluded, and therefore compliance with articles 56 to 65 is not required (article 57). These exclusions are the following:

- Telecommunications contracts are excluded from the Directive under article 13.
- Secret contracts and contracts requiring special security measures are excluded from the Directive under article 14.
- Contracts awarded in accordance with international rules are excluded from the Directive under article 15.

What are the advertising requirements? Contracting authorities wishing to award a public works concession are required to advertise in the *Official Journal of the European Union* by using the special standard form contract notice for public works concession notices provided in Annex VIIB of the Directive. According to article 58, the notice for a public works concession must be published in accordance with the relevant provisions of article 36. See module E2 for further information on advertising requirements.

Are there any statutory time limits? According to article 59, the time limit for presentation of applications for the concession by economic operators is not to be fewer than 52 days from the date of dispatch of the notice (or 45 days where the notice is dispatched electronically).

Where the specification and supporting documents are not available by electronic means on the date of publication of the contract notice, they must then be sent to economic operators within six days of receipt of the request to participate, provided that the request was made in good time prior to the deadline date for the submission of tenders (article 39(1)).

Where the specification and supporting documents are not made available within the six-day time limit or where tenders can only be made after a visit to the site or after on-the-spot inspection, then the time limit for receipt of tenders must be extended so that all economic operators concerned may be made aware of all of the information they need for preparing their tenders (article 38(7)).

Are there any rules about how the contracting authority is to conduct the process of appointing the concessionaire? No, apart from the requirements relating to advertising and statutory time limits outlined above, there are no rules as to how the contracting authority is to conduct the process of appointing the concessionaire. The contracting authority must nevertheless ensure that the process is conducted in a transparent manner, ensuring equal treatment and non-discrimination.

Are there any rules relating to the terms upon which the concessionaire is appointed? Yes, there are rules covering sub-contracting by the concessionaire and the award of additional works to the concessionaire.

What are the rules covering sub-contracting? The contracting authority has a choice. It must:

- **either** require the concessionaire to award to third parties contracts representing a minimum of 30% of the total value of the work for which the concession contract is to be awarded (the contracting authority must give candidates the option of increasing this minimum percentage);
- **or** request tenderers for concession contracts to specify in their tenders the percentage, if any, of the total value of the work for which the concession contract is to be awarded that they intend to assign to third parties (article 60).

Does the concessionaire have obligations with respect to sub-contracting? Yes. Where the concessionaire is a contracting authority, then if it intends to award a sub-contract it must do so by using one of the open competitive tendering procedures provided for in the Directive and it must comply generally with the requirements of the Directive (article 62).

Where the concessionaire is not a contracting authority, then if it intends to award a sub-contract that is above a specified threshold it must follow a competitive procedure in the manner set out in articles 63 to 65.

What are the requirements of articles 63 to 65?

Advertising: When a concessionaire that is not a contracting authority intends to award a sub-contract to a third party and the value of that contract is above the threshold for works contracts, it must advertise in the *Official Journal of the European Union* by using the special standard form contract notice for public works concessions in Annex VIIC of the Directive. According to article 64, the notice must be published in accordance with the relevant provisions of article 36. See module E2 for further information on advertising requirements.

Statutory time limits

Requests to participate: According to article 65, the time limit for the receipt of requests to participate by economic operators is not to be fewer than 37 days from the date of dispatch of the notice (or 30 days where the notice is dispatched electronically).

Receipt of tenders: The time limit for the receipt of tenders from economic operators is to not be fewer than 40 days from the date of dispatch of the invitation to tender (article 65).

- The 40-day time limit can be reduced by five days where the contracting authority offers unrestricted and full, direct access by electronic means to the contract documents and to any supplementary documents, as from the date of publication of the *OJEU* contract notice.
- Where the specification and supporting documents are not available by electronic means on the date of publication of the contract notice, they must then be sent to economic operators within six days of receipt of the request to participate, provided that the request was made in good time prior to the deadline date for submission of tenders (article 39(1)).
- Where the specification and supporting documents are not made available within the six-day time limit or where tenders can only be made after a visit to the site or after on-the-spot inspection, the time limit for the receipt of tenders must then be extended so that all economic operators concerned may be made aware of all of the information they need for preparing their tenders (article 38(7)).

Is a concessionaire that is not a contracting authority obliged to use a competitive tendering process if it intends to award sub-contracts to a company in the same group? Competitive tendering may not be necessary. Article 63(2) provides that groups of undertakings that have been formed in order to obtain a concession or related undertakings are not to be considered as third parties.

A 'related undertaking' is:

- any undertaking over which the concessionaire can exert a dominant influence, either directly or indirectly; or
- any undertaking over which the concessionaire is the dominant influence as a result of ownership, financial participation, or rules governing the undertaking.

A 'dominant influence' is presumed when one undertaking, directly or indirectly, in relation to another undertaking:

- holds a majority of the undertaking's subscribed share capital;
- controls a majority of the votes attached to the shares issued by the undertaking; or
- can appoint more than half of the members of the undertaking's administrative, management or supervisory body.

How does the contracting authority know which undertakings are 'related undertakings'? When the concessionaire applies for the concession, it must include an exhaustive list of related undertakings. This list can be brought up to date following subsequent changes in the relationship between the undertakings (article 63).

Is it possible to award additional works to a concessionaire after it has been awarded the concession? The contracting authority may only award a concessionaire additional works under very limited circumstances. All of the following conditions must be met:

- The award must be made to the economic operator performing the works.
- The circumstances leading to the additional requirements must be unforeseen.
- The additional requirements must be necessary for the performance of the work described in the initial concession project or the initial contract:
  - The award can only be made where either the additional requirements cannot be technically or economically separated from the original contract without major inconvenience to the contracting authorities or, although separable from the original contract, these additional requirements are strictly necessary for its completion.
  - The value of contracts awarded under these circumstances may not exceed 50% of the value of the original works concession contract.

SECTION 2.2
PROCUREMENT TOOLS

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology, including statutory time limits and publication requirements.

Delete sections where local legislation does not allow for such procurement tools.

This section looks at a number of procurement tools that can be used by contracting authorities. The following tools are specifically provided for in the Directive, and EU Member States have the option of deciding whether or not to implement these provisions:

- Framework agreements (article 32)
- Electronic auctions (article 54)
- Dynamic purchasing systems (article 33)

Each of these procurement tools uses one or more of the main competitive procedures as a starting point for the procurement process to be followed.

FRAMEWORK AGREEMENTS

Delete if local legislation does not allow for framework agreements.

Adapt all of this section for local use – using relevant local legislation, processes and terminology, including statutory time limits and publication requirements.

What is a framework agreement?

The term 'framework' can be used to describe a number of commercial and procurement arrangements. However, the Directive provides a definition of a 'framework agreement', and it is this type of framework agreement that is discussed in this section.

Prior to the adoption of the Directive, there were no specific provisions covering the establishment and operation of framework agreements in the public sector (there were provisions, however, applying to the utilities sector). However, contracting authorities in many EU Member States operated framework-type arrangements, which were typically used to 'draw on' commonly procured supplies and services as and when needs arose during a given period.

In the absence of specific provisions covering framework agreements, the operation of such agreements varied widely, and there was uncertainty as to how some of these arrangements complied with the legal requirements of the procurement directives. The provisions in the Directive now set out the manner in which framework agreements may be established and operated. EU Member States may opt to adopt these provisions.

A framework agreement is defined in article 11(5) as:

"an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given time limit, in particular with regard to price and, where appropriate, the quantity envisaged".

In other words, a framework agreement is a general term for agreements with economic operators that set out the terms and conditions under which specific purchases may be made.

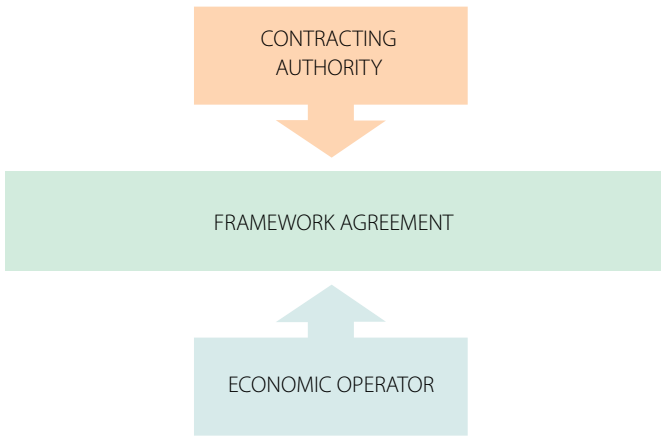
Comment

A difficulty raised by the definition of a framework agreement is that it may or may not be a 'contract' for the purposes of the Directive, as this is dependent on national law. What the Directive does is to effectively enable a non-binding framework agreement to be treated in the same way as a binding framework agreement. This issue is discussed in more detail in section 2.2.4 of module D3.

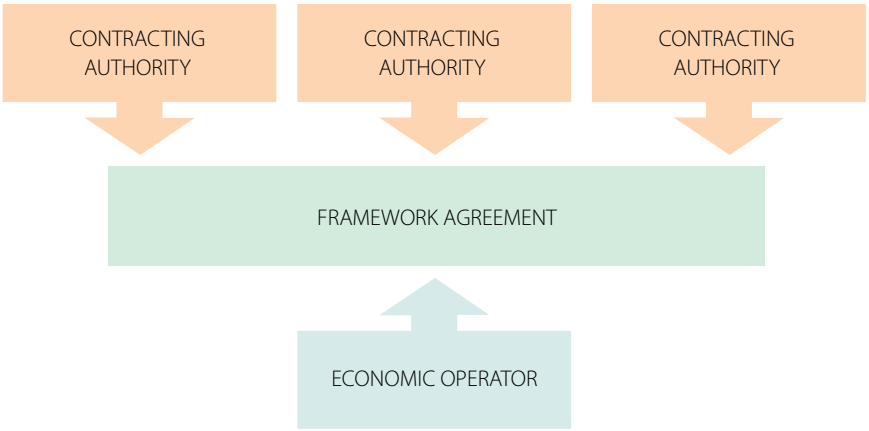
It is worth noting from the above definition that framework agreements may be set up to benefit more than one contracting authority and may involve a number of economic operators. Framework agreements are commonly set up for use by more than one contracting authority – either by a lead authority or a central purchasing body – and they involve a number of economic operators – also referred to in this context as 'providers'. See module D1 for further details concerning central purchasing bodies and module B2 on co-operation between contracting authorities.

The following diagrams provide some examples of how framework agreements may be set up.

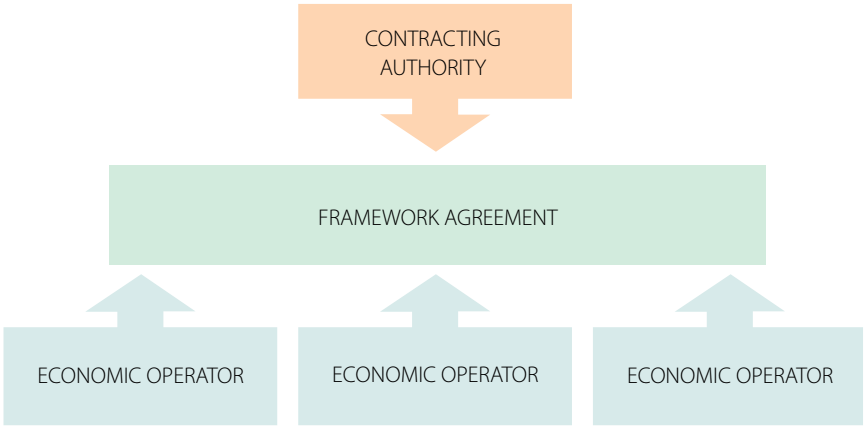
Single-supplier framework – between one contracting authority and one provider



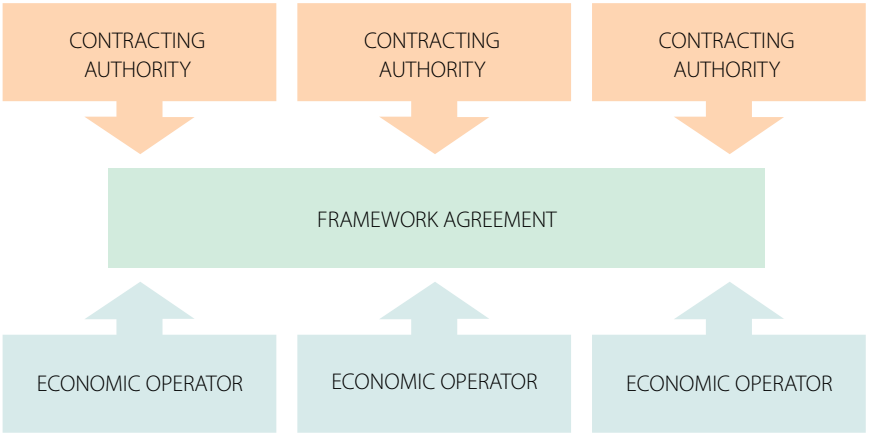
**Single-provider framework –
between a number of contracting authorities and one provider**



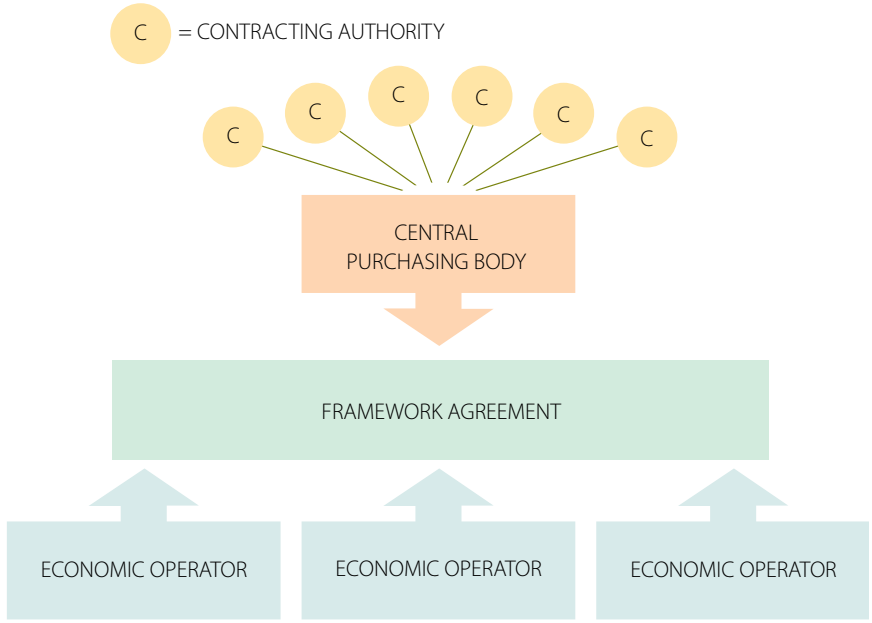
**Multi-provider framework –
between one contracting authority and multiple providers**



**Multi-provider framework –
between a number of contracting authorities and multiple providers**



Multi-provider framework – between a central purchasing body acting on behalf of a number of contracting authorities and multiple providers



Suitability of frameworks

Frameworks may not be suitable for all types of purchasing, and contracting authorities need to be certain that a framework will provide an economic and efficient means of purchasing. See module A4 on the economics of public procurement for further discussion on the suitability of frameworks.

The most appropriate use of frameworks is where a contracting authority has a repeated requirement for works, services or supplies, but the exact quantities are unknown.

Some examples of framework agreements:

- A single government department enters into a framework agreement for stationery with three providers.
- Four neighbouring local authorities enter into a framework agreement with one economic operator for the maintenance of roads.
- A central purchasing body, acting on behalf of 10 health bodies, enters into a framework agreement with four providers for vehicle maintenance services.

Contracting authorities must be in a position to manage a framework agreement, as the needs of both the contracting authority or authorities and the provider(s) must be met, and the operation of the framework agreement must be closely monitored.

Care must also be taken to ensure that framework agreements are not set up in such a way as to distort competition and that they are not improperly used.

To assess the suitability of a framework agreement, contracting authorities need to understand the advantages and disadvantages of framework agreements, the various types of framework agreements, how they are set up and how they operate in practice.

Setting up a framework agreement

Who can set up a framework agreement?

A framework can be set up by:

- an individual contracting authority;
- a contracting authority acting on behalf of a number of other contracting authorities;
- a central purchasing body acting on behalf of a sector or group of contracting authorities.

Where a framework is set up on behalf of a group of contracting authorities or by a central purchasing body, in order to satisfy the requirements of transparency, the *OJEU* contract notice must clearly indicate the contracting authorities that are party to the framework agreement.

In section I.ii of the *OJEU* contract notice, a contracting authority is to indicate if it is purchasing on behalf of other contracting authorities.

Comment: Identifying contracting authorities that will participate in the framework

There is room for debate about precisely how the contracting authorities participating in the framework are to be identified in the contract notice.

Where there is only a single authority setting up the framework agreement, it is straightforward, as that authority is identified as the contracting authority in the *OJEU* contract notice. Where the procurement is on behalf of a pre-identified group of contracting authorities, then these authorities can also be referred to by name in the *OJEU* contract notice.

The situation is more problematic where there is a very large group of potential contracting authorities or where there is some uncertainty about precisely which authorities will participate. This situation may occur where, for example, a central purchasing body representing a particular sector sets up a framework for all bodies in that sector.

The Directive is silent on this issue. The European Commission, in its *Explanatory Note – Framework Agreements – Classic Directive (CC 2005/03)* confirms in paragraph 2.1 the Commission's view that contracting authorities must be explicitly identified in the contract notice, either by naming them directly in the notice itself or by referring to other documents, such as a list held by a central purchasing body. The note also indicates that a more generic description may be acceptable, provided that it permits the immediate identification of the contracting authorities concerned, such as 'the municipalities of X province or Y region'.

Explanatory notes issued by the Commission are not legally binding, but they do provide a useful indicator of the thinking behind the drafting of the legislation.

The contracting authorities that are party to the framework agreement remain fixed for the duration of the agreement, and therefore new authorities may not join the framework once it has been established (article 32(2) of the Directive).

When does a framework agreement need to be advertised in the *OJEU*?

A framework agreement needs to be advertised in the *Official Journal of the European Union* (*OJEU*) if the estimated value of all purchases to be made under the agreement exceeds the relevant EU threshold for that type of contract. The contract notice is advertised at the start of the process to establish the framework agreement.

The total value to be taken into account is the maximum estimated value of all of the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system. The total value excludes value-added tax (VAT). See module D5 for further information about the calculation of thresholds.

Once the framework agreement has been established, there is no further requirement to advertise each time a contract is awarded under the agreement.

What procedure is used for procuring a framework agreement?

Article 32(2) of the Directive provides that any one of the four main competitive procedures may be used for procuring a framework agreement. It is only when contracts are awarded under the framework agreement that different, framework agreement-specific provisions apply.

Good practice note

Although it is possible to use any one of the four main competitive procedures to procure a framework agreement, in practice there is little likelihood of using the competitive dialogue or negotiated procedure with prior publication of a notice. This is because the subject matter and the complexity of contracts where these procedures are used is unlikely, in most cases, to be appropriate for the award of a framework agreement.

It should be noted that a framework agreement is not a list of selected economic operators that are qualified to provide the works, services or supplies covered by the agreement. To be appointed to the framework agreement, economic operators will have to have both qualified and submitted tenders, which are evaluated by the contracting authorities, and it is those tenders that will provide the basis for future awards under the framework agreement.

How is a framework agreement advertised?

A framework agreement is advertised using the standard form *OJEU* contract notice (Form 2). See module E2 for details concerning the standard form contract notices. The comment box below focuses on completing the standard form contract notice for a framework agreement.

Comments on completing the standard form *OJEU* contract notice for framework agreements

The standard form *OJEU* contract notice includes a section on framework agreements, which must be completed when a framework agreement is established.

Contracting authorities that intend to award a framework agreement must, in addition to other relevant sections, complete:

- Section II.1.3, which confirms that a framework agreement is being established;
- Section II.1.4, which indicates whether the framework agreement will involve the appointment of a single economic operator (single-provider agreement) or several economic operators (multi-provider agreement). This section then requires the contracting authority to provide further information, such as the envisaged number of providers and the time frame of the framework agreement.

Number of providers for a multi-provider framework agreement: Where the framework agreement will be with several economic operators (multi-provider agreement), then the envisaged number or maximum number must be indicated in the *OJEU* contract notice.

The minimum number of economic operators for a framework agreement involving several economic operators is three, provided that there are three suitably qualified economic operators (article 32(4)). There is no statutory limitation on the maximum number of economic operators participating in a framework agreement.

Good practice note

Although there is no statutory limitation on the maximum number of economic operators that may participate in a framework agreement, there are practical issues to consider. For example, a very large number of economic operators may act as a disincentive for the participation of economic operators, as the likely share of business obtained from the framework may be rather small. Also, if the mini-competition process is used (see below), then it may be necessary to invite all of the economic operators to participate in the framework and, again, economic operators may be disinclined to participate if there are too many of operators appointed to the framework. There is also the practical issue for the contracting authority running the framework of the increased level of administration that will be involved.

The contracting authority should carefully assess the market as well as its own requirements and resources at the preparation stage in order to decide on the appropriate number of economic operators for a particular framework agreement.

No changes in the membership of a framework agreement: The economic operators that are party to the framework remain fixed for the duration of the framework, and therefore new economic operators may not join the framework once it has been established (article 32(2) of the Directive).

Time frame of the framework agreement: The time frame of a framework agreement may not generally exceed four years.

The time frame may only exceed four years "in exceptional cases duly justified, in particular by the subject of the framework agreement." The Directive is silent as to what constitutes due justification for exceeding the four-year time frame.

What issues does the framework agreement cover?

The framework agreement typically includes details concerning:

- parties
- duration
- subject matter
- whether or not the agreement is binding
- contract terms
- how contracts will be awarded, including criteria for call-offs and/or arrangements for mini-competitions and criteria to be applied
- tendered costs and/or costing methodology for future awards

Awarding contracts under the framework agreement

Agreement with one economic operator (single-provider agreement) (Article 32(3))

Where the framework agreement is a single-provider agreement, the Directive provides that contracts "shall be awarded within the limits of the terms laid down in the framework agreement" (article 32(3)). This means that the contracting authority awards the contract directly to the economic operator, and there is no requirement for further competition.

Article (32(2) indicates that "contracting authorities may consult the operator party to the framework in writing, requesting it to supplement its tender if necessary".

Where a contract has been awarded and where consultation has taken place, "the parties may under no circumstances make substantial amendments to the terms laid down in the framework agreement".

There is a further reminder in article 32(2) that "contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition".

Comment

These provisions do allow for some flexibility when the contracting authority awards a contract. The provisions clearly envisage the need for additional, contract-specific information and consequent changes, but how much flexibility is available and what sort of additional information and changes is envisaged is not clear.

Agreement with more than one economic operator (multi-provider agreement) (Article 32(4))

Where the agreement is with more than one economic operator, the contracting authority has a choice. There are two ways of awarding a contract:

- by application of the terms laid down in the framework agreement without reopening competition, awarding the contract directly to a particular economic operator; or
- by running an additional competition, inviting all suitably qualified economic operators in the framework to participate (a 'mini-competition').

Contracting authorities should make it clear when setting up the multi-provider framework how contracts will be awarded, and the framework agreement should include provisions covering the manner of awarding the contract.

Award to an economic operator without further competition: Where the contracting authority wishes to use the first option and to award a contract directly to one of the economic operators in the framework, then:

- it must do so on the terms laid down in the framework agreement;
- "the parties may under no circumstances make substantial amendments to the terms laid down in the framework agreement"; and
- the award must not be made improperly or in such a way as to prevent, restrict or distort competition.

Award following a mini-competition: The contracting authority may use the second option of a mini-competition, where not all terms are laid down in the framework agreement. This process allows the terms referred to in the specification to be introduced or existing terms to be more precisely formulated. This option is still subject to the principle that "the parties may under no circumstances make substantial amendments to the terms laid down in the framework agreement".

All of the suitably qualified economic operators in the framework are invited to participate in a competition on this basis so as to ensure equal treatment, non-discrimination and transparency.

Article 32(4) of the Directive sets out the requirements for the conduct of the mini-competition:

- The contracting authority must consult the economic operators capable of performing the contract.
- The contracting authority must consult the economic operators in writing.
- The time limit fixed for the return of tenders must be sufficiently long to allow for the submission of tenders for the specific contract, taking into account such factors as the complexity of the subject matter of the contract and the time needed to submit tenders.
- Tenders are to be submitted in writing.
- The content of tenders is to remain confidential until the stipulated time limit for reply has expired.

- The contract is to be awarded to the tenderer that has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.
- The award must not be made improperly or in such a way as to prevent, restrict or distort competition.

Good practice note

The Directive is silent as to the details of how mini-competitions are to be conducted. There are no statutory time limits specified, and the manner of inviting economic operators to participate and to submit tenders is not set out in detail. This means that the contracting authority has discretion in determining how to conduct this process.

However, this does not mean that the process should be undertaken in a vague or unstructured manner. The framework agreement should be clear about how economic operators are to be deemed capable of performing the contract, and it must also set out the criteria to be applied in awarding the contract.

It is also good practice to set out in the framework agreement how mini-competitions will be conducted. It is permissible to use electronic auctions when conducting a mini-competition.

The award process must be conducted in compliance with the general law principles and Treaty principles, including the requirement to run the process in a transparent manner so as to ensure equal treatment and non-discrimination.

Refer to local provisions that may govern the conduct of mini-competitions. For example, in Hungarian legislation the price and other conditions cannot change if the changes are less favourable than the price and conditions in the original bid.

Standstill time limit and framework agreements

There are special provisions in the Remedies Directive covering the standstill requirements on the establishment of a framework agreement and on the award of contracts under a framework agreement. See module F1 for full details.

ELECTRONIC AUCTIONS (ARTICLE 54)

Delete if local legislation does not allow for electronic auctions.

Adapt all of this section for local use – using relevant local legislation, processes and terminology, including statutory time limits and publication requirements as well as reference to local e-auction systems.

The Directive contains a number of provisions that encourage the use of a range of electronic procurement tools. For example, where contract notices are submitted electronically and tender documents are available from the date of despatch of the notice, then the statutory time limits can be reduced.

The articles permitting and controlling electronic auctions also encourage the use of electronic procurement. EU Member States can opt to adopt these provisions.

Electronic auctions are a method of inviting revised final tenders following the conduct of a full tender process. They involve an online electronic system that is used by economic operators to submit new prices and/or other revisions to elements of their tenders for a particular contract in real time and in direct competition with other economic operators.

Definition: An electronic auction is defined in article 1(7) of the Directive:

> "An electronic auction is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, allowing them to be ranked using automatic evaluation methods."

Exclusions

Article 1(7) excludes certain types of contracts: "…certain service contracts and certain works contracts having as their subject matter intellectual performances, such as the design of works, may not be the object of electronic auctions."

Practice note

There will be other types of purchases, in addition to those specified in article 1(7), where an electronic auction is not a suitable method, such as contracts where more complex needs must be tailored for a particular project. The contracting authority needs to think carefully about the appropriate use of electronic auctions.

For example, a contract for the supply of paper where the type and quality of paper can be easily specified and where there is a good level of competition in the market would be suitable for an electronic auction.

A contract for complex medical equipment where a number of products are available, all with slightly different specifications, and where there are service delivery issues is unlikely to be suitable for an electronic auction.

See the discussion in module A4 on the economic advantages and disadvantages of an electronic auction.

Prior competitive process: The electronic auction is the final stage of the tender process. Prior to conducting an electronic auction the contracting authority must first use a competitive process.

Competitive processes that may be used prior to an electronic auction (article 54(2)): An electronic auction may be used where the contract specification can be established with sufficient precision and the contracting authority uses:

- an open procedure to select economic operators and receive tenders;
- a restricted procedure to select economic operators and receive tenders;
- a negotiated procedure with prior publication of a notice in the case where a previous open or restricted procedure has failed due to irregular or unacceptable tenders.

An electronic auction may also be used for a mini-competition under a framework agreement and under a dynamic purchasing system.

In all cases, in order to run an electronic auction, the contracting authority must have received initial tenders from all participating economic operators. The electronic auction is used to request new prices, revised downwards, and where the contract is awarded to the most economically advantageous tender, the process may also be used to improve elements of the tender other than the price.

Example

A local authority wishes to purchase street lighting equipment. It advertises the contract, which is above the EU financial threshold for supplies, in the *Official Journal of the European Union*. The contract notice states that the contracting authority is using the restricted procedure and will award the contract to the most economically advantageous tender. It confirms in the contract notice that it will use an electronic auction at the final stage of the procurement process.

The contracting authority receives requests to participate and issues a pre-qualification questionnaire. It receives pre-qualification and selection stage information from eight economic operators. It assesses the information received, pre-qualifies seven economic operators and then establishes a shortlist of five economic operators.

The contracting authority issues an invitation to tender (ITT) to the five economic operators that had submitted their tenders within the 40-day statutory time limit. The ITT includes information on the date, place, time and other technical requirements of the electronic auction, which will be held after the receipt of tenders. The contracting authority assesses the tenders and uploads the evaluation results, based on an assessment of the most economically advantageous tender, into the electronic auction software. The tenders are ranked from 1 to 5, with 1 being the most economically advantageous tender.

The contracting authority then invites all five economic operators to participate in an online, real-time electronic auction on the issue of price only and in accordance with the details set out in the ITT.

The electronic auction continues for a fixed time limit of one hour, during which time economic operators submit revised prices that are lower than those originally submitted. The electronic auction closes at the end of the hour, and the contract is awarded to the economic operator that scored the highest mark.

The economic operator that had a tender ranked as number 2 at the end of the original tender process submitted a low price during the electronic auction, which meant that its tender was the most economically advantageous tender at the conclusion of the electronic auction .

Appropriate use: Article 54(8) of the Directive contains a specific provision emphasising the need for appropriate and proper use of electronic auctions:

> "Contracting authorities may not have improper recourse to electronic auctions nor may they use them in such a way as to prevent, restrict or distort competition or to change the subject matter of the contract, as put up for tender in the published contract notice and defined in the specification."

Conduct of electronic auctions: Article 54 contains detailed provisions about how electronic auctions are to be conducted.

Basis of award (article 54(2)): Electronic auctions can be based on:

- either the submission of revised prices, but only where the contract is awarded on the basis of lowest price;
- or prices and/or new values of the features indicated in the specification, when the contract is awarded on the basis of the most economically advantageous tender.

Notification (article 54(3)): The contracting authority must indicate in the contract notice that it intends to use an electronic auction (section IV.2.2 of the standard form *OJEU* contract notice).

Specifications (article 54(3)): The specifications are to include, *inter alia*, the following details:

- the features that will be the subject of the electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;
- any limits on the values that may be submitted, as they result from the specifications relating to the subject of the contract;
- the information that will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;
- the relevant information concerning the auction process;
- the conditions under which tenderers will be able to bid and, in particular, the minimum differences that will be required when bidding;
- the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

Full initial evaluation (Article 54(4)): The contracting authority must make a full evaluation of tenders before proceeding with an electronic auction. The evaluation must be conducted in accordance with the pre-set award criterion or criteria and weightings.

I**nviting electronic bids (Article 54(4)):** All tenderers that have submitted admissible bids must be invited to participate in the e-auction. The tenderers must be invited simultaneously by electronic means to submit new prices and/or values.

Content of the invitation to participate: The invitation to participate in the electronic auction must:

- contain all relevant information concerning individual connection to the electronic equipment being used;
- state the date and time of the start of the electronic auction, which may not be sooner than two working days after the invitation is sent out;
- state the mathematical formula to be used in the e-auction to determine automatic re-ranking on the basis of the new prices and/or new values submitted;
- be accompanied – when the contract is to be awarded on the basis of the most economically advantageous tender – by the outcome of the full evaluation of the relevant tenderer's tender, and therefore each tenderer receives information about its own tender, but not about others' tenders;
- indicate the timetable for phases of the auction where phases are to be used and where the end of the phases is triggered by a lapse in time between receipt of the last new price and/or new value and the close of a phase – if that approach is used;
- indicate how the auction will be closed.

Note on the mathematical formula

- The mathematical formula is used in the e-auction to determine automatic re-ranking on the basis of the new prices and/or new values submitted.
- This formula must be disclosed in the invitation to participate in the electronic auction.
- The mathematical formula must incorporate the weighting of all criteria that are fixed to determine the most economically advantageous tender, as indicated in the contract notice or specifications.
- Any ranges with respect to weightings that were specified in advance in the contract notice or specifications must be reduced to a specified value, and that specified value must be incorporated into the mathematical formula.
- Where variants are authorised, a separate formula must be provided for each variant.

(Article 54(5) of the Directive)

Successive phases (article 54(4)): The electronic auction can be conducted in successive phases, and the invitation to participate in the auction must include the timetable for each phase of the auction.

Comment

It is essential for the rules applying to the conduct of the electronic auction to be very clear. For example, if there are to be a number of rounds of bidding that are to be conducted at specific times, this must be made clear to participants so that they know when they need to submit initial and subsequent online bids.

Instantaneous communication of relative ranking (article 54(6)): Throughout each phase of the electronic auction, the contracting authority is required to instantaneously communicate to all tenderers information that is at least sufficient to enable them to ascertain their relative ranking at any moment.

Closing the auction (article 54(7)): The contracting authority has a choice as to how to close the auction process. It can close the auction:

- at the date and time specified in advance in the invitation to participate in the auction;
- when it receives no more new prices or new values (that meet the requirements concerning minimum differences) for a pre-specified time limit. The time specified as the time required to elapse between the receipt of the last new price or new value and the close of the auction must be stated in the invitation to participate in the auction.
- when the number of phases in the auction, as specified in the invitation to participate in the auction, has been completed. Where phases are to be completed following an elapse of time between the receipt of the last new price and/or new value and the close of the auction, then the timetable must be stated in the invitation to participate in the auction.

See the discussion in module A4 on the economic arguments relating to how to decide to close the tender.

Award of the contract (article 54(8)): The contract is awarded following the close of the electronic auction and on the basis of the results of that auction.

Comment

Electronic auctions generally result in a reduction in prices relative to the prices submitted at the close of the initial tender stage before the conduct of the electronic auction. Where the electronic auction involves requests to revise other elements, these revisions can also result in improvements in quality.

An electronic auction can also result in a change in ranking of the economic operators that have submitted tenders. The economic operator that is ranked first at the end of the initial tender stage may not be ranked first at the end of the electronic auction.

Tenderers need to understand that where the criterion for award is the most economically advantageous tender, the results of the electronic auction will take into account all of the criteria used to assess the most economically advantageous tender.

This means, for example, that an economic operator that was initially ranked number 2 may remain number 2 at the end of the electronic auction, even if it submitted a lower price than the initially first-ranked economic operator in the electronic auction. This is because the combined scores of price and other factors may still result in the first-ranked economic operator submitting the most economically advantageous tender overall.

Dynamic Purchasing Systems (Article 33)

Delete if local legislation does not allow for dynamic purchasing systems.

Adapt all of this section for local use – using relevant local legislation, processes and terminology, including statutory time limits and publication requirements as well as reference to local dynamic purchasing systems.

A dynamic purchasing system is defined in article 1(6) of the Directive as follows:

"A dynamic purchasing system is a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification."

EU Member States can opt to provide for dynamic purchasing systems.

Where the total estimated value of purchases under a dynamic purchasing system exceeds the relevant thresholds, then the Directive applies to the setting up and operation of that system.

What sort of purchases are suitable? The definition of a dynamic purchasing system makes it clear that it is intended only for 'commonly used purchases' and refers to those purchases being 'generally available on the market'. Dynamic purchasing systems are generally only suitable for commodity-type purchasing where there is an active market in standard items. A dynamic purchasing system operates rather like a live, online Internet-based catalogue, which economic operators can join at any time.

Contracting authorities must not use a dynamic purchasing system to prevent, restrict or distort competition (article 33(7)).

How is a dynamic purchasing system set up?

Procedure: To set up a dynamic purchasing system, the contracting authority must have an electronic, Internet-based system. The contracting authority must follow the rules of the open procedure in all of its phases, up to the award of the contracts to be concluded under the system (article 33(1)).

Advertising: The contracting authority starts the process by publishing a standard form contract notice for the establishment of the system in the required format (article 33(3)(a)). See module E2 for details concerning standard form *OJEU* contract notices.

The contracting authority must include in the specification the following details:

- nature of the purchases envisaged;
- necessary information concerning the electronic purchasing system;
- electronic equipment used, technical connections and specifications.

(Article 33(3))

The contracting authority must offer unrestricted, direct and full access to the specification and any additional documents and must indicate in the contract notice the Internet address where these documents can be found (article 33(3)(c)). This requirement for access to the specification and additional documents applies from the day of publication of the contract notice and for the duration of the dynamic purchasing system.

The contracting authority evaluates tenderers' submissions. The tenderers that are permitted to join the dynamic purchasing system are those that (1) have satisfied the selection criteria, and (2) have submitted an indicative tender that complies with the specification and any additional documents.

Operation of the system

Duration: A dynamic purchasing system may not last for more than four years, except in duly justified exceptional cases (article 33(7)). The Directive is silent as to what may constitute a duly justified exceptional case.

Costs: A contracting authority is not permitted to request the payment of any charges by economic operators wishing to join or that have joined the system (article 33(7)), and therefore all documents must be made available free-of-charge and no charges may be made for administration or other costs.

Membership of the system – economic operators: Unlike framework agreements, where membership is fixed when the framework is set up, under a dynamic purchasing system new economic operators may apply to join the system at any time.

New and revised indicative tenders: New economic operators may access the specification and any additional documents at any time at the address indicated in the contract notice, and they are entitled to submit an indicative tender (article 33(4)).

Existing economic operators are also entitled to improve their indicative tenders at any time (article 33(1)).

Whenever a contracting authority receives a new indicative tender it is obliged to complete evaluation within 15 days of the date of submission of the tender. This evaluation time limit can be extended, provided that no invitation to tender is issued during the evaluation period, as this could result in a new potential provider missing a contract opportunity (article 33(4)).

The contracting authority is obliged to inform the tenderer applying for membership of the system of its decision to admit or reject its application 'at the earliest possible opportunity'.

Comment: Membership of contracting authorities

The Directive is silent as to whether contracting authorities participating in the dynamic purchasing system must be fixed at the outset or whether contracting authority members may change during the life of the dynamic purchasing system.

Recital 13 to the Directive explains the underlying principles behind permitting the establishment and use of dynamic purchasing systems. The main drivers of the system are to allow for a broad range of tenders to participate and "to ensure optimum use of public funds through broad competition".

The *OJEU* contract notice requires that the total estimated value of the purchases be identified and that the contracting authorities that are members of the system be named. It seems sensible to assume that, in the absence of specific provisions, a similar approach to that permitted under framework agreements is to be adopted, and therefore an expansion of the contracting authorities purchasing within the system beyond those identified in the contract notice is not advisable.

Awarding a contract: Each contract that a contracting authority wishes to award in the framework of the dynamic purchasing system must be the subject of a separate invitation to tender. The process is as follows (articles 33(5) and 33(6)):

- The contracting authority must first publish a simplified *OJEU* contract notice in the specified standard format, inviting all interested economic operators to submit an indicative tender. A special short form contract notice is provided for this purpose.
- The contracting authority issues a contract-specific invitation to tender, which may include more precisely formulated award criteria based on those set out in the contract notice used to advertise the setting up of the dynamic purchasing system.
- The date for submission of the indicative tender may not be earlier than 15 days from the date that the simplified notice was sent to the *OJEU* office.
- The contracting authority must evaluate all indicative tenders received by the deadline and admit any new economic operators to the system.
- The contracting authority then invites all economic operators in the system to submit a tender for the specific contract and sets a time limit for that submissionk.
- The contract is awarded to the tenderer that submitted the best tender on the basis of the award criteria set out in the contract notice for the establishment of the system and which may have been more precisely formulated in the contract-specific invitation to tender.

Comment

The concept of an online system that provides flexibility for improvements in tenders and allows for new economic operators to join the system is appealing. Unfortunately, the requirement under the Directive to advertise each individual contract opportunity means that the system has significant built-in delay and is not truly 'dynamic'.

Contracting authorities have found that this requirement does not necessarily provide for a speedy and efficient purchasing system, and therefore the take-up of this procurement tool by contracting authorities has been limited.

SECTION 2.3
NEGOTIATED PROCEDURE WITHOUT PUBLICATION OF A CONTRACT NOTICE

Adapt all of this section for local use – using relevant local legislation, processes and terminology – as well as practical examples from local appeals commission decisions and/or court decisions.

Contracting authorities should start with the assumption that a competitive process is required. There are only very limited circumstances where a contract that is of a certain type and value, which means that it is subject to the full provisions of the Directive, may be awarded without prior publication of a contract notice and without the use of a competitive process. The permitted derogations are set out in article 31 and are summarised below.

Practical note

The derogations in article 31 do not apply consistently to all types of contracts, and so considerable care must be taken when assessing the availability and justification for use of these derogations for the contract in question.

Derogations for public works, public supplies and public services contracts:

- **Only irregular or unacceptable tenders were received:** A derogation to apply the negotiated procedure without prior publication of a notice may be given in cases where an open or restricted procedure has already been conducted and only irregular or unacceptable tenders were received; the negotiated procedure may be used provided that the conditions of the contract are not substantially altered (article 31(1)(a)).
- **Localisation note:** where the local legislation distinguishes between 'irregular' and 'unacceptable' tenders and, in particular, the different outcomes when those types of tenders are received, then this section of the narrative will need to be adapted to reflect local provisions.
- **Technical or artistic reasons or protection of exclusive rights:** A derogation may be granted where for technical or artistic reasons or for reasons connected with the protection of exclusive rights the contract can only be awarded to a particular economic operator (article 31(1)(b)).
- **Extreme urgency:** A derogation may be given due to events that were unforeseeable by the contracting authority, where time limits available for the open or restricted procedure cannot be complied with, and where it is judged to be strictly necessary (article 31(1)(c)).

Derogations for public supplies contracts:

- **Products manufactured for research and development purposes only:** when the products involved are manufactured purely for the purpose of research, experimentation, study or development – and not where there is quantity production to establish commercial viability or to recover research and development costs (article 31(2)(a))

- **Additional deliveries from an original supplier:** for additional deliveries from an original supplier that are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations and where (1) a change of supplier would oblige the contracting authority to acquire material having different technical characteristics, which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; and (2) provided that the length of such contracts as well as any recurrent contracts does not, as a general rule, exceed three years (article 31(2)(b))
- **Supplies quoted and purchased on a commodity market** (article 31(2)(c))
- Purchase of supplies on particularly advantageous terms: where supplies can be purchased on particularly advantageous terms from (1) a supplier that is winding up its business; or (2) the receivers or liquidators of a bankruptcy for arrangements with creditors or similar procedures under national laws or regulations (article 31(2)(d))

Derogations for public services contracts:

- **Following a design contest:** Where the contract concerned is to be awarded, in accordance with the rules of a design contest, to the successful candidate(s), provided that, where there is more than one successful candidate, the negotiation is undertaken with all successful candidates (article 31(3))

Derogations for public works and public services contracts:

- **Additional requirements:** for additional works or services not included in the project that was originally considered or in the original contract, where:
  - the circumstances leading to the additional requirements must be unforeseen;
  - the additional requirements must be necessary for the performance of the contract;
  - the award can only be made where either the additional requirements cannot be technically or economically separated from the original contact without major inconvenience to the contracting authorities or, although separable from the original contract, they are strictly necessary for its completion;
  - the value of contracts awarded in these circumstances may not exceed 50% of the amount of the original contract.

  (Article 31(4)(a))

- **Repetition of works or services:** for new works or services consisting of the repetition of similar works or services entrusted to the same economic operator under the original contract, provided that:
  - the award is made within three years of the original contract award;
  - the repeated works or services are provided in conformity with a basic project for which the original contract was awarded;
  - the original contract award followed the open or restricted procedure;
  - when original project was put out to tender the possible use of this procedure was disclosed;
  - the total estimated cost of the repeated works or services were taken into consideration by the contracting authority when calculating thresholds for the original project (article 31(4)(b)).

How easy is it to qualify for these derogations?

The case law of the European Court of Justice (ECJ) makes it clear that the availability of these exceptions is narrowly interpreted. The onus is on the contracting authority to demonstrate compliance with the conditions justifying this approach.

Case note: *Commission v Italy*

C-199/85 Commission v Italy

The municipality of Milan awarded a contract for the construction of a waste recycling plant. The contract was not advertised in the *OJEU*, and the European Commission argued that this was in breach of the procurement directive*.

Italy argued that it was not necessary to advertise the contract since certain derogations from the Directive applied.

Italy relied first of all on the derogation for circumstances where for technical reasons or reasons connected with exclusive rights the contract could be performed by only one economic operator. Italy argued that this derogation applied for both technical reasons and for reasons connected with exclusive rights, and therefore there was only one economic operator that could construct the plant.

Italy also sought to rely on the derogation allowing for an exemption from competition where, for reasons of extreme urgency that were unforeseen by the contracting authority, the usual time limits could not be met.

The ECJ rejected these arguments and laid down two important general principles:

1. The derogations must be strictly construed.
2. The burden of proof that the circumstances justifying the derogation are met is on the party seeking to invoke that derogation.

(*the relevant directive at that time was Directive 71/305, a predecessor to the current Directive 2004/18/EC)

These principles have been followed in numerous ECJ cases where the urgency derogation has been invoked. These cases provide useful examples of real situations faced by contracting authorities. Here are a few examples:

Case notes

Waste treatment: The *La Spezia* case (*Commission of the European Communities v Republic of Italy 194/88R*) involved a proposed contract for the renovation of a solid waste incinerator. The case concerned the award interim measures, but the issue of the availability of the derogation was also considered.

The contract had not been advertised on the grounds of the derogation permitting an award without prior publication of a contract notice for circumstances of 'extreme urgency' that were unforeseen by the contracting authority. (These were grounds under the old Directive, but they have been transposed into the provisions of Directive 2004/18). Health and safety grounds were the basis for reliance on this derogation, as it was argued that the incinerator had to be closed down until the renovation was complete and that this closure constituted a threat to public health and safety.

The ECJ took the view that this health and safety argument would not succeed because the events leading to the urgent requirement were not unforeseeable since the need for renovation of the plant had been known for some time.

Avalanche barriers: In the case of the *Commission for the European Communities v Italian Republic C-107/92* Italy argued that it was entitled to rely on the extreme urgency derogation because it was necessary to complete avalanche barrier works before the start of winter.

The ECJ emphasised that all of the conditions set out in the derogation were cumulative and had to be complied with – therefore use of the derogation had to be 'strictly necessary', there had to be genuine extreme urgency, the circumstances had to have been unforeseeable by the contracting authority, and the circumstances had to signify that the time limits under the open, restricted or negotiated procedures could not be complied with.

In this case the ECJ concluded that the grounds of urgency could not be met, as the works could have been completed before the threat of avalanche came into existence by using the accelerated restricted procedure.

Student accommodation: In the case of *Commission of the European Communities v Republic of Spain C-24/91*, the University of Madrid awarded a contract for the construction of new student accommodation without publication of a contract notice on the grounds of urgency.

The ECJ again referred to the cumulative nature of the conditions and the availability of the accelerated restricted procedure as a means of meeting an urgent requirement.

The ECJ rejected the arguments of the Republic of Spain that the need to provide accommodation for the start of the academic year to cater for increased student numbers constituted justified grounds of urgency.

In the following case the ECJ also considered the issue of whether the award without competition could be justified for technical reasons:

Case note

Conveyor belt system: The case of *Commission v Greece C -394/02* concerned the award by the Greek public electricity company of a contract for the construction of a conveyor belt system for the transport of ashes and solids from an electricity generation plant. The electricity company did not run a competitive process; it simply invited two companies to bid.

The ECJ rejected claims by Greece that this award without competition was justified on the grounds of (1) extreme urgency, and (2) 'technical reasons' since only the recipient of the contract was capable of performing the works.

On the issue of the technical reasons, the ECJ was not persuaded that there was only one potential economic operator. The Greek Government had argued that only one economic operator could deliver the requirements because there were technical difficulties relating to the nature of the ashes to be transported, the unstable nature of the subsoil, and the need to attach new conveyor belts to existing ones. The fact that the company had originally invited two companies to bid also indicated that another enterprise was capable of delivering the contract.

Comment

It is sensible to assume, despite the lack of ECJ case law on the application of each of the derogations, that the other derogations will be interpreted in accordance with the principles laid down in the Milan case (above case concerning avalanche barriers) and therefore will only be available in very limited and narrowly restricted circumstances.

Utilities – Procurement procedure and tools

Utilities

This short note highlights some of the major differences and similarities in the advertising requirements applying to utilities.

Adapt all of this section for local use – using relevant local legislation, process and terminology.

The main legal requirements relating to the choice and conduct of competitive procedures and the use of purchasing tools are set out in Directive 2004/17/EC (Utilities Directive).

Procedures

- **Article 40** confirms that utilities may use the open, restricted or negotiated procedures with a prior call for competition.
- **Article 45** sets out the time limits for receipt of requests to participate and receipt of tenders.

- **Article 46** covers the time limits applying to the provision of additional documents and information during the course of an open procedure.
- **Article 47** governs the issue and content of invitations to submit a tender or to negotiate.
- **Articles 51 to 56** set out rules relating to the conduct of the procurement procedure, including rules on selection and tender award criteria.
- **Articles 60 to 66** set out the rules on the conduct of design contests.

Purchasing tools

- **Framework agreements:** Article 14 permits utilities to set up and operate framework agreements.
- **Dynamic purchasing systems:** Article 15 covers the establishment and operation of dynamic purchasing systems.
- **Electronic auctions:** Article 57 contains the provisions relating to the conduct of electronic auctions.

Qualification systems: In addition, utilities may set up and operate qualification systems; this provision is covered by article 53 of the Utilities Directive. A qualification system is a system in which economic operators interested in contracting with the utility may apply to be registered as potential providers. The utility then registers some or all of those economic operators in the system. The registered economic operators form a pool from which the utility may draw those operators that are invited to bid or negotiate on contracts.

Choice of advertising: Utilities have a free choice between three main forms of competitive procedure: the open procedure, restricted procedure, and negotiated procedure with a prior call for competition. Utilities generally have more flexibility in terms of how they advertise, which is referred to in the Utilities Directive as a 'call for competition'. See module E2 for details of advertising requirements.

Conduct of the procurement process: The provisions in the Utilities Directive covering the conduct of the procurement process are generally less detailed and less proscriptive than the rules applying to the public sector. For example, there is no exhaustive list of selection stage criteria, and there are provisions allowing for the time limit for receipt of tenders to be set by mutual agreement.

Design contests: There are special provisions governing the conduct of design contests, which in the case of utilities apply to service contracts only. The rules of conduct are similar to those that apply to the public sector.

Framework agreements: Utilities may set up framework agreements. The process is regulated less strictly than for the public sector, and there are no detailed provisions covering the way in which framework agreements are to be set up.

Dynamic purchasing systems: Utilities are also permitted to set up dynamic purchasing systems. The provisions covering the setting up and operation of dynamic purchasing systems are similar to those applying to the public sector.

SECTION 3
EXERCISES

Adapt all of this section for local use – using relevant local examples, legislation, processes and terminology

EXERCISE 1
CHOICE OF PROCEDURES

A new procurement officer has joined the local authority procurement team where you work. She has previously worked as a procurement officer for a large private company and has never worked in the public sector before.

She has been asked to assist with the procurement of three different contracts:

- A contract for stationery supplies
- A contract for motor vehicles
- A contract for the construction of a new school

She asks for a short meeting with you to discuss which procurement procedure should be used for each of the three contracts.

Please prepare some short notes in advance of the meeting, explaining which procedure is appropriate and why. In each case consider whether the open or restricted procedure should be used, and also whether any other procedure may be justified.

EXERCISE 2
CHOICE OF PROCEDURE

You work in the procurement team at a large local authority. You receive the following email:

To: procurementteam@bigtown.gov
From: directorofsocialservices@bigtown.gov

1 September

Dear Procurement Team leader,

I have just been appointed as Director of Social Services here at Bigtown Council. Prior to that I worked as an Assistant Director at another, smaller council.

I have been told by a junior member of your team that we have to use a competitive tender process for a number of our procurement projects. I have always tried to avoid this sort of approach because in social services we tend to find that we get the best deal by talking directly with suppliers whom we know and trust.

We have two requirements that we know about now:

(1) Procurement of cleaning services in 8 residential care homes for the elderly. We have not run a tender process yet, as the current contract will expire early next year. We have already prepared a specification and we know the three best local contractors, so we would like to negotiate with them and don't really see the point of advertising.

(2) A contract for the construction of a new daycare centre. This contract has already been tendered before using a restricted procedure, I understand. We received 5 tenders but there were problems with all of them. All of the tenders were too expensive, none of the tenders met all of our technical specification requirements, and all of the tenderers wanted to change one or more of the contract conditions. We would like to go ahead and discuss the project with some construction companies we know, using the same designs and contract documents. Those companies were not involved in the original procurement.

I just want to check with you. Do we really do have to use a competitive tender process?

Your colleague also told me that we are not permitted to negotiate with the suppliers. If we are obliged to run a competitive process then please can you confirm that we will be able to negotiate?

With many thanks,

Director of Social Services

Please assume that in each case the value of the contract will exceed the EU financial threshold.

Please consider each of the proposed procurements and answer the following questions:

(1) Can the Director of Social Services go ahead and negotiate in the way suggested in the email or is a competitive process required?

(2) If a competitive process is required, will it be possible to use the negotiated procedure with prior publication of a notice, and what conditions will apply?

EXERCISE 2
CHOICE OF PROCEDURE

The Social Service procurement committee has decided to go ahead with a competitive procurement process for the contract for cleaning services for the 8 residential care homes for the elderly. They plan to use the restricted procedure.

They ask for your support in preparing the tender timetable for this process.

Using the attached sheet as a starting point, prepare a tender timetable for this procurement process.

Tips:

You need to include statutory time limits, but you also need to discuss in your group how much time is required for preparation, administration of the process and decision making.

Please add or delete stages – – as you feel necessary.

Please assume that:

(1) No prior information notice is published.

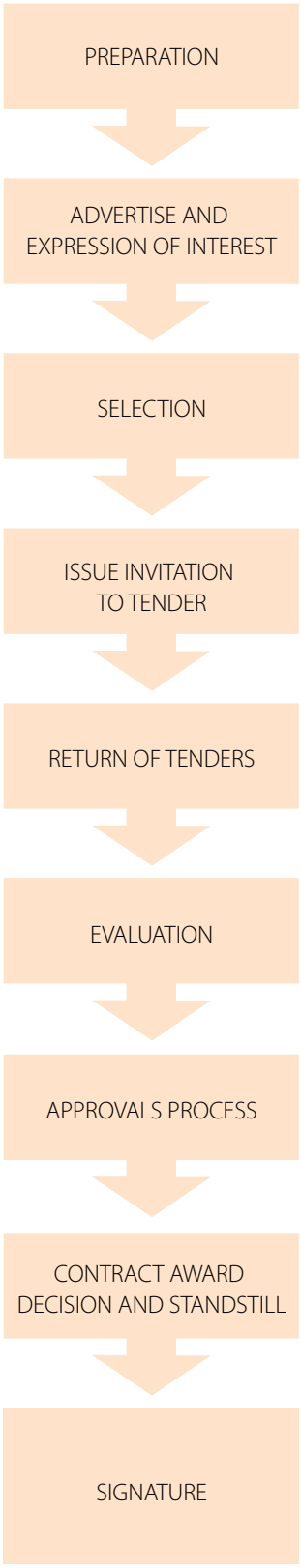
(2) The contract notice will be despatched electronically.

(3) The tender and specification documents will be not available electronically on the date of despatch of the contract notice.

(4) The date for despatch of the OJEU notice is 1 December.

EXERCISE 3
PROCUREMENT TIMETABLE: CONTRACT FOR CLEANING SERVICES

Restricted procedure



EXERCISE 4
TIMETABLE AND TENDER PREPARATION EXERCISE – PART 2

Using the timetable you have discussed, prepare a list of the documents that you think are needed for each stage of the process.

EXERCISE 5
NEGOTIATED PROCEDURE WITHOUT PRIOR CALL FOR COMPETITION (C2.3)

To: procurementteam@bigtown.gov
From: directorofsocialservices@bigtown.gov

10 September

Thank you for your assistance on my previous questions. I am writing to ask you for some further advice.

An extremely urgent requirement has arisen for 20 new vehicles for our staff – the current vehicles are so old that they may not last the winter. We need to sort this out immediately. Can we do this without advertising and running a lengthy procurement process please, as there are obviously health and safety issues involved?

By the way, we have also been planning to upgrade some of our IT equipment. We have just learned that the firm we were dealing with is in liquidation and the liquidators are selling off PCs that meet our requirements at a significantly discounted price. We have a service contract with an IT services company so we don't need to worry about maintenance. I assume we can just go ahead and buy these?

Please advise the Director of Social Services.

Please assume that in each case the value of the contract will exceed the EU financial threshold.

(1)Can they go ahead and purchase the 20 new vehicles without advertising? On what grounds do you base your advice? Is there an alternative approach you could adopt?

(2) Can they go ahead and purchase the PCs from the liquidators? On what grounds do you base your advice?

SECTION 2. PROCUREMENT TECHNIQUES (C2.2)
FRAMEWORK AGREEMENTS

EXERCISE 1
GROUP DISCUSSION

The head of procurement from the local hospital has come to you for advice. He has recently been on a training course where he has learned about framework agreements. He is interested in using these agreements, and he and his team have identified a number of purchases where the total requirements will exceed the EU financial thresholds and where they think framework agreements may be suitable. These are:

1. Contract for laptop computers
2. Contract for support services for laptop computers
3. Minor works contracts for repairs to roads where each of the individual contracts is expected to be below the EC threshold
4. Major works contracts where each of the individual contracts is expected to be above the EC threshold
5. Pharmaceuticals
6. Ambulances
7. Management consultancy for human resources advice and support
8. Specialist medical equipment

The head of procurement explains that he understands there are three broad types of framework agreement: a single-supplier framework, a multi-supplier framework with direct award of contracts, and a multi-supplier framework with a mini-competition.

He asks for your advice on:

(1) whether the purchases identified are suitable for frameworks agreements, and

(2) where a framework agreement is suitable, what type of framework would be best.

EXERCISE 2 (2.2)
GROUP DISCUSSION

The head of procurement has another question: the hospital is obliged to appoint a number of quality assessors to evaluate the clinical services that the hospital provides. The assessments are part of a five-year clinical services improvement project and needs to be conducted at least every six months for the duration of the project.

Question: The head of procurement asks for your advice on whether or not they can set up the framework agreement for five years.

He also explains that the final audit will need to take place close to the expiry of the five-year period, and that the time required for collating the information and preparation of the final reports means that the contracts they award may have to last beyond the end of the framework agreement.

Please advise the head of procurement on these two issues.

EXERCISE 3 (2.2)
GROUP DISCUSSION

The hospital has set up a multi-supplier framework for computers. The value of the contracts to be awarded under the framework will vary widely, and a number of different types and brands of desktop computers and laptops are already in use in the hospital. The framework includes six different suppliers, which reflects the diversity of the hospital's requirements.

All the framework suppliers can offer the three types of computers specified (low/middle/high performance), but the price and delivery terms of each differs. The suppliers have been chosen on the basis of the most economically advantageous tender, taking into account price, delivery time and performance against "ComputerMark", a standard benchmarking tool provided and operated by an independent test laboratory. This provides an overall score for each supplier's computer.

The weighting applied by the framework manager to assess tenders for the framework was as follows:

(i) Price 40%
(ii) Delivery time 20%
(iii) Computer Mark score 40%

Purchasing of computers is undertaken at a departmental level at the hospital.
The framework details are made available to department-based purchasers by means of a "virtual catalogue" that allows them to compare the scores of each successful supplier against these three criteria as well as their total score.

The head of procurement is trying to formulate suitable advice for purchasers to decide how to award each contract under the framework. He seeks your advice on the following points.

The cascade method – One method is to always award the contract to the supplier that scored the most points, provided that it could deliver the computers by a certain time. If that supplier could not deliver the computers, the user would seek computers from the next-highest scoring supplier, and so on. By this means the purchaser would obtain the best-value computers currently available.

Rotation – The head of procurement is concerned that this might lead to the 5th and 6th most competitive supplier receiving no business at all, even though they might have planned their production on the basis of winning a certain portion of the business. He wonders if instead the "rotation" principle could be applied, where the catalogue software would indicate which supplier was to be preferred – thus the 1st ranked supplier would become the 6th ranked after it had been awarded a contract by a user. By the end of the year, all six suppliers would have received some business.

Quotas – Another possibility is that each supplier is awarded one-sixth of the business and is effectively barred from further contracts under the framework once its quota has been fulfilled.

Question: Do you think that these approaches are permissible under EC procurement legislation? If not, what rules would you suggest to the user for awarding contracts under the framework?

EXERCISE 4
ELECTRONIC AUCTIONS

Exercise on electronic auctions to involve review of the electronic auction system used locally (if used).

SECTION 4
THE LAW

The following structure and layout can be used but this section will need significant adaptation to reflect local requirements - using relevant local legislation, standard format contract notices, processes, websites and terminology.

This section provides further detail on issues raised in earlier sections Section 2 – Narrative

SECTION 2.1
PROCUREMENT PROCEDURES

When can the competitive dialogue procedure be used?: In order to use the competitive dialogue procedure there are two conditions which must both be met. These are set out in Article 29:

Condition 1: The contract to be awarded must fall within the definition of a "particularly complex contract". The definition of a particularly complex contract is set out in Article 11(c):

> ….. a public contract is considered to be "particularly complex" where the contracting authorities:
>
> - are not objectively able to define the technical means… capable of satisfying their needs or objectives, and/or
> - are not objectively able to specify the legal and/or financial make-up of a project.

Condition 2: The contracting authority must consider that the use of the open procedure or the restricted procedure will not allow for award of the contract.

For further information see section 4 The Law.

Condition 1 requires the contract to fall within the definition of a "particularly complex contract" as defined. The definition is not cumulative so only one of the two elements of the definition needs to be satisfied.

Comment on the definition of a particularly complex contract

There is uncertainty about how the definition is to be interpreted. For example, in order to meet the definition the contracting authority must be "objectively" unable to define the technical means capable of satisfying its objectives, or to specify the financial or legal make-up of the project.

What does this mean in practice? One view which is not overly restrictive is that this refers the situation in which a contracting authority is unable to find the best solution itself, since the purpose of the dialogue is stated to be to enable the authority to identify the *best* solution. If a narrower interpretation is applied then the condition could be read as requiring the contracting authority to be entirely unable to specify the means of meeting its requirements and this would significantly reduce the circumstances where the competitive dialogue procedure can be used.

Careful consideration should be given to this condition and a clear written audit trail prepared demonstrating by reference to the particular project why the open or restricted procedures will not allow for award of the contract.

Condition 2 requires the contracting authority to be of the view that use of the open procedure or the restricted procedure will not allow for award of the contract.

Comment: In practice, if the projects meets the definition of a particularly complex contract and the contracting authority needs to use the competitive dialogue to explore solutions with the economic operators then the open or restricted procedures, where no negotiation is permitted, are unlikely to allow for award of the contracts. This should not, however, be assumed and so careful consideration should be given to this condition and a clear written audit trail prepared demonstrating by reference to the particular project why the open or restricted procedures will not allow for award of the contract.

Competitive dialogue – what discussions are permitted after receipt of tenders?

EVALUATION OF TENDERS	Contracting authority evaluates the tenders on the basis of the most economically advantageous tender, using the pre-disclosed evaluation criteria and weightings. Following conclusion of the competitive dialogue phase there are limits on any further discussion with tenderers. See Section 4 the Law for further information.

Article 29 distinguishes two stages after close of dialogue. The first stage is when tenders have been received from the tenderers which participated in the competitive dialogue phase. The second stage is when the successful tenderer has been identified. There are specific provisions covering the extent to which the information received from tenderers can be checked and changed.

After receipt of all tenders: Article 29(6) provides that:

These tenders may be clarified, specified and fine-tuned at the request of the contracting authority. However, such clarification, specification and fine- tuning or additional information may not involve changes to the basic features of the tender of the call for tender, variations in which are likely to distort competition or have a discriminatory effect."

After selection of the successful tender: Article 29(7) provides that:

" At the request of the contracting authority, the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspect of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender of the call for tender and does not risk distorting competition or causing discrimination."

The Directive clearly envisages the need for some clarifications and confirmations in the context of these complex projects. In both cases the process is instigated by the contracting authority not the tenderer. In both cases significant caution needs to be exercised in the clarificatory process so as to ensure that those actions do not there is no distort competition or cause discrimination.

DESIGN CONTESTS – ARTICLES 66 TO 74

Adapt all of this section for local use – using relevant local legislation, processes and terminology including statutory time scales and publication requirements

Scope – Contracting authorities and thresholds (Article 67(1)): The financial thresholds are different for different types of contracting authority, with a lower threshold generally applying for central government authorities. (see Module D1 for explanation of different types of contracting authorities and Module D5 for details of relevant thresholds).

The types of contracting authority and thresholds listed in Article 67 are:

- contracting authorities which are listed as central government authorities in Annex IV to the Directive – to which the lower threshold applies
- contracting authorities not listed in Annex IV – to which the higher threshold applies
- for all contracting authorities for contests concerning specified services (Research and Development and *certain types of Telecommunications* where the higher threshold applies.

Scope – contracts (Article 67(2): design contests can be used where:

- they are organized as part of a procedure leading to the award of a public service contract; and/or
- they result in the award of prizes or payments to participants

Calculating the financial threshold (Article 67(2)): When calculating the financial threshold the following rules apply:

- For design contests which are organized as part of a procedure leading to the award of a public service contract the threshold is calculated by reference to the estimated net value (i.e. excluding VAT) of the public service contract including any possible prizes or payment to participants
- For design contests which result only in the award of prizes or payments to participants the financial threshold is calculated by reference to the estimated value of the prizes or payment to participants plus the estimated net value (i.e. excluding VAT) of the public service contract which might be concluded with the successful participant (if the contracting authority does not exclude such and award in the contract notice advertising the contest.

Exclusions from the scope of design contests (Article 68): The provisions of Articles 66 to 74 do not generally apply to contests organised by utilities where they are run in pursuit of the activities referred to Articles 3 to 7 of Directive 2004/17. *This is subject to some limited exceptions for postal services* where these provisions do apply.*

For public sector contracting authorities, contracts in the fields of *certain types of telecommunications** covered by Article 13, secret contracts and contracts requiring special security measures covered by Article 14 and contracts awarded pursuant to international rules covered by Article are excluded.

Advertising design contests (Articles 69 and 70): Contracting authorities are required to advertise design contests in the prescribed manner in the Official Journal of the European Union using the standard form design contest notice (see Module E2 for full details of advertising requirements). The provisions of Article 36 on the form and manner of publication of notices apply to design contests as does Article 37 which allows for non-mandatory (voluntary) publication of notices for contracts not covered by the Directive.

Communication (Article 71): particular emphasis is placed on the requirement for integrity and confidentiality to be maintained. All information communicated by participants must be preserved and the contracting authority must ensure that the jury does not ascertain the contents of the plan and projects until after expiry of the time limits for their submission.

In addition there are rules on electronic availability and receipt of plans and documents with contracting authorities using electronic methods being required to provide the necessary encryption and obligations to ensure that electronic devices receiving plans and projects meet the requirement set out in Annex 10.

Selecting participants (Article 72): A contracting authority may choose to limit participants and where it does so is must lay down clear and non-discriminatory selection criteria. The number of participants must be sufficient to ensure genuine competition.

The jury and conduct of the evaluation (Articles 73 and 74):

- the jury must be comprised of individuals who are independent of the participants in the competition
- the number of people on the jury is not specified
- where the contest requires participants to be from a particular profession then at least a third of the members of the jury must have that qualification or the equivalent of that qualification
- the anonymity of the candidates must be preserved until the jury has reached its opinion or decision
- the jury must
  - be autonomous in its decision making
  - examine the plans and projects submitted by candidates anonymously
  - examine those plans and projects solely on the basis of the criteria indicated in the contest notice
  - record its ranking of projects in a report which is signed by its members. The report must include the jury's remarks and any points which need clarifying.
- where the jury has concluded its report and it has recorded questions or points of clarification then the candidate may be invited to answer those questions or points of clarification and complete minutes must be drawn up of the dialogue between the jury and those candidates.
- when the opinion or decision has been made *(and the successful candidates announced)* the contracting authority must publish a contract award notice in accordance with Article 37 requirements.

SECTION 2.2
PROCUREMENT TECHNIQUES

Framework agreements

A framework agreement is defined at Article 11(5) as:

> "an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged"

In other words, a framework agreement is a general term for agreements with economic operators that set out the terms and conditions under which specific purchases may be made.

The term is normally used to cover agreements which are not, themselves, readily classifiable as a public contract to which the Directive applies. Under such agreements the public contracts are created under the Directive only when a contract is awarded under the framework agreement. See Section 4 The Law.

The European Commission has issued an Explanatory Note on Frameworks (doc CC/2005/03). The Explanatory Note covers a number of issues relating to the establishing and operation of frameworks. In this note, the European Commission it explains its view of the types of contracts which are covered by the definition of frameworks and coverage of the framework provisions. Explanatory Notes are not legally binding but they do provide a useful indicator as to the way in which the Commission will deal with issues arising in respect of framework agreements.

An extract from that Explanatory Note is as follows (with footnotes deleted):

"1.1 Types of framework agreements covered by the Classic Directive

Although the Classic Directive refers exclusively to "framework agreements", the provisions actually relate to two different situations: framework agreements that establish all the terms and those which do not establish them all. Purely for explanatory purposes, the first kind may be termed ***framework contracts*** and the second ***framework agreements*** **stricto sensu**. It should be stressed that the use of this terminology is not obligatory for implementing the Directive. It is also useful to recall that framework agreements that establish all the terms (framework contracts) are "traditional" public contracts and that consequently their use was possible under the old Classic Directives, provided they were concluded in accordance with the procedural provisions of these Directives.

Framework agreements that establish all the terms (framework contracts) are legal instruments under which the terms applicable to any orders under this type of framework agreement are set out in a binding manner for the parties to the framework agreement – in other words, the use of this type of framework agreement does not require a new agreement between the parties, e.g. through negotiations, new tenders, etc. Where such framework agreements are concluded with several economic operators, they come under the first indent of Article 32(4), while those concluded with a single economic operator are covered in Article 32(3).

> Framework agreements that do **not** establish all the terms (framework agreements *stricto sensu*) are by definition incomplete: this type of framework agreement either does not include certain terms or does not establish in a binding way **all** the terms necessary so that any subsequent orders under the framework agreement can be concluded without any further agreement between the parties. In other words, some terms still have to be established subsequently."

The Explanatory note goes on to confirm that there are a number of questions which are a question of national law. These include:

- whether or not a term is actually established;
- in the case of a framework agreement that does not establish all the terms and which is concluded with one economic operator whether or not the operator is obliged to supplement its tender
- whether an economic operator that is a party to a framework is obliged to deliver the agreed goods, works or services
- whether an economic operator can oblige a contracting authority to use the framework

SECTION 5
CHAPTER SUMMARY

SELF-TEST QUESTIONS

Choice of procedures

1. What are the four main types of competitive procedure?
2. Which of the four main types of competitive procedure is a single-stage procedure?
3. Which procedures involve a separate selection stage and short-listing of economic operators?
4. In which procedures is negotiation with economic operators permitted?
5. In which procedure is a contracting authority not permitted to use lowest price as the criterion for award of the contract?
6. What conditions apply to the use of the open or the restricted procedures?
7. Does the contracting authority have a free choice when it decides whether to use the open or the restricted procedure?
8. What are the advantages and disadvantages of the open procedure?
9. What are the advantages and disadvantages of the restricted procedure?
10. Are there conditions that apply to use of the negotiated procedure with prior publication of a contract notice?
11. If there are conditions, what are they? Which conditions apply to all types of contracts, *i.e.* works, supplies and services?

The open procedure

1. What is the statutory period for receipt of tenders? How can this period be reduced? By how many days can it be reduced?
2. How quickly must the specification and supporting documents be sent to economic operators? Do these requirements apply if the documents are available electronically?

The restricted procedure

3. What is the statutory period for receipt of expressions of interest? How can this period be reduced? By how many days can it be reduced?
4. What is the statutory period for receipt of tenders? How can this period be reduced? By how many days can it be reduced?
5. How many economic operators must the contracting authority invite to tender?
6. How quickly must the specification and supporting documents be sent to economic operators? Do these requirements apply if the documents are available electronically?

The competitive dialogue procedure

1. When can the competitive dialogue procedure be used? What conditions must be satisfied? Think of some examples of the types of projects and circumstances where this procedure may be used.
2. What is the statutory period for receipt of expressions of interest? How can this period be reduced? By how many days can it be reduced?
3. What is the statutory period for receipt of tenders?
4. How many economic operators must the contracting authority invite to participate in the dialogue?
5. What can the contracting authority discuss with economic operators during the dialogue phase?
6. When does the contracting authority declare the competitive dialogue phase closed?
7. What discussions are permitted between the contracting authority and the economic operators after tenders are received but before the successful tenderer is appointed?
8. What discussions are permitted between the contracting authority and the successful tenderer?

The negotiated procedure with prior publication of a notice

1. When can the negotiated procedure with prior publication of a notice be used? What conditions must be met? Think of some examples of the types of projects and circumstances where this procedure may be used.
2. What is the statutory period for receipt of expressions of interest? How can this period be reduced? By how many days can it be reduced?
3. What is the statutory period for receipt of tenders?
4. How many economic operators must the contracting authority invite to negotiate?
5. What can the contracting authority discuss with economic operators during the negotiation phase?
6. What discussions are permitted between the contracting authority and the economic operators after tenders are received but before the successful tenderer is appointed?
7. What discussions are permitted between the contracting authority and the successful tenderer?

Reducing statutory periods – accelerated procedures

1. What two types of accelerated procedures are available?
2. In what circumstance can accelerated procedures be used?
3. What are the statutory time limits in accelerated procedures?

Design Contests

1. What is a design contest?
2. What types of contract is a design contest used for? Think also about the value of the contracts.
3. How is a design contract advertised?
4. What principles apply to the selection of participants?
5. What is the composition of the jury?
6. What are the outcomes of a design contest?

Public works contracts for subsidised housing schemes

1. When can an authority use the special provisions applying to the award of public works contracts for subsidised housing schemes? What conditions need to be satisfied?
2. How is a public works contract for a subsidised housing scheme advertised?
3. Are there any detailed rules about how the contracting authority conducts the process to appoint the concessionaire? What are the rules?

Public works concessions

1. What is a public works concession? Think of 2 examples.
2. How is a public works concession advertised?
3. What are the statutory timescales for submission of applications? How can these timescales be reduced?
4. Are there any detailed rules about how the contracting authority conducts the process to appoint the concessionaire? What general principles apply?
5. What are the rules relating to the terms upon which the concessionaire is appointed?
6. What procedures does a concessionaire which is a contracting authority have to follow when awarding works contracts to a third party?
7. What procedures does a concessionaire which is not a contracting authority have to follow when awarding works contracts to a third party?

Procurement techniques

Framework agreements

1. What is a framework agreement (as defined by the Directive?)
2. For what sort of purchases is a framework agreement suitable?
3. Who can set up a framework agreement?
4. How is a framework agreement advertised?
5. What sort of procurement procedure can you use to set up a framework agreement?
6. Where the framework agreement is with a single economic operator, on what terms are contracts awarded under the framework?
7. How many operators do you need to have on a multi-supplier framework agreement?
8. Can new economic operators join a framework after it has been set up?
9. For a multi-supplier framework agreement, what are the two ways in which contracts can be awarded under the framework?
10. What are the rules for running a mini-competition in a multi-supplier framework agreement?
11. How long should a framework agreement generally last?

Electronic auctions

1. In what types of procurement procedures can an electronic auction be used?
2. At what stage in the procurement process is an electronic auction used?
3. What sorts of purchases are suitable for electronic auctions?
4. What sorts of purchases are specifically excluded from electronic auctions?
5. What must the invitation to participate in an electronic auction contain?
6. How is an e-auction closed?

Dynamic purchasing systems

1. What is a dynamic purchasing system?
2. What sorts of purchases are suitable for a dynamic purchasing system?
3. For how long may dynamic purchasing be set up?
4. Can new economic operators join a dynamic purchasing system after it has been set up?

Negotiated procedure without publication of a contract notice

1. In which article can you find the derogations that set out the very limited circumstances where the negotiated procedure without publication of a contract notice can be used?
2. What conditions apply to circumstances where a contracting authority wishes to use the negotiated procedure without publication of a contract notice where:
   - no tenders or no suitable tenders are received for a works contract?
   - extreme urgency applies for a services contract?
   - an additional delivery of supplies from an original supplier is required?
   - additional works are required?
   - repeat services are required?
3. What two important principles did the European Court of Justice lay down in the Milan case (*Commission v Italy* C199/85)?

Useful sources of further information – guidelines, explanatory notes and Directives

http://ec.europa.eu/internal_market/publicprocurement/index_en.htm

Preparation of procurement

Social and environmental considerations

MODULE C

PART 5

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. What the social and environmental considerations are
2. When and how social and environmental considerations can be used in procurement
3. When social and environmental considerations cannot be used in procurement

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- When social and environmental considerations are specifically provided for in the Directive
- How social and environmental considerations may be incorporated into the procurement process when they are not explicitly provided for
- The limitations on use of social and environmental considerations derived from EC Treaty principles, general law principles, the Directive and guidance
- That different stages in the procurement process offer different opportunities for the incorporation of social and environmental consideration

This means that it is critical to understand fully:

- How the opportunities and limitations apply to each of the stages in the procurement process

If this is not properly understood, opportunities to incorporate social and environmental considerations may be missed. Social and environmental considerations may be incorporated inappropriately or at the wrong stage, and so risk being in breach of Treaty principles, the Directive or EC law.

1.3 LINKS

There is a particularly strong link between this chapter and the following modules or sections:

- Module C1 on procurement planning
- Module E1 on preparing tender documents
- Module E2 on advertisement of contract notices
- Module E3 on selection (qualification) of candidates
- Module E4 on setting contract award criteria
- Module E5 on contract evaluation and contract award
- Module G1 on contract management

1.4 RELEVANCE

This information will be of particular relevance to those procurement professionals who are responsible for procurement planning, specifically in the preparation of contract notices and the preparation of selection and award criteria, as well as to those involved in the selection process and tender evaluation process.

It will also be of particular relevance to those persons that, within the line management of a contracting authority, have the responsibilities and decision-making powers – including delegation powers – with regard to procurement (*e.g.* to decide on the subject matter and packaging of the procurement).

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

Adapt for local use

The legal requirements relating to the type of procedures are set out in **Directive 2004/18/EC**. In this context it is helpful to look at both the recitals to the Directive and the relevant articles:

- Recital 1: context for the new Directive
- Recital 5: integrating environmental protection requirements
- Recital 29 and article 23: technical specifications, environmental characteristics and accessibility criteria for people with disabilities
- Recital 33 and article 26: conditions for performance of contracts
- Article 27: informing economic operators about provisions relating to taxes, environmental protection, employment protection provisions and working conditions
- Recital 44 and articles 48 and 50: evidence of economic operator's technical abilities – environmental management measures
- Recital 46 and article 53: environmental and social characteristics as evaluation criteria
- Recital 26 and article 19: reserved contracts

Utilities

A short note on the key similarities and differences applying to utilities is set out at the end of Section 2.

SECTION 2
NARRATIVE

Note:
Except where specified otherwise, the narrative in this module C5 discusses the rules applying to contracts that are of a type and value subject to the full application of Directive 2004/18/EC ("the Directive"), and the term "contract" should be interpreted accordingly. For commentary on contracts falling outside the application of the Directive or only partially covered by the Directive, see module D3. For low-value (sub-threshold) contracts, see below.

SECTION 2A
INTRODUCTION AND OVERVIEW

1. INTRODUCTION

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology.

1.1 This section provides an introduction to and discussion of the extent to which social and environmental considerations can be incorporated into procurement processes. It does not contain a detailed analysis of all of the academic debate and diverse views on this issue. Nor does it provide an exhaustive analysis of all current case law or guidance.

Part 2A:

- introduces the concept of social and environmental considerations;
- discusses some terminology;
- Addresses the issue of local preference provisions – which are not permitted under the EU *acquis*.

Part 2B looks at environmental considerations and:

- outlines where the Directive deals specifically with environmental considerations;
- highlights the key European Court of Justice (ECJ) cases;
- provides an overview of what the European Commission (EC) says about the use of environmental considerations;
- looks at the procurement process in detail and provides comments and good practice guidance on when environmental considerations may be most effectively incorporated into the process.

Part 2C looks at social considerations and:

- outlines where the Directive deals specifically with social considerations;
- highlights the key ECJ cases;
- provides an overview of what the EC says about the use of social considerations;
- looks at the procurement process in detail and provides comments and good practice guidance on when social considerations may be most effectively incorporated into the process.

Part 2D looks at some suggested measures to facilitate participation in procurement processes by small and medium-sized enterprises (SMEs), which are often regarded as a form of social consideration.

1.2 It is important to bear in mind that although environmental and social considerations are dealt with separately in this module, the principles applying to the incorporation of both types of considerations are broadly similar. Some provisions in the Directive apply to both social and environmental considerations. Principles derived from a decision of the European Court of Justice often apply to both social and environmental considerations, even if the case itself related to only one of these sets of considerations. In addition, some of the guidance from the European Commission on social considerations can only be properly understood by reading the guidance on environmental considerations.

1.3 Public procurement is not conducted in a vacuum. It involves purchasing by contracting authorities or utilities operating in the public sector. Public sector bodies are subject to a wide range of internal and external pressures and influences, including local and national expenditure decisions and policies. These can impact on all aspects of the procurement process. Public procurement is also used to promote particular policies, as the purchasing power of the contracting authorities can be considerable. This can create tensions between (1) what is permitted under the EU *acquis* and (2) the aims of local and national governments and contracting authorities.

What is permitted under the EU *acquis* is not always entirely clear, due to a number of reasons, including the following:

- the Directive contains some specific provisions but is not comprehensive in addressing this issue;
- the ECJ case law is not always consistent;
- the European Commission (EC) has traditionally held a more restrictive view of what is permissible than some EU Member States;
- this is an area of considerable ongoing debate in terms of practice, policy and academic discussion;
- this is currently an area of rapid change within the EU and in EU Member States.

2. WHAT ARE SOCIAL AND ENVIRONMENTAL CONSIDERATIONS?

2.1 There is no fixed definition of what a social or environmental objective is. The concept is most easily understood by way of examples:

Examples of social considerations:

- Reducing unemployment
- Preventing the use of child labour
- Preventing discrimination on the grounds of race, religion, disability, sex or sexual orientation
- Encouraging good employment practices
- Reducing local unemployment
- Reducing social exclusion
- Promoting training opportunities for the young or disadvantaged
- Encouraging access to work for people with disabilities

Examples of environmental considerations:

- Minimising the impact of a construction project on the environment
- Encouraging environmentally sensitive working practices by economic operators
- Increasing the energy efficiency of buildings
- Reducing wastage of natural resources
- Encouraging the development of alternative energy sources
- Reducing transport costs by sourcing products locally
- Reducing the carbon footprint

Contracting authorities have often used public procurement to further these types of broader policy objectives. Some examples of how contracting authorities do this are set out below:

2.2 **Examples of social considerations** – *and how contracting authorities try to incorporate these into procurement processes:*

- Reducing unemployment – *by requiring economic operators to recruit a specified percentage of the workforce from unemployed people*
- Preventing the use of child labour – *by disqualifying economic operators who are known to use child labour*
- Preventing discrimination on the grounds of race, religion, disability, sex or sexual orientation – *by including contract conditions that require compliance with all relevant legislation*
- Encouraging good employment practices – *by requiring economic operators to pay the national minimum wage*
- Reducing local unemployment – *by requiring economic operators to recruit a specified percentage of their work force from unemployed people*
- Reducing social exclusion – *by locating a community facility in a place where the socially excluded are more likely to use it*
- Promoting training opportunities for the young or disadvantaged – *by obliging economic operators to provide training opportunities*
- Encouraging access to work for people with disabilities – *by specifying that a contract can only be delivered by workshops or schemes that are run for the benefit of people with disabilities*

2.3 **Examples of environmental considerations** – *and how contracting authorities try to incorporate these into procurement processes:*

- Minimising the impact of a construction project on the environment – *by deciding to build a tunnel rather than a road*
- Encouraging environmentally sensitive working practices by economic operators – *by requiring an economic operator that is building a road through an area of natural beauty to meet specified environmental management measures*
- Increasing the energy efficiency of buildings – *by requiring architects to design a building to meet the highest energy efficiency standards*
- Reducing wastage of natural resources – *by requiring operators to recycle and re-use products*
- Encouraging the development of alternative energy sources – *by purchasing green energy*
- Reducing the carbon footprint – *by purchasing electric vehicles*

2.4 Some of the ways in which contracting authorities try to incorporate social and environmental considerations into procurement processes (including some of the examples above) are not legally permitted under the EU *acquis*. Others are permitted provided that certain conditions are met. Some are specifically permitted in the Directive.

The key questions from a procurement perspective are:

(1) Is it legally permitted under the EU *acquis* to incorporate social and environmental considerations into the procurement process? and

(2) If it is legally permitted to do so, when and how can this be done?

As already indicated, the answers are not straightforward and sometimes there is a conflict between general policy and what is achievable under the EU *acquis*.

Comment on terminology: Environmental and social considerations are quite often referred to as "secondary objectives". Why is this?

The "primary" objective of procurement by a contracting authority is the *acquis*ition of works, goods (supplies) or services on the best possible terms.

Environmental and social objectives, such as those outlined above, are not necessarily connected with this primary objective but are often motivated by policy, economics or politics. Objectives that are unconnected to the primary objective of the procurement are often referred to in the EU, by the European Commission and in academic debate as "secondary" objectives or considerations. In the United States the term "collateral" objectives or considerations is used.

The distinction between what is a primary objective and what is a secondary objective is not always clear.

In practice a contracting authority will make purchases in order to carry out its own functions, which may themselves be social or environmental in nature. For example, an education authority may procure contracts to build a school, purchase equipment and stationery and procure cleaning services, all of which are required to fulfil its own functions that satisfy a social requirement for education for all children of school age. Procurement undertaken to deliver these types of core functions of a contracting authority is not a "secondary objective" for the purpose of this discussion.

However, a decision on a contract to build a school to select only economic operators that recruit a specified percentage of their work force from among the long-term unemployed – in order to satisfy a policy to encourage the long-term unemployed to return to work – may well be a "secondary objective".

Contracts below the EU financial thresholds

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology. Briefly set out the requirements of the local legislation for sub-threshold contracts.

This module describes the requirements for contracts of a particular type and/or value, which means that they must be advertised using a contract notice published in the *Official Journal of the European Union* (see module D for more information on the types of contract concerned and the financial thresholds).

The Directive does not set out specific provisions that apply to the award of these types of contract, but the basic principles, including the requirements of transparency and equal treatment, do apply to the procurement process that the contracting authority follows in procuring these contracts.

In the specific context of social and environmental considerations, contracting authorities remain free to define and apply in their procurement procedures selection and award criteria of a social or environmental nature, provided that these criteria comply with national legislation and the general rules and principles of the EC Treaty. This implies, among other things, an appropriate degree of transparency and compliance with the principle of equality of treatment of economic operators.

Particular care must be taken to ensure that practices such as reserving contracts for specified persons, *e.g.* disabled persons working in sheltered workshops or the unemployed, do not constitute direct or indirect discrimination.

Local preferences, price preferences and offer-back provisions – not permitted under the EU *acquis*

Procurement has traditionally been an important tool for national industrial development policy in many countries. Procurement has been used, for example, in the past to support businesses in depressed regions, encourage business development in a particular sector, favour economic operators who may otherwise struggle to succeed in procurement processes, and implement "buy national" policies.

Some examples of the measures used are outlined below for illustration purposes, but it should be noted that these types of measures are not permitted under the EU *acquis*. They have been held to be in breach of both EC Treaty provisions and procurement law.

Procurement methods supporting national industrial policies vary but most commonly these take the form of:

- **Set aside:** where specific types of contract or a given percentage of contracts are set aside so that only a specified group of economic operators may tender. Those groups may comprise, for example, only small and medium-sized enterprises, economic operators based in a particular region, or economic operators with particular expertise or structures, such as workers' and artisans' co-operatives.

- **Regional or national price preference (domestic preference schemes):** where a financial advantage is given to particular types of contractor or to products produced in a specified region or country. A common example is a percentage price preference given to economic operators based in the region where the contracting authority is based. When tenders are evaluated, the price submitted by an economic operator based in the region is discounted by 10%. A similar approach is sometimes used for assessing tenders for products where a price advantage is given to products produced in the country where the contracting authority is located.
- **Offer back:** where a competitive tender process is conducted but when tenders are received, the best performing tenderer from a favoured group is awarded the contract if it can match the best tender overall.

These types of measures create direct discrimination and are in breach of the EC Treaty. EU Member States are not permitted to use these types of measures. The European Court of Justice (ECJ) has upheld this principle on numerous occasions. For example, regional preferences were considered in case C360/89 and found to be in breach of Treaty principles (see below). In the case of Commission v Italy C 263/85 the ECJ held that measures requiring Italian public authorities to purchase motor vehicles manufactured in Italy in order to qualify for subsidies was in breach of article 28 of the Treaty.

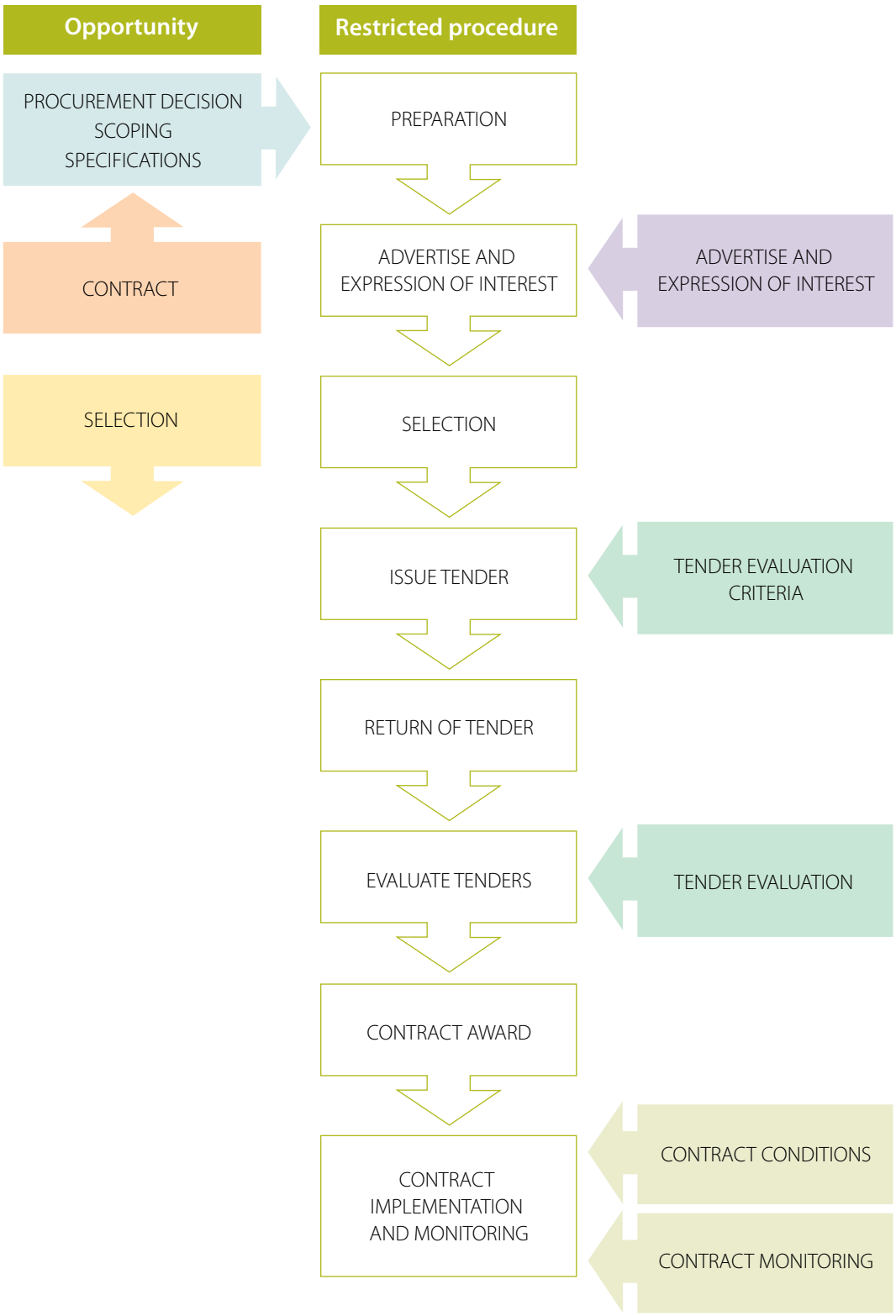
3. OPPORTUNITIES TO INCORPORATE SOCIAL AND ENVIRONMENTAL CONSIDERATIONS INTO THE PROCUREMENT PROCESS

Before going on to look in more detail at what the Directive, the European Court of Justice and the European Commission say about the incorporation of environmental and social considerations into procurement processes, it is sensible to take a quick look at a procurement process, as a reminder of the different stages.

This is because the combined impact of the Directive, case law and guidance makes it clear that the opportunities for incorporating environmental and social considerations, and the ease with which that incorporation can be done, differ according to the stage in the procurement process. As a general rule it is easier, and often more effective, to incorporate social and environmental criteria at the planning stage than at the selection and evaluation stages of a procurement process.

The flow chart below shows a restricted procedure process and illustrates when and how social and environmental considerations may be taken into account. The restricted procedure has been used as it can illustrate both the selection and shortlisting of economic operators.

Opportunities for social and environmental considerations in procurement



SECTION 2B
ENVIRONMENTAL CONSIDERATIONS

WHAT DOES THE DIRECTIVE SAY ABOUT ENVIRONMENTAL CONSIDERATIONS?

The following section provides an overview of where environmental considerations are addressed in the Directive.

The Directive contains a number of provisions that refer specifically to the incorporation of environmental considerations into the procurement process. In this context it is helpful to look at the recitals to the Directive as well as the articles. The recitals are not operative parts of the Directive, but they do provide some explanation and place the specific provisions in context. The relevant recitals and articles are listed below.

- **Recital 1**: context for the new Directive
- **Recital 5**: integrating environmental protection requirements
- **Recital 29 and Article 23**: technical specifications and environmental characteristics
- **Recital 33 and Article 26**: conditions for performance of contracts
- **Article 27**: informing economic operators about provisions relating to taxes and to environmental protection
- **Recital 43**: referring to the potential for non-compliance with environmental legislation to amount to an offence concerning professional misconduct of the economic operator or grave misconduct
- **Recital 44 and Articles 48 and 50**: evidence of the economic operator's technical abilities – environmental management measures
- **Recital 46 and Article 53**: environmental characteristics as evaluation criteria

These provisions are explained in more detail in the following paragraphs:

Context for the new Directive:

Recital 1 provides some background on the reasons why the new Directive was prepared. The recital refers specifically to the need to take account of ECJ case law on award criteria. This case law clarified the possibility for contracting authorities, in order to meet the needs of the public concerned, to include environmental criteria. The recital states that this is possible "provided that such criteria are linked to the subject matter of the contract, do not confer an unrestricted freedom of choice of the contracting authority, and are expressly mentioned" and comply with the fundamental Treaty principles.

Comment

When considering the incorporation of environmental considerations, it is always necessary to consider whether the proposed approach is in compliance with the fundamental Treaty principles. This is the case even where there are specific provisions in the Directive permitting the use of these considerations.

The Directive makes this clear, as does the case law and guidance.

Integrating environmental protection requirements:

Recital 5 confirms that "under Article 6 of the Treaty, environmental protection requirements are to be integrated into the definition of Community policies and activities…in particular with a view to promoting sustainable development. This Directive therefore clarifies how the contracting authorities may contribute to the protection of sustainable development, whilst ensuring the possibility of obtaining best value for money for their contracts".

The specific provisions in the Directive are as follows:

Technical specifications – environmental characteristics:

Recital 29 refers to the ability of contracting authorities to lay down environmental characteristics in technical specifications for a given contract and also to the availability of eco-labels.

Article 23 sets out the relevant provisions. Article 23(3)(a) states that technical specifications may be formulated in terms of performance or functional requirements, which may include environmental characteristics.

These parameters must be sufficiently precise to allow economic operators to determine the subject matter of the contract and to allow contracting authorities to award the contract (article 23(3)(b)).

Article 23(6) sets out some further provisions and conditions where contracting authorities lay down environmental characteristics in terms of performance or functional requirements. This article confirms that contracting authorities may use detailed specifications as defined by European or multinational eco-labels or other eco-labels, but only provided that:

- the specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract;
- the requirements for the label are drawn up on the basis of scientific information;
- the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, can participate; and
- they are accessible to all interested parties.

Contracting authorities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents.

Contracting authorities must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body (recognised bodies are defined in article 23(7)).

See section 4 (The Law) for further information on eco-labels.

Conditions for performance of contracts:

Recital 33 states that contract performance conditions are compatible with the Directive "provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents".

Importantly, this recital explains that contract performance conditions must be intended to assist "the protection of the environment".

Article 26 sets out the relevant provision:

"Contracting authorities may lay down special conditions relating to the performance of the contract." These conditions "may, in particular, concern social and environmental considerations", provided that:

- the special conditions are compatible with Community law; and
- they are indicated in the contract notice or in the specifications.

Informing economic operators about provisions relating to environmental protection

Article 27 permits a contracting authority to state in the contract documents from which bodies economic operators may obtain information relating to obligations in force in the member state, region or location where a works or services contract is to be performed. This information relates to taxes, environmental protection, employment protection provisions, and working conditions applying to the delivery of the contract.

Evidence of an economic operator's technical abilities - Environmental management measures:

Recital 44 confirms that where the nature of the works or services justifies applying environmental management measures or schemes during the performance of the contract then the application of such measures or schemes may be required.

Article 48(2)(f) provides that, in appropriate cases (where they are related to technical capability), contracting authorities may ask for environmental management measures as evidence of an economic operator's technical abilities in delivering a public works and public services contract.

Article 50 refers to the bodies and schemes that contracting authorities may refer to in these cases, where they require the production of certificates drawn up by independent bodies attesting compliance with certain environmental management standards.

Environmental characteristics as evaluation criteria:

Recital 46 refers to economic and qualitative criteria for the award of the contract and mentions as examples the use of criteria "such as meeting environmental requirements".

Article 53(1) sets out a non-exhaustive list of criteria on which a contracting authority may base its award for the most economically advantageous tender. This list refers specifically to "environmental characteristics". The criteria used must be "linked to the subject matter of the contract".

WHAT DOES THE EUROPEAN COURT OF JUSTICE (ECJ) SAY ABOUT ENVIRONMENTAL CONSIDERATIONS?

The ECJ has considered a number of different aspects relating to the incorporation of environmental considerations into procurement processes and the extent to which that is permissible under the Treaty of Rome principles and under the procurement directives.

A key case is outlined below. This case was decided before the introduction of Directive 2004/18 and it influenced the drafting of that directive.

ECJ case concerning environmental considerations at the tender evaluation stage

Facts: The "Concordia Buses" case (C-513/99 Concordia Bus Finland v Helsinki) relates to a tender process for the contract for the operation of bus networks in Helsinki. The City of Helsinki published a call for tenders and confirmed that the award of the contract would be on the basis of the most economically advantageous tender.

One category of criteria was the economic operator's quality and environmental management. Within this category points were awarded for a number of issues, including the levels of nitrogen oxide emissions below a defined level and external noise below a defined level.

One of the unsuccessful tenderers challenged the use of these environmental criteria as tender award criteria. The Finnish review body referred several questions to the ECJ, including whether it was permitted to use the environmental criteria in question.

Decision: The ECJ ruled that the permitted award criteria were not limited to those that were "purely economic in nature" and confirmed that the list of award criteria was illustrative and therefore not exhaustive.

The ECJ went on to state that it was permitted to use criteria relating to the "preservation of the environment" provided that certain conditions were met. The criteria:

- had to be related to the subject matter of the contract; and
- could not give the contracting authority an unrestricted freedom of choice.

Unfortunately, the ECJ did not explain what an "unrestricted freedom of choice" meant. It did indicate that, in this case, the two criteria concerning emissions and noise levels above certain pre-stated levels were sufficiently "specific and objectively quantifiable" to comply with the requirement that the criteria were not to give the contracting authority an unrestricted freedom of choice.

The principles in the Concordia buses case also apply to social considerations.

Impact on Directive 2004/18: Article 53 of the Directive lists "environmental characteristics" among the non-exhaustive list of award criteria. It also includes the requirement for linkage between the criterion and the contract referring to the criteria as "linked to the subject-matter of the public contract in question".

WHAT DOES THE EUROPEAN COMMISSION SAY ABOUT ENVIRONMENTAL CONSIDERATIONS?

History: The European Commission has, historically, been reluctant to encourage the use of procurement as a means for the implementing of environmental policy. This approach is now changing and the Commission has provided a lead in demonstrating how environmental issues can be incorporated into the procurement process. See the Commission's website on Green Public Procurement at: http://ec.europa.eu/environment/gpp.

There has in the past been a particular concern that the unfettered use of environmental considerations in procurement could result in breaches of Treaty principles: by encouraging discriminatory practices, unequal treatment and restrictions on freedom of movement, and development of the internal market. These concerns are still relevant when considering how best to incorporate environmental considerations into public procurement, but there are now many more examples of how this can be achieved in a manner that complies with the EU *acquis*.

There was very little in the original procurement directives (prior to Directive 2004/18) about the extent to which it was permissible to take into account social and environmental considerations in the procurement process. Contracting authorities were reliant on case law and on the European Commission's Interpretative Communications (which were not legally binding) when exploring possibilities for integrating environmental considerations into public procurement and establishing what was and was not permissible.

Interpretative Communication: The Commission's Interpretative Communication is:

- COM (2001) 274 Final: Commission Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement

The content of this communication is summarised below.

Relevance: During the negotiations on the draft Directive 2004/18 there was a lot of debate on this issue. As can be seen from the outline of the content of the Directive, the position has changed, with the incorporation of a number of provisions addressing environmental issues and the inclusion of a number of principles derived from case law. The Directive is not comprehensive, however, in tackling the issue of when environmental considerations can or cannot be used.

The Commission's Interpretative Communication was issued before the new Directive and there have been further decisions by the ECJ on issues relating to the incorporation of environmental criteria. The Interpretative Communication does still provide an indication of the Commission's thinking on these issues.

Summary of content of the Commission's Interpretative Communication ("IC") on the incorporation of environmental considerations into public procurement

The IC starts by providing some background and context to the issues relating to the incorporation of environmental considerations into public procurement. It then goes on to consider the different stages in the procurement process, providing comments on the relevant provisions of the directives in force at the time and on case law, as well as practical examples.

The stages in the procurement process that are discussed are:

Pre-procurement: referred to as "definition of the subject matter of the contract". This is identified as the first occasion when contracting authorities can take into account environmental considerations. It is pointed out that at this stage contracting authorities have wide opportunities and scope to take into account these types of considerations. Contracting authorities are free to define the subject of the contract subject to requirements to comply with the requirements of the Treaty and European law.

Technical specifications: this emphasises the need to ensure that technical specifications are clearly linked to the subject matter of the contract and are not discriminatory. Environmental considerations may be incorporated into technical specifications where they are relevant to the contract and contract delivery. The possibility of prescribing materials and specific production processes as well as the use of eco-labels are discussed, as is the use of variants to assess the impact of environmental considerations on a tender and the inclusion of requirements to comply with legislation that may be environmental in nature.

Selection: The IC distinguishes between the grounds for exclusion and selection based on technical capacity/ability.

Exclusion: The commentary confirms the possibility of exclusion on the grounds of non-compliance with relevant legislation and discusses the possibility of excluding candidates on the grounds of grave professional misconduct related to environmental issues.

Selection on the basis of technical capacity/ability: The IC refers to the possibility of selection linked to environmental considerations and highlights the requirement for a clear link with the subject matter of the contract.

Award of the contract: The IC discusses how environmental considerations may be incorporated as evaluation criteria when a contract is to be awarded on the basis of the most economically advantageous tender. There is a clear warning about the requirement to ensure that such criteria be related to the subject matter of the contract and concern the nature of the work to be carried out under the contract or the manner in which the work is done. These criteria must also be measurable.

The IC also discusses **life-cycle costing** and **externalities.**

Additional criteria: The IC also mentions the possibility of using environmental evaluation criteria and refers to this possibility being available only after tenders have been assessed from an economic perspective.

Abnormally low tenders: The IC on social considerations refers to the possible exclusion of abnormally low tenders where they are linked to non-compliance with legal rules on issues such as employment, labour law, and health and safety.

Execution of the contract: The IC comments on the use of contract clauses and emphasises the need to ensure that these are not, in effect, disguised technical specifications or criteria. Contract clauses relating to environmental issues are permissible provided that they are related to the delivery of the contract and are compliant with Treaty principles. The IC on social considerations highlights the wide possibilities for the use of social clauses and provides a number of examples.

Contracts not covered by the public procurement directives: The IC includes sections on contracts not covered by the Directives, which address the need for compliance with Treaty and European law requirements.

Social provisions applicable to public procurement: The IC contains some detailed discussion and comments on the implications of Treaty and European law requirements in the specific context of freedom of movement and the protection of workers' rights under the Posted Workers Directive and Transfer of Undertakings Directive.

Other Commission publications:

As mentioned above, there have been several recent developments at EU level in relation to "Green Public Procurement" (GPP).

- "Buying Green! A handbook on environmental public procurement" was published in 2004

Comment:

The "Buying Green!" handbook was published before the implementation of the Directive. It provides a practically focused commentary on the way in which environmental considerations may be taken into account in the procurement process. Like the ICs, it goes through each of the stages of a procurement process, highlighting relevant legislation and case law. The handbook also provides many real life examples of how contracting authorities have legitimately incorporated environmental issues into procurement processes and provides useful information on issues such as eco-labels, sustainable timber, renewable energy, and environmental management schemes.

This practical approach has been continued in more recent publications, such as the Toolkit referred to above.

This handbook has been followed by a significant range of additional information and documents, all available online at http://ec.europa.eu/environment/gpp.

The information includes:

- **Green Public Procurement Training Toolkit:** This toolkit covers how to create an action plan for GPP and includes a legal module on how and where to integrate environmental criteria into the public procurement process. A third module specifically designed for purchasing officers includes concrete examples on environmental criteria that may be used for 10 product and service groups. Work is underway to expand the product and service groups covered.

INCORPORATING ENVIRONMENTAL CONSIDERATIONS INTO THE PROCUREMENT PROCESS

The next few pages look at the stages in a procurement process and provide comments and some guidance on incorporating environmental considerations into the procurement process.

The restricted procedure and contract award based on the most economically advantageous tender have been used, as they make it possible to illustrate both the selection and shortlisting of economic operators and the greater opportunities available for the consideration of environmental issues when evaluating the tender. The principles apply to all four main competitive procedures.

Preparation

Note on Environmental Impact Assessments:

For certain types of public and private projects it is obligatory to undertake an Environmental Impact Assessment (EIA). This obligation does not derive from the procurement directives but from Directive 85/337/EC (as amended), "the EIA Directive". Where a project is of a type that is subject to the EIA Directive, then the contracting authority must carry out an EIA in advance so that the authority has all relevant information enabling it to take a decision in the full knowledge of the environmental impact of that decision. The types of project covered are set out in the EIA Directive and can include, for example, oil refineries, power stations, major infrastructure projects and waste disposal installations. Where an EIA is produced, this may have an effect on the subject matter of the contract and/or on the performance clauses. For further information on the EIA Directive, see: http://ec.europa.eu/environment/eia/.

For additional comments on the practical impact of EIAs on the procurement process, see module C1.

General comment: There is very little in the Directive specifically covering the conduct of the pre-advertisement stage. The Directive's focus is on the conduct of the competitive procurement process.

In practice, the preparation stage provides significant opportunities for the inclusion of environmental considerations that will impact on the entirety of the procurement process. This is because it is at the preparation stage that:

- key strategic purchasing decisions are made
- the subject matter of the contract is defined
- the contract notice is drafted
- general and technical specifications are prepared
- the contract terms and conditions are drafted*

Each of these elements can include consideration of environmental issues; these issues are examined further below.

These elements have direct links with later stages in the process and so the decisions made before the start of the procurement can have a major impact. For example, if technical specifications are prepared taking into account relevant environmental criteria, these criteria can then form part of the tender evaluation criteria and therefore impact on the final award decision.

Contract conditions are discussed below under "Contract Conditions".

Preparation - Purchasing decision: what and how

What to purchase, how to purchase and what type of purchasing method is used: In principle the Directive does not prevent a contracting authority from implementing environmental considerations when deciding what to purchase. Strategic purchasing decisions can therefore be taken with environmental considerations in mind provided that they are not in breach of the Treaty provisions.

See module A4, "Economic Considerations", for further discussion of purchasing and packaging decisions.

For example, environmental considerations may legitimately impact on a decision as to what is to be purchased, how the procurement is packaged, and what type of purchasing method is used.

Examples of the impact of environmental issues on the decision as to what to purchase:

(1) A roads authority intends to award a construction contract for the building of a new road through an area of outstanding natural beauty and significant ecological importance. The contracting authority therefore decides that the road will use tunnels wherever possible so as to lessen the long-term environmental impact. The contracting authority is free to take this decision and to require the use of tunnels.

(2) An education authority is buying a new fleet of delivery vehicles. It decides to purchase electric vehicles rather than petrol vehicles so as to reduce the environmental impact. The education authority is free to make this decision.

Example of the impact of environmental considerations on the packaging of a procurement process:

Many innovative, environment-friendly products and solutions are developed by small and medium-sized enterprises (SMEs). SMEs can be disadvantaged if contracting authorities decide to only offer large-value or large-scale contracts, and as a consequence contracting authorities may reduce opportunities for the most environment-friendly solutions.

Provided that it makes good economic sense to do so and is not in breach of Treaty principles, contracting authorities may decide to package contracts in such a way as to make the opportunities more appealing to SMEs.

A good example is the decision to subdivide a contract into lots. Subdivision into smaller lots can facilitate SME participation, as smaller lots may correspond better to the production capacities of SMEs. Subdivision into specialist lots may correspond better to the particular expertise of SMEs. A construction contract could be divided into smaller general lots or a contracting authority could choose to award contracts for some specialist aspects – such as solar panels, heating systems, and energy management systems – separately.

Contracting authorities must keep in mind that they must not use this type of approach in such a way as to impair competition or favour particular economic operators. Making it possible for economic operators to tender for an unlimited number of lots has the advantage of not discouraging general or larger contractors from participating.

Example of the impact of environmental issues on the purchasing method used:

As explained above, SMEs can be disadvantaged by larger, generalised contracts, and a contracting authority may suffer as a result if it does not receive the most environment-friendly tenders. A contracting authority may therefore decide to set up a "multi-supplier" framework agreement with a range of different types of economic operators selected to participate. Framework agreements generally provide wider and more varied opportunities for different types of economic operators.

Variants:

The Commission's IC on environmental considerations points out that products and services that are less damaging to the environment can be more expensive than other products and services. The "Buying Green!" handbook indicates that it is possible, even after conducting a market analysis (see below), that a contracting authority may still not be sure whether a suitable alternative exists or that there may still be uncertainty about the quality or price of alternative "green" products.

The "Buying Green!" handbook makes the following suggestion:

"If this is the case, it may be interesting to ask potential bidders to submit green variants. This means that you establish a minimal set of technical specifications for the product you want to purchase that will apply to both the neutral offer and its green variant. For the latter you will add an environmental dimension. When the bids are sent in, you can then compare them all (the neutral ones and the green ones) on the basis of the same set of award criteria. Hence you can use variants to support the environment by allowing a comparison between standard options and environment friendly options (based on the same standard technical requirements). Companies are free to provide offers based on the variant or the initial tender, unless indicated otherwise by the contracting authority."

Comment: In the context of social considerations, a contracting authority may adopt a similar approach when purchasing products. For example, a contract for the supply of office furniture could involve a variant requesting economic operators to submit proposals for furniture that has better ergonomic design features, making it better suited to the needs of people with physical disabilities, such as wheelchair-users.

Decisions may also be taken on issues such as requirements for raw materials and means of production – see below the section, "Preparation - Technical specifications", for further discussion on these issues.

Comment: Market Analysis

The European Commission's "Buying Green!" handbook provides some helpful commentary on the use of market analysis (pp. 15-16), to be undertaken before the start of the procurement process:

"In the process of determining what to buy, it is essential to have some understanding of the market. It is very difficult to develop a concept for a product, service or work, without knowing what is available. Green alternatives are not always obvious or well advertised.

So you need to do some research. This research could take the form of a market analysis. A market analysis is a general survey of the potential in the market that could satisfy your defined need. In order to be successful, this analysis has to be conducted in an open and objective manner, focusing on what general solutions are available on the market and not on preferred or favoured contractors. It will then show environment-friendly alternatives, if there are any, and the general price level of options available."

Preparation - General description

The Directive distinguishes between more general descriptive documents (including broad specifications) and "technical specifications".

The general descriptive documents will reflect the key purchasing decisions, including how the contract is to be delivered and packaged. This may, as we have seen above, include environmental considerations.

Preparation - Technical specifications

Technical specifications are defined in Annexe VI to the Directive and, put simply, they are requirements that relate directly to the characteristics of the subject matter of the contract. Technical specifications cover matters such as design requirements, costings and materials required in a works contract and quality levels, environmental performance levels and safety standards in relation to services and supplies.

Technical specifications have two functions:

- They describe the contract to the market so that economic operators can decide whether the contract is of interest to them. This means that they help determine the level of competition.
- They provide measurable requirements against which tenders can be evaluated and constitute minimum compliance criteria.

As a general rule, contracting authorities can incorporate environmental considerations into technical specifications provided that those requirements relate to the subject matter of the contract and comply with the Directive and Treaty principles.

Incorporating national technical rules: Article 23 provides that technical specifications may be formulated in specified ways "without prejudice to mandatory national technical rules to the extent that they are compatible with Community law." This means that, provided that national legislation/rules are compatible with Community law, they can include requirements linked to environmental considerations.

For example, national laws or national technical rules may prohibit the use of specific substances that are harmful to the environment and may include provisions relating to product safety. Where national laws or national technical rules are relevant to the particular contract, then those requirements can be incorporated into the technical specifications.

Other methods for incorporation of environmental considerations into the technical specifications:

Characteristics of the contract: Article 23(3) permits a contracting authority to include environmental characteristics in the technical specifications. This is provided that

- those characteristics relate to the performance or functional requirements; and
- the parameters are sufficiently precise to allow economic operators to determine the subject matter of the contract and to allow the contracting authority to award the contract.

Specifying basic or primary materials: A contracting authority can specify materials to be used in the delivery of a contract, including product components, provided that the Treaty principles are respected. The definition of technical specifications in Annexe VI of the Directive refers specifically to materials as part of the technical specifications.

Examples of where this specification of materials is permitted are:

- where a contracting authority gives a list of hazardous substances harmful to the environment or to public health and specifies that it does not want these substances present in materials that it is purchasing;
- where a specified percentage of recycled or re-used content in products is required;
- where window frames are required to be made of wood.

Specifying the use of specific production processes: A contracting authority can specify production processes to be used in the delivery of a contract, provided that there is a direct link to the subject matter of the contract and that the Treaty principles are respected. Annexe VI of the Directive refers to means of production as part of the technical specifications.

Examples of where this use of specific production processes is permitted are:

- **Electricity from renewable sources:** requirement for a specified percentage of electricity to come from renewable sources (the economic operator will need to provide clear evidence of the source in its tender, as it is not possible to tell from the product by what means it was generated)
- **Food from organic agriculture:** requirement for a specified percentage of foodstuffs to be organically produced
- **Sustainably logged timber:** requirement for timber for a new building to be obtained from sustainable resources

The following examples are not permitted. A requirement for:

- a supplier of office furniture to use recycled paper in its own offices – as there is no link to the subject matter of the contract;
- a food supplier to only provide Fair Trade products, as this is not linked to a characteristic of the product itself or to a method of production;
- timber to be sourced from forests where there are schemes for the protection of indigenous people, as this is not linked to a characteristic of the product itself or to a method of production.

Eco-labels: A number of eco-labels have been developed to communicate information on the environmental credentials of a particular product or service in a standardised way. These eco-labels have been developed with a view to helping consumers and other businesses to select greener products or services. The eco-label criteria cover a range of parameters that assess the environmental impact of the product or the service for its entire lifecycle.

Article 23(6) permits contracting authorities to use eco-labels when laying down environmental characteristics in terms of performance or functional requirements. This use is subject to a number of conditions (see section 4, "The Law", for further detail).

Contracting authorities can never oblige economic operators to be registered under a particular eco-label scheme, and the authorities must accept suitable alternative evidence as well, such as a test report from a recognised body or a technical dossier from the manufacturer that demonstrates standards equivalent to those set by the eco-label.

Example – from the "Buying Green!" handbook

The EU eco-label criteria for light bulbs require them to have an average lifespan of 10,000 hours. When reflecting this requirement in a call for tender for light bulbs, 10,000 hours could be set as the technical specification for the minimum lifespan, and a bonus point could be included in the award criteria for every 1,000 hours above 10,000.

ADVERTISING

It is important to identify in advance whether and how environmental considerations are to be incorporated into the process. In some cases, if you wish to use such considerations you must refer to them in advance in the contract notice. If you fail to do so, then you may not be able to incorporate those considerations at a later stage. For example:

- The contract opportunity must be clearly and accurately described and so if, for example, a contracting authority requires a road with tunnels rather than a road that is cut out of the hillside, this should be in the description of the contract so that economic operators are clear about the requirement.
- If you require variants – which could relate to environment-friendly alternatives – then this needs to be provided for in the contract notice.
- Minimum specifications that tenders have to meet must be clearly indicated in the contract notice or in the specification.
- Special contract conditions must be specified in the contract notice or in the specification.
- If the contracting authority is using permitted environmental issues as award criteria, then the award criteria must be specified in the contract notice or in contract documents.

SELECTION

Following publication of the contract notice, the contracting authority will receive requests from economic operators that wish to participate in the process and tender. The contracting authority will undertake a process in which it selects economic operators that it will then invite to tender.

For the purpose of this illustration, the selection stage is broken down into two distinct phases:

- Phase 1 relates to excluding candidates from the process altogether;
- Phase 2 relates to the selection of candidates that will then move forward in the process.

Selection Phase 1: Exclusion

The Directive sets out in article 45 the grounds on which candidates expressing an interest must be excluded and also grounds on which they may be excluded.

The grounds on which candidates must be excluded are listed in article 45(1) of the Directive. They cover convictions for participation in a criminal organisation, corruption, fraud and money-laundering. The grounds for obligatory exclusion do not specifically cover social or economic issues.

The grounds on which a candidate may be excluded from participation are listed in article 45(2). They include bankruptcy/winding-up (and equivalent situations), conviction for an offence related to professional conduct, grave professional misconduct, failure to pay social security contributions, and failure to pay taxes.

It is these non-mandatory grounds for exclusion that are most likely to form the basis for exclusion on issues linked to environmental considerations. The opportunities are limited.

Note: The appropriateness of such an approach will need to be considered carefully to ensure that it is proportionate and relevant to the contract, and economic operators should be made aware of the potential for exclusion on these grounds and of the way in which such a decision will be made. See section 4, "The Law", for details of the La Cascina case, which looked at this issue.

Exclusion on the grounds of professional misconduct or grave misconduct: It may be possible to argue that a candidate can be excluded for a past failure to comply with environmental policy, particularly where there was a deliberate and documented breach of contract terms requiring compliance with that policy.

Recital 43 refers to the potential for non-compliance with environmental legislation to amount to an offence concerning professional misconduct or grave misconduct of the economic operator.

Under Article 45(2)(c) and (d), an economic operator can be excluded when it has been convicted of "any offence concerning professional conduct" or "been guilty of grave professional misconduct", proven by any means that the contracting authority can demonstrate.

This route may also be available where there is an established breach of a code of professional ethics if this code includes environmental requirements. This approach will also be dependent upon effective and accurate contract monitoring, and care has to be taken to ensure that this approach is not conducted or operated in a manner that is discriminatory or creates a "blacklist" type of situation.

Selection Phase 2: Selection of Tenderers

The Directive sets out an exhaustive list of selection criteria that can be used by the contracting authority to select candidates to which an invitation to tender (or invitation to negotiate) will be issued.

The contracting authority applies selection criteria that assess the candidates in terms of:

- "economic and financial standing" (article 47); and
- "technical knowledge and/or professional ability" (article 48).

There are limits on the extent to which social and environmental selection criteria can be used at this stage. The Directive and case law confirm that:

- the list of selection criteria is exhaustive - it cannot be expanded;
- this limited list of criteria is narrowly constrained, with little room for interpretation or manoeuvre;
- the assessment can only relate to the candidate's ability to deliver the particular contract that is the subject matter of the procurement.

It is very unlikely that environmental considerations can be incorporated into consideration of a candidate's "economic and financial standing". This means that in most cases the only way in which environmental considerations can be used as grounds for not selecting a candidate is if they can be regarded as affecting the candidate's "technical knowledge and/or professional ability".

Technical knowledge and professional ability: social considerations may form part of the evaluation of technical knowledge and professional ability in a number of ways.

As mentioned above, the selection criteria are set out in an exhaustive list. The following examples show how some of the listed criteria could relate to environmental aspects, where the conditions referred to above are satisfied:

- **A statement of the tools, plant and technical equipment available** to the candidate for executing the contract – ***information about the economic operator's waste processing plant, for a waste disposal contract***
- **A description of the supplier's technical facilities**, its measures for ensuring quality, and its study and research facilities – ***details of the health protection measures an economic operator has in place for a contract for asbestos removal***
- **Specific expertise:** For a particular contract, specific environmental experience may be required and so information about the works carried out or contracts delivered can focus on demonstrating relevant experience.

For example, it is permitted to ask for the following information in the specified circumstances:

Experience of:

- managing hazardous waste, in relation to a waste disposal contract;
- designing buildings to a high environmental quality, in relation to a contract for architectural and design services;
- dealing with the removal and disposal of asbestos, in relation to a contract for the demolition of a building.

Environmental management schemes: In the environmental field, in specified circumstances it may also be possible to ask economic operators to demonstrate their technical capacity to meet requirements set by the contract so as to put into place certain environmental management measures. See section 4, "The Law" for further information about environmental management schemes.

See module E3 for further discussion of this stage.

TENDER EVALUATION

Overview

Once the economic operators have been selected, the contracting authority moves on to invite tenders from the shortlisted economic operators. The contracting authority evaluates tenders received and awards the contract.

The contracting authority will have decided at the procurement planning stage whether it will award the contract on the basis of (1) lowest price only; or (2) the most economically advantageous tender. The basis for the award must be stated in the contract notice.

It is possible to include environmental considerations in tenders to be awarded on the basis of lowest price by incorporating the relevant requirements into the technical specifications and contract conditions. As the price is the only award criterion, there is no opportunity to include criteria relating to environmental considerations.

Where a contracting authority proposes to award a contract on the basis of the most economically advantageous tender, there are more opportunities to incorporate environmental considerations.

See module E4 for further information on determining which award criteria to apply.

This illustration assumes that the basis of the award will be the most economically advantageous tender. This section looks at the way in which environmental considerations can be used as tender evaluation criteria.

The Directive

Article 53 sets out an illustrative list of tender evaluation criteria: "quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales services, technical assistance, delivery date and delivery period or period of completion". There is a specific reference to environmental criteria.

Setting award criteria

As explained in module E4, article 53 of the Directive refers to the tender most economically advantageous "from the point of view of the contracting authority", thus putting stress on the contracting authority's discretion in choosing the criteria to be applied. However, this discretion is not unrestricted and has some limitations. All award criteria relating to environmental considerations and used for assessing the most economically advantageous tender must meet four conditions:

- Award criteria must have a link to the subject matter of the contract
- Award criteria must be specifically and objectively quantifiable
- Award criteria must have been advertised/notified previously
- Award criteria must respect Community law – and thus must comply with the fundamental principles of equal treatment, non-discrimination and transparency

The award criteria must also be distinct from the selection criteria. See modules E3 and E4 for discussion on this point.

What does this mean for contracting authorities that wish to use award criteria relating to environmental and social considerations?

The following paragraphs provide short comments on these four conditions in the specific context of environmental criteria as well as examples of the sort of criteria that may be permitted.

When are criteria linked to the subject matter of the contract?

Article 53(1) states that the criteria chosen must be "linked to the subject matter of the public contract in question".

Comment:

As pointed out in module E4, the requirement for the criteria to be linked to the subject matter of the contract means that a contracting authority cannot determine the criteria to be applied in an abstract way. The criteria chosen must be directly linked to the specific contract that is the subject matter of the tender and must therefore apply to the supplies, works and services to be provided.

This requirement prevents a contracting authority from choosing criteria relating to secondary policies, such as social and environmental policies, if these criteria are chosen simply to promote and foster such policies in general and are not linked to the subject matter of the contract.

Examples from case law:

In the Concordia Buses case relating to the purchase of a bus fleet, one category of criteria was the economic operators' quality and environmental management measures. Within this category, points were awarded for a number of issues, including the levels of nitrogen oxide emissions below a defined level and external noise below a defined level. The European Court of Justice (ECJ) considered that there was sufficient linkage between the criteria and the subject matter of the contract.

The Wienstrom case (EVN AG and Wienstrom GmbH v Republic of Austria C-448/01) concerned the award of a contract for the supply of electricity. The contracting authority included as an award criterion with 45% weighting the requirement for the electricity supplied to be from renewable energy resources. The ECJ held that the public procurement legislation did not preclude the contracting authority from setting this criterion*.

*The ECJ did state that all such requirements had to be effectively verified – see section 4, "The Law", for further information about this case.

Compliance with technical specifications: Where environmental requirements are legitimately incorporated into the technical specification, then there is a clear link with the subject matter of the contract. It should be possible to translate all technical specifications into award criteria.

How can award criteria be specifically and objectively quantifiable?

In the Concordia Buses case the ECJ ruled that award criteria must never confer unrestricted freedom of choice on contracting authorities. In practice this has been interpreted as a requirement to set specific, product-related and measurable criteria – which will limit a contracting authority's discretion when undertaking the evaluation.

In the Concordia Buses case, the contracting authority had specified and published the system for awarding extra points for certain levels of noise and emissions. The ECJ considered that this system was specific and objectively quantifiable.

In the Wienstrom case, the ECJ held that in order to give tenderers equal opportunities in formulating the terms of their tenders, the contracting authority would have to formulate its criteria in such a way that "all reasonably well-informed tenderers of normal diligence [would] interpret them in the same way". The ECJ also required that the contracting authority only set criteria against which the information provided by tenderers could actually be verified.

How does the contracting authority comply with the requirement to have previously advertised the award criteria?

The contracting authority complies with its basic obligations by completing the standard form contract notice and publishing it in accordance with the requirements of the Directive. Detailed criteria and weightings must be included in either the contract notice or the contract documents.

How does the contracting authority ensure that the award criteria respect Community law?

Before a contracting authority sets an award criterion it must consider, in particular, whether the criterion ensures equal treatment and is transparent or, on the other hands, whether it is directly or indirectly discriminatory and has the potential of distorting trade. This is the case for all criteria, including criteria incorporating environmental considerations.

Additional criteria

It may be possible to use environmental conditions as "additional criteria", which can be used to decide a "tie-break" situation. This is provided that:

- the contracting authority has fully evaluated the tenders and has a tie-break situation between two or more tenders;
- the condition (or conditions) is in line with Community law;
- the condition(s) is explicitly mentioned in the contract notice.

See the information below on the "Nord Pas-de-Calais" case, where this issue was considered in the context of social conditions.

Other possibilities for the incorporation of environmental considerations at the evaluation stage:

In the specific context of environmental considerations, the Commission's IC on environmental issues refers to possibilities of:

Taking into consideration all costs incurred during the whole life cycle of the product (See module E4 for further comments on life-cycle costing. See also the European Commission's Fact Sheet on Lifecycle Costings in Green Public Procurement at the website referred to above.) Examples of where life-cycle costing can be used to promote environmental considerations include:

- **Savings on use of water and energy:** for example, in the design of energy-efficient buildings where the initial building costs may be higher but the life-cycle costs are lower than for a traditionally designed building due to better insulation, air circulation systems rather than air conditioning, and the re-use of rain water.

- **Savings on disposal costs:** these may relate to the physical costs of removal to pay for secure disposal, for example by re-using materials in road construction or by requiring the handling and disposal of hazardous waste as part of the building demolition process.

Taking into account externalities: externalities are damages or benefits that are not paid for by the polluter or beneficiary under normal market conditions but are borne by society as a whole. The IC contains some warnings about this approach, which should only be taken into account where the external costs are due to the execution of the contract and where at the same time the costs are borne directly by the purchaser of the product or the service. The IC also refers to the possibility of such a measure having the potential of favouring a preferred tender or of disguising discrimination, neither of which is permitted.

Abnormally low tenders: Article 55 of the Directive permits a contracting authority to reject abnormally low tenders. A contracting authority that is concerned about what it regards as an abnormally low tender must first of all request in writing the details of constituent elements of the tender that it considers relevant. Only after proper consideration of that information may it reject a tender as being abnormally low.

Article 55 sets out an illustrative list of the details that a contracting authority may request. These include information on the technical solutions and also, according to article 55(d), "compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed".

Where the requirements set by the contracting authority comply with the provisions of EU law and the Directive, non-compliance with these requirements may then provide grounds for rejection on the basis of an abnormally low tender.

This approach is raised as a possibility in the context of the IC on social issues, but it will be equally applicable to environmental issues incorporated into technical specifications.

CONTRACT CONDITIONS

Incorporating environmental contract conditions

Contract conditions can include contract performance clauses, which are used to specify how a contract is to be carried out.

Article 26 of the Directive specifically states that "contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing performance of a contract may, in particular, concern social and environmental considerations."

Recital 33 provides further guidance and states that contract performance conditions are compatible with the Directive "provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents".

Importantly, this recital explains that contract conditions "may, in particular, be intended to favour …… the protection of the environment".

Summary: Environmental considerations can therefore be included as contract conditions provided that they:

- relate to the performance of the contract;
- are published in the contract notice or contract documents; and
- comply with Community law.

Restrictions on the use of these conditions during the procurement process

Contract conditions should not be disguised technical specifications, selection criteria or evaluation criteria; they should be able to be met by whoever is awarded the tender as from the time that the contract starts. Proof of compliance with contract conditions should not be requested during the procurement procedure. Economic operators must accept the conditions in order to be awarded the contract.

Contract conditions should be used carefully and they should be supported by the costs and benefits that they accrue.

Contract conditions do still need to be set out clearly so that economic operators that are tendering are aware of all of the obligations in the contract and are able to price accordingly.

Examples of possible contracts with conditions incorporating environmental considerations are:

- A works contract for construction of a new office building, which includes a contract condition requiring the use of re-usable containers to transport materials to a construction site and efforts to reduce waste generation on site and to increase recycling rates
- A cleaning contract requiring the use of dosage indicators to ensure that an appropriate quantity of cleaning product is used and obliging the contractor to recycle packaging wherever possible
- A contract for the supply of photocopier paper requiring delivery in appropriate quantities so as to keep the number of deliveries to a minimum and delivery outside peak times to reduce petrol consumption by the delivery vehicles.

Contract Management

An important part of contract management is monitoring to ensure that the contract is being carried out as agreed. Careful drafting of specifications and of contract conditions to incorporate environmental conditions is a waste of time if the contracting authority fails to check whether those requirements are complied with and fails to take action if it establishes that the requirements are not being met.

See module G on contract management.

UTILITIES

Utilities

To a large extent the same legal rules apply under the Public Sector Directive 2004/18/EC and the Utilities Directive 2004/17/EC. These directives have many similar or parallel provisions. The European Court of Justice (ECJ) has tended to apply the same interpretation to both public sector contracting authorities and utilities.

The key difference relates to the rules on the exclusion and selection of economic operators, where the provisions in the Utilities Directive are much less detailed and less prescriptive than those in the Public Sector Directive. These provisions are discussed further below under the heading "incorporating environmental considerations into the procurement process".

What does the Directive* say about environmental considerations?

*References to the Directive are to the Utilities Directive 2004/17/EC, unless indicated otherwise.

The Directive contains a number of provisions that refer specifically to the incorporation of environmental considerations into the procurement process. In this context it is helpful to look at the recitals to the Directive as well as its articles. The recitals are not operative parts of the Directive, but they do provide some explanation and place the specific provisions in context. The relevant recitals and articles are listed below.

- **Recital 12**: integrating environmental protection requirements (Recital 5 in Directive 2004/18/EC)
- **Recital 42 and Article 34**: technical specifications and environmental characteristics (Recital 29 and Article 23 in Directive 2004/18/EC)
- **Recital 44 and Article 38**: conditions for performance of contracts (Recital 33 and Article 26 in Directive 2004/18/EC)
- **Article 39**: informing economic operators about provisions relating to taxes, and environmental protection (Recital 27 in Directive 2004/18/EC)
- **Recital 54**: referring to the potential for non-compliance with environmental legislation amounting to an offence concerning professional misconduct or grave misconduct of the economic operator (Recital 43 in Directive 2004/18/EC)
- **Recital 45 and Article 52**: evidence of economic operator's technical abilities – environmental management measures (Recital 44 and Articles 48 and 50 in Directive 2004/18/EC)
- **Recital 55 and Article 55**: environmental characteristics as evaluation criteria (Recital 46 and Article 53 in Directive 2004/18/EC)

For detailed commentary on these provisions, please see the main narrative on environmental considerations.

What does the European Court of Justice say about environmental considerations?
The ECJ has tended to apply the same interpretation to both public sector contracting authorities and utilities, and so the discussion above in the main narrative is also relevant to utilities.

What does the European Commission say about environmental considerations?
The EC's views on this issue, which are set out in the Commission's Interpretative Communication and other publications, applies to utilities to the extent to which the same or parallel rules apply to both public sector contracting authorities and utilities.

Incorporating environmental considerations into the procurement process: stages in the procurement process

Preparation – Purchasing decision: what and how

What to purchase, how to purchase and what type of purchasing method is used: In principle the Directive does not prevent a contracting authority from implementing environmental considerations when deciding what to purchase. Strategic purchasing decisions can therefore be taken with environmental considerations in mind provided that they are not in breach of the Treaty provisions. See examples in the main narrative.

Preparation - General description

The Directive distinguishes between more general descriptive documents (including broad specifications) and "technical specifications".

The general descriptive documents are to reflect the key purchasing decisions, including how the contract is to be delivered and packaged. This may include environmental considerations.

Preparation - Technical specifications

The Directive contains parallel provisions to those in Directive 2004/18/EC on the incorporation of environmental considerations into the technical specifications. The same legal principles also apply. See recital 42 and article 34 as well as article 53(3) on qualification systems.

Advertising

It is important to identify in advance whether and how environmental considerations are to be incorporated into the process. In some cases, if you wish to use such considerations you must refer to them in advance in the contract notice. If you fail to do so, then you may not be able to incorporate those considerations at a later stage. The same principles apply when advertising a qualification system. For example:

- The contract opportunity must be clearly and accurately described and therefore if, for example, a utility requires an energy-efficient facility designed in a manner thatis sympathetic to the local environment, then this should be incorporated in the description of the contract so that economic operators are clear about the requirement.
- If you require variants – which could relate to environment-friendly alternatives – then this should be set out in the contract notice.
- Minimum specifications must be set out in the contract notice or in the specification.
- Special contract conditions must be specified in the contract notice or in the specification.
- If the utility is using permitted environmental issues as award criteria then the award criteria must be specified in the contract notice or contract documents.

Selection – Phase 1: Exclusion

This is one of the main areas where the legal provisions in the Directive applying to utilities are different to the legal provisions in Directive 2004/18/EC applying to public sector contracting authorities. There is also a distinction between utilities that are public sector contracting authorities and those that are not.

Grounds for obligatory exclusion: Article 54 stipulates that a utility that is a contracting authority must comply with the provisions of article 45(1) of Directive 2004/18/EC. Article 45(1) obliges contracting authorities to exclude candidates from participation in the procurement process where these candidates have been found guilty of specified offences. The offences cover convictions for participation in a criminal organisation, corruption, fraud and money-laundering. The grounds for obligatory exclusion do not specifically cover social or environmental issues.

Utilities that are not contracting authorities are not obliged to exclude candidates from participation in the procurement process under the provisions of article 45(1) of Directive 2004/18/EC. However, they may choose to do so.

Grounds for discretionary exclusion: All utilities may choose to exclude candidates on the discretionary grounds set out in article 45(2) of Directive 2004/18/EC, but they are not obliged to do so. The discretionary grounds include exclusion on the grounds of professional misconduct or grave misconduct.

Recital 54 refers to non-compliance with environmental legislation as potentially constituting an offence concerning the professional misconduct or grave misconduct of the economic operator.

See the main narrative section for more information on the grounds for obligatory exclusion and discretionary exclusion.

Selection – Phase 2: Selection of tenderers

The Utilities Directive does not set out an exhaustive list of the criteria to be used for the selection of tenderers. This is very different to the position under Directive 2004/18/EC, where there is a detailed and exhaustive list of the criteria that can be used and the information that can be requested.

Under article 54 utilities are required, when selecting economic operators, to use "objective rules and criteria". Those objective rules and criteria must be available to the interested economic operators. Utilities probably, therefore, have more flexibility to incorporate environmental considerations into this stage of the procurement, provided that the criteria relate to the subject matter of the contract, relate to the economic operator's ability to deliver the particular contract that is the subject matter of the procurement, and do not breach Treaty principles.

The same principles of selection apply to the selection of economic operators to participate in qualification systems (see article 53).

Tender evaluation

Once the economic operators have been selected, the utility moves on to invite tenders from the shortlisted economic operators. The utility evaluates tenders received and awards the contract.

The utility will have decided at the procurement planning stage whether it would award the contract on the basis of (1) lowest price only or (2) the most economically advantageous tender. The basis for the award must be stated in the contract notice.

It is possible to include environmental considerations in tenders to be awarded on the basis of lowest price by incorporating the relevant requirements into the technical specifications and contract conditions.

Where a utility proposes to award a contract on the basis of the most economically advantageous tender, then there are more opportunities to incorporate environmental considerations and to include those considerations as award criteria.

Where a qualification system is used, the utility is still required to invite tenders by way of a call for competition. The same principles will apply to the use of tender evaluation criteria.

The Directive: Article 55 sets out an illustrative list of tender evaluation criteria: "quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales services, technical assistance, delivery date and delivery period or period of completion". As you can see, there is a specific reference to environmental criteria.

The same principles set out in the main narrative apply to the setting of award criteria for utilities tender evaluations. See the main narrative for further discussion on this point.

Contract conditions

Contract conditions can include contract performance clauses that are used to specify how a contract is to be carried out.

Article 38 of the Directive specifically states that "contracting entities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing performance of a contract may, in particular, concern social and environmental considerations."

Recital 44 provides further guidance and states that contract performance conditions are compatible with the Directive "provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents".

Importantly, this recital explains that contract conditions "may, in particular, be intended to favour …… the protection of the environment".

Summary: Environmental considerations can therefore be included as contract conditions provided that they:

- relate to performance of the contract;
- are published in the contract notice or contract documents; and
- comply with Community law.

Contract conditions should be used carefully, and they should be supported by the costs and benefits that they accrue.

Contract Management

An important part of contract management is monitoring to ensure that the contract is being carried out as agreed. Careful drafting of specifications and contract conditions to incorporate social conditions is a waste of time if the utility fails to check whether those requirements are complied with and fails to take action if it establishes that the requirements are not being met.

See module G on contract management.

SECTION 2C
SOCIAL CONSIDERATIONS

WHAT DOES THE DIRECTIVE SAY ABOUT SOCIAL CONSIDERATIONS?

The following section provides an overview of where social considerations are addressed in the Directive.

The Directive contains a number of provisions that refer specifically to the incorporation of social considerations into the procurement process. In this context it is helpful to look at the recitals to the Directive as well as the articles. The recitals are not operative parts of the Directive, but they do provide some explanation and place the specific provisions in context. The relevant recitals and articles are listed below.

- **Recital 1**: context for the new Directive
- **Recital 29 and Article 23**: technical specifications and accessibility criteria for people with disabilities
- **Recital 33 and Article 26**: conditions for performance of contracts
- **Article 27**: informing economic operators about provisions relating to taxes, employment protection provisions and working conditions
- **Recital 43**: referring to the potential for non-compliance with the Directive's provisions relating to equal treatment to amount to an offence concerning the professional misconduct or grave misconduct of the economic operator
- **Recital 46 and Article 53**: social characteristics as evaluation criteria
- **Recital 26 and Article 19**: reserved contracts

These provisions are explained in more detail in the following paragraphs.

Context for the new Directive:

Recital 1 provides some background on the reasons why the new Directive was prepared. The recital refers specifically to the need to take account of European Court of Justice (ECJ) case law on award criteria. This case law clarified the possibility for contracting authorities, so as to meet the needs of the public concerned, to include environmental and social criteria. The recital states that this is "provided that such criteria are linked to the subject matter of the contract, do not confer an unrestricted freedom of choice of the contracting authority, are expressly mentioned" and comply with the fundamental Treaty principles.

Comment:

When considering the incorporation of social considerations it is always necessary to consider whether the proposed approach is in compliance with the fundamental Treaty principles. This is the case even where there are specific provisions in the Directive permitting the use of these considerations.

The Directive makes this clear as does the ECJ case law and guidance.

Technical specifications – accessibility criteria for people with disabilities:

Recital 29 and Article 23 (1) state that contracting authorities should, "whenever possible, lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users".

Conditions for the performance of contracts:

Recital 33 states that contract performance conditions are compatible with the Directive "provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents".

Importantly, this recital explains that contract performance conditions "may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, or the protection of the environment".

The recital goes on to refer to examples of measures for the recruitment of long-term job-seekers, provision of training for the unemployed and young persons, compliance with the International Labour Organisation Conventions, and the recruitment of more handicapped persons than is required under national legislation.

Article 26 sets out the relevant provision:

"Contracting authorities may lay down special conditions relating to the performance of the contract." These conditions "may, in particular, concern social and environmental considerations". This is provided that :

- the special conditions are compatible with Community law; and
- they are indicated in the contract notice or in the specifications.

Informing economic operators about provisions relating to taxes, employment protection provisions and working conditions:

Article 27 permits a contracting authority to indicate in the contract documents from which bodies economic operators may obtain information relating to obligations in force in the member states, regions or locations where a works or services contract is to be performed. This information relates to taxes, environmental protection, employment protection provisions, and working conditions applying to the delivery of the contract.

Where a contracting authority notifies the economic operators in this manner, it may then request tenderers to indicate that they have taken into account in the preparation of their tenders those obligations relating to employment protection provisions and working conditions.

Social characteristics as evaluation criteria:

Recital 46 refers to economic and qualitative criteria for the award of the contract and mentions as examples the use of "criteria aiming to meet social requirements".

Article 53(1) sets out a non-exhaustive list of criteria on which a contracting authority may base its award for the most economically advantageous tender.

Contracts reserved for sheltered workshops or sheltered employment programmes for people with disabilities:

Recital 28 explains that employment and occupation are key elements in guaranteeing equal opportunities for all and contribute to integration into society. Sheltered workshops and sheltered employment programmes help facilitate this integration, but they may not be able to obtain contracts under normal conditions of competition. EU Member States may therefore limit participation in competition for certain "reserved contracts" to sheltered workshops and sheltered employment programmes.

Article 19 permits EU Member states to have "reserved contracts". These are contracts to be performed by sheltered workshops and sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or seriousness of their disabilities, cannot exercise occupations under normal conditions.

The contracting authority is still required to advertise in the *Official Journal of the European Union* by publishing a contract notice and to follow the usual competitive procedures, but it may reserve the right to participate in the competition reserved for sheltered workshops and sheltered employment programmes.

The contract notice must indicate that the contract is a reserved contract, and the standard form contract notice includes a section covering this requirement in III.2.4. (amend or delete cross-reference for local advertisements)

Good practice note

The provisions in the Directive allow for social considerations to be taken into account at different stages in the process. Careful thought needs to be given, before the contract is advertised, to how those considerations will be incorporated into the process because early action may be required.

For example:

Article 19 on Reserved Contracts will be linked to a decision by the contracting authority to limit the contract opportunity to sheltered workshops/programmes. This is a decision that will be made at a very early procurement stage before advertisement and will then be picked up in the contract notice.

Article 23 on technical specifications must also be considered early on in the process, as technical specifications should be prepared prior to advertisement.

Article 26, which relates to social conditions in the contract, needs to be considered before the contract conditions are drafted and issued. If they are "special contract conditions" (see 13.1), they will need to be referred to in the contract notice.

WHAT DOES THE EUROPEAN COURT OF JUSTICE (ECJ) SAY ABOUT SOCIAL CONSIDERATIONS?

The ECJ has considered a number of different aspects relating to the incorporation of social considerations into procurement processes and the extent to which that is permissible under the Treaty of Rome principles and the procurement directives.

Three key cases are outlined below.

The first case was decided before the introduction of Directive 2004/18 and it influenced the drafting of that Directive.

The second and third cases show how the ECJ has responded to national policies or laws that have been linked to social considerations.

Case 1: Social conditions as criteria for exclusion

Facts: The "Beentjes" case (Case 31/87 Gebroeders Beentjes BV v The Kingdom of the Netherlands) arose from a decision of a local committee to exclude Beentjes from the tendering procedure for a public works contract for land consolidation, even though Beentjes' tender was the lowest tender. The contract was awarded to the next lowest tenderer.

One of the reasons for this exclusion was that Beentjes did not seem to be in a position to employ long-term unemployed persons. This requirement had been expressly set out in the invitation to tender.

Decision: The ECJ looked at the way in which this criterion (and other disputed criteria) could be used. It commented on whether and how the criterion was compatible with the directive and Treaty principles and whether the criterion would have to be specifically mentioned in the contract notice.

The ECJ found that the requirement for tenderers to demonstrate that they were in a position to employ long-term unemployed persons was a condition that had no relation to either checking the economic operators' suitability on the basis of their economic and financial standing and their technical knowledge (selection) or to the criteria for award of the contract (tender evaluation).

The ECJ commented that this type of condition could be permitted if it were compatible with the relevant provisions of European Community law, including Treaty principles.

The ECJ classified the requirement as an "additional specific condition" relating to suitability. It ruled that if a contracting authority wished to include "additional specific conditions", then those conditions would have to be referred to in the contract notice.

Impact on Directive 2004/18: Article 26 incorporates this last point into the Directive. Under article 26 contracting authorities can lay down "special conditions" that are compatible with Community law provided that they are referred to in the contract notice or in the specification.

What does this mean in practice?

The ruling itself is somewhat ambiguous and does not specifically state that social conditions cannot be used to exclude economic operators. The Commission, in interpreting this case, aligned itself with the view of the Advocate General in Beentjes as meaning that:

(1) special conditions can be laid down, including in the contract; but

(2) economic operators that accept the condition cannot be excluded just because the contracting authority thinks that the economic operator will not meet that condition.

Comment: This interpretation is set out in the Commission's interpretative communication (see below.) It is based on the view that the list of selection criteria in the Directive is exhaustive and that the ability to meet conditions is not one of the listed selection criteria.

Directive 2004/18 was drafted after the Beentjes decision and article 26 of the Directive does now specifically permit the inclusion of "special conditions" provided that they relate to the performance of the contract. The Directive does not, however, address the issue of whether non-compliance with special conditions can provide grounds for exclusion.

Non-compliance with technical specifications can provide grounds for exclusion, but it is argued that as special conditions are not the same as technical specifications and do not address the issue of technical capacity, non-compliance with special conditions* do not provide grounds for exclusion.

Case 2: Regional preferences in works contracts

The case of the Commission of the European Communities v Italian Republic (C-360/89) concerned a challenge by the European Commission in relation to Italian legislation that had created regional preferences in works contracts.

Facts: The Commission challenged a number of provisions of the law, including:

(1) a provision requiring the main contractor for certain types of works contracts to reserve a percentage of the work to an undertaking whose registered office was in the region where the works were to be carried out; and

(2) a provision requiring contracting authorities, in deciding to invite to tender, to give preference to consortia and joint ventures, which included undertakings that carried out their main activities in the area where the works were to be carried out.

Decision: The ECJ ruled that both of these provisions were in breach of the Treaty requirement to uphold the freedom to deliver services.

The Commission also claimed that the second provision was in breach of the articles set out in the procurement directive in force at the time, relating to the selection of economic operators. (These were very similar to the provisions in the current Directive relating to selection, requiring the selection to be based on the grounds for exclusion and selection listed in the Directive.)

The ECJ ruled that the provisions of the Directive required the contracting authority to make its selection based only on the grounds for exclusion and selection listed in the Directive.

See part 2A for comments on local preferences, prices preferences and offer-back provisions.

Case 3: Local law requiring government contractors to comply with local collective agreement on wages

Facts: The "Ruffert" case (C-346/06 Ruffert v Land Niedersachsen) concerned a public contract for construction work on a prison roof. The procurement law of Lower Saxony required economic operators (1) to adhere to the minimum wage set under local collective agreements in the areas where the work was to be carried out, (2) to impose the same obligation on their sub-contractors, and (3) to monitor for compliance. Under the law non-compliance could result in a 1% compliance penalty. A Polish subcontractor to the successful tenderer was alleged to have violated these provisions in the wages paid to Polish workers on the project.

The German court referred the question of whether this local law was lawful under the EC Treaty. The ECJ also considered the application of this law to the Posted Workers Directive.

Decision: The ECJ ruled that the provision of the law was in breach of the Treaty requirement to uphold the freedom to deliver services (and also in breach of the Posted Workers Directive). EU Member States may not in general require contractors for government contracts to adhere to wage levels set in collective agreements that are only in force locally and that only apply to government contracts.

Comment: This case potentially casts doubt on the possibility of imposing conditions that relate to workers on public contracts where the conditions do not apply to workers more generally, *i.e.* to both the public and private sectors.

Award criteria:

Article 53 of the Directive has a non-exhaustive list of award criteria. The "Concordia Buses" Case discussed in the context of environmental considerations means that there is a requirement for linkage between the criterion and the contract referring to the criteria as "linked to the subject-matter of the public contract in question".

Comment:

Social considerations are not specifically mentioned in the non-exhaustive list of award criteria, but this does not mean that they are not permitted.

In practice, social issues are probably more difficult to include in a procurement process than environmental issues.

It is relatively easy to find a direct link between the goods, works and services that are being procured and environmental factors – such as less toxic emissions from buses, the purchase of recycled paper or low-energy light bulbs, and compliance with environmental standards for waste disposal services.

For works and supplies, the linkage between social considerations and the subject matter of the contract is often harder to establish. For service contracts, particularly where direct contact with users is required, the social issues are often easier to incorporate into the procurement process.

WHAT DOES THE EUROPEAN COMMISSION SAY ABOUT SOCIAL CONSIDERATIONS?

History: The European Commission has, historically, been reluctant to encourage the use of procurement as a means for the implementation of social policy. This approach is changing.

There is a particular concern that the unfettered use of social considerations in procurement could result in breaches of Treaty principles by encouraging discriminatory practices, unequal treatment and restrictions on the freedom of movement and development of the internal market.

There was very little in the original procurement directives (prior to Directive 2004/18) about the extent to which it is permissible to take social considerations into account in the procurement process. Contracting authorities were reliant on case law and on the European Commission's interpretative communications (which are not legally binding) when exploring possibilities for incorporating social considerations into public procurement and establishing what is and is not permissible.

Interpretative Communications: The interpretative communication on environmental considerations has been referred to above. The Commission has also issued an interpretative communication on social considerations.

The two interpretative communications need to be read together as the interpretative communication on social considerations refers to discussion and commentary contained in the interpretative communication on environmental considerations.

The two Commission Interpretative Communications are:

- COM (2001) 566 Final: Commission Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement
- COM (2001) 274 Final: Commission Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement

The content of the interpretative communication on social considerations is summarised below.

Relevance: During the negotiations on the draft Directive 2004/18 there was a lot of debate on this issue. As you can see from the outline of the contents of the Directive, the position has changed, with the incorporation of a number of provisions addressing social issues and the inclusion of a number of principles derived from case law. The Directive is not comprehensive, however, in tackling the issue of when social considerations can or cannot be used.

The Commission's Interpretative Communications were issued before the new Directive and there have been further decisions by the ECJ on issues relating to the incorporation of social criteria. The interpretative communications still do provide an indicator of the Commission's thinking on these issues.

Summary of the contents of the Commission's Interpretative Communication ("IC") on the incorporation of social considerations into public procurement

The IC starts by providing some background and context to the issues relating to the incorporation of social considerations into public procurement. It then goes on to consider the different stages in the procurement process, providing comments on the relevant provisions of the directives in force at the time and on case law as well as practical examples.

The stages in the procurement process that are discussed are:

Pre-procurement: referred to as "Definition of the subject matter of the contract". This is identified as the first occasion when contracting authorities can take into account social considerations. It is pointed out that at this stage contracting authorities have wide opportunities and scope to take into account these types of considerations. Contracting authorities are free to define the subject of the contract provided that this is in compliance with the requirements of the Treaty and European law.

Technical specifications: The IC emphasises the need to ensure that the technical specifications are clearly linked to the subject matter of the contract and are not discriminatory. Social considerations may be incorporated into the technical specifications where they are relevant to the contract and to contract delivery.

Selection: The IC distinguishes between the grounds for exclusion and selection based on technical capacity/ability.

Exclusion: The commentary confirms the possibility of exclusion on the grounds of non-compliance with relevant legislation and discusses the possibility of excluding candidates on the grounds of grave professional misconduct in relation to social issues.

Selection on the basis of technical capacity/ability: The IC refers to the possibility of selection linked to social considerations and highlights the requirement for a clear link with the subject matter of the contract.

Award of the contract: The IC discusses how social considerations may be incorporated as evaluation criteria when a contract is to be awarded on the basis of the most economically advantageous tender. There is a clear warning about the requirement to ensure that such criteria are related to the subject matter of the contract and concern the nature of the work to be carried out under the contract or the manner in which the work is done. These criteria must also be measurable.

Additional criteria: The IC also mentions the possibility of using social evaluation criteria and refers to this possibility being available only after tenders have been assessed from an economic perspective.

Abnormally low tenders: The IC refers to the possible exclusion of abnormally low tenders where they are linked to non-compliance with legal rules on issues such as employment, labour law, and health and safety.

Execution of the contract: The IC comments on the use of contract clauses and emphasises the need to ensure that these clauses are not, in effect, disguised technical specifications or criteria. Contract clauses relating to social issues are permissible provided that they are related to the delivery of the contract and are compliant with Treaty principles. The IC highlights the wide possibilities for the use of social clauses and provides a number of examples.

Contracts not covered by the public procurement directives:

The IC includes sections on contracts not covered by the public procurement directives. These sections address the need for compliance with Treaty and European law requirements.

Social provisions applicable to public procurement:

The IC contains some detailed discussion and comments on the implications of Treaty and European law requirements in the specific context of the freedom of movement and the protection of workers' rights under the Posted Workers Directive and the Transfer of Undertakings Directive.

Other Commission publications: The Commission has also published other documents on this issue. Helpful documents include how to facilitate access to public procurement contracts for small and medium-sized enterprises (SMEs):

The "European code of best practices facilitating access by SMEs to public procurement contracts" is a Commission Staff working document published in 2008 (SEC(2008) 2193).

Comment:

The European code of best practices facilitating access by SMEs to public procurement contracts is intended to provide general guidance on how to apply the legal framework in such a way as to enable SMEs to participate in contract award procedures. The code highlights a number of national rules and practices that facilitate access and provides useful practical examples.

This code is covered in more detail in part 2D on SMEs.

INCORPORATING SOCIAL CONSIDERATIONS INTO THE PROCUREMENT PROCESS

In the next few pages we look at the stages in the procurement process and provide comments and some guidance on incorporating social considerations into the procurement process.

The restricted procedure and contract award based on the most economically advantageous tender have been used as they make it possible to illustrate both the selection and shortlisting of economic operators and the greater opportunities available for the consideration of social and environmental issues when evaluating the tender. The principles apply to all four main competitive procedures.

Preparation

General comment: There is very little in the Directive that specifically covers the conduct of the pre-advertisement stage. The Directive's focus is on the conduct of the competitive procurement process.

In practice, the preparation stage provides significant opportunities for the inclusion of social considerations that will impact on the entire procurement process. This is because it is at the preparation stage that:

- key strategic purchasing decisions are made;
- the subject matter of the contract is defined;
- the contract notice is drafted;
- general and technical specifications are prepared;
- the contract terms and conditions are drafted*.

Each of the above steps can include consideration of social considerations.

These steps are directly linked with later stages in the process, and therefore the decisions made before the start of the procurement can have a major impact. For example, if technical specifications are prepared taking into account relevant social considerations, these specifications can then form part of the tender evaluation criteria and thus impact on the final award decision.

* Contract conditions are discussed under "Contract Conditions".

Preparation – Purchasing decision: what and how

What to purchase, how to purchase and what type of purchasing method is used: In principle the Directive does not prevent a contracting authority from implementing social considerations when deciding what to purchase. Strategic purchasing decisions can therefore be taken with social issues in mind provided that they are not in breach of the Treaty provisions.

For example, social issues may legitimately impact on a decision on what is to be purchased, how the procurement is packaged, and what type of purchasing method is used.

Examples of the impact of social issues on the decision on what to purchase:

(1) A housing authority wishes to award a contract for double-glazed windows for social housing. It is aware that there are a number of sheltered workshops across the EU that produce double-glazed window units. It decides to classify this as a "reserved contract" under article 19 and thereby limit the competition for this contract to operators of sheltered workshops/programmes. This limitation of the competition is specifically permitted in the Directive.

(2) A local authority has funds available to build one new community care centre in the current financial year. It intends to go to tender for a construction contract to carry out that work. It has a choice between two different sites in the local authority area. It chooses to build the new community care centre in an area of urban deprivation where there are high levels of social need. The local authority is free to make this decision.

Example of the impact of social considerations on the packaging of a procurement process:

Encouraging small and medium-sized enterprises (SMEs) to participate in procurement processes may be regarded as a social consideration. SMEs can be disadvantaged if contracting authorities decide to only offer large-value or large-scale contracts. SMEs are often not in a position to meet the selection criteria. Provided that it makes good economic sense to do so and is not in breach of Treaty principles, contracting authorities may decide to package contracts in such a way as to make the opportunities more appealing to SMEs.

A good example is the decision to subdivide a contract into lots. Subdivision into smaller lots can facilitate SME participation, as smaller lots may correspond better to the production capacities of SMEs. Subdivision into specialist lots may correspond better to the particular expertise of SMEs. A contract for catering services could be divided into smaller lots or a contracting authority could choose to award contracts for some specialist aspects separately so as to encourage participation by SMEs.

Contracting authorities must keep in mind that they must not use this type of approach in a way that impairs competition or favours particular economic operators. Making it possible for economic operators to tender for an unlimited number of lots has the advantage of not discouraging general or larger contractors from participating.

Example of the impact of social issues on the purchasing method used:

As explained above, SMEs can be disadvantaged by larger, generalised contracts. A contracting authority may therefore decide to set up a multi-supplier framework agreement with a range of different types of economic operators selected to participate. Framework agreements generally provide wider and more varied opportunities for different types of economic operators.

Variants:

The Commission points out in its publications the potential use of variants as a way of assessing the benefits of tenders that incorporate relevant social considerations.

General description

The Directive distinguishes between more general descriptive documents (including broad specifications) and "technical specifications".

The general descriptive documents are to reflect the key purchasing decisions, including how the contract is to be delivered and packaged. As we have seen above, this may include social considerations.

Technical specifications

Technical specifications are defined in Annexe VI to the Directive and, put simply, are requirements that relate directly to the characteristics of the subject matter of the contract. Technical specifications cover matters such as design requirements, costings and materials required in a works contract and quality levels, performance levels and safety standards in relation to services and supplies.

Technical specifications have two functions:

- They describe the contract to the market so that economic operators can decide whether the contract is of interest to them. This means that they help to determine the level of competition.
- They provide measurable requirements against which tenders can be evaluated and constitute minimum compliance criteria.

As a general rule, contracting authorities can incorporate social considerations into technical specifications provided that those requirements relate to the subject matter of the contract and comply with the Directive and with Treaty principles.

Incorporating national technical rules: Article 23 provides that technical specifications may be formulated in specified ways "without prejudice to mandatory national technical rules to the extent that they are compatible with Community law." This means that, provided that national legislation/rules are compatible with Community law, they can include requirements linked to social considerations.

For example, national laws or national technical rules require disabled access to public buildings. Where national laws or national technical rules are relevant to the particular contract, then those requirements can be incorporated within the technical specification.

Other methods of incorporating social considerations into the technical specifications:

Accessibility: Article 23 (1) of the Directive requires contracting authorities, whenever possible, when considering technical specifications to define these specifications so as to take into account accessibility criteria for people with disabilities or to design them for all users.

Good examples of where technical specifications can be defined in this way include specifying buses with good disabled access or requiring the design of a new library to specifically address the needs of those with limited or no eyesight.

Characteristics of the contract: Article 23 (3) permits a contracting authority to include environmental characteristics in the technical specifications. This is provided that

- those characteristics relate to the performance or to functional requirements; and
- the parameters are sufficiently precise to allow economic operators to determine the subject matter of the contract and to allow the contracting authority to award the contract.

Although not specifically referred to in the Directive, the same principles apply to the incorporation of social characteristics into technical specifications.

Examples include specifications requiring:

- computer equipment adapted to the needs of the visually impaired;
- school meals that include options for students with special dietary requirements.

Advertising

It is important to identify in advance whether and how social considerations are to be incorporated into the procurement process. In some cases, if you wish to use such considerations you must refer to this in advance in the contract notice. If you fail to do so, then you may not be able to incorporate those considerations at a later stage. For example;

- If the contract is reserved under article 19 to sheltered workshops/employment programmes, then this must be indicated in the contract notice.
- The contract opportunity must be clearly and accurately described and so if, for example, a contracting authority requires special design requirements ensuring easy access to a building for people with disabilities, then this should be in the description of the contract so that economic operators are aware of the requirement.
- If you require variants – which could relate solutions with social benefits – then this needs to be provided for in the contract notice.
- Minimum specifications that tenders have to meet must be specified in the contract notice or in the specification.
- Special contract conditions must be specified in the contract notice or in the specification.
- If the contracting authority is using permitted social considerations as award criteria, then these award criteria must be specified in the contract notice or in the contract documents.

Selection

Following publication of the contract notice, the contracting authority will receive requests from economic operators that wish to participate in the process and tender. The contracting authority will undertake a process in which it selects economic operators that it will then invite to tender.

For the purpose of this illustration, the selection stage is broken down into two distinct phases:

- Phase 1 relates to excluding candidates from the process altogether
- Phase 2 relates to the selection of candidates that will then move forward in the process.

Selection – Phase 1: Exclusion

The Directive sets out in article 45 the grounds on which candidates expressing an interest must be excluded and also the grounds on which they may be excluded.

The grounds on which candidates must be excluded are listed in article 45(1) of the Directive. They cover convictions for participation in a criminal organisation, corruption, fraud and money-laundering. The grounds for obligatory exclusion do not specifically cover social or environmental issues.

The grounds on which a candidate may be excluded from participation are listed in article 45(2). They include bankruptcy/winding-up (and equivalent situations), conviction of an offence relating to professional conduct, grave professional misconduct, failure to pay social security contributions, and failure to pay taxes.

It is these non-mandatory grounds for exclusion that are most likely to form the basis for exclusion on issues linked to social considerations. The opportunities are limited.

Note: The appropriateness of such an approach will need to be considered carefully to ensure that it is proportionate and relevant to the contract and economic operators should be made aware of the potential for exclusion on these grounds and of the way in which such a decision will be made. See section 4, "The Law", for details of the La Cascina case, which looked at this issue.

Exclusion on the grounds of professional misconduct or grave misconduct: It may be possible to argue that a candidate can be excluded for a past failure to comply with social policy, particularly where there was a deliberate and documented breach of contract terms requiring compliance with that policy.

Recital 43 refers to the potential for non-observance of Council Directives 2000/78/EC and 76/207/EEC, which concern the equal treatment of workers, amounting to an offence concerning the professional misconduct or grave misconduct of the economic operator.

Under article 45(2)(c) and (d), any economic operator can be excluded if convicted of "any offence concerning [its] professional conduct" or "been guilty of grave professional misconduct proven by any means which the contracting authority can demonstrate".

This route may also be available where there is an established breach of a code of professional ethics if this code includes social requirements. This approach will also be dependent upon effective and accurate contract monitoring, and care has to be taken to ensure that this approach is not conducted or operated in a manner that is discriminatory or that creates a "blacklist" type of situation.

Selection – Phase 2: Selection of Tenderers

The Directive sets out an exhaustive list of selection criteria that can be used by the contracting authority to select candidates to whom an invitation to tender (or invitation to negotiate) will be issued.

The contracting authority applies selection criteria that assess the candidates in terms of:

- "economic and financial standing" (article 47); and
- "technical knowledge and/or professional ability" (article 48).

There are limits on the extent to which social selection criteria can be used at this stage. The Directive and case law confirm that:

- the list of selection criteria is exhaustive - it cannot be expanded;
- this limited list of criteria is narrowly constrained, with little room for interpretation or manoeuvre;
- the assessment can only relate to the candidate's ability to deliver the particular contract that is the subject matter of the procurement.

It is very unlikely that social considerations can be incorporated into consideration of a candidate's "economic and financial standing". This means that in most cases the only way in which social considerations can be used as grounds for not selecting a candidate is if they can be regarded as affecting the candidate's "technical knowledge and/or professional ability".

Technical knowledge and professional ability: social considerations may form part of the evaluation of technical knowledge and professional ability in a number of ways.

As mentioned above, the selection criteria are set out in an exhaustive list. The following examples show how some of the listed criteria could relate to social aspects, where the conditions referred to above are satisfied:

- **A description of the supplier's technical facilities**, its measures for ensuring quality and its study and research facilities – ***details of the health protection measures an economic operator has in place for a contract for asbestos removal***
- **Details of the educational and professional qualifications** of the service provider or contractor and/or those of the undertaking's managerial staff and, in particular, those of the person or persons responsible for providing the service or managing the work – ***details of the relevant qualifications in child care which the manager of a crèche has for a contract for the provision and operation of a crèche.***

- **Specific expertise:** For a particular contract, specific environmental or social experience may be required and so information about the works carried out or contracts delivered can focus on demonstrating relevant experience.

For example, it is permitted to ask for the following information in the specified circumstances:

Experience of:

- working with children with disabilities, in relation to a contract for the management of a crèche;
- production of food for people with special dietary requirements, in relation to a contract for the provision of pre-cooked meals to a hospital.

See module E3 for further discussion of this stage.

TENDER EVALUATION

Overview

Once the economic operators have been selected, the contracting authority moves on to invite tenders from the shortlisted economic operators. The contracting authority evaluates tenders received and awards the contract.

The contracting authority will have decided at the procurement planning stage whether it will award the contract on the basis of (1) lowest price only; or (2) the most economically advantageous tender. The basis for the award must be stated in the contract notice.

It is possible to include social considerations in tenders to be awarded on the basis of lowest price by incorporating the relevant requirements into the technical specifications and contract conditions. As the price is the only award criterion, there is no opportunity to include criteria relating to social considerations.

Where a contracting authority proposes to award a contract on the basis of the most economically advantageous tender, there are more opportunities to incorporate social considerations.

See module E4 for further information on determining which award criteria to apply.

This illustration assumes that the basis of the award will be the most economically advantageous tender. This section looks at the way in which social considerations can be used as tender evaluation criteria.

The Directive

Article 53 sets out an illustrative list of tender evaluation criteria: "quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales services, technical assistance, delivery date and delivery period or period of completion".

There is specific reference to environmental criteria but not to social criteria. However, recital 46 states that, subject to various conditions, a contracting authority "may use criteria aiming to meet social requirements, in response to particular needs defined in the specifications…".

Setting award criteria

As explained in module E4, article 53 of the Directive refers to the tender most economically advantageous "from the point of view of the contracting authority", thus putting stress on the contracting authority's discretion in choosing the criteria to be applied. However, this discretion is not unrestricted and has some limitations. All award criteria relating to environmental considerations and used for assessing the most economically advantageous tender must meet four conditions:

- Award criteria must have a link to the subject matter of the contract
- Award criteria must be specifically and objectively quantifiable
- Award criteria must have been advertised/notified previously
- Award criteria must respect Community law – and thus must comply with the fundamental principles of equal treatment, non-discrimination and transparency.

The award criteria must also be distinct from the selection criteria. See modules E3 and E4 for discussion on this point.

What does this mean for contracting authorities that wish to use award criteria relating to social considerations?

The following paragraphs provide short comments on these four conditions in the specific context of social criteria as well as examples of the sort of criteria that may be permitted.

When are criteria linked to the subject matter of the contract?

Article 53(1) states that the criteria chosen must be "linked to the subject matter of the public contract in question".

Comment:

As pointed out in module E4, the requirement for the criteria to be linked to the subject matter of the contract means that a contracting authority cannot determine the criteria to be applied in an abstract way. The criteria chosen must be directly linked to the specific contract that is the subject matter of the tender and must therefore apply to the supplies, works and services to be provided.

This requirement prevents a contracting authority from choosing criteria relating to secondary policies, such as social policies, if these criteria are chosen simply to promote and foster such policies in general, and are not linked to the subject matter of the contract.

Compliance with technical specifications: Where social requirements are legitimately incorporated into the technical specification, then there is a clear link with the subject matter of the contract. It should be possible to translate all technical specifications into award criteria.

How can award criteria be specifically and objectively quantifiable?

In the Concordia Buses case discussed earlier in the context of environmental considerations, the ECJ ruled that award criteria must never confer the unrestricted freedom of choice on contracting authorities. In practice this has been interpreted as a requirement to set specific, product-related and measurable criteria – which will limit a contracting authority's discretion when undertaking the evaluation.

How does the contracting authority comply with the requirement to have previously advertised the award criteria?

The contracting authority complies with its basic obligations by completing the standard form contract notice and publishing it in accordance with the requirements of the Directive. Detailed criteria and weightings must be included in either the contract notice or the contract documents.

How does the contracting authority ensure that the award criteria respect Community law?

Before a contracting authority sets an award criterion it must consider, in particular, whether the criterion ensures equal treatment and is transparent or, on the other hand, is directly or indirectly discriminatory and has the potential of distorting trade. This is the case for all criteria, including criteria incorporating social and environmental considerations.

Additional criteria

It may be possible to use environmental or social conditions as "additional criteria", which can be used to decide a "tie-break" situation. This is provided that:

- the contracting authority has fully evaluated the tenders and has a tie-break situation between two or more tenders;
- the condition (or conditions) is in line with Community law;
- the condition(s) is explicitly mentioned in the contract notice.

Nord Pas-de-Calais case

Case C-225/98 (Commission v French Republic (Nord Pas-de-Calais)) concerned the award of a number of works contracts for construction, modernisation and maintenance of schools.

The ECJ considered a number of issues, including the possibility of social considerations being taken into account as part of the evaluation process.

In the contract notices the contracting authorities had referred to the fact that a condition relating to the project for combatting local unemployment would constitute an "award criterion" for the contract.

The European Commission in its IC on environmental issues commented as follows:

> "…the ECJ held that the awarding authorities could apply a condition relating to the campaign against unemployment, provided that this condition was in line with all the fundamental principles of Community law, but only where the said authorities had to consider two of more economically advantageous bids. Such a condition would be applied as an accessory criterion once the bids had been compared from a purely economic point of view. As regards the campaign against unemployment the Court made it clear that it must not have any direct or indirect impact on those submitting bids from other Member states of the Community and must be explicitly mentioned in the contract notice so that potential contractors were able to ascertain that such a condition existed.

This could be equally applicable to conditions relating to environmental practice."

Comment: It is debatable whether a condition that relates to local unemployment issues will be in line with Community law principles, as it may have a discriminatory effect.

Abnormally low tenders: Article 55 of the Directive permits a contracting authority to reject abnormally low tenders. A contracting authority that is concerned about what it regards as an abnormally low tender must first of all request in writing the details of constituent elements of the tender that it considers relevant. Only after proper consideration of that information may it reject a tender as being abnormally low.

Article 55 sets out an illustrative list of the details that a contracting authority may request. These include information on the technical solutions and also, according to article 55(d), "compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed".

Where the requirements set by the contracting authority comply with the provisions of EU law and the Directive, non-compliance with these requirements may then provide grounds for rejection on the basis of an abnormally low tender.

CONTRACT CONDITIONS

Incorporating social contract conditions

Contract conditions can include contract performance clauses, which are used to specify how a contract is to be carried out.

Article 26 of the Directive specifically states that "contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing performance of a contract may, in particular, concern social and environmental considerations."

Recital 33 provides further guidance and states that contract performance conditions are compatible with the Directive "provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents".

Importantly, this recital explains that contract conditions "may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment".

The recital goes on to refer to examples of measures for the recruitment of long-term job-seekers, provision of training for the unemployed and young persons, compliance with the International Labour Organisation Conventions, and the recruitment of more handicapped persons than is required under national legislation.

Summary: Social considerations can therefore be included as contract conditions provided that they:

- relate to the performance of the contract;
- are published in the contract notice or contract documents; and
- comply with Community law.

Restrictions on the use of these conditions during the procurement process

Contract conditions should not be disguised technical specifications, selection criteria or evaluation criteria; they should be able to be met by whoever wins the tender as from the time that the contract starts. Proof of compliance with contract conditions should not be requested during the procurement procedure. Economic operators must accept the conditions in order to be awarded the contract.

Contract conditions should be used carefully, and they should be supported by the costs and benefits that they accrue.

Contract conditions still do need to be set out clearly so that economic operators that are tendering are aware of all of the obligations in the contract and are able to price accordingly.

Examples of possible contracts with conditions incorporating social considerations are:

- A works contract for the refurbishment of a community centre, with a condition that 5% of the work is to be delivered by new entrants who have an apprenticeship or training contract with the economic operator
- Contract for a catering service in a day-care centre for the elderly, with a condition that all staff are to have training on various dietary requirements for the elderly and for people with disabilities

Contract implementation and monitoring

An important part of contract management is monitoring to ensure that the contract is being carried out as agreed. Careful drafting of specifications and contract conditions to incorporate social conditions is a waste of time if the contracting authority fails to check that those requirements are complied with or fails to take action if it establishes that the requirements are not being met.

See module G on contract management.

UTILITIES

Utilities

To a great extent the same legal rules apply under the Public Sector Directive 2004/18/EC and the Utilities Directive 2004/17/EC. These directives have many similar or parallel provisions, and the European Court of Justice has tended to apply the same interpretation to both public sector contracting authorities and utilities.

The key difference relates to the rules on excluding economic operators and selection, which are discussed further below.

What does the Utilities Directive say about social considerations?

Directive 2004/17/EC contains a number of provisions that refer specifically to the incorporation of social considerations into the procurement process. In this context it is helpful to look at the recitals to the Directive as well as the articles. The recitals are not operative parts of the Directive, but they do provide some explanation and place the specific provisions in context. The recitals and articles are listed below.

- **Recital 12**: integrating social requirements (Recital 5 in Directive 2004/18/EC)
- **Recital 42 and Article 32**: technical specifications and accessibility criteria for people with disabilities (Recital 29 and Article 23 in Directive 2004/18/EC)
- **Recital 44 and Article 38**: conditions for performance of contracts (Recital 33 and Article 26 in Directive 2004/18/EC)
- **Article 39**: informing economic operators about provisions relating to taxes, employment protection provisions and working conditions (Recital 27 in Directive 2004/18/EC)
- **Recital 54**: referring to the potential for non-compliance with the Directive's provisions relating to equal treatment to amount to an offence concerning the professional misconduct or grave misconduct of the economic operator (Recital 43 in Directive 2004/18/EC)
- **Recital 55 and Article 55**: social characteristics as evaluation criteria (Recital 46 and Article 53 in Directive 2004/18/EC)
- **Recital 39 and Article 28**: reserved contracts (Recital 26 and Article 19 in Directive 2004/18/EC)

For detailed comments on these provisions, please refer to the main narrative on social considerations.

What does the European Court of Justice say about social considerations? The European Court of Justice has tended to apply the same interpretation to both public sector contracting authorities and utilities, and therefore the discussion in the main narrative is relevant to utilities.

What does the European Commission say about social considerations? The European Commission's views on this issue, which are set out in the Commission's Interpretative Communication and other publications on social considerations and SMEs, apply to utilities to the extent to which the same or parallel rules apply to both public sector contracting authorities and utilities.

Incorporating social considerations into the procurement process: Stages in the procurement process

Preparation – Purchasing decision: what and how

What to purchase, how to purchase and what type of purchasing method is used: In principle the Utilities Directive does not prevent a contracting authority from implementing social considerations when deciding what to purchase. Strategic purchasing decisions can therefore be taken with social considerations in mind provided that they are not in breach of the Treaty provisions. See examples in the main narrative.

Preparation - General description

The Utilities Directive distinguishes between more general descriptive documents (including broad specifications) and "technical specifications".

The general descriptive documents are to reflect the key purchasing decisions, including how the contract is to be delivered and packaged. This may include social considerations.

Preparation - Technical specifications

The Directive contains parallel provisions to those in Directive 2004/18/EC on the incorporation of social considerations into the technical specifications. The same legal principles also apply. See recital 42 and article 34 as well as article 53(3) on qualification systems.

Contracts reserved for sheltered workshops or sheltered employment programmes for people with disabilities:

Recital 39 explains that employment and occupation are key elements in guaranteeing equal opportunities for all and contributing to integration into society. Sheltered workshops and sheltered employment programmes help facilitate this integration, but they may not be able to obtain contracts under normal conditions of competition. EU Member States may therefore limit the participation in competition for certain "reserved contracts" to sheltered workshops and sheltered employment programmes.

Article 28 permits EU Member States to have "reserved contracts". These are contracts to be performed by sheltered workshops and sheltered employment programmes, where most of the employees concerned are handicapped persons who, due to the nature or seriousness of their disabilities, cannot exercise occupations under normal conditions.

The utility is still required to advertise in the *Official Journal of the European Union* and to follow the usual competitive procedures, but it may reserve the right to participate in the competition to sheltered workshops and sheltered employment programmes.

The contract notice must indicate that the contract is a reserved contract, and the standard form contract notice includes a section covering this limitation of competition. (amend or delete cross-reference for local advertisements)

Advertising

It is important to identify in advance whether and how social considerations are to be incorporated into the procurement process. In some cases, if you wish to use such considerations, you must refer to this in advance in the contract notice. If you fail to do so, then you may not be able to incorporate those considerations at a later stage. The same principles apply when advertising a qualification system. For example;

- The contract opportunity must be clearly and accurately described, and so if, for example, a utility requires a service that meets the diverse social needs of a particular community, this should be included in the description of the contract so that economic operators are aware of the requirement.
- If you require variants – which could relate to alternatives including social considerations – then this should be set out in the contract notice.
- Minimum specifications must be set out in the contract notice or in the specification.
- Special contract conditions must be specified in the contract notice or in the specification.
- If the utility is using permitted social issues as award criteria, then these award criteria must be specified in the contract notice or in the contract documents.

Selection – Phase 1: Exclusion

This is one of the main areas where the legal provisions in the Directive that applies to utilities are different to the legal provisions in Directive 2004/18/EC applying to public sector contracting authorities. There is also a distinction between utilities that are public sector contracting authorities and those that are not.

Grounds for obligatory exclusion: Article 54 provides that a utility that is a contracting authority must comply with the provisions of article 45(1) of Directive 2004/18/EC. Article 45(1) obliges contracting authorities to exclude candidates from participation in the procurement process if they have been guilty of specified offences. The offences cover convictions for participation in a criminal organisation, corruption, fraud and money-laundering. The grounds for obligatory exclusion do not specifically cover social or environmental issues.

Utilities that are not contracting authorities are not obliged to exclude candidates from participation in the procurement process under the provisions of article 45(1) of Directive 2004/18/EC, but they may choose to do so.

Grounds for discretionary exclusion: All utilities may choose to exclude candidates on the discretionary grounds set out in article 45(2) of Directive 2004/18/EC, but they are not obliged to do so. The discretionary grounds include exclusion on the grounds of professional misconduct or grave misconduct.

Recital 54 refers to non-compliance with environmental legislation as potentially constituting an offence concerning the professional misconduct or grave misconduct of the economic operator.

See the main narrative section for more information on the grounds for obligatory exclusion and discretionary exclusion.

Selection – Phase 2: Selection of tenderers

The Utilities Directive does not set out an exhaustive list of the criteria to be used for the selection of tenderers. This is very different to the position under Directive 2004/18/EC, where there is a detailed and exhaustive list of the criteria that can be used and of the information that may be requested.

Under article 54 of the Directive utilities are required, when selecting economic operators, to use "objective rules and criteria". Those objective rules and criteria must be available to the interested economic operators.

Utilities probably, therefore, have more flexibility to incorporate social considerations into this stage of the procurement, provided that the criteria relate to the subject matter of the contract, relate to the economic operator's ability to deliver the particular contract that is the subject matter of the procurement, and do not breach Treaty principles.

The same principles of selection apply to the selection of economic operators to participate in qualification systems (see article 53).

Tender evaluation

Once the economic operators have been selected, the utility moves on to invite tenders from the shortlisted economic operators. The utility evaluates tenders received and awards the contract.

The utility will have decided at the procurement planning stage whether it will award the contract on the basis of (1) lowest price only; or (2) the most economically advantageous tender. The basis for the award must be stated in the contract notice.

It is possible to include social considerations in tenders to be awarded on the basis of lowest price by incorporating the relevant requirements into the technical specifications and contract conditions.

Where a utility proposes to award a contract on the basis of the most economically advantageous tender, then there are more opportunities to incorporate social considerations and to include those considerations as award criteria.

Where a qualification system is used, the utility is still required to invite tenders by means of a call for competition. The same principles apply to the use of tender evaluation criteria.

The Directive: Article 55 sets out an illustrative list of tender evaluation criteria: "quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales services, technical assistance, delivery date and delivery period or period of completion".

The same principles set out in the main narrative apply to the setting of award criteria for utilities. See the main narrative for further discussion on this point.

Contract conditions:

Contract conditions can include contract performance clauses, which are used to specify how a contract is to be carried out.

Article 38 of the Utilities Directive specifically states that "contracting entities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing performance of a contract may, in particular, concern social and environmental considerations."

Recital 44 provides further guidance and states that contract performance conditions are compatible with the Directive "provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents".

Importantly, this recital explains that contract performance conditions "may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment".

The recital goes on to refer to examples of measures for the recruitment of long-term job-seekers, provision of training for the unemployed and young persons, compliance with the International Labour Organisation Conventions, and the recruitment of more handicapped persons than is required under national legislation.

Summary: Social considerations can therefore be included as contract conditions provided that they:

- relate to the performance of the contract;
- are published in the contract notice or contract documents; and
- comply with Community law.

Contract conditions should be used carefully, and they should be supported by the costs and benefits that they accrue.

Contract Management

An important part of contract management is monitoring to ensure that the contract is being carried out as agreed. Careful drafting of specifications and contract conditions to incorporate social conditions is a waste of time if the utility fails to check that those requirements are complied with and fails to take action if it establishes that the requirements are not being met.

See module G on contract management.

SECTION 2D
SMALL AND MEDIUM-SIZED ENTERPRISES (SMEs)

Small and medium-sized enterprises (SMEs) that wish to participate in public procurement processes face many practical challenges. These challenges relate to basic issues, such as the lack of understanding of procurement documents and processes and the shortage of resources and expertise to prepare tenders. They may also face difficulties in meeting selection requirements in terms of their size, financial standing and experience. Quite often the contracts advertised are too large or complex for a smaller organisation to deliver. These and other factors create barriers to the entry of SMEs into the public sector marketplace.

The position of SMEs in public procurement has been the subject of specific attention from the European Community. This attention has been given in the context of the wider single-market policy and of Treaty provisions encouraging support for business undertakings, including SMEs.

In 2008 the European Commission issued the "European code of best practices facilitating access by SMEs to public procurement contracts" (SEC(2008)2193). This code is a Commission Staff working paper and it therefore has no legal standing. It does, however, provide very useful comments and practical suggestions on how best to facilitate SME participation in public procurement. It includes many examples of best practice from a number of EU Member States. The following summary of the content of the code should provide helpful pointers to contracting authorities that are concerned with encouraging SME participation in the procurement process.

The code starts by highlighting the main problems faced by SMEs and emphasising that what is most needed is not a change in the Directive but a change in the procurement culture of contracting authorities. It then goes on to make suggestions and to provide practical examples of how changes can be achieved within the current legal framework:

Overcoming difficulties with the size of contracts: One issue commonly faced by SMEs is that the size of contracts is too large for them to deliver. The code therefore suggests that contracting authorities:

- **divide contracts into lots** as smaller lots are more likely to appeal to SMEs. Dividing contracts into lots should not be done in such a way that it impairs competition, and so the code recommends leaving the opportunity to tender open for any number of lots;
- **encourage groupings of SMEs** so that at the selection stage SMEs can rely on collective experience, financial information, etc.;
- **set up "multi-supplier" frameworks**;
- **ensure more visibility for sub-contracting opportunities** and ensure equal terms for subcontractors.

Ensuring access to relevant information: SMEs also face problems with accessing information about procurement opportunities and processes. The EC code refers to three practical ways of facilitating access:

- **e-procurement**, which provides easy and cheap access and communication and reduces copying and mailing costs. The Directive includes measures to encourage e-procurement. Particularly helpful elements are a single, centralised website, online publication of contract notices available free of charge, an alert service, direct downloading of contract notices and tender documents, and electronic tendering facilities;
- **Information centres** to provide personalised assistance to SMEs, for example through a telephone help-line service;
- **Feedback to tenderers:** constructive and informative feedback would help SMEs understand the strengths and weaknesses of their tenders and enable them to learn lessons for the future.

Improving the quality and understanding of information provided: Economic operators do not always find it easy to understand the needs of contracting authorities because of a lack of sufficient, relevant and clear information. The EC code suggests:

- **Training and guidance for contracting authorities** on how to design contract award processes in a way that ensures the participation of SMEs on an equal footing with larger enterprises;
- **Training and guidance for SMEs on drawing up their tenders:** SMEs usually lack large and/or specialised administrative capacities and do not understand procurement language and procedures, which results in greater difficulties in participating in procurement processes, and increased training and guidance is therefore required.

Setting proportionate qualification levels and financial requirements: SMEs can be disadvantaged by qualification levels and technical requirements that are set too high. The EC code encourages contracting authorities to think carefully about their requirements and to:

- keep selection criteria proportionate;
- require proportionate financial guarantees.

The code reminds both contracting authorities and SMEs of the possibility of taking advantage of the provisions in the Directive that permit groups of economic operators to act jointly and to rely on the economic and financial standing and technical capacity of other undertakings.

Alleviating the administrative burden: time-consuming paperwork is among the most common complaints voiced by SMEs. The code suggests a number of tactics to keep administrative requirements to a minimum. It suggests that member states consider carefully whether they require full documentary evidence for information relating to exclusion or whether, for example:

- a declaration by tenderers may be sufficient (subject to later verification);
- a waiver may be permitted where evidence has been submitted recently;
- short and simple standardised forms may be used.

Placing emphasis on value-for-money rather than price: SMEs can often provide "added-value" to the contracting authority, for example by providing innovative, environment-friendly solutions, or advantageous life-cycle costs. As a contract award based on the lowest price will not allow a wider value-for-money assessment, the code recommends the award of contracts on the basis of the most economically advantageous tender.

Providing scope for innovative solutions through technical specifications: SMEs are often at the forefront of developing innovative solutions, and technical specifications that are defined in terms of performance or functional requirements can encourage a range of innovative proposals.

Allowing sufficient time to draw up tenders: The lack of administrative capacity and expertise in procurement of many SMES means that they may need a lot of time to prepare tenders. The EC code therefore encourages contracting authorities to use Prior Information Notices, which are sufficiently detailed, so that the market is pre-warned of the opportunities and can therefore start to prepare well in advance.

Ensuring that payments are made on time: cash flow is an issue for all businesses but can be particularly critical for SMEs. The EU already has legislation (Directive 2000/35/EC) requiring prompt payment by contracting authorities. SMEs are encouraged to make full use of these provisions. Contracting authorities are also reminded of the potential to include the prompt payment clause in their contracts, requiring economic operators to pay their subcontractors and suppliers promptly.

Comment:

It should be noted that any measures taken to encourage the participation of SMEs in procurement must be in accordance with Treaty principles and, in particular, must not distort competition or be directly or indirectly discriminatory.

SECTION 3
EXERCISES

For localisation: Adapt all of this section for local use – using relevant local examples, legislation, processes and terminology

EXERCISE 1
PLANNING THE PROCUREMENT

You are advising a local education authority that is planning to run a procurement process for a contract for the design and construction of a new primary school in Smalltown. The contract will also include the demolition of the existing buildings on the site.

Smalltown is located in an area of outstanding natural beauty in the mountains and so the new school will need to be designed in a manner that is in harmony with its surroundings.

The local education authority has a green purchasing policy – which means that, wherever possible, all of its buildings are constructed in an environmentally friendly manner and to a high level of energy efficiency.

Exercise: Working as a group, please identify at least 8 ways in which the local education authority can incorporate environmental considerations into its requirements for the design and construction of the school. Think about issues such as location, detailed design requirements, how the school will be constructed and what materials will be used.

EXERCISE 2
GROUNDS FOR EXCLUSION AND SELECTION OF ECONOMIC OPERATORS

Consider and discuss the following scenarios and answer the questions. In each case please assume that the purchasing organisation is a contracting authority subject to the Directive and that the value of the contract is above the EU financial thresholds.

A local authority is planning to run a restricted procedure tender process for a contract for waste disposal services. This contract will involve the collection of household waste, and the processing and disposal of that waste. You are advising the local authority on the preparation of the documents and the conduct of the process.

The local authority team wants to ask the economic operators to provide the following information, which will be used to assess the suitability of the economic operators (*i.e.* at the selection stage):

(1) Details of the economic operator's experience of sorting and recycling household waste;

(2) Information on the technical equipment available to the economic operator to maximise the recycling of paper and plastic;

(3) A copy of the economic operator's internal policy on how it recycles its own waste at its offices.

1. For each of the three examples above please consider (a) whether this information can be requested; and (b) if it can be requested, which of the grounds set out in articles 47 or 48 applies.

The local authority sends a contract notice to the Official Journal of the European Union. When the contract notice is published the local authority receives requests to participate from six economic operators. All six economic operators submit the information required for qualitative selection by the prescribed deadline.

Just before the local authority starts to evaluate the information submitted by the economic operators, a local newspaper publishes claims that economic operator "X" has been dumping waste illegally, in breach of the environmental laws.

2. Can the local authority exclude economic operator "X" from participating in the procurement process? On what basis? What further information might you need to make this decision?

The local authority goes ahead and evaluates the information submitted by the economic operators. Economic operator "Y" discloses that in a recent court case it has been found guilty of breaches of environmental protection laws relating to illegal reprocessing of waste.

3. Can the local authority exclude economic operator "Y" from participating in the procurement process? On what basis? What further information might you need to make this decision?

EXERCISE 3
AWARD CRITERIA: SOCIAL AND ENVIRONMENTAL CONSIDERATIONS

In your groups:

(1) List the key principles that apply to the use of social and environmental award criteria.

(2) Applying the principle that the award criteria must be linked to the subject matter of the contract, look at the list below and identify which criteria can be used for which contract. Note that some of the criteria can be used for more than one contract.

SECTION 4
THE LAW

For localisation: The following structure and layout can be used but this section will need significant adaptation to reflect local requirements - using relevant local legislation, standard format contract notices, processes, websites and terminology.

This section provides further detail on issues raised in earlier sections

ECO-LABELS

The "Buying Green" handbook explains that the Directive explicitly allows a contracting authority to use the underlying specifications of eco-labels when defining performance based requirements or functional environmental requirements.

This is provided that:

- The specifications are appropriate for defining the characteristics of the supplies or services which are the subject matter of the contract
- The requirements for the label are based on scientific information
- The eco-labels are adopted with the participation of all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations
- They are accessible to all interested parties

It is important to understand that it is not permitted to set a requirement for economic operators to possess or be compliant with a particular eco-label. A contracting authority must always accept other suitable evidence as well.

See Article 23

Social conditions as criteria for exclusion

The "Beentjes" case (Case 31/87 Gebroeders Beentjes BV v The Kingdom of the Netherlands) arose from a decision of a local committee to exclude Beentjes from the tendering procedure for a public works contract for land consolidation. This was even though Beentjes' tender was the lowest tender. The contract was awarded to the next lowest tenderer. This case related to the previous works directive, now replaced by Directive 2004/18. The principles decided in Beentjes were incorporated into Directive 2004/18.

The 3 reasons for rejection of Beentjes' tender were that the contracting authority considered that:

(1) Beentjes had insufficient experience for the work in question,

(2) its tender appeared to be less acceptable and

(3) it did not seem to be in a position to employ long term unemployed persons.

The first two reasons were criteria which were listed in the Uniform Rules on Invitations to Tender. The last reason was expressly set out in the invitation to tender.

The European Court of Justice looked at the way in which each of the three criteria could be used. The ECJ commented on whether and how this was compatible with the directive and Treaty principles and whether it must be mentioned specifically in the contract notice.

(1) **Insufficient experience of the work** – used to assess the technical knowledge and suitability of tenderers (selection).

This was a legitimate criterion for checking suitability and was provided for in the directive (selection criterion).

There was no need to refer to this requirement (selection criterion) in the contract notice

(2) t**ender less acceptable** –used to evaluate the tender to establish which is the most advantageous tender(tender evaluation).

This was an evaluation criterion.

This provision would be incompatible with the directive if it conferred unrestricted freedom of choice on contracting authorities as regards awarding the contract. It was not incompatible with the directive if it was interpreted as giving contracting authorities discretion to compare the different tenders and to accept the most economically advantageous tender on the basis of objective criteria.

Evaluation criteria should be set out in the contract notice or the contract documents

(3) **employment of long term unemployed persons** – this was a condition which had no relation to checking the tenderers' suitability (selection) or to the criteria for award of the contract (tender evaluation).

This Court classified the requirement as an "additional specific condition" relating to suitability.

This condition could be incompatible with the Treaty provisions on the right of establishment and freedom to provide services. This would be on the basis of discrimination on the grounds of nationality where such a condition could only be satisfied only by tenderers from the state concerned (direct discriminatory effect) or that tenderers from other Member States would have difficulty complying with it (indirect discriminatory effect).

Even if these conditions are not incompatible with the Treaty they must be applied in conformity with all the provisions of the directive including the rules on advertising.

Additional specific conditions must be referred to in the contract notice.

These principles are now reflected in Directive 2004/18. Evaluation criteria must now be listed either in the contract notice or in the contract documents (see Module E4) and "special conditions" must be referred to in the contract notice.

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. What general Treaty principles apply to the incorporation of environmental considerations into the procurement process?
2. Which articles in the Directive cover the incorporation of environmental characteristics into technical specifications?
3. What principles did the "Concordia Buses" case establish?
4. Which articles cover the issue of when and how eco-labels can be specified?
5. When can economic operators be excluded from a procurement process on environmental grounds?
6. When can environmental conditions be used as "additional criteria"?
7. When can environmental contract conditions be included in the terms of a contract?
8. Do the same general Treaty principles applying to the incorporation of environmental considerations into the procurement process also apply to the incorporation of social considerations?
9. Under the EU procurement rules, can a contracting authority use local price preference provisions or regional preferences that favour locally based contractors?
10. What key principles did the "Beentjes" case establish? Where is this principle incorporated into the Directive?
11. Can a contracting authority specify that a contract can only be awarded to economic operators of sheltered workshops/programmes? On what basis?
12. What approaches can a contracting authority adopt to ensure that opportunities for small and medium-sized enterprises are maximised? Think of 3 examples.

ADDITIONAL RESOURCES

The Narrative refers to the extensive information available at the European Commission's website on green purchasing: http://ec.europa.eu/environment/gpp/index_en.htm

See also the book:

Arrowsmith, Sue and Peter Kunzlik, 2009, *Social and Environmental Polices in EC Procurement Law*, Cambridge University Press.

MODULE D

PUBLIC PROCUREMENT TRAINING FOR IPA BENEFICIARIES

Public procurement law – scope of application

Public procurement law – scope of application

Contracting authorities (classical sector)

MODULE D

PART 1

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to identify:

1. The national and sub-national bodies that must apply the public procurement rules in the award of their works, supplies and services contracts
2. Those bodies that are part of the state, at the executive, legislative and judicial levels of government
3. Those bodies that do not fall within the general definition of state but which must nonetheless follow the procurement rules
4. The effect of falling within the definitions
5. The effect of a change in the constitution of a body that changes its position in respect of the definitions of the Directives (*e.g.* a public authority becoming a "body governed by public law" and vice versa)

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- That the procurement rules apply to "public" procurement, and that this is defined widely to cover the defined purchases of all public authorities
- That the European Court of Justice (ECJ) defines the concept of public authorities independently of any national definition, and makes that definition a functional one
- The way that each type of public authority is defined
- The conditions that apply to the different types of public authority before they are covered by the public procurement rules
- The possibility that the ability of a body to meet those conditions may change over time

This means that it is critical to understand fully:

- The definitions of the Directives in respect of the state and other public authorities
- The definition of the Directives in respect "bodies governed by public law"
- The interpretation given to these definitions by the ECJ
- The conditions that apply to a body before it may become a "body governed by public law"

1.3 LINKS

There is a particularly strong link between this chapter and the following modules or sections:

- Module A3 on the international regulation of procurement, where there is some overlap in the definitions used
- Module A4 on the economic benefits of centralised procurement
- Module B1 on the organisation of centralised procurement
- Module D2 on the contracting entities in the utilities sector
- Module E, to the extent that different procedures apply to contracting authorities in the classical sector and to contracting entities in the utilities sector

1.4 RELEVANCE

This information will be of particular relevance to the senior management of the body in question, since the status of the body under the Directives determines whether or not the provisions of those Directives apply. It will also be of particular relevance to those involved in procurement planning and strategic decision making, especially where the body at issue is a "body governed by public law" or where it may be possible to envisage the creation of publicly owned companies to carry out the functions of the public authority.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

In **Directive 2004/18**, please look at Article 1(9).

Localisation: In national law, please look at:

SECTION 2
NARRATIVE

2.1 INTRODUCTION

In this chapter, we will be looking at the definition of 'contracting authorities' for the purposes of the procurement rules. The major distinction that must be made is between the two main categories of public or contracting authority, as defined in Directive 2004/18/EC (the Directive), namely:

- state, regional or local authorities ('public authorities')
- bodies governed by public law

Contracting authorities may also be made up of associations formed by one or several of such authorities or by one or several bodies governed by public law.

Note: In the case of the classical sector, the preferred term is 'contracting authorities' because the bodies involved are public 'authorities' in the sense that they are, formally or informally, part of the state apparatus. In the utilities sector, on the other hand, the preferred term is 'contracting entities' since, as we will see in module D2, whilst they may also be public authorities, they can be private sector companies that happen to operate in the utilities sector under privileged conditions.

The importance of understanding these definitions is that they affect the applicability of the procurement rules that form the subject matter of this training. These rules only apply if a body falls within one of the definitions of the Directive. If the body in question does not fall within those definitions, its procurement will not be subject to the Directive. If the body does not fall within the definition but it nevertheless tries to follow the rules, this does not mean that any breach of the Directive's provisions that it commits would be open to challenge. The Directive either applies or does not apply; there is no 'in-between'.

Furthermore, once a body falls within the definition of 'contracting authority', all of its purchases of goods, works and services will be subject to the procedural requirements of the Directive, even if these purchases are made for the purposes of tasks that are not, or even mostly not, in the general interest. Once covered by the Directive, the authority is covered for all purchases within the definition of the Directive.

Especially in the case of a body governed by public law, the status of a contracting authority can change over time as a result of a change of its functions or a change in its legal status. The financing of the contracting authority may also change over time. These all have an effect on the inclusion of the body within the definition of the Directive, and therefore it is not possible to say, once and for all, whether a body is covered or not covered by the Directive. The situation may require review.

2.2 PUBLIC AUTHORITIES

Public authorities are defined as `state, regional or local authorities'. This definition covers all state entities and not only the executive authority of the state, i.e. state administrations and regional or local authorities. The term `the state' also encompasses all of the bodies that exercise legislative, executive and judicial powers. The same applies to bodies that, in a federal state, exercise those powers at federal level.

Case note: In the *Vlaamse Raad* case, the European Court of Justice (ECJ) also dismissed the argument that the procurement rules did not apply to legislative bodies because of the independence and supremacy of the legislative authority. (Case C-323/96 *Commission v Belgium* [1998] ECR I-5063)

The definition of the state is broad and the ECJ has taken a particularly functional approach. It thus looks more at the actual function of the entity concerned than at the formal categorisation that the entity has been given by internal law. In the famous *Beentjes* case, the awarding authority was a body with no legal personality of its own, whose functions and composition were governed by legislation and its members appointed by the provincial executive of the province concerned. It was bound to apply rules laid down by a central committee established by royal decree, whose members were appointed by the Crown. The state ensured observance of the obligations arising out of measures of the committee and financed the public works contract awarded by the local committee in question. The ECJ held that the term `state' must be interpreted in functional terms. As a result, a body such as the awarding authority – whose composition and functions are laid down by legislation and which depends on state authorities for the appointment of its members, the observance of the obligations arising out of its measures, and the financing of the public works contracts that it is its task to award – was held to fall within the notion of the state, even though it is not part of the state administration in formal terms.

Case note: The term `contracting authority' will be defined according to the functions of the body in question. (Case 31/87 *Gebroeders Beentjes BV v Netherlands ('Beentjes')* [1988] ECR 4635)

The state, regional or local authorities (the 'public authorities') are, by definition, contracting authorities for the purposes of the Directive. The Directive makes no distinction, in this respect, between public contracts awarded by a contracting authority for the purposes of fulfilling its task of meeting needs in the general interest and those contracts that are unrelated to such a task. There is thus no need, as in the case of bodies governed by public law, to distinguish between activities meeting needs in the general interest that are of an industrial or commercial character and those tasks that are not. All contracts awarded by a public authority are to be covered by the Directive, whatever their character.

[Localisation required: In [xxx], the concept of 'public authorities' would include...]

An 'association' of contracting authorities is not different from a contracting authority; it is merely a term used to describe the mechanism whereby public contracts are awarded by 'entities' that do not have their own legal personality or identity but are based on co-operation between public law bodies subject to the Directive, such as purchasing consortia between territorial public bodies. It means a group of contracting authorities.

2.3 BODIES GOVERNED BY PUBLIC LAW

A 'body governed by public law' does not have a simple definition; it depends rather on whether it has certain characteristics. These characteristics are expressed as conditions that need to be met in order for the body in question to be considered as a body governed by public law. It is similar in approach to the functional test adopted by the ECJ in respect of the definition of public authorities.

The main question centres around the three *cumulative* conditions required by the Directive to indicate the existence of a body governed by public law. The ECJ has consistently held that a body must satisfy all three of these conditions to fall within the definition. These conditions, as now set out in article 1(9) of the Directive, are that a body governed by public law is a body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and
- having legal personality, and
- financed, for the most part, by the state, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities or by other bodies governed by public law.

Annex III of the Directive includes a list of entities in each EU Member State that are considered to fall within the definition of 'body governed by public law'. The lists are intended to be as comprehensive as possible and are to contain the names of those bodies that the member state considers to fall within the definition at the time of adoption of the Directive. They are not exhaustive, however. Even if a body is not listed, it will nonetheless be covered if it meets all of the three conditions referred to above. The concept of a body governed by public law must be interpreted as having a broad meaning and, if a specific body is not listed in Annex III, its legal and factual situation must thus be determined in each individual case in order to assess whether or not it meets, for example, a need in the general interest.

[Possible localisation: where [XXX] becomes a member, insert: 'For [XXX] the list of such bodies includes OR is contained in [xxx]']

2.3.1 Condition 1: defining needs in the general interest

The term 'needs in the general interest' is not defined in the Directive, but the need for uniform application of Community law and of the principle of equality require that the terms of a provision of Community law must normally be given a consistent interpretation throughout the Community. The ECJ has, therefore, held that this term has to be given an autonomous and uniform interpretation throughout the Community. There are two main issues that are relevant, and these include the definition of (i) needs in the general interest and (ii) general interest needs not having an industrial or commercial character.

2.3.1.1 Needs in the general interest

'Needs in the general interest, not having an industrial or commercial character' are generally needs that are satisfied otherwise than by the availability of goods and services in the marketplace and that, for reasons associated with the general interest, the state chooses to provide itself or over which it wishes to retain a decisive influence. In general, the ECJ has looked towards state requirements with regard to the specific tasks to be achieved; the explicit reservation of certain activities to the public authorities; the obligation of the state to cover the costs associated with the activities in question; the control of prices to be charged for the services; the degree of monitoring or security required; and the 'public interest'.

There have been several examples:

- One example is of an entity established to produce, on an exclusive basis, official administrative documents, some of which required secrecy or security measures, such as passports, driving licences and identity cards, whilst others were intended for the dissemination of legislative, regulatory and administrative documents of the state. The public authorities fixed the prices, and a state control service was responsible for monitoring the security measures, where necessary. The documents were closely linked to public order and required guaranteed supply and production conditions that ensured the observance of standards of confidentiality and security. The body had been established for the specific purpose of meeting those needs in the general interest. (C-44/96 *Mannesmann* [1998] ECR I-73)
- An entity that was a public limited company set up by two municipalities, which was specifically entrusted with a series of tasks defined by law in the field of waste collection and cleaning of the municipal road network, carried out a need in the general interest. (Case C-360/96 *Gemeente Arnhem* [1998] ECR I-6821)
- The activities of funeral undertakers could be regarded as meeting a need in the general interest, especially since the exercise of the activity was subject to the issue of prior authority and the public authorities could fix the maximum prices for funeral services. (Case C-373/00 *Adolf Truley* [2003] ECR I-1931)
- In other examples, it was found that regional development agencies and other more specialised undertakings that were designed to attract investment to a particular location could fall within the definition of general interest since, by bringing together manufacturers and traders in one geographical location, they were not acting solely in the individual interest of those manufacturers and traders but were also providing consumers who attended the events with information that enabled them to make choices in optimum conditions. The resulting stimulus to trade was considered to fall within the general interest. (Cases C-223/99 and C-260/99 *Agorà* [2001] ECR 3605; case C-18/01 *Korhonen* [2003] ECR I-5321)

2.3.1.2 General interest needs not having an industrial or commercial character

The additional criterion for the purposes of this definition is that the general interest needs should not have an industrial or commercial character. These are generally activities that are carried out for profit in competitive markets. The ECJ (Case C-360/96 *Gemeente Arnhem* [1998] ECR I-6821) held that

(i) the absence of an industrial or commercial character was a criterion intended to clarify and not limit the meaning of the term `needs in the general interest';

(ii) the term creates, within the category of needs in the general interest, a sub-category of needs that are not of an industrial or commercial character; and

(iii) the legislature drew a distinction between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character.

This does not mean, however, that a body governed by public law may *only* carry out tasks in the general interest not having an industrial or commercial character. It may do both. In the *Mannesmann* case, for example, the entity involved had the task of providing the public authorities with official documents (a need in the general interest) but was also in the business of acting as a commercial printing company. It is also immaterial that an entity carries out other activities *in addition* to tasks in the general interest.

However, once an entity falls within the definition of a body governed by public law, any contract, of whatever nature, entered into by that entity is to be considered to be a public contract within the meaning of the Directive, and all of the entity's contracts are covered by the Directive. Even the fact that meeting needs in the general interest constitutes only a relatively small proportion of the activities actually pursued is irrelevant, provided that the entity continues to attend to the needs that it is specifically required to meet.

This also means that bodies governed by public law can carry out activities that are pursued for profit, provided they continue to carry out the general interest needs that they are specifically required to meet.

On the other hand, if a body governed by public law carries out other activities and these are provided in a competitive market, this may, in fact, indicate the absence of a need in the general interest, not having an industrial or commercial character. If an entity falls into this category, then the Directive will not apply.

This is a conceptually difficult distinction because whilst the existence of significant competition does not in itself prevent there being a need in the general interest not having an industrial or commercial character to be met, the very existence of such competition may be an indication that a need in the general interest does have an industrial or commercial character.

In the last resort, the problem is solved by looking more closely at the nature of the entity concerned rather than at the activity it carries out. The question becomes one of whether the entity is operating in an industrial or commercial manner. Thus, in the *Korhonen* case, the ECJ held that if the body:

(i) operates in normal market conditions,

(ii) aims to make a profit, and

(iii) bears the losses associated with the exercise of its activity,

it is unlikely that the needs that the body aims to meet are not of an industrial or commercial nature.

The relevant legal and factual circumstances have to be taken into account in each case, especially those prevailing when the body concerned was formed but also the conditions in which it carries out its activity, including the level of competition on the market, the issues of whether its primary aim is or is not the making of profits and whether it bears the risks associated with the activity, and any public financing of the activity.

2.3.2 Condition 2: legal personality

The existence of a legal personality is generally the clearest distinction between bodies that form part of the state, regional or local authorities and those that are considered to be bodies governed by public law. Most government ministries, departments and divisions do not have a separate legal personality. If a separate body is created as a company or enterprise, then it will have a legal personality that is separate from the state and it is likely to be seen as a body governed by public law if the other two conditions are also met.

It does not matter whether the body in question is subject to public or private law. The only issue is whether it has a legal personality.

Case note: Under Spanish law, public bodies constituted under private law (a category composed, in the Spanish legal system, of commercial companies under public control) were excluded from the scope of the Spanish rules governing procedures for awarding public contracts. The ECJ held that it was necessary to establish only whether or not the body concerned fulfilled the three conditions for establishing the existence of a body governed by public law and that a body's status as a body governed by private law did not constitute a criterion capable of excluding its being classified as a contracting authority for the purposes of the Directives. (Case C-214/00 *Commission v Spain* [2003] ECR I-4667)

2.3.3 Condition 3: dependency on the state

This third condition is contained in article 1(9)(c) of the Directive:

> Article 1(9)(c) of the Directive: "…financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law."

This condition is used primarily to determine the degree of dependency of the body on the state. This dependency may, alternatively, be

- financial,
- managerial, or
- supervisory.

This condition is satisfied where only one of these three criteria is met.

2.3.3.1 Financial dependency

The term 'financed for the most part' means financed by 'more than half', but the term 'financed' is not as clear as it seems. The question concerns the actual degree of state dependency implied by the level of state financing. Not all payments made by a contracting authority have the effect of creating or reinforcing a specific relationship of subordination or dependency between that authority and another body. Only payments that are made to finance or support the activities of the body concerned, without any specific consideration, may therefore be described as public financing.

Example from case law:

In the case of a university, payments in the form of awards or grants for the support of research work that go to the institution as a whole may be regarded as financing by a contracting authority. Similarly, the payment of student grants in respect of tuition fees collected by the universities may also be classified as public financing. Since there is no contractual consideration for those payments, they are not to be regarded as financing by a contracting authority in the context of its educational activities. On the other hand, the position is quite different in the case of payments made, in the form of consideration, by one or more contracting authorities for the supply of services comprising research work or for the supply of other services, such as consultancy or the organisation of conferences. These 'sources of financing' are, in fact, sums paid by one or more contracting authorities as consideration for contractual services provided by the university, and it also does not matter that those activities of a commercial nature happen to coincide with the teaching and research activities of the university. The contracting authority has in fact an economic interest in providing the service.

(Case C-380/98 *The Queen v HM Treasury, ex parte The University of Cambridge* [2000] ECR 8035)

If the degree of dependency varies according to the sources of funding, then a change in the source of funding will affect the degree of dependency. Accordingly, the decision as to whether a body is a contracting authority must be made annually, and the budgetary year during which the procurement procedure is commenced is the appropriate period for calculating how that body is financed. Therefore, if at the beginning of the budgetary year in question it is estimated that more than half of the body's funding will be public financing, procurement for that year will be covered by the Directive.

Good practice note: The importance of predicting sources of funding

When working in an institution that is only partially funded by the state it would be wise to ensure that accurate funding forecasts are prepared whenever the proportion of state funding is likely to fluctuate. Compliance with the procurement procedures of the Directive is not without cost, and in those years when there is not a majority of state funding it might sometimes be possible to reduce those costs by adopting more flexible procedures.

2.3.3.2 Managerial dependency

This condition relates in effect to the direct participation of public authorities and officials in the management of the entity in question. The condition will be fulfilled, for example, where a body has been established by a government minister, where its memorandum and articles and any amendments must be approved by the minister, where the chairman and other directors are appointed and their remuneration determined by the minister, where the appointment of the body's auditors must be approved by the minister, and where the body is obliged to comply with state policy and any ministerial directives with regard to the remuneration, allowances and conditions of employment of its employees.

Example from case law:

Even where there is no legal provision expressly providing for state control over the award of public supply contracts by the body in question, the ECJ found that the state could nonetheless exercise such control, at least indirectly. It was the state that had set it up and entrusted it with specific tasks, and it was the state that had the power to appoint its principal officers. Moreover, the minister's power to give instructions to the entity, in particular requiring it to comply with state policy, and the powers conferred on that minister and on the minister of finance in financial matters gave the state the possibility of controlling its economic activity.

(Case C-306/97 *Connemara Machine Turf Co Ltd v Coillte Teoranta* [1998] ECR I-8761)

2.3.3.3 Supervisory dependency

This condition goes further than mere general supervision of an administrative or financial nature, and it must give rise to a dependency on the public authorities equivalent to the dependency that exists whenever one of the other alternative criteria is fulfilled. Namely, an equivalent dependency exists whether the body in question is financed, for the most part, by the public authorities or whether the latter appoint more than half of the members of the body's administrative, managerial or supervisory organs, thereby enabling the public authorities to influence the decisions of these organs in relation to public contracts.

The criterion of managerial supervision is not satisfied in the case of mere review since, by definition, such supervision does not enable the public authorities to influence the decisions of the body in question in relation to public contracts. Where the supervision of the activities of the body exceeds that of a mere review, the position will be different. That could be the case, for example, where the public authorities supervise not only the annual accounts of the body but also its conduct from the point of view of proper accounting, regularity, economy, efficiency and expediency and where those public authorities are authorised to inspect the business premises and facilities of that body and to report the results of those inspections to a public authority that holds all of the shares in the body concerned.

It is also appropriate to consider whether the various controls to which entities are subject render them dependent on the public authorities in such a way that the latter are able to influence the decisions of these bodies in relation to public contracts. It thus requires a degree of managerial supervision that permits the public authorities to influence or interfere with procurement procedures.

2.4 CENTRAL AND JOINT PURCHASING

The Directive has now formalised the practice current in a number of EU Member States in respect of centralised procurement. Public purchasers have recognised that they can benefit from economies of scale by buying their requirements in bulk. Even where the procurement needs of a single procuring contracting authority are relatively modest in respect of a given product or service, the combined needs of a number of such government purchasers may be significant. Government departments operating in similar sectors or in neighbouring locations have often found it beneficial to group together jointly to purchase specific items. This is most likely to be the case of products used daily, where the various purchasers do not have any requirements that are specific to the contracting authority or differential technical requirements. In some cases, joint purchasing could also be used as a means of purchasing more specialised equipment where technical compatibility is needed. In some cases, the task of making such bulk purchases may be entrusted to a single purchaser, with either one of the group of purchasers acting as agent for the others, or to a specially created contracting authority established with that function in mind: a central purchasing body.

For more information concerning the benefits of aggregating demand by means of centralised purchasing between several contracting authorities, see module A 4. For the organisation of centralised procurement within a contracting authority, see module B1.

For the purposes of the Directive, a central purchasing body is a "contracting authority" that "acquires supplies and/or services intended for contracting entities" or "awards public contracts or concludes framework agreements for works, supplies or services intended for contracting entities".

To ensure that a central purchasing body passes on the costs of its procurement to other contracting authorities, the Directive (article 1(10)) also provides

(i) that "Member States may stipulate that contracting authorities may purchase works, supplies and/or services from or through a central purchasing body", and

(ii) that contracting authorities purchasing works, supplies or services from or through a central purchasing body are deemed to have complied with the Directive insofar as the central purchasing body has complied with it.

Example: Office of Government Commerce

In the United Kingdom, for example, the Office of Government Commerce operates a centralised procurement system for particular common-use goods and services. It does so through its commercial arm, known as 'Buying Solutions'. This body offers a range of products and services, often available on the basis of a number of framework agreements, that have been procureed in accordance with the procedures of the Directive. Information on how this system operates can be downloaded from www.buyingsolutions.gov.uk.

Localised Example?: XXX

…Information on how this system operates can be downloaded from:

It is also possible that a number of contracting authorities will simply choose to aggregate their requirements and jointly conduct a contract award procedure (including a framework agreement). This form of joint purchasing could be done in the name of each of the contracting authorities or in the name of a single contracting authority acting on behalf of the others. To the extent that these contracting authorities simply act jointly, without the benefit of a special purpose vehicle or without nominating one of their number as agent for the others, they will be acting as an association of contracting authorities. This association, as we have seen, has only a residual function and would have no capacity itself to conduct the contract award procedure. The procedure would necessarily be conducted by all of the contracting authorities or by one or more acting on their behalf. For reasons of responsibility and legal certainty, it would be advisable to ensure that the arrangements be made explicit and, where appropriate, indicated in the contract award notice.

See module B2 for further discussion of co-operation arrangements between contracting authorities.

Example: Eastern Shires Purchasing Organisation (ESPO)

Again in the UK, ESPO is a joint committee of regional local authorities. It acts as a purchasing agent for its member authorities and other customers and provides a procurement and supply service (offering goods and services) to its members for a value of approximately 700 million GBP per annum. Information on how this system operates can be downloaded from: www.espo.org.

Localised Example?: XXX

...information on how this system operates can be downloaded from:

2.5 CONTRACTING AUTHORITIES AND THE WTO'S GOVERNMENT PROCUREMENT AGREEMENT (GPA)

As discussed in module A3, the EU is a signatory of the Government Procurement Agreement (GPA) of the World Trade Organisation (WTO). As a result of the negotiating approach taken by the EU (consisting of using the coverage of the Directives as a basis for GPA coverage), all contracting authorities that are public authorities for the purposes of the public sector Directive, namely public authorities and bodies governed by public law, are also covered by the GPA.

In practical terms, *compliance* with the Directives ensures compliance with the provisions of the GPA in respect of those entities that are also covered by the GPA. Since the Directives will apply in any event, no further action needs to be taken in respect of compliance with the procedural rules. The only obvious difference in application consists in the different threshold values that apply to contracts for goods and services awarded by the central government authorities listed in Annex IV and in the differential treatment accorded to certain defence products and services.

In terms of granting *access* to EU procurement markets, however, and of compliance with EU contract award procedures, for GPA purposes contracting authorities are obliged to do so only in respect of those entities, products and/or services of other GPA signatory states, as covered in the various country appendices to the GPA, that are not otherwise subject to the exclusion or reciprocity requirements set out in the notes to the appendices. This would only become an issue if a GPA contracting authority decided to exclude such a beneficiary on grounds that would otherwise constitute a breach of the Directives and/or the GPA. To determine the extent of access, it would be necessary to consult the specific country annexes.

SECTION 3
EXERCISES

EXERCISE 1
CLASS CASE STUDY

Arcadia municipality decides it wants to develop a business and commercial zone on an attractive plot of land at the edge of town, which it is calling Evergreen Park. It is considering setting up a non-profit organisation in the form of a private company, Apple Inc., in which it would own the majority of the shares to undertake the development in the hope that this will reduce the administrative burden of creating Evergreen Park. A neighbouring municipality, Eden Town, which has experience in such developments decides that, when the arrangements are in place for the development, it would itself like to bid for the contract to design the overall architectural scheme and undertake the general planning of Evergreen Park. Eden Town does not, however, have in-house capability for the landscaping requirements of the park. Having used them in the past, Eden Town decides that, before bidding for the contract, it should make sure that it can rely on the services of Greenfingers, a private landscaping company. It therefore enters into a contract with Greenfingers to supply the required landscaping services when and only if Eden Town wins the design contract.

You are the legal adviser to Arcadia municipality, and it has asked you to set its mind at rest on a number of issues that have been raised by the various parties during the negotiations. Prepare an opinion on each of the questions asked, supporting your arguments with relevant case law.

1. Does it make any difference to the application of the procurement rules whether Evergreen Park is developed by Arcadia municipality directly or by Apple Inc.?
2. Eden Town is a potential bidder. Does that mean that its contract with Greenfingers is not subject to the procurement rules?

You have enough information to answer (b) from the general principles. However, you might want to consider a further case: C-126/03 *Commission of the European Communities v Federal Republic of Germany ("City of Munich")* ECR [2004] I-11197

EXERCISE 2
INDIVIDUAL CASE STUDY

Until now, the municipality of Cleverton has provided municipal waste disposal services by way of an autonomous service unit of the municipality called the Cleanup Team. Although Cleanup Team was not set up formally as a company, it operated as if it were an independent company – despite the fact that its management was governed by rules put in place by Cleverton, and that traditionally all its funding came from the treasury department of Cleverton. Indeed, the Cleanup Team believed it was just like a company, and would also provide services to private sector clients and other municipalities in return for payment. By its 2008 year-end, it transpired that its receipts from these latter services accounted for 51% of all the income it received for that year (roughly EUR 3 million), an increase of more than 20% over the previous year. This was expected to increase further in 2009.

Having seen the projected financial results, Cleverton believed that it should put the Cleanup Team on a more proper financial footing and decided to create a limited liability company to take over its functions. It created Cleanup Limited, a wholly owned subsidiary, on 5 November 2008 and signed with it, on 10 November, a contract for the supply of municipal waste disposal services for 2009 to begin on 1 January 2009. The value of these services was in the order of EUR 1.5 million.

On 25 November 2008, the central government introduced much stricter and more sophisticated environmental regulations that would apply to the transport and disposal of municipal waste. The Cleanup Team had previously contracted out its routine environmental compliance work to a private sector company, Opportune Limited. In 2008, the value of this work had been about EUR 150 000. Realising that it did not have the expertise to meet these new regulations, the management of Cleanup Limited approached Opportune Limited directly to provide the services without following the procurement directives.

In February 2009, you are approached by Superclean Limited, a private waste disposal company with expert environmental knowledge, which feels that Cleverton has acted unlawfully. In particular, Superclean Limited believes that

(i) the Cleanup Team should never have contracted directly with Opportune Limited in any event; and

(ii) Cleanup Limited should have awarded the contract to Opportune Limited according to the procurement directives.

How do you reply?

EXERCISE 3
CENTRALISED AND JOINT PURCHASING

Split into 4 groups.

Using the Internet, 2 groups will search for organisations offering centralised procurement and 2 groups will search for organisations offering joint purchasing.

Search for these systems in your country, in neighbouring countries or in European member states.

Consider the following issues:

1. Is the purchase organised through a lead contracting authority, or by way of special purpose company?
2. What is the common feature of the participating organisations? For example, geographical proximity; sectoral cohesion; common use items, etc.
3. What services do they offer?
4. Do they use catalogues and/or framework arrangements?
5. What are the benefits of using these systems?
6. What might be the disadvantages? Consider, for example, technical specifications, time and place of delivery, terms of sale, etc.

Each group is to prepare a short report to be presented to the class.

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. Why do we need to define contracting authorities?
2. What is the difference between contracting *authorities* and contracting *entities*?
3. Name the two broad categories of contracting authority.
4. What branches of government are covered?
5. What is the position in a federal state?
6. Explain the European Court of Justice's "functional" approach to the definition of public authorities.
7. Do public authorities need to be providing a service in the public interest before they are covered by the Directive? Yes/No
8. Is the position of bodies governed by public law any different?
9. Name the conditions that need to be met before an entity will be considered to be a body governed by public law.
10. Which of the conditions must be met? Are any optional?
11. Describe "needs in the general interest" using examples from case law.
12. Are "needs in the general interest" inconsistent with "needs having an industrial or commercial character"?
13. Are the activities of meeting "needs in the general interest" and "meeting needs in the general interest not having an industrial or commercial character" mutually exclusive? Can a body governed by public law do both?
14. If the body in question is mainly carrying out a commercial activity and only meets a need in the general interest incidentally, does that mean the Directive does not apply?
15. Explain the impact of the existence of competitive markets for the products or services provided by a body governed by public law.
16. What, in practice, is the means of deciding whether a body is pursuing needs in the general interest not having an industrial or commercial character?
17. Describe the different means of imposing state dependency on a body governed by public law.
18. Must all the state dependency conditions be satisfied?
19. Are the conditions of state dependency applied once and for all? Illustrate your answer by way of example.
20. What is meant by (i) centralised and (ii) joint purchasing? Describe their benefits and indicate when they might be used.

Public procurement law – scope of application

Contracting entities in the utilities sector

MODULE D

PART 2

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to identify:

1. The bodies that must apply the public procurement rules in the award of their works, supplies and services contracts that operate in the utilities sector
2. Which of those bodies form part of the state and which fall outside the definition of "contracting authorities"
3. The mechanisms used to bring bodies other than "contracting authorities" within the scope of the Utilities Directive (**Directive 2004/17**)
4. The reasons for bringing such bodies within the scope of the Directive
5. The different utility activities ("relevant activities") that fall within the definition of the "utilities sector"
6. The effect of falling within and outside the definitions
7. The reasons why such bodies are not subject to the Directive 2004/18

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- That the Utilities Directive also applies procurement rules to entities that may not be public but that can be wholly private
- The logic behind application of the procurement rules, albeit more flexibly, to this sector
- The extent to which the rules apply in each of the defined utility sectors
- The central role played by the definition of "relevant activities"
- That the logic of including these sectors within the rules also gives way, in appropriate circumstances, to their exemption from the Utilities Directive

This means that it is critical to understand fully:

- The motivation for inclusion of the utilities sectors into the EU procurement regime
- The mechanism used to bring these sectors within the system
- The definitions of the covered entities
- The definition of "relevant activities"
- The specific and general exemption mechanisms

1.3 LINKS

There is a particularly strong link between this chapter and the following modules or sections:

- Module D2 on the contracting authorities in the classical sector
- Module E, to the extent that different procedures apply to contracting authorities in the classical sector and to contracting entities in the utilities sector
- Module A3 on the international regulation of procurement where there is some overlap in the definitions used

1.4 RELEVANCE

This information will be of particular relevance to the senior management of the body in question, since the status of the body under the Utilities Directive determines whether or not the provisions of the Directive apply.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

For this chapter, reference will be made to **Directive 2004/17** (the "Utilities Directive"). For the purposes of the scope of application discussed here, the relevant recitals and articles are:

Recital 2	Article 2
Recital 3	Article 3
Recital 4	Article 4
Recital 5	Article 5
Recital 6	Article 6
Recital 8	Article 7
Recital 9	Article 8
Recital 10	Article 9
Recital 25	Article 20
Recital 26	Article 30
Recital 27	
Recital 28	
Recital 29	
Recital 40	
Recital 41	

You may also find the following European Commission explanatory notes useful:

EXPLANATORY NOTE – Utilities Directive Definition of Exclusive or Special Rights
(Document CC/2004/33 of 18.6.2004)

EXPLANATORY NOTE – Utilities Directive Contracts Involving More Than One Activity
(Document CC/2004/34 of 18.6.2004)

For localisation: In national law, please look at:

SECTION 2
NARRATIVE

2.1 INTRODUCTION

As the name of the EC Directives suggests, the procurement directives were originally intended to cover *public* procurement, that is, contracts awarded by public authorities or other *public* bodies. As a result, the current Directive 2004/18/EC (as well as all of the previous directives that applied to the public sector) – hereafter referred to in this module as 'the Public Sector Directive or the Directive' – specifically excludes from its scope of application all public contracts that, under the Utilities Directive (Directive 2004/17/EC), are awarded by contracting authorities exercising one or more of the defined activities in the utilities sector (in the fields of water, energy, transport and postal services) and that are awarded for the pursuit of those activities (see article 12 of the Directive).

This exclusion was not made because the Community authorities did not want to cover public authorities operating in these sectors (they did), but because the bodies awarding such contracts were not always 'public entities'. Indeed, they were and are often wholly private undertakings, even though, in many EU Member States, activities in these sectors are entrusted to government agencies or to a combination of both private and public entities.

In some member states, it is (or was) the public authorities that also operated in these sectors, and so there was no reason, *in principle*, why these sectors should not also be covered by the public procurement system set up by the Public Sector Directive. However, this system did not 'capture' (*i.e.* cover) private companies, and there was some reluctance to covering these companies in the first place. The Community authorities could not simply impose the rules on the 'public' utilities because this would have created an uneven playing field, since the utilities would then only be covered in those member states where they were in public hands and not in member states where they were in private hands. This would have distorted competition, and the member states were not ready to take such half-measures.

By 1990, however, the Community regulator had come up with a means of applying the procurement rules to the utilities sector. It did so in a separate Utilities Directive, where it was made clear that not only were 'public' entities bound to follow Community rules with regard to their procurement of goods, works and services, but so were those private undertakings operating on the basis of special or exclusive rights. The paramount consideration in both public and private sectors is the extent to which contracting entities are subject to state influence, whether this influence is exercised directly or indirectly (*e.g.* the state's power to control the granting and operation of special or exclusive rights to private undertakings).

The rules were adopted in a separate directive because the provisions for the utilities sector were more flexible than those in the classical (public) sectors. It was recognised that the entities in these sectors were operating in a more commercial market so that, although the main principles of the public procurement rules needed to be respected, it was also necessary to provide some flexibility in order to take account of the reality of the environment in which their activities took place.

2.2. DEFINITION OF ENTITIES OPERATING IN THE UTILITIES SECTOR

The entities covered by the Community procurement rules fall within two broad categories. The first category consists of entities over which the state may exercise direct control. These are public authorities and bodies governed by public law. The second category, referred to, for the sake of convenience, as 'utilities', consists of defined *public* bodies and those *private* entities that operate in their relevant sectors on the basis of special or exclusive rights granted by a member state of the Community.

It is important to remember that, unlike in the case of the Public Sector Directive, where contracting authorities once caught by the definition must carry out all of their procurement according to that directive, public authorities, bodies governed by public law and other entities covered by the Utilities Directive are covered only to the extent that they carry out a relevant activity defined in the Utilities Directive. To fall within the scope of application of the Utilities Directive, they must (i) fall within the definition of an entity operating in a utility sector, and (ii) carry out a relevant activity (only or as one among many relevant and/or non-relevant activities).

Important note

Entities operating in the utilities sector, as defined in the Utilities Directive, are covered by the directive only to the extent that they carry out a relevant activity defined in the Utilities Directive.

As stated above, the Public Sector Directive excludes from its scope of application all public contracts that are awarded by contracting authorities under the Utilities Directive. It also makes clear that contracts that are excluded from the Utilities Directive do not, at the same time, re-enter the scope of application of the Public Sector Directive. As a result, public authorities carrying out relevant activities in the utilities sector are covered by the Utilities Directive, not by the Public Sector Directive.

There are three types of defined entity: (i) contracting 'authorities', (ii) public undertakings, and (iii) entities (usually privately owned) operating on the basis of special or exclusive rights.

2.2.1 Contracting 'authorities'

The definition of 'contracting *authority*' is the same in both the Public Sector and Utilities Directives. There are two main types of contracting authority, and the case law on this issue has resulted in a flexible definition. The two types are: 'public authorities' and 'bodies governed by public law'.

Refer to module D1 for an understanding of the scope of the definition of 'contracting *authorities*'.

2.2.2 Public undertakings

Public undertakings are defined in article 2(1)(b) of the Utilities Directive as any undertaking over which public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of the undertaking, their financial participation therein, or the rules that govern it. A dominant influence on the part of the public authorities is to be presumed when these authorities, directly or indirectly, in relation to an undertaking:

- hold the major part of the undertaking's subscribed capital, or
- control the majority of the votes attaching to shares issued by the undertaking, or
- can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

The distinction between public authorities and public undertakings flows from the recognition that the state may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services in the market. In order to make such a distinction, it is necessary, in each case, to consider the activities exercised by the state and to determine the category to which those activities belong. In this respect, the European Court of Justice (ECJ) also takes a functional approach to the definition.

Example from case law

The concepts of 'bodies governed by public law' and 'public undertakings' are not mutually exclusive. The objective of the Utilities Directive is to extend the procurement rules to utilities not covered by the public sector directives and thus ensure that all the contracting entities operating in the utilities sectors are included within its scope, regardless of their legal form and the rules under which they were formed.

Case 283/00 *Commission v Spain* [2003] ECR I-11697

[Localisation possible: In (XXX), this might/will include entities such as (xxx)…]

2.2.3 Entities operating on the basis of special or exclusive rights

A critical reason for the exclusion of certain sectors from the scope of the earlier public sector directives (on works, supplies and services, respectively) was that the contracting entities involved in those sectors could not simply be classified as 'public' entities. Indeed, their legal status ranged from purely government-owned undertakings to private companies holding exclusive concessions. The task of the Community regulator was, therefore, to find a way of going beyond the traditional public/private distinction and to adopt a solution that would address the situations that led to the possibility of protectionist procurement procedures, regardless of the formal legal definition of the entities carrying out activities in those situations.

2.2.3.1 Rationale

One of the primary objectives of the EU procurement system is to protect the interests of economic operators established in an EU Member State that wish to offer goods or services to contracting authorities in another member state and to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by contracting authorities. This objective is not limited to the purely public sector but applies equally to the utilities sector, where both public and private entities are active. The European Commission, after researching the position in the sectors that were excluded at the time, came to the conclusion that there were, in essence, two objective factors that led to nationalistic purchasing attitudes.

Commission Communication

"…as regards the field of application, the proposal is based on the identification of those underlying, objective conditions which lead entities in the sectors to pursue procurement policies that are uneconomic in the sense that they do not ensure that the best offer from any supplier or contractor in the Community is systematically preferred but privilege national suppliers."

(COM (88) 376 final: *Communication from the Commission on a Community Regime for Procurement in the Excluded Sectors: Water, Energy, Transport and Telecommunications)*

The **first condition** identified refers to the 'qualified competitive environment' that exists in a situation where the entity concerned, whether public or private, is insulated from normal market forces. This means that the entity is in a position where it is able, and is often encouraged, to pursue goals that do not necessarily rely on purely commercial objectives. This position of relative privilege can arise in a number of ways, the main example being the grant to an entity of a formal legal monopoly of a geographical nature.

The **second condition** is the result of a situation where the services provided are made available by means of a technical 'network' that has a natural tendency to develop into a monopoly (a natural monopoly). This tendency is likely to be reinforced by the allocation of special rights or powers relating to the management of the network by the state. The ownership of an entity by the state and the control of its management or its financing are obvious indicators of state influence. However, private entities can also be subject to such influence. This may be the result, in particular, where the principal activity of the entity depends on state approval, for example by means of a concession or authorisation that grants to the entity concerned an exclusive right to carry out that activity within a specified geographical area or particular sector.

For the Community regulator, therefore, it is this type of approval that differentiates these privileged undertakings from 'ordinary' undertakings, which benefit from no special or exclusive rights and operate on a normal commercial basis in a completely open and competitive environment.

To overcome those objective conditions permitting the continued existence of uneconomic and protectionist procurement procedures, the Commission found its solution in a formula consisting of the identification of those situations in the relevant sectors in which, whatever the public or private status of the entities concerned, the objective conditions leading to nationalistic purchasing practices can be identified.

The Commission identified those situations by relying on the concept of special or exclusive rights.

2.2.3.2 Existence of special or exclusive rights

Article 2 of the Utilities Directive identifies the contracting entities that are covered by the proposals and groups the contracting entities in two categories, namely public authorities and public undertakings (as above) as the first category and undertakings operating on the basis of special or exclusive rights as the second category.

Article 2(2)(b) provides that the provisions of the Utilities Directive are to apply to:

- contracting entities that are not public authorities or public undertakings; and
- that have as *one* of their activities any of those referred to in articles 3 to 7 (discussed below) or any combination thereof; and
- that operate on the basis of special or exclusive rights granted by a competent authority of a member state.

Note: Covered Utilities

The Directive also provides, in annexes I-X, an illustrative (and non-exhaustive) list of entities in each of the EU Member States that are considered to fulfil the criteria discussed here. *[Localisation possible: In (XXX), this might/will include entities such as (xxx)]*

Article 2(3) of the Utilities Directive states that, for the purpose of the directive, special or exclusive rights are to mean rights deriving from authorisations granted by a competent authority of the member state concerned, by means of any legal, regulatory or administrative provision, the effect of which is to limit the exercise of activities defined in articles 3 to 7 to one or more entities, which substantially affects the ability of other entities to carry out such activity.

No 'special or exclusive rights' exist where they have been conferred upon the undertaking as a member of a class of undertakings carrying on an economic activity that is open to anyone. Indeed, exclusive or special rights must generally be taken to mean rights that are granted by the authorities of a member state to an undertaking or to a limited number of undertakings in a way *other than* the application of objective, proportional and non-discriminatory criteria, and this special or exclusive status substantially affects the ability of other undertakings to provide the same services in the same geographical area under substantially equivalent conditions.

Note: Grant of rights

Compare this approach to the approach taken by the regulator under the general exemption mechanism found in article 30 of the Utilities Directive and discussed below in section 2.3.6.

For further explanation, see the Commission's *Explanatory note – Utilities Directive: definition of exclusive or special rights* (Document CC/2004/33 of 18 June 2004).

2.3 DEFINITION OF RELEVANT ACTIVITIES

Unless exempted under article 30 (see section 2.3.6), contracting entities falling within the above definitions are covered by the Utilities Directive, but only to the extent that they carry out a relevant activity and only in relation to contracts awarded for the purpose of carrying out that activity. The relevant activities are discussed below.

Note: New definitions of 'relevant activities' – changes from the earlier directives

Previously, **telecommunications** was a relevant activity, but it has now been removed from the list. Following the success of the Community's telecommunications liberalisation initiative to introduce effective competition into the sector, the Commission no longer considers it necessary to regulate purchases by entities operating in this sector. Now **postal services** are included as a relevant activity.

2.3.1 Water

The relevant activity consists of the provision or operation of a fixed network intended to provide a service to the public in connection with the production, transport or distribution of drinking water.

In the case of a contracting 'authority', the supply of drinking water to networks that provide a service to the public is also a relevant activity for the purposes of the Utilities Directive. As for other contracting entities, whenever the supply of drinking water to such networks is one of their principal activities, then it is covered by the Directive.

The supply of drinking water is not considered as a principal activity and is not covered where:

- its production takes place because it is necessary for carrying out an activity other than a relevant activity; and
- such supply depends only on the entity's own consumption of drinking water and has not exceeded 30% of the entity's total production of drinking water on average for the preceding three years, including the current year.

In addition, the Utilities Directive also covers the award of contracts connected with hydraulic engineering, irrigation or land drainage, as well as the disposal or treatment of sewage. It applies in the context of hydraulic engineering, irrigation or land drainage provided that the volume of water intended for the supply of drinking water represents more than 20% of the total volume of water made available by such projects or by irrigation or drainage installations.

Exclusion

Contracts for the purchase of water awarded by entities listed in Annex I to the Utilities Directive (production, transport or distribution of drinking water) are not covered since procurement rules are inappropriate for the purchase of water, given the need to procure water from sources near the area where it will be used.

2.3.2 Energy

This activity concerns:

- the provision of electricity, gas or heat; and
- the exploitation of a geographical area for the purpose of exploring for and extracting oil, gas, coal or other solid fuels.

2.3.2.1 Electricity, gas or heat

This activity consists of the provision or operation of a fixed network intended to provide a service to the public in connection with the production, transport or distribution of electricity, gas or heat.

In the case of a public authority, the supply of electricity, gas or heat to networks that provide a service to the public is also a relevant activity for the purposes of the Utilities Directive.

As indicated above concerning water, in the case of other contracting entities, the supply of electricity, gas or heat to such networks is covered only where that activity is one of their principal activities. However, this condition applies differently to electricity, on the one hand, and to gas or heat on the other.

In the case of other contracting entities that supply electricity to such networks, this supply is not covered, as in the case of water supplies (above) where:

- production takes place because it is necessary for carrying out an activity other than a relevant activity; and
- such supply depends only on the entity's own consumption of electricity and has not exceeded 30% of the entity's total production of energy on average for the preceding three years, including the current year.

In the case of other contracting entities that supply gas or heat to such networks, this supply is not covered where:

- the production of gas or heat is the unavoidable consequence of carrying on an activity other than a relevant activity; and
- the supply of gas or heat to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20% of the entity's turnover on average for the preceding three years, including the current year.

Exclusion

The Utilities Directive does not apply to contracts awarded for the supply of energy or of fuels for the production of energy. This exemption was included because of the lack of liberalisation in the Community energy market, which meant that energy could effectively not be traded across EU borders. The exemption refers to the purchase of fuels for the production of energy; it does not exclude the purchase of fuels for other purposes, such as transport.

2.3.2.2 Exploitation of a geographical area

The Utilities Directive applies to contracting entities that exploit a geographical area for the purpose of exploring for and extracting oil, gas, coal or other solid fuels.

In addition, a specific exemption was provided in the previous utilities directive for activities concerning the exploration and extraction of hydrocarbons. This exemption has not been retained in the current Utilities Directive, and no new exemption will be granted under this procedure, although the exemptions already granted under the procedure remain valid. Exemption will now be considered under the new general exemption mechanism of article 30 (see section 2.3.6 below).

Exclusion

As with the energy sector in general, the Utilities Directive does not apply to contracts awarded by contracting entities for the supply of energy or of fuels for the production of energy.

2.3.3 Transport services

The provisions of the Utilities Directive apply not only to the operation of transport networks but also to the operation of transport terminal facilities.

2.3.3.1 Transport networks

This activity consists of the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolleybus, bus or cable.

A transport network is considered to exist where the service is provided under operating conditions laid down by a competent authority of an EU Member State, such as conditions concerning the routes to be served, capacity for the transport to be made available, or frequency of the service.

Previously, the provision of bus services was not covered whenever other entities were permitted to provide those services, either in general or in a particular geographical area, under the same conditions as those provided by the contracting entities. In practice, this meant that other contracting entities were obliged not only to be authorised to operate in the market for the services in question, without any legal barriers to entry for the provision of those services, but they also had to be in a position to actually provide those services under the same conditions as provided by the contracting entity.

The transport sector is now also subject to the general exemption procedure under article 30. Bus transport services that are not already subject to an exemption are required to seek an explicit exemption under article 30 (see section 2.3.6 below).

2.3.3.2 Terminal facilities

The exploitation of a geographical area for the purpose of providing airport, maritime or inland port, or other terminal facilities to carriers by air, sea or inland waterway is also a relevant activity.

However, the Utilities Directive covers only the operators of these terminal facilities. Carriers using such facilities are not covered.

On the other hand, contracts awarded by carriers that are also contracting authorities for the purposes of the Public Sector Directive, are subject to the provisions of that directive.

2.3.4 Postal services

Prior to the adoption of the Utilities Directive (2004/17/EC), contracts awarded for postal services to the public fell within the scope of the Public Sector Directives, to the extent that the entities in question were contracting 'authorities' for the purposes of those directives.

The difference now is that these entities are subject to the more flexible regime of the Utilities Directive and are also in a position to benefit from the general exemption procedure of article 30 (see section 2.3.6 below), which could apply where postal services are provided in a competitive market.

The Utilities Directive applies to:

- activities relating to the provision of postal services *[services consisting of the clearance, sorting, routing and delivery of postal items]; and*
- 'other services than postal services' *[mail service management services (services both preceding and subsequent to despatch, such as 'mailroom management services'); added-value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic mail); and services concerning postal items not included in the main definition].*

This second category of services is covered only to the extent that the entity in question also provides 'postal services' and that the conditions provided for in the general exemption of article 30 are not satisfied in respect of those 'postal services'. As a result, the Utilities Directive applies only where the services are not provided on a competitive basis.

2.3.5 Scope and necessity of 'relevant activities'

A utility is covered only where it carries out a 'relevant activity', as defined above.

Exclusion

The Utilities Directive does not apply to the pursuit of such relevant activities in a third country or under conditions that do not involve the physical use of a network or geographical area within the Community. Such activities must be notified to the European Commission for information purposes.

What happens when an entity carries out a number of activities and awards a contract for a non-relevant activity?

Article 9 of the Utilities Directive provides a mechanism for distinguishing between various situations. The three paragraphs of this article describe essentially three situations:

- A contract that is intended to cover several activities is subject to the rules applicable to the activity for which it is *principally intended.*
- If one of the activities for which the contract is intended is subject to the Utilities Directive and the other to the Public Sector Directive and if it is objectively impossible to determine for which activity the contract is principally intended, the contract is to be awarded in accordance with the latter Directive (2004/18/EC).
- If one of the activities for which the contract is intended is subject to the Utilities Directive and the other is not subject to either the Utilities Directive or the Public Sector Directive, and if it is objectively impossible to determine for which activity the contract is principally intended, the contract is to be awarded in accordance with the Utilities Directive.

Article 9(1) of the Utilities Directive also includes an anti-avoidance provision. It provides that the choice between awarding a single contract and awarding a number of separate contracts may not be made with the objective of excluding the contract(s) from the scope of this Directive or, where applicable, the Public Sector Directive. This provision, which is clearly based on the intention of the contracting entity, would prevent a contracting entity from bundling together *all* contracts under the pretence that they were for the purposes of non-relevant activities when in fact only some were for the purposes of non-relevant activities.

For further explanation, see the Commission's *Explanatory note – Utilities Directive: contracts involving more than one activity* (Document CC/2004/34 of 18 June 2004).

2.3.6 General exemption of Article 30

As indicated above, the previous utilities directive included a series of exemptions in specific sectors where the entities concerned were supplying services in competitive markets, either because that was the reality of the specific market or because competition had been introduced by means of Community market liberalisation.

Given the degree of liberalisation in various sectors, the new Utilities Directive has now introduced a more general exemption provision, which grants an exemption from the provisions of the directive to those contracting entities carrying out an activity that, in the member state in which it is performed, is:

- directly exposed to competition;
- in a market to which access is not restricted.

The test of whether markets are competitive necessarily takes account of both the legal and factual situations in the member state in question and necessarily is to be addressed on a case-by-case basis.

2.3.6.1 Existence of competitive markets

When looking at the question of whether an activity is directly exposed to competition, the assessment is made on the basis of criteria that are in conformity with the Treaty provisions on competition, such as the characteristics of the goods or services concerned, the existence of alternative goods or services, the prices and the actual or potential presence of more than one supplier of the goods or services in question. This indicates very clearly whether the tests to be applied are the same as those applied when making the market analyses required by articles 81 and 82, as well as article 86, of the Treaty.

Further Details

Commission Decision 2005/15 sets out the more detailed requirements for applications under article 30. Annex I of the Decision sets out all of the information that would be necessary for the market analysis to be conducted, not all of which would be relevant to each specific situation.

Consideration is given to both legal and *de facto* barriers to entry. Since the liberalisation directives in the various sectors are designed to remove any remaining legal barriers to entry, the actual removal of those barriers through compliance with the various directives is sufficient to demonstrate the absence of any legal restrictions on access to the market for the activities in question. Access to a market is therefore deemed to not be restricted if the EU Member State has implemented and applied the provisions of Community legislation mentioned in Annex XI of the Utilities Directive, which contains a list of Community legislation designed to liberalise various utility sectors.

Currently the list refers to legislation in the following sectors: transport or distribution of gas or heat (Directive 98/30); production, transmission or distribution of electricity (Directive 96/92); contracting entities in the field of postal services (Directive 97/67); and exploration for and extraction of oil or gas (Directive 94/22).

No liberalisation legislation is currently listed for the production, transport or distribution of drinking water; contracting entities in the field of rail services; contracting entities in the field of urban railway, tramway, trolleybus or bus services; exploration for and extraction of coal or other solid fuels; contracting entities in the field of seaport or inland port or other terminal equipment; or contracting entities in the field of airport installations.

2.3.6.2 Exemption procedure under Article 30

The exemption is granted by means of a Decision by the European Commission, which is prompted by an application by an EU Member State, a contracting entity, or the Commission itself on its own initiative. The procedure of article 30 is supplemented by Decision 2005/15 ('the Decision'), which covers, among other issues, publication requirements, extensions, and procedures for forwarding decisions.

Application by an EU Member State

When an EU Member State intends to apply for an exemption for a given activity, it must notify the Commission and inform it of all relevant facts, in particular of any law, regulation, administrative provision or agreement that demonstrates that the activity in question is directly exposed to competition in markets to which access is not restricted.

If appropriate (*i.e.* where such a body exists and has issued such an opinion), it will include the position adopted by an independent national authority that is competent in the activity concerned. The exemption becomes effective (*i.e.* contracts intended to enable the activity concerned to be carried out are no longer subject to the Utilities Directive) if the Commission has either:

- adopted a Decision establishing the applicability of the conditions for exemption within the appropriate time limit; or
- not adopted a Decision concerning such applicability within that period.

If the exemption is sought on the basis of compliance with the EU liberalisation directives *and* if a competent independent national authority has established that the activity in question is directly exposed to competition in markets to which access is not restricted, the exemption will apply to the extent that the Commission has *not*, by means of a Decision, established the inapplicability of the conditions within the time limit.

The Commission is given a period of three months to come to a Decision, commencing on the first working day following the date on which it receives the notification or the request. The period may be extended once only and for a maximum of three months in duly justified cases, such as where the information contained in the notification or the request or in the annexed documents is incomplete or inexact or where the facts as reported undergo any substantive changes. However, where a competent independent national authority has established that the activity in question is directly exposed to competition in markets to which access is not restricted, then this extension is limited to one month rather than three months.

Application by a contracting entity

When the legislation of the EU Member State concerned so provides, contracting entities may also submit a request to the Commission for an exemption Decision. In that event, the Commission must immediately inform the member state concerned. The member state is then effectively required to follow the procedure as if it had made the application itself (see the preceding section) by informing the Commission of all relevant facts and including, where appropriate, the position of the competent national authority. The same procedure for taking the Decision and the same time limits apply. If, at the end of the time period laid down in paragraph 6 of article 30 of the Utilities Directive, the Commission has not adopted a Decision concerning the applicability of paragraph 1 to a given activity, the exemption becomes applicable.

Procedure at the Commission's initiative

The Commission may also begin, on its own initiative, the procedure for adoption of a Decision establishing the existence of competitive markets. In that event, the Commission immediately informs the member state concerned. There is no requirement for the member state to provide information, and there appears to be no time limit in respect of the Decision in this case.

2.4 CONTRACTING ENTITIES AND THE WTO'S GOVERNMENT PROCUREMENT AGREEMENT

As discussed in module A3, the EU is a signatory of the Government Procurement Agreement (GPA) of the World Trade Organisation (WTO). It is to be recalled that entity coverage under the GPA was generally based on the idea of reciprocity so that each member (signatory) would offer to the other members equivalent access to its government procurement in proportion to its size and to the size of the economy as a whole based on negotiations. Whilst this is not always obvious in the case of the public sector, the negotiations for coverage in the utilities sector were far more specific and sought to measure equivalence and reciprocity more accurately. As a result, not all of the utilities covered by the Utilities Directive are covered by the GPA. They are covered only where they have been explicitly included in the EU's Appendix to the GPA.

In the case of the utilities sector, only contracting authorities and public undertakings are covered, and not those entities operating on the basis of special or exclusive rights, which operate in defined activities. Even then, not all of the utilities sectors are covered. In the case of the utility sectors in the EU, the EU negotiated access to the contracts awarded only by public authorities and public undertakings defined in the Utilities Directive that carry out one or more activities in the fields of water, electricity, urban transport, and terminal facilities in ports and airports. In the case of the EU, the GPA does not apply to activities in the fields of gas and heat, extraction of oil, gas and solid fuels, transport by railway (other than urban railway), and telecommunications (also now excluded from the Utilities Directive itself).

The EU's General Notes to Appendix I to the GPA also set out some more significant exceptions in respect of certain contracts in the utilities sector. For example, until such time as reciprocal access is given to EU suppliers and service-providers, the EU will not extend the benefits of the GPA to, for example, Canada and the USA in respect of water activities; Canada and Japan in respect of electricity activities; and Canada, Korea and the USA in respect of airport terminal facilities.

In practical terms, compliance with the Directives ensures compliance with the provisions of the GPA in respect of those entities that are also covered by the GPA. Since the Directives apply in any event, no further action needs to be taken in respect of *compliance* with the GPA procedural rules. However, in terms of granting access to EU procurement markets, contracting entities for GPA purposes are obliged to do so only in respect of (1) those entities, and (2) those products and/or services from other GPA members as are covered in the various country appendices to the GPA and which are not otherwise subject to exclusion or reciprocity requirements set out in the notes to the appendices. As the exceptions are more significant in the utilities sector than in the public sector, in order to accurately determine the extent of access it would be necessary to consult the specific country appendices.

SECTION 3
EXERCISES

EXERCISE 1
GROUP DISCUSSION ON PUBLIC AND PRIVATE SECTOR PROCUREMENT

Split into groups of about 6 for a debate on the merits of public or private sector procurement practices in the utilities sector.

Half of the groups will take the position that all utilities should follow public procurement rules.

The other half will take the position that all utilities should be permitted to follow private sector procurement practices.

Issues to be addressed include (but are not limited to):

- the impact of state influence over the ability for the utility to operate in the sector;
- the mode of granting authorisations/licences to operate;
- the effect of the existence of a monopoly position (*de facto* or *de jure*)
- the nature of a natural monopoly;
- the fact that utilities may need to compete for customers in competitive markets;
- the commercial outlook of utilities.

The presentations should also consider why it is that private sector operators do not need procurement regulations such as those contained in the procurement Directives in order to be encouraged to pursue economic and efficient procurement practices.

Each group is to present their arguments and conclusions in turn. A vote is to be taken at the end.

EXERCISE 2
CASE STUDY – SUMMERCLIFF BUS & TOUR CO.

You are the procurement officer for Summercliff Bus & Tour Co., a bus transport company that provides two types of service, namely a bus service for the general public along an established route in a city centre, and a coach hire service for holiday trips or to attend special events.

You are contemplating two procurement activities in the forthcoming financial year:

(i) You intend to purchase a new fleet of buses and, to get the most out of the buses, you intend to use them both for the city route and for hire to local schools for transport to sports events.

- Are you obliged to follow the Utilities Directive?
- Would it make any difference if you decided not to use the buses for both purposes?
- Why?

(ii) The business is outgrowing the administration building you currently use and you are considering expanding by constructing new office space.

- What questions should you ask to determine whether you should follow the Utilities Directive?
- Your boss does not know whether to simply build a new headquarters to house the whole company, or whether he should build an annex to house part of the operations. Would you have any opinion from a procurement perspective?

Your boss is not sure whether he wants to comply with the procurement rules at all. He had heard that there was a special exemption for buses operating on competitive routes, which is the case for Summercliff. Is he right?

EXERCISE 3
GENERAL EXEMPTION MECHANISM (HOME STUDY)

Please consider the following three Commission Decisions:

1. Commission Decision 2005/15 of 7 January 2005 on the detailed rules for the application of the procedure provided for in article 30 of **Directive 2004/17/EC** of the European Parliament and of the Council co-ordinating the procurement procedures of entities operating in the water, energy, transport and the postal services sector.

   (OJ 2005 L7/7)

2. Commission Decision 2006/211 of 8 March 2006 establishing that article 30(1) of **Directive 2004/17/EC** of the European Parliament and of the Council co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors applies to electricity generation in England, Scotland and Wales.

   (OJ 2006 L76/6)

3. Commission Decision 2006/422 of 19 June 2006 establishing that article 30(1) of **Directive 2004/17/EC** of the European Parliament and of the Council co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors applies to the production and sale of electricity in Finland, excluding the Åland Islands.

   (OJ 2006 L168/33).

Answer the following questions:

(i) How important were the energy sector liberalisation Directives to the two exemption decisions?

(ii) Based on the two exemption decisions, would you say that the criteria listed in Annex 1 of Decision 2005/15 are mandatory or illustrative?

(iii) What do the two exemption decisions tell you about the value of determining the product and geographic markets at issue?

(iv) What do they tell us about the identity of the independent national authorities referred to in article 30?

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. What are the three types of contracting entity in the utilities sector?
2. Why was the utilities sector originally excluded from the scope of the EC public procurement rules?
3. Was the original exclusion a matter of principle or a matter of practicality?
4. Explain the relevance of government influence.
5. How did the Community regulator bring the utilities sector within the ambit of the rules?
6. In the case of contracting "authorities", are the Public Sector and Utilities Sector Directives mutually exclusive?
7. Is there a difference between "bodies governed by public law" and "public undertakings"?
8. What are "special" or "exclusive" rights? Are "special" rights different from "exclusive" rights?
9. Is it enough that a contracting entity falls within the definition of "utility"?
10. What is the purpose of considering "relevant activities"?
11. Name the four main relevant activities.
12. Why were telecommunications dropped from the list of "relevant activities"?
13. If a contracting entity also carries out non-relevant activities, is it still covered by the Directive for purchases for those activities?
14. If an exclusion was granted before the adoption of **Directive 2004/17**, does it remain in force or is it replaced by the general exemption of article 30?
15. Explain the reasons for including the general exemption mechanism.
16. What considerations will apply to the award of the exemption?
17. Who may apply for the exemption, and how?

Public procurement law – scope of application

MODULE D

Contracts covered

PART 3

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. The different types of contract that are covered by the rules
2. The contracts not covered by the procurement rules
3. The means of distinguishing between the different types of contract
4. The general treatment given to the different types of contract

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- The essential characteristics of a "procurement contract"
- The nature of the contracts covered
- The scope of the contracts covered
- The effect of combining contract types

This means that it is critical to understand fully:

- The elements of a contract
- The characteristics of arrangements that do not constitute contracts
- The aim or purpose of a contract

1.3 LINKS

There is a particularly strong link between this chapter and the following modules or sections:

- Module C4 on the award of concession contracts
- Modules D1 and D2 on the internal structure of the contracting authorities and contracting entities
- Module D4, applying value thresholds to the contracts that become subject to the rules
- Module E – all parts, on procedures that apply to the various contract types

1.4 RELEVANCE

This information will be of particular relevance (i) at a strategic level where decisions as to the type of contract to be employed may be used to affect the type of contract and, therefore, type of procedure that is appropriate and (ii) at the operational level, where the type of contract at issue will determine the applicable thresholds, possible exemptions, and types of procurement methods to be used.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

In addition to the provisions of the Directives, it may also be useful to have at hand:

- [Localise: the (national law relating to concessions);
- The section of the applicable local law that applies to services contracts]

SECTION 2
NARRATIVE

2.1 INTRODUCTION

Note: This narrative discussion has general application for both the Public Sector and Utilities Directives, and so the term "Directives" is used except where the context requires otherwise.

The Directives cover three main types of contract:

- works
- supplies
- services (other than works), including design contests

There is no separate category for consultancy services, which are dealt with essentially in the same way as are other services.

Some contracts will often contain elements of one or more of the above types of contract. Thus, a contract to construct a building might include design services and certain necessary supplies. Similarly, a supply contract may include siting and installation services. The Directive contains specific rules that are used to classify these 'mixed contracts'.

A number of contracts are entirely excluded from the scope of the Directives (but not necessarily of the Treaty), either because of their nature (*i.e.* where it would be inappropriate to apply the provisions of the Directives) or because they are the subject of different systems of regulation or administration. Some contracts, the new 'reserved contracts', receive special treatment as a result of the identity of those supplying the goods, works or services under them. These exempted and reserved contracts, which are subject to specific eligibility requirements, are discussed in module D4.

Even if not excluded, contracts will only be subject to the provisions of the Directives where their value exceeds the relevant monetary value set out in the Directives – the EU financial threshold. These thresholds reflect the level at which it was assumed by the Community Legislator that cross-border trade was likely (although it is possible that, depending on the circumstances, tenderers may be interested in below-threshold contracts in other EU Member States – it is to be recalled that the general principles apply to the award of these contracts in any event). In order to prevent creative methods of calculating the value of the contracts to be awarded, the Directives also apply rules and methods of calculation as well as prohibition of methods designed to circumvent the Directives by splitting, aggregating or packaging contracts in such a way that the contracts do not properly fall within the appropriate provisions. Thresholds are discussed in module D5.

One important distinction made by the Directives is between 'contracts' and 'concessions', the latter being treated differently from contracts. Special rules apply to the award of works concessions in the Public Sector Directive, while services concessions are excluded from the scope of both the Public Sector Directive and the Utilities Directive.

Finally, it should be mentioned that the latest Public Sector Directive also resolves the previous uncertainty over the position of framework agreements, which – although they may still be contracts for works, supplies or services (or treated as such) and are therefore no different in nature by reason of their method of award – require separate treatment.

2.2 'PROCUREMENT' CONTRACTS

The Directives do not give any particular definition of a 'procurement' contract, but only certain contracts fall within the scope of the Directives. The Directives refer to 'public works' contracts, 'public supply' contracts and 'public services' contracts, [Localisation may be required if the definitions in the local law are different] but there are some general characteristics that are common to all types of contract covered by the Directives.

The Directives apply to contracts for pecuniary interest concluded in writing between an economic operator and a contracting entity, as follows:

- The contract must be for pecuniary interest, *i.e.* for money or money's worth. There must be a financial consideration, no matter how it is paid.
- The contract must be in writing. In the very unlikely event that a contract that falls within the Directives is not in writing, it will be subject to the general application of the rules contained in the Treaty, as discussed in module A1.
- The contract must be between two parties: the economic operator and the contracting entity. There are situations in the public sector, however, where agreements are not made between two separate and distinct parties, and therefore there is no contract according to this definition. Arrangements made between departments of the same organisation, for example, would not ordinarily be covered by the procurement rules. This is because there would normally not be any contractual relationship between the various departments of a single organisation. This part of the definition has attracted some interest recently and is considered in the next sub-section.

2.2.1. Internal arrangements within the contracting entity

Where there is a purely internal arrangement between departments of the same public sector organisation, there will generally be no contract. However, as indicated in module D1, even public sector organisations can make use of private sector structures, such as companies, to carry out public services. These structures/companies can also be used to provide services directly to the public organisation that controls them. Where they are part of the same legal structure, these arrangements are not 'contracts' for the purposes of the Public Sector Directive (in the utilities sector, the existence and treatment of separately owned affiliated undertakings is specifically foreseen, and therefore the issue concerns mainly the public sector). As soon as these structures become separate legal entities, however, any arrangement between them becomes a 'contract' between two parties, with one being a contracting entity, and the other an economic operator.

When this happens, the procurement of goods, works and services between the 'parent' contracting entity and the 'owned' economic operator becomes a procurement contract between those parties. This means that the contract must be awarded using the provisions of the Public Sector Directive so that the contracting entity may not make a direct award of a contract to its own company.

This situation has been explicitly recognised in the utilities sector, where it is often the case that a contracting entity owns a number of subsidiaries. Under the Utilities Directive, there is an explicit 'affiliated undertakings' exemption. The effect of this exemption is to exclude the intra-group (*i.e.* between the parent and subsidiary or between the various subsidiaries) that is providing goods, works and services from the scope of the Utilities Directive, subject to certain conditions. There is no equivalent provision in the Public Sector Directive. This means that where there is a contract, the award of that contract, whether or not it is to a wholly-owned company, will be subject to the procedural rules.

This situation has been confirmed by the European Court of Justice (ECJ). The ECJ also provides an exemption, however. In the rather important case of *Teckal*, the ECJ held that it was sufficient to apply the arrangements set out in the Directive "if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority". It then went on to say, however, that the situation would be different if, in effect, the contracting entity controlled the company as if it were one of its departments. This would take the arrangement outside the scope of the Public Sector Directive.

Case note:

"The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities."

(ECJ Case C-107/98 *Teckal Srl v Comune di Viano and AGAC di Reggio Emilia* [1999] ECR I-8121)

This decision has also been applied to inter-administrative agreements, that is to say, not to contracts between a contacting authority and a company in which it has a financial interest but to contracts between different public authorities. Thus contracts between two public authorities are not excluded simply because both parties are public authorities; to be excluded, one of the authorities must also satisfy the *Teckal* test, *i.e.* it must exercise over the other public authority a control that is similar to the control that it exercises over its own departments, and the latter authority must carry out the essential part of its activities under the control of the controlling local authority or authorities.

In a subsequent case, the private company (economic operator) at issue was only partly owned by a public authority, while the remaining shares were held by private parties. It was argued that the very small minority share held by the public authority (24.9%) still gave the contracting entity control over the company, which was sufficient to take the contract outside the Public Sector Directive. The ECJ disagreed because the existence of a private interest was incompatible with the public interest objectives presumed to be pursued by public authorities and because the capital presence of a private undertaking would give that undertaking an advantage over its competitors and thus risk distorting competition and violating the principle of equal treatment (in respect of other tenderers).

Case note:

"The participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant *excludes in any event* the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments."

(ECJ Case C-26/03 *Stadt Halle* [2005] ECR I-1)

2.2.2 When does a contract arise?

When a new contract is awarded, there is normally little difficulty in identifying it. Sometimes, however, this is not obvious. For example, an existing contract might be amended or renewed. A contract may also be amended during its execution. All of these situations give rise to new obligations between the parties and may change the terms of the original contract.

If the result of the changes is so extensive that the renewed or amended contract is fundamentally different from the original contract, then it may be the case that a new contract will be established. If there is a new contract and all of the elements of a contract are present, then the contract should be subject to the procurement rules, *i.e.* it must be awarded according to the provisions of the Directives. This means that a simple extension, renewal or even amendment might not be permitted if it is made without competition.

The practical difficulty will be in determining when a change in the contract will give rise to a new contract, thus creating an obligation to apply the Directives, and when it will not. The Directives are silent on the issue and there is very little case law in this regard.

In some cases, the Directives do provide a solution. Options can be included in contracts, and these options might foresee an extension or renewal of the contract following satisfactory performance, for example. If the value of the option or the renewal is taken into account in the calculation of the estimated price of the original contract, it will be covered by the original competition and there will be no need to apply the Directives again. See module D5.

Similarly, some contracts can be renewed automatically until terminated by one party or the other or by mutual agreement, or they may simply be concluded for an indefinite period of time. These are 'indefinite' contracts, and the Directives provide a mechanism for calculating the value of such contracts for the purposes of the applicable thresholds. See module D5.

The case of contract variations (*i.e.* where the contract needs to be varied/amended during its execution) is less clear. Even where variations are anticipated, as is often the case with works contracts, there will still be a question of whether those variations are acceptable as part of the original contract or whether they go beyond the terms of the original contract and become, in effect, a new contract.

The issue came before the ECJ in the case of *Pressetext* (Case C-454/06 *Pressetext v Austria* [2008] ECR I-4401), where the ECJ provided a number of indicators:

- Amendments to the provisions of a public contract during the execution of the contract constitute a new award of a contract when they are *materially different* in character from the original contract and therefore demonstrate the intention of the parties to renegotiate the essential terms of that contract.
- An amendment may be regarded as being material when it 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.
- An amendment may also be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered.
- An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner that was not provided for in the terms of the initial contract.

2.2.3 Contracts and concessions

A concession is a contract of the same type as the contracts defined in the Directives except that consideration for the works or services to be carried out, for example, consists either solely in the right to exploit the work or service or in this right together with payment.

A concessionaire often accepts the operational and financial risk of providing a public service, in the broadest sense, in return for the chance of making a profit through the exploitation of the 'service'. A contractor seeks to make a profit by means of the fixed payment received for the execution of the contract. Public-private partnerships (PPPs) will sometimes include the award of a concession.

Concessions are used, for example, to carry out and finance major infrastructure projects, notably in respect of the construction of a road network, bridges or tunnels, where the concessionaire is remunerated by way of tolls charged to users. They are also used, however, simply to provide for the operation and maintenance (rather than construction) of facilities by concessionaires, such as where an operator is given the concession to operate an existing railway or underground railway infrastructure. The former types of concession are examples of works concessions; the latter is an example of a services concession.

Only public works concessions are dealt with comprehensively in the Public Sector Directive. Article 17 of the Public Sector Directive now explicitly excludes coverage of public services concessions. The general principles of the Treaty continue to apply, however.

Case note:

The general Treaty principles, including the principles of non-discrimination and transparency, must be applied to the award of public services concessions.

(ECJ Case C-275/98 *Unitron* [1999] ECR I-8291)

2.2.4 Framework agreements and contracts

Under article 1(5), a framework agreement is an agreement between a contracting entity and one or more suppliers, contractors or service providers, the purpose of which is to establish the terms – in particular with regard to prices and, where appropriate, the quantity envisaged – governing the contracts to be awarded during a given period. Such agreements are used frequently in practice where a purchaser has a continuing or recurring need to purchase the same or similar products or services and wishes to avoid the costs associated with awarding a new contract each and every time that it needs to purchase additional supplies.

The difficulty raised by the definition of framework agreement is that it may or may not be a 'contract' for the purposes of the Directives, *i.e.* the parties to the agreement do not always undertake binding commitments to buy or sell but merely set out the terms that would apply to any future contracts that they might conclude. Whether there is a contract or not will depend on national law.

If there is no binding contract at the stage of the framework agreement, the issue of establishing a contract would arise when orders are placed under the agreement so that each agreement call-off would amount to a separate contract. Ordinarily, therefore, the Directives would apply to each call-off above the threshold. These individual orders could also be aggregated if individually they fell below the thresholds (see module D5).

What the Directives do is to effectively enable a non-binding framework agreement to be treated in the same way as a binding framework contract. Thus, if the contracting entity chooses to award the framework agreement under the provisions of the Directives as if it were a binding contract, then the subsequent call-off 'contracts' may be awarded without competition.

Where the non-binding framework agreement has not been awarded pursuant to the provisions of the Directives, however, each contract above the threshold value will be treated as a contract falling within the terms of the Directives and will be subject to their procedures. Individual contracts that have been awarded pursuant to a framework agreement are subject, as any other contract that has been awarded subject to the Directives, to the requirement of the publication of a contract award notice in the *Official Journal of the EU*. In addition, a framework agreement could be entered into with multiple suppliers, followed by a mini-tender when call-offs were required. The procedures for awarding framework agreements are covered in module C4.

The Directives further provide that contracting entities may not misuse framework agreements in order to hinder, limit or distort competition, although they do not refer to any particular cases of misuse. The duration of framework agreements is limited to four years, except in exceptional circumstances justified by the subject of the framework agreement.

2.3 WORKS CONTRACTS

Works contracts are defined as those contracts that:

- have as their object either the execution or both the execution and design of works related to one of the activities referred to in Annex I; or
- have as their object the realisation, by whatever means, of work corresponding to the requirements specified by the contracting entity.

The possibility of including design works in a works contract means that 'design and build' contracts may fall within the definition of a works contract. This could include, for example, contracts covering the planning and financing of a project as well as its execution. Where design and construction are awarded separately, the design services would be a priority service (category 12) or could, alternatively, be awarded by means of a design contest.

For the second part of the definition, a 'work' is the outcome of building or civil engineering works taken as a whole that is sufficient in itself to fulfil an economic and technical function (see 2.3.2 below for details). This definition is relevant for a number of reasons, notably in the context of the realisation of works by any means and for the purposes of assessing the threshold values and, consequently, when deciding whether a single requirement for works has been split up with a view to bringing contracts below the relevant threshold value.

2.3.1 Building and civil engineering activities

Annex I of the Public Sector Directive (Annex XII of the Utilities Directive) gives a list of professional activities as set out in the general industrial classification of economic activities within the European Communities (NACE). The Common Procurement Vocabulary (CPV) is often recommended for use in the contract award notices, and the annexes to the Directorates provide for each NACE code a corresponding reference to the relevant CPV code, even though the CPV is not binding. Article 1(14) of the Public Sector Directive explicitly provides that, in the event of any difference of interpretation between the CPV and the NACE, the NACE nomenclature will apply. The following list, contained in the annexes, covers building and civil engineering. In summary, the list includes:

- general building and civil engineering work and demolition work;
- construction of flats, office blocks, hospitals and other buildings, both residential and non-residential (to include such activities as roofing, construction of chimneys, waterproofing, restoration and maintenance of outside walls, etc.);
- civil engineering: construction of roads, bridges, railways, etc. (to include such activities as earth-moving, hydraulic engineering, irrigation, and sewage disposal);
- installation: fittings and fixtures (to include activities such as gas fitting and plumbing, installation of heating and ventilating apparatus, electrical fittings, etc.);
- building completion works (to include such activities as plastering, joinery, painting and tiling).

See module E2 on the use of NACE and CPV codes in the contract notice.

2.3.2 Realisation of a work by whatever means

A works contract would also fall within the definition of the Directives where the party signing the agreement was not, in fact, the contracting entity itself, but a company acting as an agent on its behalf. This would apply, for example, in the construction industry where an engineering and construction company was taken on as management contractor providing engineering design, procurement, construction and project management services to the contracting entity. The management contractor would be obliged to follow the procurement rules when awarding contracts for works since it would be providing work corresponding to the requirements specified by the contracting authority. The contracting entity would obtain such work 'by whatever means'.

This provision concerning the realisation, by whatever means, of work corresponding to the requirements specified by the contracting authority also covers other arrangements that are common among developers, whereby a developer or builder constructs buildings on its own land and subsequently transfers or agrees to transfer the land together with the buildings to the contracting entity. This might, at first sight, appear to be a contract for the acquisition of land (a type of contract that is excluded from the Directives – see module D4), but the fact that the buildings are often constructed according to the contracting entity's specifications would bring the arrangement within this definition of a works contract.

This provision also covers situations where a contracting entity is in some way obliged to purchase works from a developer who owns the particular land. In some respects, a public purchaser has no possibility of contracting with anyone else, and so the idea that it can apply the procurement rules appears to be purely academic. Such would be the case, for example, with urban regeneration and development projects, which often involve complicated relationships between local authorities and developers and which are regulated by a series of national and local planning laws and regulations. Development may be undertaken by the public authorities on land that they do not own or it may be undertaken by the private sector in areas designated by the public authorities for development.

The relationships are complicated and raise problems in the procurement context because, even in the case of private development, there will inevitably be public intervention since, as designated development areas, developers will often be required, in return for planning consent, to contribute to consequential 'public' requirements, such as by providing feeder roads or even major highways, parking spaces, sewerage and utility networks, street lighting, and leisure parks and gardens. In some cases, there will be requirements concerning the provision of social or affordable housing.

The question is essentially to determine the degree of intervention by the public authority that would imply that it was requiring and paying for works (by whatever means) that complied with its own 'public' requirements. Where the degree is determinative, then the procurement rules will apply. In practice, however, the public authority may not be able to select the private sector partner because the developer who owns the land and development will be able, legally, to insist on carrying out the work.

This issue arose in the case of *La Scala* (Case C-399/98, [2001] ECR I-5409), where a private developer was restoring the La Scala opera house as part of a wider urban development project. The ECJ made several findings (in respect of the public sector works directive at issue):

- The fact that the direct execution of infrastructure works forms part of a set of urban development regulations is not sufficient to exclude the direct execution of works from the scope of the Directive when the elements required to bring it within the scope of the Directive are present.
- Therefore, once there is a contract for pecuniary interest between two independent parties for public works above the threshold, those works will fall within the scope of the Directive.
- The fact that the works were directly executed did not preclude the existence of a contract since, where infrastructure works are executed directly, a development agreement must always be concluded between the municipal authorities and the owner or owners of the land to be developed.
- In this case, there was a public works contract that should have been put out to tender, even though the works could only be executed by the owner of the land.
- The Directive could still be given full effect if the national legislation allowed the municipal authorities, in order to discharge their own obligations under the Directive, to require the developer holding the building permit, in accordance with the agreement it had concluded with them, to carry out the work contracted for in accordance with the procedures laid down in the Directive.

The legal solution, therefore, when the contracting authority was in effect captive to the developer, was for the authority to require the developer to comply with the Directive so that it would in turn be able to discharge its own obligations under the Directive. In other words, the solution would be to make the developer the agent of the procuring entity and force it to apply the provisions of the Directive.

However, even if the developer itself happened to be a contracting entity obliged, in any event, to follow the Directives, it would not mean that the authority awarding the initial contract could avoid applying the rules of the Directives. The Directives apply at both stages.

Case note:

"A contracting authority is not exempt from using the procedures for the award of public works contracts laid down in the Directive on the ground that, in accordance with national law, the agreement may be concluded only with certain legal persons, which themselves have the capacity of contracting authority and which will be obliged, in turn, to apply those procedures to the award of any subsequent contracts."

(ECJ Case C-220/05 *Auroux* [2007] ECR I-385)

2.3.3 Public works concessions

As indicated above, only public works concessions are covered by the Public Sector Directive.

2.3.3.1 Definition

A 'public works concession' is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment. It must thus first fall within the definition of a works contract before the form of the consideration becomes relevant. In considering 'exploitation', significant weight will be given to the element of risk transfer between the public authority and the concessionaire. The absence of risk transfer will suggest the existence of a contract subject to the full rigour of the Directive rather than a concession subject to the Directive's special provisions on concessions.

Important note:

For the purposes of the Directive, a public works concession is, first, a public works contract, and second, it is subject to alternative payment methods. As a result, the award of a public works concession is, by definition, within the scope of the Directive. It is then subject to a special procedure. Public works concessions are thus not outside the scope of the procurement rules. In addition, the principles of the Treaty will apply to the award of public works concessions, whether or not a special procedure applies.

Modern 'concessions' often contain a mix of works and services, *i.e.* they include not only the construction of infrastructure or facilities but also the operation of those facilities. The means of distinguishing between these different elements is discussed further in section 2.7 below.

2.3.3.2 Procedure for the award of a works concession

The Directive sets out a special procedure for the award of a works concession contract by a contracting authority. The special procedure imposes fewer detailed requirements on the contracting authority than does any of the four main competitive procedures. See module C4 for full details of the procedural requirements for the award of a works concession contract.

2.3.3.3 Subcontracting by concessionaires

- The Directive contains specific rules on subcontracting, and contracting authorities have the option of either requiring a concessionaire to subcontract a specified percentage of the contract to a third party or of requesting information from economic operators participating in the tender process to specify the percentage of the contract that they would subcontract if awarded the contract. See module C4 for further information.

2.3.3.4 Obligations of concessionaires

The Directive applies specific conditions on the award of contracts by concessionaires to third parties. A distinction is made between the obligations that apply to concessionaires depending on whether they are themselves contracting authorities.

Where contracts are awarded by concessionaires that are themselves contracting authorities, the concessionaires are bound to comply with the provisions of the Directive in respect of public works contracts. Where contracts are awarded by concessionaires that are not contracting authorities, a more limited set of provisions applies. See module C4 for further information.

2.3.4 Subsidised works or services contracts

The Directive makes special provision for two types of contract: first, in respect of works or services contracts that are subsidised by contracting authorities for more than 50%; second, in respect of design and construction contracts concluded in the context of a public housing scheme.

2.3.4.1 Contracts subsidised by more than half

Where a private entity does not fall within the definition of a body governed by public law, it may still in certain circumstances be treated as if it were such a contracting authority when it awards a contract that is subsidised by a public authority.

This is the case when certain works or services contracts are subsided by public authorities for more than 50%.

In such cases, EU Member States are required to take the necessary measures to ensure that the contracting authorities awarding such subsidies comply with the Directive whenever the contract is awarded by one or more entities other than themselves.

This provision only applies to certain contracts:

- works contracts (falling within the definition of the civil engineering activities contained in Annex I to the Directive) whose value meets or exceeds the normal threshold value for works contracts; and
- services contracts, connected to such a works contract, whose value meets or exceeds the normal threshold value for services contracts.

However, the Directive applies *only* in respect of activities where the contracts involve building work or connected services with a 'public' dimension. Those activities are defined as works and connected services for hospitals, facilities intended for sports, recreation and leisure, school and university buildings, and buildings used for administrative purposes.

See module C4 for information on the detailed requirements.

2.3.4.2 Subsidised housing schemes

Article 34 applies to public contracts relating to the design and construction of a subsidised housing scheme where the size and complexity of the scheme and the estimated duration of the work involved require that planning be based from the outset on close collaboration within a team comprised of representatives of the contracting authorities, experts and the contractor responsible for carrying out the works.

In such cases, a special award procedure can be adopted for selecting the contractor that is the most suitable for integration into the team, but the contracting authorities are required to follow a set of basic procedures and must, in any event, treat economic operators equally, without discrimination and transparently.

No particular procedure is mandated, but the contracting authorities are required to advertise the scheme in accordance with the Directive's rules on advertising and transparency (articles 35 and 36):

- the contract notice must contain as accurate as possible a description of the works to be carried out so as to enable interested contractors to form a valid idea of the project;
- the contracting authorities must comply with the minimum time limits set out in article 38 of the Directive, depending on the overall procedure that they have adopted (open or restricted);
- the contracting authorities may provide additional information in accordance with similar provisions applying to open procedures (article 39);
- they may also use electronic means of communication (article 42).

In selecting contractors, the contracting authorities are bound by the qualitative selection criteria referred to in articles 45 to 52 and must set out in the contract notice the personal, technical, economic and financial conditions to be fulfilled by the candidates.

Contracting authorities are also bound by the duty to inform the unsuccessful candidates and tenderers of the reasons for their lack of success (article 41) and to keep written records of the procedures (article 43).

See module C4 for detailed information on the requirements.

2.4 SUPPLIES CONTRACTS

The definition of supplies is rather more straightforward than that of works or services. 'Public supply contracts' are defined in article 1(2)(d) as contracts – other than works – involving the purchase, lease, rental or hire purchase, with or without option to buy, of products. In addition, the delivery of such products may include siting and installation operations.

The range of products covered by the Directives can be seen in the various nomenclatures used to describe products for the purposes of advertising. See, for example, the Common Procurement Vocabulary (CPV).

2.5 SERVICES CONTRACTS

The term 'service contracts' essentially refers to contracts other than works or supply contracts that have as their object the provision of services referred to in Annex II of the Public Sector Directive (Annex XVII of the Utilities Directive). A number of services are specifically excluded, mainly because they are not amenable to purchase through the rules provided by the Directives. These services are described in module D4.

However, further distinction is made in the relevant annexes between what may be called 'priority services' (Annex IIA of the Public Sector Directive) and 'non-priority' services (Annex IIB).

The services covered are defined by reference to the United Nations' Central Product Classification (CPC), and the annexes referred to above set out the services by name, together with the relevant CPC category. Other classifications are also used for various purposes: for example, the Classification of Products by Activity (CPA) and, more recently, the Common Procurement Vocabulary (CPV). Only the CPC reference is binding. Furthermore, the annexes state that in the event of any difference of interpretation between the CPV and the CPC, the CPC nomenclature will apply.

See module E2 for further information on CPV and CPC.

2.5.1 The two-tier approach

The Directives make a distinction between priority and non-priority services. This distinction is not made on the basis of the nature of the particular activity but rather on the potential that exists for the provision of the services concerned across national borders and on the clear capability of those services to affect trade between member states.

This distinction becomes most readily apparent in the case of services, where those listed in Part IIB as non-priority, whilst capable of attracting localised competition, are less amenable to international competition, either because of the nature of the services (*e.g.* legal and administrative services that are based on familiarity with national laws and jurisdiction) or because of the location in which they need to be provided (*e.g.* hotel and restaurant services).

This does not mean that competition for such contracts is not possible, certainly at local or national level, or even that international competition for them is inconceivable, but only that the nature of the services or their value is such that this is less likely. [Localisation required if appropriate: "For example, in XXX, competitive procedures are also applied for the purchase of [xxx] and [xxx] which, under the Directives, are non-priority services. Within XXX, competition is both possible and desirable for these services.]

The priority services are subject to the detailed award procedures and other provisions of the Directives.

The non-priority services are subject only to a basic transparency regime that requires adherence to the Directives' rules on non-discriminatory technical specifications and the obligation to publish the results of the award.

2.5.2 Priority services

These priority services are listed in Annex IIA of the Public Sector Directive. They are:

1. Maintenance and repair services (CPC: 6112, 6122, 633, 886);
2. Land transport services[1], including armoured car services, and courier services, except transport of mail (CPC: 712 (except 71235) 7512, 87304);
3. Air transport services of passengers and freight, except transport of mail (CPC: 73 (except 7321));
4. Transport of mail by land[2] and by air (CPC: 71235, 7321);
5. Telecommunications services (CPC: 752);
6. Financial services: (a) insurance services and (b) banking and investment services[3] (CPC: ex 81, 812, 814);
7. Computer services and related services (CPC: 84);
8. Research and development services[4] (CPC: 85);
9. Accounting, auditing and bookkeeping services (CPC: 862);
10. Market research and public opinion polling services (CPC: 864);
11. Management consulting services[5] and related services (CPC: 865, 866);
12. Architectural services; engineering services and integrated engineering services; urban planning and landscape engineering services; related scientific and technical consulting services; technical testing and analysis services (CPC: 867);
13. Advertising services (CPC: 871);
14. Building-cleaning services and property management services (CPC: 874, 82201 to 82206);
15. Publishing and printing services on a fee or contract basis (CPC: 88442);
16. Sewage and refuse disposal services; sanitation and similar services (CPC: 94).

2.5.3 Non-priority services

The non-priority services are listed in Annex IIB of the Public Service Directive. They are:

17. Hotel and restaurant services (CPC: 64);
18. Transport services by rail (CPC: 711);
19. Water transport services (CPC: 72);
20. Supporting and auxiliary transport services (CPC: 74);

[1] Except for rail transport services covered by category 18

[2] Except for rail transport services covered by category 18

[3] Except financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services. Also excluded: services involving the acquisition or rental, by whatever financial procedures, of land, existing buildings or other immovable property or concerning rights thereon; nevertheless, financial service contracts concluded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive.

[4] Except research and development services other than those where the benefits accrue exclusively to the contracting entity for its use in the conduct of its own affairs on condition that the service provided is wholly remunerated by the contracting authority.

[5] Except arbitration and conciliation services

21. Legal services (CPC: 861);
22. Personnel placement and supply services[6] (CPC: 872);
23. Investigation and security services, except armoured car services (CPC: 873 (except 87304));
24. Education and vocational education services (CPC: 92);
25. Health and social services (CPC: 93);
26. Recreational, cultural and sporting services (CPC: 98);
27. Other services[7].

2.5.4 Mixed priority and non-priority services contracts

The Directives apply an explicit value test to services contracts that contain both priority and non-priority services.

Contracts will be for priority services where the value of the priority services contained in the contract is greater than the value of the non-priority services.

In other cases, it will be a non-priority services contract, so that a contract in which the share of non-priority services is equal to or greater in value than the share of priority services will be a non-priority services contract.

There is no obligation to separate out the priority and non-priority services and to award them as separate contracts, which could lead to a contract for largely non-priority services, even if it contained a large proportion (say 49%) of priority services, being awarded as a contract for non-priority services. Such a separation of services could also turn out in the opposite way, so that the value of priority services would be greater than the value of non-priority services. The result would be the application of the procedures of the Directives to even the non-priority services.

This provision cannot be used, however, to avoid the application of the Directives.

Case note:

A contracting authority may not "*artificially* group in one contract both priority and non-priority services *without there being any link arising from a joint purpose or operation,* with the sole purpose of increasing the proportion of non-priority services and thus avoiding the full application of the Directives."

(ECJ Case C-411/00 *Felix Swoboda* [2002] ECR-567)

Therefore, when assessing whether priority and non-priority services have been packaged together correctly or split up, consideration will be given to the artificiality of the exercise as well as to the intention of the contracting entity. If the services naturally combine to achieve a single purpose, then splitting them up would be artificial. In other cases, where the services do not naturally combine to achieve a single purpose, then there can be no objection to awarding them separately.

6 Except employment contracts

7 Except contracts for the acquisition, development, production or co-production of programmes by broadcasting organisations and contracts for broadcasting time

2.6 DESIGN CONTESTS

Design contests are those national procedures providing the contracting entity with a plan or design that is selected by a jury on the basis of a competition, with or without the award of prizes.

Such contests are held mainly in the fields of town or area planning (with particular regard for the public sector), architecture, civil engineering and data processing. They are often used in the case of the construction of notable public buildings and are being used more and more frequently for the design of projects such as IT infrastructure projects.

These contests may be part of a procedure leading to the award of a service contract or may be held independently under a separate procedure since there are no inevitable results when undertaking a design contest.

The rules only apply where the total amount of contest prizes and payments to participants meets the appropriate threshold.

On the other hand, where the contests form part of a procedure for the award of other contracts, the threshold value consists of both the value of contest prizes and payments *and* the value of the services contract that might be awarded to the winner where the rules of the competition provide that the resulting services must be awarded to one or the other of the winners of the design contest. The resulting services must be a 'direct functional link' between the contest and the contract concerned, and therefore a mere connection in terms of the subject matter of the contract does not suffice. Furthermore, this provision applies only where the rules of the competition specify that the resulting services *must* be awarded to one or the other of the winners of the design contest.

See module C4 for further information on such contests.

2.7 MIXED CONTRACTS

The Directives contain provisions on how to categorise a contract containing elements of works and/or supplies and/or services.

The distinctions are relevant in the case of mixed supplies and services contracts, notably where the services included are non-priority services. If the contract can be categorised as a non-priority services contract, then it would remain largely unregulated, even if it also contained supplies.

It is an issue also in the case of works contracts that contain elements of supplies or services, given the much higher thresholds that apply to works contracts. The way in which mixed contracts are categorised depends on the mix.

2.7.1 Supplies/services

Essentially, contracts containing elements of both supplies and services will be treated as one or the other type of contract depending on the value represented by each element.

The contract will be considered to be a services contract where the value of the services performed is greater than the value of the products supplied. Where the value is equal, it will be considered as a supplies contract.

The definition makes no distinction between priority and non-priority services, with the effect that, where the value of non-priority services in a mixed contract is greater than the value of supplies, the whole contract will be treated as a contract for non-priority services.

Supplies contracts that also cover, as an incidental matter, siting and installation operations, will be defined as supplies contracts.

2.7.2 Works/services

In the case of works and services, the Directives do not provide for a value test, as above, but include a test based on the principal object of the contract, as opposed to considerations that are merely incidental to that object.

A contract having as its object services (either priority or non-priority) and including activities within the definition of 'works' that are only incidental to the principal object of the contract is to be considered to be a service contract.

The 'principal object' test is clearly inspired by the decision of the ECJ in the *Gestión Hotelera* case, as discussed below.

Case note:

The case concerned two invitations to tender, one in respect of the installation and opening of a casino, the other in respect of the operation of a hotel. The contracting authority intended to arrange for the installation of a casino in the premises of a hotel owned by the municipality. It wanted, however, to award the contract to the company that, following competitive selection, would assume responsibility for the operation of the hotel business. Despite the works component, it was clear for the ECJ that the main object of the award of the contract was, first, the installation and opening of a casino and, secondly, the operation of a hotel business. Those objects constituted services concessions and thus were outside the scope of the Directives.

(Case 331/92 *Gestión Hotelera* [1994] ECR I-1329)

2.7.3 Works/supplies

Under the Directives, supplies contracts that also cover, as an incidental matter, siting and installation operations, are defined as supplies contracts. For example, in the case of the purchase of a crane to be installed on a dockside, the object of the contract is the *supply* of the crane and not the works required to site it, even if those works are considerable.

This 'principal object' test, which mirrors the way in which works and services contracts are to be distinguished, would appear to apply even if the value of siting or installation services is greater than the value of the supplies itself, since it is a test based on the object of the contract and not the value-based test applied to distinguish between supplies and services.

SECTION 3
EXERCISES

EXERCISE 1A
CLASS CASE STUDY

These are the original facts from the Class Case Study (Exercise 1) for module D1:

Arcadia municipality decides it wants to develop a business and commercial zone on an attractive plot of land at the edge of town which it is calling Evergreen Park. It is considering setting up a non-profit organisation in the form of a private company, Apple Inc., in which it would own the majority of the shares to undertake the development in the hope that this will reduce the administrative burden of creating Evergreen Park. A neighbouring municipality, Eden Town, which has experience in such developments decides that, when the arrangements are in place for the development, it would itself like to bid for the contract to design the overall architectural scheme and undertake the general planning of Evergreen Park. Eden Town does not, however, have in-house capability for the landscaping requirements of the Park. Having used them in the past, Eden Town decides that, before bidding for the contract, it should make sure that it can rely on the services of Greenfingers, a private landscaping company. It therefore enters into a contract with Greenfingers to supply the required landscaping services when and only if Eden Town wins the design contract.

Additional facts for this exercise are as follows:

The land on which Evergreen Park is to be built is owned by Monolith, a private developer who had previously begun a similar project but ran out of money. There are some buildings and amenities on the land but it is mostly an evergreen site. It tells Arcadia that it will only sell the land if it is given the construction contracts for the development.

Question: Since Arcadia has no option but to give the construction contracts to Monolith, does that mean that it can avoid the procurement rules?

EXERCISE 1B
CASE STUDY

These are the original facts from the Individual Case Study (Exercise 2) for module D1:

Until now, the municipality of Cleverton has provided municipal waste disposal services by way of an autonomous service unit of the municipality called the Cleanup Team. Although not set up formally as a company, the Cleanup Team operated as if it were an independent company, despite the fact that its management was governed by rules put in place by Cleverton and that traditionally all its funding came from the treasury department of Cleverton. Indeed, the Cleanup Team believed it was just like a company and would also provide services to private sector clients and other municipalities in return for payment. By its 2008 year-end, it transpired that its receipts from these latter services accounted for 51% of all the income it received for that year (roughly EUR 3 million), an increase of more than 20% over the previous year. This was expected to increase further in 2009.

Having seen the projected financial results, Cleverton believed that it should put the Cleanup Team on a more proper financial footing, and decided to create a limited liability company to take over its functions. It created Cleanup Limited, a wholly owned subsidiary, on 5 November 2008 and signed with it, on 10 November, a contract for the supply of municipal waste disposal services for 2009, to begin on 1 January 2009. The value of these services was in the order of EUR 1.5 million.

On 25 November 2008, the central government introduced much stricter and more sophisticated environmental regulations that would apply to the transport and disposal of municipal waste. The Cleanup Team had previously contracted out its routine environmental compliance work to a private sector company, Opportune Limited. In 2008, the value of this work had been about EUR 150 000. Realising that it did not have the expertise to meet these new regulations, the management of Cleanup Limited approached Opportune Limited directly to provide the services without following the procurement Directives.

Additional facts for this exercise are as follows:

Rather than risk simply selling its know-how in this new area, however, Opportune Limited offered to enter into partnership with Cleanup Limited, which would protect its know-how. As a result, it agreed to provide ongoing environmental services to Cleanup Limited at the going market rate (of approximately EUR 300 000 per annum), but in return for a 10% stake in Cleanup Limited. The transfer of shares took place in the middle of December 2008 and the contracts were in place by 30 December 2008.

Question: Superclean also believes that Cleverton should not have given a contract to Cleanup Limited without following the provisions of the procurement Directives. How do you respond?

Note: You have enough information to answer this question from the general principles. However, you might want to consider a further case: C-29/04 *Commission of the European Communities v Republic of Austria ("Mödling")* [2005] ECR I-9705.

EXERCISE 2
MIXING AND MATCHING

Provide 1 example each of practical situations where you would find a mix of:

- supplies and services
- works and supplies
- works and services

1. Explain why these components are mixed.
2. Consider whether they could be separated, and why.
3. Devise procurement plans that will, legitimately,
   (i) maximise and
   (ii) minimise

   application of the Directives.

EXERCISE 3
GROUP DISCUSSION ON COMPETITION IN NON-PRIORITY SERVICES

Split into groups of about 6 for a debate on the question of whether competition for non-priority services is possible and/or desirable at a national level.

One group will take the position it is possible and/or desirable.

The other group will take the position it is not possible and/or desirable.

Issues to be addressed include (but are not limited to):

- the objective of the Directives is to foster interstate trade
- the nature of some services is amenable to competition across borders
- competitive procurement is beneficial even if international competition is unlikely
- the effect of procurement taking place in border areas

In considering the issues, take the example of

- legal services
- hotel and catering services
- vocational training
- security services

Each group is to present their arguments and conclusions in turn. A vote is to be taken at the end.

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. Are oral contracts covered by the Directives? Explain what principles apply.
2. Who are the parties to a public contract?
3. Can a public sector authority be a party?
4. Can a company owned by public sector authority be a party?
5. What is the test that applies when a public authority wishes to contract with a company it owns without following the procurement rules?
6. Does an extension to a contract have any effect on the application of the procurement rules?
7. If a contracting authority wants to provide for a renewal on the basis of good performance, is there anything that should be done when awarding the original contract to make that easier?
8. Explain how the European Court of Justice (ECJ) would look at a contract variation under the procurement rules.
9. Are concessions covered by the Directive?
10. Explain the fundamental difficulty of dealing with framework "arrangements" under the procurement rules. How do the Directives deal with this difficulty?
11. Describe a works contract.
12. What is the significance of the phrase "the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority"?
13. What are the problems associated with urban regeneration projects? How does the ECJ deal with them?
14. In the case of public works concessions, does the Directive apply only to the award of the concession?
15. What rules apply?
16. Describe supply contracts.
17. Describe services contracts.
18. What is the significance of the separation of services into priority and non-priority services?
19. Does the categorisation of non-priority services mean that competition is never possible for such services?
20. What rules apply when a services contract includes both priority and non-priority services?
21. What are mixed contracts?
22. How do you classify a mixed supplies/services contract?
23. How do you classify a mixed works/services contract?
24. How do you classify a mixed works/supplies contract?

Public procurement law – scope of application

Exemptions

MODULE D

PART 4

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. Which contracts are not covered by the procurement rules
2. Why some contracts are exempted and others not
3. The mechanisms for determining when contracts are exempted
4. The connection between the exemption and type of contract at issue
5. How exemptions will be interpreted by the European Court of Justic

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- The reasons for exclusion
- The scope and extent of the exclusions
- The specific nature of the exclusions

This means that it is critical to understand fully:

- The primary purposes of the procurement rules that underpin the inclusion and/or exclusion of contracts
- The limits of exclusion
- The effects of particular exclusions

1.3 LINKS

There is a particularly strong link between this chapter and the following modules or sections:

- Modules D1 and D2 on the internal structure of the contracting entities
- Module D3 on contracts that are covered by the rules
- Module E – all parts, on procedures that apply to the various contract types

1.4. RELEVANCE

This information will be of particular relevance (i) at a strategic level, where decisions as to the type of contract to be employed may be used to affect the type of contract and, therefore, type of procedure that is appropriate; and (ii) at the operational level, where the type of contract at issue will determine the applicable thresholds, possible exemptions, and types of procurement methods to be used.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

In addition to the provisions of the Directives, it may also be useful to have at hand:

- [Localise: the provisions of national law relating to exemptions;
- If applicable, reference to any national law that applies to defence procurement]

Further, reference should be made to **Directive 2009/81** on the co-ordination of procedures for the award of certain public works contracts, public supply contracts, and public service contracts in the fields of defence and security

SECTION 2
NARRATIVE

2.1 INTRODUCTION

Even where contracts fall within the general definition of a public contract, some of these contracts will be excluded from the scope of the Directives for a number of reasons. Some are excluded because they are not, by their nature, amenable to competition. Some are excluded because governments wish to exclude them from competition for specific reasons. Some of the exclusions apply only to contracts of a specific type. There is also a category of 'reserved' contracts that, although not excluded, do benefit from preferential treatment.

In addition, article 12 of the Public Sector Directive provides an exemption for those public contracts that are otherwise covered by the Utilities Directive or for public contracts that, although covered by the Utilities Directive in principle, are exempt from the provisions of that directive. Contracts specifically excluded in the utilities sector will be discussed separately.

General note

As exemptions from the normal rules of the Directives, any exemption will be interpreted strictly by the European Court of Justice (ECJ).

(Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-3609)

2.2 EXEMPTIONS BY REASON OF CHOICE

This section concerns procurement of a military nature, procurement requiring secrecy, and procurement that, by agreement, is subject to different procurement rules. All three types of exemption concern the Public Sector Directive.

2.2.1 Defence procurement

Defence procurement has not been entirely exempt from the procurement rules since they were introduced, but the public sector directives have always provided for a partial exemption for this kind of procurement. However, it was not and still is not the identity of the contracting authority that determines whether or not procurement is to be exempt from the procurement rules. Thus, the exemption is not given because it is the Ministry of Defence carrying out the procurement; the exemption applies only to the subject matter of the procurement, *i.e.* to products that are of a military nature.

Until 2009, certain military products were explicitly exempt from the provisions of the Public Sector Directive and were not subject to any alternative provisions. Since 2009, however, those exempt products and related services are now covered by Directive 2009/81, which applies a more flexible and confidential regime to the procurement of military supplies and related works and services (although EU Member States have until August 2011 to transpose this directive).

Important note

The procurement of certain military supplies and related works and services is now covered by Directive 2009/81. All other public contracts awarded in the fields of defence and security remain covered by the Public Sector Directive.

Directive 2009/81 amended the Public Sector Directive to the effect that the Directive now applies to "public contracts awarded in the fields of defence and security with the exception of contracts to which Directive 2009/81/EC applies". This amendment did not change, however, the substance of the exemption. Directive 2009/81 applies essentially the same definitions to the contracts that are exempt from the Public Sector Directive. It merely provides an alternative procurement regime so that the procurement of such products is no longer entirely excluded from the scope of Community procurement rules and principles.

Whilst the provision of security devices and equipment, such as weaponry and surveillance equipment, is more clearly susceptible to exclusion on the basis of security arguments, many supplies are less easily excluded on the same basis. The supply of uniforms, pharmaceuticals and medical equipment are examples of purchases that may not be so easily justified, although there may be particular instances where, even for such purchases, security is an issue.

The exemption thus applies (and Directive 2009/81 now applies) to contracts awarded by contracting authorities in the field of defence where the products to be supplied are subject to the provisions of article 296(1)(b) (formerly article 223(l)(b)) of the Treaty.

According to that article, a member state may take such measures as it considers necessary for the protection of the essential interests of its security, which are connected with the production of or trade in arms, munitions and war materials. The article is subject to the condition that the measures do not adversely affect the conditions of competition in the common market regarding products that are not intended for specifically military purposes.

This article makes a clear distinction between purely military equipment and equipment that, although used in the context of defence, is not specifically 'military', such as dual-use products (*i.e.* products that may have both civil and defence applications, *e.g.* computers, clothing, blankets, food and medicine).

The provision does not apply to works or services, although it probably applies to such activities as repair and maintenance services *connected with* the procurement in question, and only to those products that are specifically subject to article 296(1)(b).

A list of such products was included in a Council Decision of 15 April 1958, which was not published but is readily available. Whilst Directive 2009/81 also makes explicit reference to this list, it also does not reproduce the list. Products that appear on the list but are nevertheless not intended for specifically military purposes and all other products not covered by the list are subject to the procurement rules.

European Court of Justice:

"It is for the member state which seeks to rely on those exceptions to furnish evidence that the exemptions in question do not go beyond the limits of such cases."

(C-414/97 *Commission v Spain* [1999] ECR I-5585)

Unlike the Directives, the Government Procurement Agreement (GPA) of the World Trade Organisation (WTO) generally exempts purchases of military equipment by defence departments or ministries, except in the case of specified 'dual-use' products listed in the relevant annexes (reproduced in Annex V of the Directive). All products not specifically listed are exempt, and this exemption continues to apply under Directive 2009/81.

In addition, article XXIII of the GPA states that the agreement does not prevent a party from "taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement *indispensable for national security* or for national defence purposes" [emphasis added]. This provision may also be relied upon under Directive 2009/81.

In terms of compliance with GPA obligations of European central government authorities, the dual-use items referred to in Annex V of the Directive are subject to procurement under the terms of the Directive, subject to the application of the exemption.

Directive 2009/81 extends the exemption of both that Directive and the Public Sector Directive to contracts awarded in a third country, with local economic operators, for the deployment of military forces or for the conduct of or support to a military operation outside the territory of the European Union.

2.2.2 Contracts requiring secrecy measures

The Directives do not apply to public contracts (i) that are declared secret, or (ii) the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the member state concerned, or (iii) when the protection of the essential interests of that state's security so requires.

2.2.3 Contracts governed by other rules

The Directives does not apply to contracts that are governed by different procedural rules and awarded:

- pursuant to an international agreement concluded in conformity with the EEC Treaty between a member state and one or more third countries and covering works, supplies or services intended for the joint implementation or exploitation of a project by the signatory states;
- to undertakings in a member state or a third country in pursuance of an international agreement relating to the stationing of troops;
- pursuant to the particular procedure of an international organisation.

The last provision refers to organisations in which states are members. It would include, for example, organisations such as the United Nations, European Bank for Reconstruction and Development, or World Bank. The World Bank, in particular, provides grants and credits to various countries for the procurement of works, goods and services. The procurement of these items is generally subject to the World Bank's own procurement guidelines, except where the national procurement systems are considered to be equivalent and, therefore, acceptable. Many of the new EU Member States have benefited from World Bank assistance and may still be beneficiaries of World Bank financing. To the extent, therefore, that the World Bank continues to impose its own guidelines, this provision will provide the requisite exemption from the Directives.

See module A3 for further information on procedures of international organisations, such as the World Bank.

In the case of defence procurement, the public contracts otherwise subject to Directive 2009/81 now benefit from this exemption by virtue of article 8 of that Directive.

2.3 EXEMPTIONS DUE TO THE NATURE OF THE CONTRACT

2.3.1 Contracts for the acquisition of land

The Directives exclude contracts for the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property, or for the acquisition of rights thereon.

These contracts are excluded because they relate to immovable property, which is naturally dependent on the geographic location. Such contracts take place essentially in local markets and their objects generally rule out any real prospect for cross-frontier competition. The exclusion applies only to contracts concerning the purchase of land or buildings, however.

General note

In practice, this exemption often becomes relevant in cases of urban regeneration, where the public and private sectors are jointly executing development projects that contain public elements. This issue is described in more detail in module D3.

Financial services contracts concluded at the same time as, before or after the contract of acquisition or rental, in whatever form, are subject to the Directive. The Directive also covers any other associated services, such as contracts for the sale of land or property on a fee basis (estate agency contracts) to which the priority service category 14 applies.

In the case of defence procurement, the public contracts otherwise subject to Directive 2009/81 now benefit from this exemption by virtue of article 9(a) of that directive.

2.3.2 Exclusions relating specifically to services

These exclusions apply to specific circumstances, based on the award of exclusive rights to certain authorities to carry out certain services as well as on the nature of a number of specified services.

- **Services contracts provided on the basis of exclusive rights**

  The Directives do not apply to services contracts awarded to contracting authorities or to an association of contracting authorities on the basis of an exclusive right, which they enjoy pursuant to a published law, regulation or administrative provision that is compatible with the Treaty. This exclusion does not apply to those situations in which the contracting authority provides the service in-house (effectively to itself) since, in those cases, there is no contract (see module D3).

  Rather, the exclusion covers situations where the right to provide a service to a contracting authority is granted exclusively to another contracting authority. Thus there is no competition at all from private service-providers, either from within the member state itself or from other member states. Since such services may be provided in return for remuneration and on the basis of an agreement between the contracting authorities concerned, they would be contractual arrangements falling within the terms of the Directives, were it not for this explicit exemption.

The exclusion depends on the granting of an exclusive right, pursuant to a published law, regulation or administrative provision that is compatible with the Treaty. It applies to an ongoing provision of services that has been reserved to a specific public authority. Examples might be public auditing authorities, which other contracting authorities are obliged to employ to conduct audits of their activities, or public inspection authorities, which provide technical inspection services of works acquired by contracting authorities.

Broadcasting material and time

The Public Sector Directive (it is not relevant in the utilities sector) excludes contracts for the acquisition, development, production or co-production of programme material by broadcasters as well as contracts for broadcasting time. This covers the production of audio-visual works, such as films, videos and sound recording, including for advertising purposes, and the purchase of services for the purchase, development, production or co-production of off-the-shelf programmes as well as other preparatory services, such as those relating to the preparation of scripts or to artistic performances necessary for the production of programmes.

The exemption also covers broadcasting time (transmission by air, satellite or cable, now defined as any transmission and distribution using a form of electronic network). In principle, the contracting-out of audio-visual production, for example for information, training or advertising purposes, would be covered, but it is granted an exemption insofar as it is connected with the broadcasting activities of broadcasting organisations that are public authorities.

The exemption is justified on the grounds of the cultural and social significance of programming material, so that national broadcasters remain free to procure programme material from whomever they wish and according to the procedures of their choice. The exclusion does not apply to the supply of technical equipment necessary for the production, co-production and broadcasting of such programmes.

The provision of broadcasting time is also, in principle, covered by the Directives, but it is again excluded from the scope of the Public Sector Directive since the need to obtain broadcasting may have implications in respect of public security or health protection. Broadcast information on crime prevention and detection, traffic conditions, civil emergencies and communicable diseases, for example, may need to be disseminated as widely and as quickly as possible. Given the nature of these examples, there may be no contractual basis at all for the use of broadcasting time, which is likely to be provided on the basis of the exercise of the member state's official authority.

Arbitration and conciliation services

The recitals of the Directives state that it is inappropriate to include the procurement of contracts for arbitration and conciliation services in the Directives because competitive bidding for such services would interfere with the joint selection of arbitrators and conciliators by the parties to a dispute. These parties would, in any event, want to select arbitrators and conciliators on the basis of their competence and experience and within relatively short time frames.

Certain financial services

The Directives exclude contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments and in connection with central bank services. This exclusion refers to contracts that constitute transactions concerning government bonds, for example, and activities related to public debt management.

Also included in the derogation are contracts awarded to financial intermediaries to arrange the above financial transactions, as these services are specifically excluded from the scope of investment services (category 6 of the list of priority services – see module D3 for an explanation of priority and non-priority services). The exclusion is based on the fact that such services are closely connected with national monetary policies, tend to be heavily regulated, and are generally reserved to a small number of qualified and registered undertakings. Transactions are also carried out within very short time-limits.

Employment contracts

Whilst the Community protects those persons in employment relationships and guarantees the right of Community citizens to move freely throughout the Community for the purposes of taking up employment and establishing themselves, such relationships do not fall within the scope of the procurement rules.

Even if employees may be recruited from all over the Community, the employment market is generally a localised one and subject to local conditions of employment, taxation and social regimes. These relationships are usually permanent (full or part-time) relationships, even if they are entered into for short periods of time.

These relationships are not entered into for the purposes of trade. The Directives are concerned with cross-border trade and thus with the freedom of individuals and companies to provide services throughout the Community and, where appropriate, to establish themselves in other member states, with a view to providing services to purchasers in those member states.

Research and development contracts

The Directives exclude research and development service contracts other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is mainly remunerated by the contracting authority.

This provision is intended, essentially, to exclude from the procurement procedures research and development contracts of an altruistic nature, which are for the benefit of society as a whole. The exclusion would not apply, on the other hand, where the benefits accrued to the contractors themselves. To avoid an interpretation that would lead to abuse of this provision, the European Council and the European Commission adopted, in the context of the former Services Directive, an interpretative declaration, stating that *any* fictitious sharing of the results of research and development or any symbolic participation in the remuneration of the service provided would not prevent the application of the Directive.

The negotiated procedure may be used with prior publication of a contract notice in respect of works that are performed solely for the purpose of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs. The negotiated procedure without publication of a contract notice may be used in respect of supply contracts when the products involved are manufactured solely for the purpose of research, experimentation, study or development. See module C4 for further information on the availability and use of these procedures.

This provision does not extend to quantity production so as to establish commercial viability or recover research and development costs.

2.4 RESERVED CONTRACTS

The Directives introduced a new category of 'reserved' contracts, which are not excluded from the scope of the Directive but are subject to specific conditions of eligibility being imposed on the participants.

EU Member States may reserve the right to participate in public contract award procedures concerning sheltered workshops or may provide for such contracts to be performed in the context of sheltered employment programmes, where most of the employees concerned are handicapped persons who, by reason of the nature or seriousness of their disabilities, cannot carry on occupations under normal conditions. For further details, see module C5.

UTILITIES

Exemptions specific to the utilities sector

The Utilities Directive provides for sector-specific exemptions in a number of utility sectors, based essentially on the degree of competition in these markets. Such exemptions apply in respect of the purchase of fuel and energy for the production of energy; purchases of water; bus transport services; and upstream oil and gas exploration and exploitation. The Utilities Directive has also introduced a new general exemption mechanism for activities exposed to competition in markets to which access is not restricted. These exemptions are discussed in module D2.

The Utilities Directive also contains a series of other exemptions specific to the utilities sector:

- **Activities outside the Community**

  The Directive does not apply to contracts awarded by contracting entities for purposes other than the pursuit of their relevant activities, or the pursuit of such activities in a third country, in conditions that do not involve the physical use of a network or geographical area within the Community.

  The contracting entities must notify the Commission, at its request, of any activities that they consider to be excluded under this provision. The Commission may periodically publish, for information purposes, lists of the categories of activities that it considers to be covered by this exclusion, and it will respect any sensitive commercial aspects that the contracting entities may point out when forwarding this information.

Affiliated undertakings exemption

Where 'undertakings' are made up of a number of mutually owned or mutually dependant companies, the Utilities Directive provides for a specific exemption for purchases made between these companies under certain conditions. These purchases are treated as 'in-house' contracts, known as intra-group transactions. Since the amendment to the Utilities Directive in 2004, the exemption now covers works and supplies contracts in addition to services contracts.

The contracts excluded are those that have been awarded to affiliates, whose essential purpose is to act as central service-providers to the group to which they belong, rather than selling their services commercially on the open market.

The Utilities Directive excludes two categories of contracts. These contracts are awarded:

- by a contracting entity to an affiliated undertaking; or
- by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out relevant activities, with [one of those contracting entities] or with an undertaking that is affiliated to one of these contracting entities.

  This provision relates, for example, to the provision of common services, such as accounting, recruitment and management; the provision of specialised services embodying the know-how of the group; and the provision of a specialised service to a joint venture.

The exclusion from the provisions of the Utilities Directive is subject, however, to two conditions:

(i) *the economic operator must be an undertaking affiliated to the contracting entity:* an affiliated undertaking, for the purposes of article 23(1) of the Utilities Directive, is one in which the annual accounts are consolidated with those of the contracting entity, in accordance with the requirements of the seventh company law Directive. In the case of contracting entities not subject to that Directive, an affiliated undertaking is any undertaking over which the contracting entity may exercise, directly or indirectly, a dominant influence, in the same way as a public authority may exercise a dominant influence over a public undertaking. This will also be the position where it is the undertaking exercising a dominant influence over the contracting authority or where both the undertaking and the contracting entity are subject to the dominant influence of a third undertaking.

(ii) *the economic operator must exist essentially to provide services to the group and not to sell them on the open market:* since a number of such economic operators do, in fact, have their own marginal commercial activities, the Directive lays down criteria according to which the acceptability of such commercial activities may be gauged. The exclusion only applies if at least 80% of the average turnover of the affiliated undertaking achieved within the Community for the preceding three years has been derived from the provision of works, supplies or services to undertakings with which it is affiliated.

The 'average turnover' relates to that turnover resulting from the works, supplies or services provided and not from the general or total turnover of the undertaking. Where more than one undertaking affiliated to the contracting entity provides the same or similar services, supplies or works, the above percentages are calculated by taking into account the total turnover derived respectively from the provision of services, supplies or works by those affiliated undertakings.

The Commission is empowered by article 23(5) to monitor the application of this article and to require the notification of certain information:

- names of the undertakings or joint venture concerned;
- nature and value of the contracts involved;
- such proof as may be deemed necessary by the Commission that the relationship between the undertaking(s) or joint venture to which the contracts are awarded and the contracting entity meet the required conditions of the exemption.

Purchases for re-sale or hire

The Directive excludes from its scope of application any contracts that have been awarded for purposes of re-sale or hire to third parties. This exclusion is intended to include contracts for goods where the contracting entity intends to sell or hire the equipment purchased in a competitive market.

These contracts will only be excluded if the contracting entity enjoys no special or exclusive right to sell or hire the subject of such contracts and if other entities are free to sell or hire the same goods under the same conditions as the contracting entity.

The contracting entities must inform the Commission, at its request, of the categories of products that they regard as excluded under this provision. The Commission may also periodically publish lists of the categories of activities that it regards as excluded by this provision whilst respecting any sensitive commercial aspects that the contracting entities may point out when forwarding the information.

SECTION 3
EXERCISES

EXERCISE 1
INDIVIDUAL CASE STUDY ON DEFENCE PROCUREMENT

You are the procurement officer for the Ministry of Defence. You have been asked by your commanding officer to purchase a number of items. Explaining your reasons, which rules and which procurement procedures would you use for the purchase of the following items (or which questions would you ask to determine the outcome):

1. Blankets
2. Uniforms
3. Radar equipment
4. Guns and ammunition for general use
5. Guns and ammunition for use by your soldiers in Afghanistan
6. Guns and ammunition for use in joint operations with the United States in Iraq
7. Guns and ammunition for use in joint operations with NATO forces of which you form part
8. Repair and maintenance services for your transport vehicles
9. Repair and maintenance services for your combat vehicles
10. Construction of new storage facilities at your bases in Europe
11. Construction of secure munitions storage facilities at your bases in Europe
12. Purchase of housing estate to house your soldiers at their base

EXERCISE 2
CLASS CASE STUDY

Look once more at the case study referred to in Exercise 1 of module D3.

Explain how the exemption of contracts for the acquisition of land and existing buildings might affect the outcome of this case study.

EXERCISE 3
GROUP DISCUSSION ON RESERVED CONTRACTS

Split into groups of no more than 6 for a debate on the question of reserved contracts.

Half of the groups will take the position that use of reserved contracts applies positive discrimination in a way that distorts the primary purposes of the Directives.

The other half will take the position that use of reserved contracts is a legitimate secondary objective that can be achieved while maintaining the integrity of the Directives.

Issues to be addressed include (but are not limited to):

- what are the secondary objectives sought
- whether the pursuit of such objectives have an economic impact
- whether this implies a trade-off between the economic goals of the Directives and pursuit of the secondary objective
- whether this is relevant to the procurement rules
- what other similar objectives might be contained in the Directives that have a similar effect
- whether this is a political objective
- whether national policies with similar objectives can also be pursued by procurement legislation

Each group is to present their arguments and conclusions in turn. A vote is to be taken at the end.

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. Provide three reasons to explain why some contracts are excluded from the scope of the Directives.
2. How does the European Court of Justice interpret exclusions?
3. Why do you think defence purchases have always been excluded?
4. Explain what difference of approach took place in 2009.
5. Does the defence procurement exclusion apply automatically to contracting authorities of a military nature?
6. What is the difference between defence procurement and secret procurement?
7. What is meant by the phrase "governed by different procedural rules"?
8. Why are contracts related to the acquisition of land excluded?
9. Why are contracts of employment excluded?
10. Why are conciliation and arbitration services excluded?
11. Explain the treatment of research and development contracts, *i.e.* when are they excluded and when are they not excluded?
12. List the contracts excluded in the utilities sector.
13. What are affiliated undertakings and why are contracts with such undertakings excluded?
14. What are the conditions that apply to the affiliated undertakings exemption?
15. Give an example of a product that a utility might purchase for resale or hire.
16. What are "reserved" contracts?
17. Are reserved contracts excluded from the scope of the Directives?

Public procurement law – scope of application

Thresholds

MODULE D

PART 5

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. How and why EU financial thresholds are set
2. What the EU financial thresholds are
3. How the EU financial thresholds are calculated

The focus of this module is on understanding the EU financial thresholds rather than national financial thresholds for lower-value contracts (*i.e.* those contracts below the EU financial thresholds). Please see the comment in Section 2 of this module on low-value contracts below the EU financial thresholds.

In this module, references to "thresholds" and "financial thresholds" are to the EU financial thresholds unless otherwise specified.

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- That the financial thresholds differ according to both 1) the type of authority awarding the contract and 2) the type of contract to be awarded
- The starting assumption for the calculation of thresholds is to include all payments (financial and non-financial) for the maximum potential period of the contract
- That the method for calculation of thresholds is constructed to prevent contracting authorities from splitting contracts or requirements in an effort to avoid application of the Directive

This means that it is critical to understand fully:

- What the financial thresholds are
- The different types of contracting authority, the different types of contract (see module D3), and how those factors combine for the purpose of calculating thresholds
- The basic principles applying to the calculation of thresholds
- The detailed rules applying to the calculation of thresholds, particularly for repeat purchases and purchases of a similar type

If this is not properly understood, you may select the wrong threshold and so fail to award a contract in accordance with the requirement of the Directive.

1.3 LINKS

There is a particularly strong link between this chapter and the following modules or sections:

- Module D1 on contracting authorities
- Module D3 on contracts covered
- Module E2 on advertisement of contract noticesr

1.4 RELEVANCE

This information will be of particular relevance to those procurement professionals who are responsible for procurement planning and involved in the preparation of contract notices.

It will also be of particular relevance to those persons who, within the line management of a contracting authority, have the responsibilities and decision-making powers, including delegation powers, with regard to procurement (*e.g.* to decide on the packaging of the procurement).

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

Adapt for local use

The legal requirements relating to thresholds are set out in **Directive 2004/18/EC** at Chapter 1, articles 7 to 9:

- Article 7
  - confirms that the Directive applies to contracts that are of a value equal to or greater than the specified thresholds
  - states that the value is calculated exclusive of VAT
  - specifies different threshold levels for different types of contracting authority and for different types of contracts
- Article 8 contains provisions relating to the application of financial thresholds for contracts that are subsidised by contracting authorities at a level in excess of 50%
- Article 9 sets out the methods for calculating the estimated value of public contracts, framework agreements and dynamic purchasing systems

Commission Regulations are also published regularly to amend the Directive to update the financial threshold levels each time that they change (see Narrative section). See, for example, Commission Regulation (EC) No. 1422/2007, which entered into force on 1 January 2008.

Utilities

A short note on the key similarities and differences applying to utilities is set out at the end of Section 2 of this module.

SECTION 2
NARRATIVE

Note: Except where specified otherwise, the narrative in this module D5 discusses the rules applying to contracts that are of a certain type and value, which means that they are subject to the full application of Directive 2004/18/EC ('the Directive'), and the term 'contract' should be interpreted accordingly. For commentary on contracts falling outside the application of the Directive or only partially covered by the Directive, see module D3. For low-value contracts under the EU thresholds, please see the comment box below.

2.1 INTRODUCTION

Adapt all of this section for local use – using relevant local legislation, references to local thresholds where relevant, processes and terminology.

The EC Treaty can affect all public procurement, however small, but the Directive only applies to contracts of a specified type and of a value that meets or exceeds the relevant EU financial threshold.

Module D3 explains the types of contracts that are covered (and not covered) by the Directive. This module D5 explains what the financial thresholds are and how the value of contracts is calculated in order to establish whether the financial thresholds are met.

Note

In this module, unless otherwise specified, the terms 'financial threshold' and 'threshold' refer to the EU financial thresholds and not to national financial thresholds, except to the extent that they match the EU financial thresholds.

In this module, where reference is made to 'sub-threshold' contracts, this means contracts that are below the EU financial thresholds.

See the comment below on sub-threshold contracts.

The EU financial thresholds are set with the aim of identifying contracts for which there is likely to be interest and competition from economic operators functioning across the borders of EU Member States (and economic operators in countries that are signatories to the Agreement on Government Procurement (GPA) of the World Trade Organisation (WTO), where the type of contract is covered by the GPA and where GPA thresholds are met – see module A3 for further information on the interaction between the GPA and EU procurement requirements).

The EU financial thresholds are also set so as to ensure that the administrative costs of applying a full EU tender procedure are justified as being proportionate to the value of the contract being advertised.

There are a number of financial thresholds; different thresholds apply to different types of contracting authorities and also to different types of contracts. Contracting authorities therefore need to understand which type of contracting authority they are and what they are purchasing.

The main aims of the provisions relating to the calculation of the value of the contracts are to ensure (1) that there is a genuine and transparent pre-estimate of the value of the contract to be awarded, and (2) that the contracting authority does not attempt to avoid the application of the Directive, for example by splitting a requirement or a contract into smaller sub-threshold packages or contracts.

There are some quite complex provisions governing the calculation of the value of contracts. These provisions are different for works contracts and supply and service contracts.

The provisions cover how the value of an individual contract is calculated and also how similar or repeated requirements are treated. These include provisions covering the situation where a contracting authority awards a number of contracts for a particular project or a number of contracts for similar supplies or services. The term often used to refer to the requirements involved when taking into account a number of contracts or a number of repeated or similar requirements is 'aggregation'.

There are also specific provisions covering the calculation of the value of framework agreements, dynamic purchasing systems, design contests, and works concession contracts.

Low-value contracts (sub-threshold contracts)

Adapt all of this section for local use – using relevant local legislation, local thresholds, processes and terminology. Briefly set out the requirements of the local legislation for sub-threshold contracts.

This module describes the requirements for calculating whether contracts are of a value that signifies that they must be advertised using a contract notice published in the *Official Journal of the European Union* (see module D3 for more information on the types of contract covered).

These requirements are therefore relevant for all contracts, even those that may appear to be below the EU financial thresholds, in order to establish whether or not the Directive applies.

It is particularly important to bear in mind the implications of the aggregation provisions. These provisions mean that, for example, a number of similar contracts, all of which are below the EU financial threshold, may still be subject to the Directive. This is because the total value of all of the contracts must be aggregated if certain conditions are met, and the total value may then exceed the EU financial threshold. The Directive will then apply to each of the contracts.

The Directive will then apply to each of the contracts.

Statistics demonstrate that the majority of contracts that are awarded by contracting authorities are not subject to the requirement to advertise in the *Official Journal of the European Union (OJEU)*. For example, they may be a type of contract that is not subject to those obligations or they are of low value and therefore do not meet the EU financial thresholds.

EU Member States have generally opted to introduce their own rules for sub-threshold contracts and other contracts that are not subject to the detailed procurement requirements of the Directive. Individual contracting authorities may also be permitted or required to publish and follow their own internal purchasing rules, which may include the introduction of additional national and/or local financial thresholds.

Amend/adapt to reflect national and local thresholds and the type of process required.

National and/or local financial thresholds may trigger different types of requirements in terms of advertising and tender processes. For example:

- Direct invitations, which may be allowed for very low-value contracts;
- Simplified procedures, such as competitive quotes or requests for proposals from a specified number of economic operators, or local advertising and a local competitive process for medium-value contracts that are below the EU threshold levels.

2.2 STATUTORY FINANCIAL THRESHOLDS

2.2.1 Setting the financial thresholds

The financial thresholds are listed in articles 7 and 8 and are expressed in euros (EUR). The financial thresholds are generally fixed for a period of two years and are amended every two years, with effect from 1 January. The amendments are made by means of European Commission Regulations. There are provisions allowing for the amendment of the financial thresholds at other times.

See the Additional Note below on the setting of thresholds for further information on why the thresholds are set every two years and then applied for a fixed period.

The current financial thresholds can be found on the Commission's website: www.simap.europa.eu. The table below, from the simap website, indicates all of the financial thresholds.

Insert screen grab of current threshold table on simap.europa.eu website.

Additional notes on setting of thresholds

Alignment with GPA thresholds: When the thresholds are set, usually every two years, they are re-aligned with the GPA threshold levels. The GPA thresholds are set using the GPA currency, which is called 'Special Drawing Rights' (SDR). The re-alignment involves rounding some of the EUR equivalents to the SDR up or down to the nearest EUR 1000. See modules A3 and D1 for information on the link between the GPA and the EU procurement regime.

EU Member States outside the euro zone: For EU Member States that are not in the euro zone, the thresholds are converted into the national currency at the time of publication of the new thresholds, which is usually every two years. The European Commission issues a Communication notice, published in the *OJEU*, which sets out the corresponding values of thresholds. The threshold is then fixed at that rate and does not change until the thresholds are next changed, which will normally be in two years. There is therefore no ongoing variation to reflect changes in currency exchange rates.

The following sections explain each of the thresholds in more detail.

2.2.2 General thresholds for works, supplies and services contracts

The table below shows the current general thresholds for work, supplies and services contracts (amounts shown are as at 1 January 2010 – they may need to be updated to reflect changed thresholds). These are not the only thresholds, but they are the thresholds that are most commonly referred to in practice, as they apply to the majority of types of contracts advertised by contracting authorities.

The table includes notes, which are explained below.

Type of contract (see note 2)	Type of contracting authority (see note 2)	
	Central government	Other authorities
Works	EUR 4 845 000	EUR 4 845 000
Supplies	EUR 125 000 (with some exceptions for defence purchasers – see note 3)	EUR 193 000 (and defence purchasers for certain supplies– see note 3)
Services (for nearly all priority services - see note 4)	EUR 125 000	EUR 193 000
Services (Non-priority and specified Part A services - see note 5)	EUR 193 000	EUR 193 000

Note 1:

Type of contracting authority: There are two types of contracting authority for the purposes of the financial thresholds.

Central Government: Contracting authorities that are classified as central government bodies are listed in Annex IV of the Directive.

The financial thresholds are generally lower for these central government bodies than for other contracting authorities. This is because the World Trade Organisation's Government Procurement Agreement (GPA), which is binding on EU Member States, applies lower thresholds to central government bodies that award contracts covered by the GPA. See module A3 for further information about the GPA and contracting authorities.

Other authorities: the 'other authorities' are contracting authorities as defined by the Directive that are not central government bodies listed in Annex IV. This category normally includes regional and local authorities.

Note 2:

Types of contract: The thresholds are different for works contracts and supplies and services contracts, as the thresholds are far higher for works contracts. This difference reflects the aim of ensuring that the administrative burden of a full EU process is proportionate to the contract and the need to identify contracts that will be of cross-border interest. The thresholds are referred to in articles 7(a) (b) and (c) of the Directive.

Note 3:

Supplies contracts in the defence sector: Where a central government body is operating in the field of defence and is purchasing supplies that are not listed in Annex V, then the higher supplies threshold applies. This is because these types of supplies are not subject to the GPA.

Where a central government body is operating in the field of defence and is purchasing supplies that are listed in Annex V, then the lower supplies threshold applies. This is because these types of supplies are subject to the GPA. See article 7(a) and (b).

Note 4:

Priority services – specified Annex II A services: The thresholds referred to in the table for service contracts apply to all services of a type listed in Annex II A ('priority services'). See module D3 for further information on priority and non-priority services.
For contracting authorities that are not central government bodies, the higher threshold applies to the award of priority services.

In the majority of cases, central government bodies will apply the lower threshold for the award of priority services (including contracts awarded for priority services as a result of design contests).

The higher threshold applies to the award by central government bodies of the following priority services (including contracts for the following services awarded as the result of design contests):

- Research and development services specified in Category 8 of priority services
- Telecommunications services in Category 5 of priority services as follows:
- Television and radio broadcasting services
- Interconnection services
- Integrated telecommunication services

Note 5:

Non-priority services: Module D3 explains that the Directive applies fully to priority services contracts but only partially to the types of services listed in Annex II B ('non-priority services').

The limited provisions relating to non-priority services (including services awarded as a result of design contests) are triggered by the higher threshold for both central government bodies and other contracting authorities. See article 7(b) of the Directive.

This higher threshold is due to the fact that these services are not covered by the GPA.

2.2.3 Works concession contracts, subsidised contracts, and contracts awarded by concessionaires (articles 7, 8 and 63)

The thresholds for works concession contracts, subsidised works contracts, and contracts awarded by works concessionaires are the same for central government bodies and other authorities. See modules C4 and D3 for further information on these types of contracts.

For subsidised services contracts, the higher threshold applies for both central government bodies and other authorities. See modules C4 and D3 for further information on subsidised services contracts.

Type of contract	Type of contracting authority	
	Central government	Other authorities
Works concession contracts, works contracts awarded by concessionaires and subsidised works contracts	EUR 4 845 000	EUR 4 845 000
Subsidised services contracts	EUR 193 000	EUR 193 000

2.2.4 INDICATIVE NOTICES/PRIOR INFORMATION NOTICES (ARTICLE 35)

A contracting authority may opt to publish indicative notices (also referred to as prior information notices) on an annual basis for supplies and services contracts and on a contract-specific basis for works contracts. Indicative notices/prior information notices are used to pre-warn economic operators of forthcoming opportunities. Where a contracting authority publishes an indicative notice/prior information notice sufficiently well in advance of the contract-specific contract notice, it can then take advantage of some reductions in statutory time scales for the submission of tenders.

See module E2 for further information on the publication and use of indicative notices/prior information notices and on reductions in statutory time scales.

The thresholds applying to the publication of indicative notices/prior information notices are shown below. In the case of works contracts, they are calculated on a contract-specific basis, using the rules in articles 7 and 9 of the Directive. In the case of supplies and services contracts, the thresholds are calculated by using the total estimated value of contracts of each type (services or supplies) to be awarded over the following 12 months.

Indicative notice/prior information notice		
Type of contract	Type of contracting authority	
	Central government	Other authorities
Works contracts	EUR 4 845 000	EUR 4 845 000
Supplies and services contracts	EUR 750 000	EUR 750 000

Summary tables of thresholds

Type of contract	Type of contracting authority (see note 2)	
	Central government	Other authorities
Works	EUR 4 845 000	EUR 4 845 000
Supplies	EUR 125 000 (with some exceptions for defence purchasers)	EUR 193 000 (and defence purchasers for certain supplies)
Services (for nearly all priority services - see note 4)	EUR 125 000	EUR 193 000
Services (Non-priority and specified Part A services - see note 5)	EUR 193 000	EUR 193 000
Works concession contracts, works contracts awarded by concessionaires and subsidised works contracts	EUR 4 845 000	EUR 4 845 000
Subsidised services contracts	EUR 193 000	EUR 193 000

Indicative notice/prior information notice

Indicative notice/prior information notice		
Type of contract	Type of contracting authority	
	Central government	Other authorities
Works contracts	EUR 4 845 000	EUR 4 845 000
Supplies and services contracts	EUR 750 000	EUR 750 000

2.3 CALCULATING THE FINANCIAL THRESHOLDS – BASIC PRINCIPLES (ARTICLE 9)

The methods for calculating the estimated value of public contracts, framework agreements and dynamic purchasing systems are set out in article 9 of the Directive.

There are a number of core principles that apply to the calculation of the estimated value of all contracts:

2.3.1 Total amount payable/total value

The calculation is based on the total amount payable or the total value of the contract. The assumption is that all financial and non-financial elements that may be paid will be included.

2.3.2 Calculation of the total amount payable includes third-party payments

The total amount payable is not limited to the total amount payable by the contracting authority.

When applicable, payments to be made by other contracting authorities, organisations and individuals also need to be included when calculating the estimated value of a contract.

2.3.3 Calculation of the total amount payable is not limited to just financial payments

Calculation of the total amount payable is not limited to just financial payments but also includes non-financial payments, such as part-exchange.

Example

A contracting authority awards a contract for the provision of lease vehicles. As part of the overall arrangement, the supplier will take any old vehicles owned by the contracting authority and dispose of them, with the supplier retaining the sale proceeds.

The value of the contract must be calculated to include the estimated sale proceeds of the old vehicles as well as any payments to be made by the contracting authority to the supplier.

In practice, where this occurs a supplier may offer lower lease payments for the new vehicles in order to take into account any sale proceeds from old vehicles.

2.3.4 Options and renewals

The estimated value of the contract must take into account the estimated total amount, including all options and renewals, even if those options or renewals are not subsequently exercised (article 9(1)).

Example

A local authority proposes to enter into a contract for architectural services for an initial period of three years, at an estimated value of EUR 50,000 per year. The local authority includes a provision in the contract allowing the contracting authority to renew the contract on expiry of the initial three-year period for up to two further 12-month periods. The total period of the contract could therefore be three, four or five years, at an estimated value of EUR 50,000 per year.

The local authority must take into account the maximum potential value of the contract, which is five years at EUR 50,000 per year. The total value of the contract is EUR 250,000 and therefore over the financial threshold for service contracts for local authorities, and so the Directive will apply.

2.3.5 Value-Added Tax Excluded

The estimated value of the contract is based on the total amount payable (or total value) excluding value-added tax (article 9(1) of the Directive).

2.3.6 Prizes and other payments

The estimated value of the contract must take into account the estimated total amount, including all prizes and other payments made to all candidates or tenderers (article 9(1)).

2.3.7 Timing

The estimate must be valid at the moment when the contract-specific contract notice is dispatched to the Office of the *Official Journal of the European Union (OJEU)* or, where such a notice is not required, at the moment when the contracting authority commences the contract award procedure (article 9(2)).

2.3.8 No sub-division to avoid application of the Directive

No works project or proposed purchase of supplies or services may be subdivided to prevent that project or purchase from entering into the scope of the Directive (article 9(3)).

Comment

Care does need to be taken about assumptions regarding the nature of payments to be made, as can be seen from the following case of the European Court of Justice (ECJ). In this case it was argued that a contract with a charitable organisation that had only been established for the reimbursement of costs was not a public contract for the purposes of the procurement directive in force at the time.

Case note: The nature of payments

The case of *Commission v Italy C119-06* concerned the award of framework contracts for the provision of health care-related transport services.

In 1999 the region of Tuscany and public health organisations in the region awarded a number of framework contracts to charitable (non-profit) organisations, including the Italian Red Cross, for the provision of health-related transport services. The contracts were for a combination of Annex A and Annex B transport services. The contracts were subsequently renewed for a period for four years (2004 to 2008).

The ECJ considered a number of issues, including an argument that, as the contracts only involved the direct reimbursement of costs, there had been no payment or consideration for the purposes of the procurement rules and therefore no public contract had been awarded.

The ECJ decided that, even though a contract may only involve the reimbursement of costs, this did not mean that it fell outside the application of the procurement directive. The obligations under the contract need to be considered as a whole, and the contract can still be regarded as a public contract for the purposes of the procurement directive even if the payment is merely for the reimbursement of costs.

Based on the facts of the case, the ECJ held that payments under the contract were not limited to the reimbursement of costs alone. The fixed payments under the contract meant that the providers were more than reimbursed for costs incurred.

2.4 CALCULATING THE FINANCIAL THRESHOLDS – RULES APPLYING TO SPECIFIC CONTRACTS AND CIRCUMSTANCES

2.4.1 Works contracts – works and related supplies must both be taken into account

When calculating the estimated value of a works contract, the contracting authority must take into account both the cost of the works plus the estimated value of the supplies necessary for executing the works that are placed at the economic operator's disposal by the contracting authority (article 9(4) of the Directive).

Example

A local authority intends to award a public works contract for the construction of a new office building. The estimated value of the works is EUR 4,500,000. The authority intends to provide EUR 1,000,000 worth of building materials for the economic operator to use on the project.

The total estimated value of the contract must take account of both the works and the estimated value of the related supplies made available by the contracting authority. The total value is therefore EUR 5,500,000, which means that the contract is over the works threshold and therefore the Directive will apply.

2.4.2 Contracts awarded at the same time in lots – works, supplies and services (Article 9 (5))

Works: Where there is a proposal for a particular work, which may result in a number of related works contracts being awarded at the same time for the particular project in the form of separate lots, then the estimated value, for the purposes of calculating the relevant financial thresholds, is the total value of all of the lots.

Supplies: Where a proposal for the acquisition of similar supplies may result in a number of supplies contracts being awarded at the same time in the form of separate lots, then account must be taken of the total estimated value of the lots for the purposes of calculating the relevant threshold.

Services: Where there is a proposal for the acquisition of similar services, which may result in a number of services contracts being awarded at the same time in the form of separate lots, then the estimated value, for the purposes of calculating the relevant financial thresholds, is the total value of all of the lots.

Where the aggregate (total) value of the lots is equal to or exceeds the relevant financial threshold, then the Directive applies to the award of each lot. This is the case even if some or all of the individual lots are under the relevant financial threshold.

Comment

In this context the term 'lots' is not limited to lots that are identified as lots by the contracting authority in the *OJEU* notice. The term includes separate contracts, which are not necessarily referred to as 'lots' in the contract notice but which are for similar types of purchases.

Case note

Case *C-412/04 Commission v Italy* concerned an Italian law regulating the award of works contracts.

Under Italian building permit and planning arrangements, a private person/company could carry out works infrastructure and other works on behalf of a local authority as part of a development arrangement. The value of the works contract could then be set off against the cost of the contributions payable by the private person/company to the local authority in respect of the relevant building permits for that development.

The law required the private person/company to award the works contract in accordance with the public procurement directive, where the value of the works contract, assessed individually, exceeded the EU financial threshold.

The ECJ held that the law was in breach of the procurement directive in force at the time and that the value of the contracts should be the total value of all of the works contracts to be awarded by the private person under a particular building permit or planning arrangement.

2.4.3 The small-lot exemption (Article 9(5))

Review carefully and amend to reflect local law and the way in which the EU procurement rules link with local thresholds for contracts below the EU thresholds. The waiver for small contracts is not always included in national legislation implementing the Directive.

There is a waiver to this general rule for 'small' contracts in the context of lots where the aggregate value of all of the lots means that the financial thresholds are exceeded. The provisions of the Directive can be waived for one or more individual lots where:

- the estimated value of the individual lot is less than EUR 80,000 for supplies and services contracts; or
- the estimated value of the individual lot is less than EUR 1,000,000 for £works contracts;

and where in both cases:

- the total (aggregate) value of those small lots to which the waiver is applied does not exceed 20% of the value of all of the lots.

Amend if new thresholds mean that the exercise does not work.

Example

A local authority wishes to award a number of contracts for the cleaning of schools, civic buildings and council offices. Each contract will be for two years. It intends to advertise by using a single contract notice and to split the requirements into six lots. The estimated values below represent the total value for the two-year contracts:

- Lot 1: four secondary schools for an estimated value of EUR 75,000
- Lot 2: six primary schools for an estimated value of EUR 85,000
- Lot 3: five primary and three secondary schools for an estimated value of EUR 90,000
- Lot 4: two nursery schools for an estimated value of EUR 40,000
- Lot 5: two office buildings for an estimated value of EUR 35,000
- Lot 6: one main civic building for an estimated value of EUR 85,000

The total value of all six lots is EUR 410,000.

Lots 1, 4 and 5 are below the EUR 80,000 threshold.

20% of EUR 410,000 is EUR 82,000.

The contracting authority could therefore apply the small-lot exemption to: Lot 1 only, Lot 4 only, Lot 5 only or Lots 4 and 5 combined. In each case the total value of the lot or lots would not exceed EUR 82,000.

Good practice note

It is important to note that the value of the small lots to which the exemption is applied must still be taken into account when calculating the total value of all of the lots for the purposes of establishing whether the threshold has been met or exceeded. The small-lot exemption cannot be used to bring the total value below the threshold.

Example

A contracting authority wishes to award works contracts for the construction of a new civic building. The total value of the works is EUR 5,100,000 and the works are split into two lots; one contract for EUR 4,600,000 (below the works financial threshold) and one contract for EUR 500,000 (also below the works financial threshold and also less than 20% of the total contract value). The contracting authority must aggregate the two contracts, which means that the total value exceeds the financial threshold for works contracts and therefore the Directive applies in full.

2.4.4 Calculating the value of supply contracts (Article 9 (6) and (7))

There are specific rules covering the way in which the value of supply contracts is calculated for the purposes of establishing the total estimated contract value.

- **For supply contracts relating to the lease, hire, rental, or hire-purchase of products**
  - **Where the term is fixed**, then the total value is expressed in the Directive as the total estimated contract value for contracts up to 12 months long, and as the total estimated contract value including residual payments for contracts in excess of 12 months. This means that in all cases the total estimated contract value applies.
  - **Where there is no fixed term or where the term cannot be defined**, then the value is the estimated monthly value multiplied by 48.

Example

A health organisation enters into a contract for the hire of a mobile x-ray machine. The mobile x-ray machine is required to provide extra capacity while a new hospital is being built. The building programme for the new hospital has been unexpectedly delayed due to unforeseen problems on the site.

At the start of the hire contract it is not certain for how long the mobile x-ray machine will be required; the period of hire will end when the new hospital is completed, but a final building completion date has not been agreed.

The hire contract is for an initial period of 24 months and is then automatically renewable by the health organisation after the initial 24-month period on a quarterly basis.

In this case the estimated value will be the monthly value of the hire contract multiplied by 48.

- **For supply contracts that are regular in nature or are expected to be renewed** within a given period, the calculation is based on either of the following two approaches. The contracting authority has a choice:
- **Either** the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year, such value being adjusted if possible to take account of the changes in quantity or value that might occur in the course of the 12 months following the initial contract;

Note

This method is only available if the contracting authority has actually had a requirement for this type of supply in the previous 12 months.

- Or the total estimated value of the successive contracts awarded during the first 12 months following the first delivery or during the financial year if that period is longer than 12 months.

The choice of method applied must not be made with the intention of excluding the contracts from the application of the Directive.

Example

A local authority has a requirement for a regular supply of recycled paper for use in its photocopiers and printers. Last year it purchased recycled paper every eight weeks from a number of suppliers. The total value of these purchases amounted to just below the EU financial threshold for supplies.

The authority expects its requirements in the next 12-month period to be double the value of last year's requirements. It intends to make purchases every four weeks from a number of suppliers.

The authority has a choice about how to calculate its requirements. If it uses last year's figures, then the estimated value will not exceed the EU procurement thresholds. However, if it adds up the total value of the successive contracts that it intends to award in the next 12 months, the EU procurement threshold will be exceeded.

If the authority relies on last year's figures, knowing that next year's requirements will be in excess of the EU financial thresholds, then it is likely to be regarded as acting with the intention of avoiding the application of the Directive. It must therefore use the total estimated value of purchases of recycled paper from all suppliers over the next 12-month period as the basis for calculating the total value of the contract.

Practical note: In these circumstances it would be sensible for the authority to consider setting up a framework agreement if that option is available under national law.

2.4.5 Calculating the value of specific types of service contracts (Article 9 (8)(a))

There are specific rules covering the way in which the value of service contracts is calculated for the purposes of establishing the total estimated contract value:

- **Insurance services:** the value includes the premium payable and any other forms of remuneration;
- **Banking and other financial services:** the value includes the fees, commissions, interest and other forms of remuneration;
- **Design contests:** the value includes fees, commission payable and other forms of remuneration; where a design contest is run, then the value includes all prizes or other payments to candidates and tenderers.

2.4.6 Calculating the value of service contracts (Article 9 (8)(b))

For contracts that do not indicate a total value but for which the term is fixed for 48 months or less, then the total price is the total estimated value of the full term of the contract.

Example

A fire authority intends to enter into a maintenance contract for fire engines for a period of 24 months. The contract cost is made up of (1) a fixed monthly payment, which is paid irrespective of how much work is undertaken; plus (2) a variable payment based on actual maintenance work undertaken. The total value of the contract is therefore uncertain.

The total value of all of the fixed monthly payments to be made over the 24-month period amounts to just below the EU financial threshold for services.

The fire authority uses information from previous maintenance contracts to estimate the likely value of the variable payments. It then calculates the total estimated price by adding (1) the total value of the fixed payments over 24 months, plus (2) the genuine pre-estimate of the variable payments over 24 months. The total estimated price is above the EU financial threshold and therefore the Directive applies.

For service contracts that do not indicate a total value and are either without a fixed term or the fixed term is more than 48 months, then the value is the total estimated monthly value multiplied by 48.

The choice of method applied must not be made with the intention of excluding the contracts from the application of the Directive.

Comment: Contracts that are for a similar or the same type of supplies and services

Article 9 refers to the requirement to aggregate contracts that are for 'similar' (article 5(b)) or for the 'same type' (article 7(a)) of supplies or services. It is not entirely clear what this provision means.

A sensible interpretation would be to consider the nature of the supplies and services required and to establish whether those requirements could normally be supplied by the same supplier or service-provider.

For example, in a contract for the lease of cars, it would be common for leasing companies to provide a range of various types of vehicles, and so it would be commercially reasonable to package the requirement in a single contract or in a series of aggregated supplies.

For specialist vehicles, such as ambulances, fire engines or rubbish collection vehicles, there is a separate specialist supplier market, and so each type of vehicle could be the subject of a separate procurement procedure.

Similarly, requirements for general office cleaning services should be aggregated, but two contracts for specialist cleaning of hospital operating theatres and for cleaning of technical laboratories would not necessarily have to be aggregated.

Comment and good practice note

Where the aggregation of the value of a number of contracts or lots results in the application of the Directive, then the requirements of the Directive, except where the small-lot exemption applies, apply to the award of all of the aggregated contracts.

This means that if the contracting authority establishes that the Directive applies to a series of contracts and then decides to split the award into two separate procedures, with the value of the contract(s) to be awarded under those procedures being sub-threshold, the Directive will still apply to each of the two procurement procedures.

2.4.7 Calculating the value of framework agreements and dynamic purchasing systems (Article 9 (9))

The total value to be taken into account is the maximum estimated value of all of the contracts envisaged for the total term of the framework agreement or dynamic purchasing system. The total value excludes value-added tax (VAT).

2.4.8 Calculating the value of works concessions

The value of a works concession contract is calculated using the same principles as those applying to other works contracts, in particular the requirement to take into account all sources of funding, including third-party sources.

UTILITIES

Utilities

This short note highlights some of the major differences and similarities in the requirements applying to utilities in relation to thresholds.

Adapt all of this section for local use – using relevant local legislation, processes and terminology.

The main legal requirements relating to financial thresholds are set out in articles 16 and 17 of Directive 2004/17/EC (Utilities Directive).

Article 16 confirms that, subject to the exclusions in articles 19 to 26 or the provisions of article 30, the Utilities Directive applies to contracts that have a total value (excluding VAT) exceeding the specified thresholds.

Article 17 sets out the rules governing the calculation of thresholds.

1. Thresholds

There are two thresholds for utilities, which are shown in the table below.

The financial thresholds are listed in article 16 and are expressed in euros (EUR). The financial thresholds are generally fixed for a period of two years and are amended every two years, with effect from 1 January. The amendments are made by means of European Commission Regulations. There are provisions allowing for the amendment of the financial thresholds at other times.

Utilities – contract notices	
Type of contract	
Works contracts, concession contracts, works contracts awarded by concessionaires, subsidised works contracts	EUR 4 845 000
Supplies and services contracts	EUR 387 000

Utilities – Indicative notices	
Type of contract	
Works	EUR 4 845 000
Supplies and services	EUR 750 000

2. General principles applying to the calculation of thresholds

Timing: the rules for utilities relating to the time when the estimated value is calculated differ from the rules under the Public Sector Directive 2004/18 (the Directive). The time for estimating the value depends upon the way in which the procedure is launched. The relevant times are as follows:

- Qualification system: the date on which the selection commences
- Periodic Indicative Notice: the date of dispatch of the contract notice to the *OJEU*
- Other cases: the date when the contract notice would be sent to the OJEU if the call for competition requirement applied and the utility decided to satisfy the call for competition through such a contract notice.

Total amount payable: The estimate must take into account the total amount payable. The total excludes VAT but includes:

- any form of option or renewal;
- all prizes and payments;
- any non-financial payments.

No avoidance: No works project or proposed purchase of supplies or services may be subdivided to prevent that project or purchase from entering into the scope of the Utilities Directive (article 17(2)).

3. Calculation of thresholds

3.1 Works contracts – works and related supplies and services must all be taken into account

When calculating the estimated value of a works contract, the contracting authority must take into account both the cost of the works plus the estimated value of both the supplies and services necessary for executing the works that are placed at the economic operator's disposal by the contracting authority (article 17(4) of the Utilities Directive). This differs from the provisions under article 9(4) of the Directive (2004/18), which requires the inclusion of only the estimated value of supplies and not that of services.

3.2 Works contracts and unrelated supplies and/or services

Article 17(5) of the Utilities Directive specifically provides that where supplies and/or services are not necessary for the performance of a works contract, then the value of those supplies and services is not to be added to the value of the works contract if by doing so the procurement of those supplies and/or services would be removed from the scope of the Directive.

3.3 Contracts for supplies and services

Article 17(8) of the Utilities Directive includes a provision that is not included in article 9 of the Directive. This article requires that where there is a contract involving a mix of supplies and services, then the basis for calculating the estimated value of the contract is the total value of the supplies and services, regardless of their respective shares.

This article also provides that the calculation is to include the value of the siting and installation of operations.

3.4 Aggregation of lots

Article 17(6) of the Utilities Directive contains similar provisions to those in article 9 of the Directive. This article confirms that where proposed contracts for works or services or similar supplies may result in contracts being awarded at the same time in separate lots, then the value of those lots must be aggregated.

Where the total value exceeds the EU financial thresholds, then the Directive will apply.

3.5 The small-lot exemption

There is a waiver in article 17(6) of the Utilities Directive to the general aggregation rule for 'small' contracts in the context of lots. The provisions of the Utilities Directive can be waived for one or more individual lots on the same basis and for the same financial values as under article 9(5) of the Directive (2004/18).

3.6 Calculating the value of supply and services contracts (Article 17)

There are specific rules covering the way in which the value of supply and services contracts are calculated for the purposes of establishing the total estimated contract value.

For supply or services contracts that are regular in nature or are expected to be renewed within a given period, the calculation is based on either of the following two approaches. The contracting authority has a choice:

- **Either** the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year, such value being adjusted if possible to take account of the changes in quantity or value that might occur in the course of the 12 months following the initial contract;

> **Note**
> This method is only available if the contracting authority has actually had a requirement for this type of supply in the previous 12 months.

- **Or** the total estimated value of the successive contracts awarded during the first 12 months following the first delivery or during the financial year if that period is longer than 12 months.

For supply contracts relating to the lease, hire, rental or hire-purchase of products, the value taken as a basis for calculating the estimated contract value is to be as follows:

- **In the case of fixed-term contracts**, the total value is expressed in the Utilities Directive as being the total estimated contract value for contracts of up to 12 months, and the total estimated contract value including residual payments for contracts in excess of 12 months. This means that in all cases the total estimated contract value applies.
- **For supply contracts without a fixed term or where the term cannot be defined**, the value is the estimated monthly value multiplied by 48.

3.7 **Calculating the value of specific types of service contracts (Article 17(10))**

There are specific rules covering the way in which the value of service contracts is calculated for the purposes of establishing the total estimated contract value:

- **Insurance services:** the value includes the premium payable and any other forms of remuneration;
- **Banking and other financial services:** the value includes the fees, commissions, interest and other forms of remuneration;
- **Contracts involving design tasks:** the value includes fees, commission payable and other forms of remuneration.

3.8 **Calculating the value of service contracts (Article 17(11))**

- **For contracts that do not indicate a total value but for which the term is fixed for 48 months or less**, the total price is the total estimated value of the full term of the contract.
- **For service contracts that do not indicate a total value and are either without a fixed term or with a fixed term of more than 48 months**, the value is the total estimated monthly value multiplied by 48.

3.9 **Calculating the value of framework agreements and dynamic purchasing systems (Article 17(3))**

The total value to be taken into account is the maximum estimated value of all of the contracts envisaged for the total term of the framework agreement or dynamic purchasing system. The total value excludes VAT.

SECTION 3
EXERCISES

Adapt all of this section for local use – using relevant local examples, legislation, processes and terminology. You could add to the exercises to allow discussion of local thresholds below the EU thresholds

EXERCISE 1
PREPARATION AND GROUP WORK

You work in the procurement department at the Ministry of Education (which is a central government department for the purposes of calculation of the EU financial thresholds). The Head of the Ministry's Information Technology (IT) Department sends an email to your boss asking for advice on a number of proposed purchases over the next year. Your boss asks you prepare a written reply to send to the Head of the IT Department.

Please prepare outline answers to the questions raised in the email – answers should explain in a simple way the reasons for your advice.

Then discuss the answers in your small group. Nominate a spokesperson for your group who will speak for the group in the feedback session.

email 1

Amend figures if necessary when new thresholds are published, to ensure that 80 laptops are sub-threshold but 90 laptops are over the EU financial threshold for central government and to refer to the two threshold levels in the final sentence.

From: headIT@mined.gov
To: headprocure@mined.gov

Subject: IT procurements

URGENT

Dear Head of Procurement,

As you know we are planning a number of IT procurements over the next few months. I need to know from you whether we will have to advertise the procurements in the OJEU. Details are a bit vague on some of the procurements but here is the information that I have on the two main ones.

The first procurement is for about 80 high-specification laptop computers. The average price for a top-of-the-range model is EUR 1 600 plus VAT if we bulk purchase. We would like to buy all 80 laptops in one go. I understand that a figure of EUR 133 000 is relevant somehow – and the EU rules do not apply for purchases below that level. I assume that it is OK to go ahead and run a competition without advertising in the OJEU? We would like to include an option to add a few extra laptops to the order, perhaps 10 more. As we are not sure about these additional laptops, I assume that it is still OK and we are still under the financial limits? Please confirm the position.

Our second major procurement is for computer peripherals – printers, leads, ink, discs, etc. We think that it might be easier to package these all together in a single contract for 3 years, as most suppliers can supply all of the items. However, the total cost for a 3-year contract would be about EUR 250 000. We don't want to have to advertise in the OJEU if we don't have to, so can we split the contract into smaller parts for different types of purchases and avoid the OJEU route?

Many thanks,

Head of IT

P.S. – One of my friends who works for the town council says that it is not the figure of EUR 133 000 that matters, but it is the EUR 206 000 which triggers the requirement for an OJEU advertisement. Is he correct? Can you explain this, please?

The Head of IT gets back to you with another email

email 2

Amend figures if necessary when new thresholds are published, to ensure that the costs are over the EU financial threshold for central government but two contracts fall within the small lots provisions.

From: headIT@mined.gov
To: headprocure@mined.gov

Subject: IT procurements

URGENT

Dear Head of Procurement,

Thanks for your replies to my first email – all very useful.

I have a further question: We are going to be purchasing a large number of basic desktop PCs for use in our schools. We want to test the market to see if we can benefit from large-scale purchasing from major suppliers, but we think there might also be some good deals available from smaller suppliers.

We would like to split the purchases into 4 separate contracts, by geographical area. Suppliers could then bid for some or all of the contracts. All of the contracts will be for much less than the EUR 133 000 financial threshold. Our current rough estimates for the contracts are as follows:

Area A	EUR 20 000
Area B	EUR 60 000
Area C	EUR 50 000
Area D	EUR 40 000
Area E	EUR 10 000

My questions are: does the requirement to advertise in the OJEU apply? If there is a requirement to advertise in the OJEU, is there any way we could ensure that the contracts for Area A and Area E don't have to be awarded using a full European procurement process?

Many thanks,

Head of IT

EXERCISE 2
INDIVIDUAL CASE STUDY

You work in the procurement department at a town council. The council is involved in an urban regeneration project for the town centre.

Please answer the following questions, giving reasons for your answers.

1. The Council is providing 55% of the funding for the construction of a new sports facility. The Council is providing the funding to a private sector urban regeneration company. The estimated construction costs are EUR 6 000 000. Will the urban regeneration company have to advertise the construction contract in the OJEU and comply with the Directive in the contract award process?
2. The Council decides to redevelop the local cinema and theatre complex, which is next to the urban regeneration area. The estimated cost is EUR 5 200 000. The Council will award the contract and make available to the successful construction contractor, for use on the project, a large amount of building materials, including local marble. The estimated value of the building materials is EUR 600 000. Will this contract be over the relevant EU financial threshold?
3. The Council decides to run a design competition for the architectural designs of the cinema and theatre complex. It offers 3 prizes of EUR 10 000 each. The winning architect will, in addition, be awarded a contract worth EUR 100 000 for the design services. Will the design contest have to be advertised in the OJEU?

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. How often are the EU financial thresholds set?
2. Why are the thresholds for central government contracting authorities often lower than the thresholds for other contracting authorities?
3. Why are the thresholds for works contracts so much higher than the thresholds for services and supplies contracts?
4. At what time must the estimate be valid?
5. What is the threshold for a contract for the following?
   - 5.1. the construction of a new office building by a central government department
   - 5.2. the construction of a new school by a local authority
   - 5.3. the purchase of stationery by a central government department
   - 5.4. the purchase of a new boat (not a warship) by the government's defence department
   - 5.5. the purchase of photocopiers by a local hospital
   - 5.6. the purchase of architects' services by a local authority
   - 5.7. the purchase of legal services by a central government department
6. Is the threshold for a Prior Information Notice for works contracts calculated using the total estimated value of the contracts for a 12-month period?
7. When you calculate the total value of a contract, can you exclude the value of payments made by third parties for the contract?
8. What is the value of the following contracts for the purposes of calculating whether they exceed the financial threshold:
   - 8.1. A 3-year contract for the supply of stationery at an estimated value of EUR 100 000 per year
   - 8.2. A 2-year contract for cleaning services with an option to extend for a further 1 year where the estimated annual value is EUR 75 000
   - 8.3. A contract for design services worth EUR 150 000, awarded as a result of a design competition where there were 4 prizes awarded of EUR 20 000 each
9. A local authority intends to purchase 20 photocopiers over the next 12 months. Each photocopier is estimated to cost approximately EUR 7 000. Will these purchases be subject to the full application of the Directive?

10. A local authority intends to award construction contracts for two new administrative buildings and a separate canteen for the occupants of those new buildings. The local authority intends to use a single procurement process but divide the contract into lots:

Lot 1	Administrative building 1	estimated value of EUR 2 200 000
Lot 2	Administrative building 2	estimated value of EUR 3 300 000
Lot 3	Canteen	estimated value of EUR 500 000

    10.1. Is the relevant financial threshold exceeded so that the Directive applies in full?

    10.2. Can the local authority award Lot 3 for the Canteen without complying with the full requirements of the Directive?

11. What is the value, for the purposes of calculating whether the EU financial threshold is exceeded, of a contract for the supply of stationery without a fixed term where the estimated value is EUR 5 000 per month?

12. What is the value, for the purposes of calculating whether the EU financial threshold is exceeded, of a contract for insurance services estimated to cost EUR 200 000 plus commission of 10% of the total contract value?

13. How is the value of framework agreements calculated?

MODULE

E

PUBLIC PROCUREMENT TRAINING FOR IPA BENEFICIARIES

Conducting the procurement process

Conducting the procurement process

MODULE E

Preparing tender documents

PART 1

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this module are to make participants aware of:

1. The standard content of the invitation to tender documents
2. Guiding principles for the design of tender documents
3. The design of specifications
4. The different types of specification
5. Good and bad practice in preparing specifications
6. The different responsibilities during the process of specification
7. The differences and difficulties in specifying works, supplies and services
8. How to manage the process of responding to questions from economic operators about specifications

1.2 IMPORTANT ISSUES

Specifications are a vital step in the procurement process. Inappropriate, incomplete, invalid and specific specifications cause contracting authorities to get poor value-for-money solutions that can also result in challenges from the supply market. Getting the specification fit for the purpose is vital.

1.3 LINKS

Links to other modules appear throughout the text of this document. This module does, however, contain major links to the following modules:

- Module B2 on the procurement cycle
- Module B3 on the role of the procurement officer
- Module B4 on the role of stakeholders
- Module B5 on the contribution from external consultants
- Module G1 on contract management
- Module G2 on measuring performance in public procureme

1.4 RELEVANCE

Procurement officers need to understand the concept of generic performance-based specifications and be able to guide stakeholders to describe their requirement in this way. This module describes different options for developing specifications and focuses on good practice, while also highlighting poorer practices to avoid.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

This section will link to other areas referring more closely to legal information.

LOCALISATION WILL NEED TO REFER TO SPECIFIC LEGAL DOCUMENTS

SECTION 2
NARRATIVE

2.1 INTRODUCTION

The Directives include detailed rules on the selection and award process as well the elaboration of technical specifications, but for the most part leaves it to the member states to regulate the detailed content of the documentation for the pre-qualification and the tender award process.

The basic requirements laid down in the Directives are that an invitation to submit a tender, to participate in the dialogue or to negotiate must contain at least:

> A reference to the contract notice published; the deadline for the receipt of the tenders, the address to which the tenders must be sent, the language or languages in which the tenders must be drawn up, a reference to any possible adjoining documents to be submitted, support of verifiable declarations, the information on personal suitability, and technical and professional ability for the selection process and the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria.

Some countries also have regulations or laws requiring contracting authorities to use certain model documentation for these processes. Another aspect of interest is whether there are any rules in terms of costs on the provision of tender documentation. Localisation required to highlight local requirements.

The majority of the regulatory instruments of the member states as well as in SIGMA partner countries include, in varying degree, the main content of the tender documentation in terms of invitation to tenders, instructions to tenderers, specifications and draft contracts.

The tender documents are the focal point in the tendering process and shall furnish all information necessary for a prospective tenderer to prepare a responsive tender for the supplies, services and works to be provided. While the detail and complexity of these documents may vary with the size and nature of the contract, they generally should include:

(a) Invitation to tender;

(b) Instructions to tenderers;

(c) General and special conditions of contract;

(d) Technical/services specifications;

(e) Tender form;

(f) Contract form;

(g) Appendices (model financial offers, forms for guarantees, etc., as applicable)

The tender documents shall be drafted so as to permit and encourage the widest possible competition. They shall clearly define the scope of supplies and associated services, the services and works to be supplied, the rights and obligations of the contracting authority and of suppliers, service providers and contractors, and the conditions to be met in order for a tender to be declared responsive, and they shall set out fair and non-discriminatory criteria for selecting the winning tender.

2.2 GUIDING PRINCIPLES FOR THE DESIGN OF THE TENDER DOCUMENTS

It is the responsibility of the contracting authority to:

- prepare thoroughly drawn up tender documentation that would allow optimal competition and make it possible, generally, to make an award decision without prior negotiations;
- ensure that all legal formalities in connection with the tender proceedings will be met; announcement of tender, submission and opening of tenders, presentation of award criteria and recording of the process;
- include technical, commercial, environmental and other requirements that correctly will balance and optimally reflect the character and size of the contract.

In particular, the following areas are of importance in the preparation of the tender documents (instructions to tenderers):

- Based on the size and duration of the contract, determine the qualification or selection criteria for participation in the tender, which shall be disclosed in the contract notice and tender documents when applicable;
- Determine how qualifications shall be evidenced by tenderers without imposing unnecessary formal conditions that could negatively affect the participation;
- Decide on the appropriate packaging of the tender and whether to allow tendering for lots or variants;
- Decide whether groups or joint ventures will be required to take a specific legal form for performance of the contract;
- Decide on the award criteria and their relative weighting, or if necessary their descending order of importance, for listing in the contract notice or tender documents;
- Determine and indicate all important aspects of the tender evaluation methodology and procedure, including the rules regarding minor and major deviations, correction of arithmetical errors, and rules for rejection of tenders;
- Decide on instruments for the invitations to participate or for tenders in addition to the publication of a contract notice in the OJEU, such as the government website or procurement bulletin of the member state, national and local newspapers;
- Determine the appropriate time limits for the preparation and submission of tenders, which shall respect the minimum time limits but be sufficiently extended when required in order to correctly reflect the size and complexity of the tender;
- Indicate the rules and procedure for submission and opening of tenders;
- Determine the length of the tender validity period, which should be set to enable an effective and correct tender evaluation, including the award and conclusion of contract, but not so long as to affect prices and costs negatively.

- Consider the need for a pre-bid conference, which could be necessary in the case of complex technical specifications or contract conditions;
- Indicate the procedure and rules for clarification of the tenders submitted;
- Indicate the rules for cancellation of the tender procedure;
- Decide on the need for requesting tender and performance securities;
- Determine the appropriate contract model, taking into account the size, type and duration of the contract;
- Indicate the procedures for debriefing and lodging of a complaint.

2.3 DESIGN OF SPECIFICATIONS

Introduction

The purpose of technical and service specifications is to give instructions and guidance to tenderers at the tendering stage about the nature of the tender they will need to submit, and to serve as the economic operator's mandate during contract implementation. The technical specifications will be included in the tender documents and will become an annexe of the eventual contract awarded as a result of the tender.

They should reflect correctly the needs of the contracting authority and the budget estimations made for the acquisition. Incorrect or unrealistic specifications are a common reason for many of the problems that later frequently occur during the tender and award process, such as the need for issuing amendments to the tender dossier, cancellation of tender proceedings, lodging of complaints and contract problems.

Furthermore, a set of precise and clear specifications is a prerequisite for tenderers to respond realistically and competitively to the requirements of the contracting authority. They must be drafted to permit the widest possible competition and, at the same time, present a clear statement of the required standards of workmanship, materials, performance and other factors of relevance related to products and services to be procured.

Technical specifications must afford equal access for candidates and tenderers, and not have the effect of creating unjustified obstacles to competitive tendering.

Thorough preparation of technical specifications is extremely important for the ultimate success of the contract implementation. It is most likely to ensure that the contract has been properly conceived, that the work is carried out on schedule, and that resources will not be wasted. Therefore, greater effort during the preparation phase will save time and money in the later stages of the project cycle.

The Directives provide that the technical specifications should be defined by the contracting authorities by reference to national standards implementing European standards, or by reference to European technical approvals, or by reference to common technical specifications.

Definitions

(1) *Technical specifications* means the totality of the technical requirements contained in particular in the contract documents, defining the characteristics required of a service to be provided, a material or product to be supplied or works to be constructed, and thus permitting these to be described in a manner such that it fulfils the use for which it is intended by the contracting authority;

(2) *Standard* means a technical specification approved by a recognised standardising body for repeated and continuous application, compliance with which is in principle not compulsory;

(3) *European standard* means a standard approved by the European Committee for Standardization (CEN) or by the European Committee for Electrotechnical Standardization (Cenelec) as "European standards (EN)" or "Harmonization documents (HD)" according to the common rules of these organisations;

(4) *European technical approval* means a favourable technical assessment of the fitness for use of a product, based on fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use. The European approval shall be issued by an approval body designated for this purpose by the member state;

(5) *Common technical specification* means a technical specification laid down in accordance with a procedure recognised by the member states to ensure uniform application in all member states, which has been published in the Official Journal.

Exceptions:

- where there are legally binding national technical rules that are compatible with the Treaty;
- where the standards etc. do not include any provision for establishing conformity, or the technical means to do so do not exist;
- where use of the standards etc. would result in incompatibility with equipment in use, disproportionate costs or disproportionate technical difficulties;
- for genuinely innovative projects.

The justification for invoking an exception must be given in the contract notice or the tender dossier.

Technical specifications must not refer to services, goods or works of a specific make or source, or process, in particular to trademarks, patents, types or a specific origin if that would favour certain service providers, suppliers, products or contractors. Such an indication is permitted, however, where it would otherwise be impossible to describe the subject of the contract with sufficient precision, but only if accompanied by the words "or equivalent".

With the **EC Directives 2004/17 and 18,** a modern approach has been adopted; these provide that technical specifications can be based on:

- national standards transposing European standards or, in their absence, the same hierarchy of alternatives; or
- functional or performance requirements; or
- functional or performance requirements with references to national standards transposing European standards etc. as a means of proving conformity; or
- transposed standards etc. for some characteristics and functional requirements for others.

The Directives further provide that where a technical specification is based on standards, the contracting cannot reject offers that do not comply with the standards if the tenderer can prove to the satisfaction of the contracting authority that the offer will satisfy the requirement in an equivalent manner. Similarly, a contracting authority cannot reject an offer that conforms with a standard etc. if the offer also meets a required functional or performance requirement.

Key principles

Non-discrimination

As mentioned above, there is a general ban on technical specifications that mention goods of a specific make or source, or of a particular process, and that have the effect of favouring or eliminating certain enterprises or products. Among the specifications that can have such a discriminatory effect and are therefore prohibited, the Directive mentions in particular the indication of trademarks, patents, and types or a specific origin or production.

An exception to this general ban is allowed where the subject matter of the contract cannot otherwise be described by specifications that are sufficiently precise and intelligible to all concerned. Reliance on this derogation should not, however, have discriminatory effects; to that end, the Directives require that such indications be accompanied by the words "or equivalent". Contracting authorities relying on this or other derogations must always be able to provide evidence that they are necessary.

Principle of equivalence and mutual recognition

Contracting authorities must presume that products manufactured in accordance with the standards drawn up by the competent standards bodies conform to the essential requirements laid down in the Directive concerned. They may not refuse products simply because they were not manufactured in accordance with such standards, if evidence is supplied that those products conform to the essential requirements established by Community legislative harmonisation.

If there are no common technical rules or standards, a contracting authority cannot reject products from other member states on the sole grounds that they comply with different technical rules or standards, without first checking whether they meet the requirements of the contract.

In accordance with the mutual recognition principle, a contracting authority must consider on equal terms products from other member states manufactured in accordance with technical rules or standards that afford the same degree of performance and protection of the legitimate interests concerned as products manufactured in conformity with the technical specifications stipulated in the contract documents.

2.4 DESIGN OF SPECIFICATIONS IN PRACTICE

This section describes the process and practicalities of specifying a requirement in such a way that economic operators can understand what is needed. This will allow them to tender in the required format and deliver a solution to meet the needs of the contracting authority, stakeholders and users of the purchase.

- The role of the procurement officer at this stage of the process is to ensure that the specification is drawn up by appropriately qualified people in such a way that any number of economic operators can successfully tender for the requirement.
- The role of specialist technical stakeholders within a contracting authority is to use their knowledge and expertise, consulting with others in the contracting authority to construct a specification that is fit for the intended purpose.
- Specifying a requirement is a fundamental and early stage in the procurement process. Simply put, if the specification is lacking in some way, what is delivered will also be lacking.

A procurement practitioner's definition

For a procurement practitioner, a useful definition of a specification is "a generic description of the required attributes fundamental to the need of the prime user of the requirement, which includes an indication of how fitness for purpose will be measured".

Unpacking that definition leads to:

1. A realisation that the specification must be generic. This means that specifications need to be developed in such a way that the requirement described can be met by any number of economic operators who supply the works, goods or services identified.
2; Defining fundamental attributes is key. An attribute is an "inherent characteristic", or "a word ascribing a quality". The specification must describe what is fundamental to the prime user of the works, goods or services being purchased.
3. The specification must include text about how those who have written the specification and users will compare the goods, works and services delivered with their aspirations. Simply put, the specification must indicate "what a job well done will look like". If the writer and prospective user of the requirement cannot determine what success looks like, what chance has the economic operator of delivering success?

In summary: procurement officers must in all cases ensure that requirements are specified in a way that is non-discriminatory; they must provide equal access to the specification for all tenderers; and the way in which the specification is prepared must not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

Good practice note – Specifications

The objective of a specification is to promote competition for a requirement. The specification must not therefore favour one economic operator; it must allow as many economic operators as possible to tender for the work.

Definitions from the Directive – goods and services

The main governing definitions are found in the Directive, which uses the following definition of technical specification [Annex VI 1(b)]:

> "Technical specification", in the case of public supply or service contracts, means a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures."

Definitions from the Directive – works

As above, the Directive uses the following definition of technical specification for works [Annex VI 1(a)]:

> "Technical specification", in the case of public works contracts, means the totality of the technical prescriptions contained in particular in the tender documents, defining the characteristics required of a material, product or supply, which permits a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority. These characteristics shall include levels of environmental performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling and production processes and methods. They shall also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.

Good practice note – Time

Specifying is an upstream procurement process. Invest time in getting the specification right in relation to your requirement. The investment will pay dividends during the delivery of the requirement downstream. Contract management (referred to in module G1) is less problematic if the specification meets the needs.

2.5 TYPES OF SPECIFICATION

1. Generic specifications
2. Conformance specifications
3. Detailed design specifications
4. Performance specifications

Unacceptable design of specifications

Frequently, stakeholders in contracting authorities who are involved in preparing specifications use information from previous purchases, or information from one economic operator, to specify a requirement. There is a significant danger in this approach, as by doing so the requirement can end up being written in such a way as to favour the economic operator whose information is used. This result may, or may not, be deliberate. Favouring a particular economic operator when drafting a specification may take the form of, for example:

- Using a brand name or a title
- Reading the part number of the item
- Looking up the details in a economic operator's catalogue and replicating them
- Using information prepared for them by a economic operator, to meet the need in question

There *are* certain limited circumstances provided for in the Directive where further purchases from an economic operator may be permitted where that economic operator is already providing works, supplies or services to the contracting authority. This is covered in module C4.

Apart from the limited circumstances permitted under the Directive, use of a specification that favours a single economic operator will lead to reducing the options available to ensure that the best overall value is provided through the procurement process. In addition, it could lead to a legal challenge on a number of grounds, including unequal treatment and/or breach of specific provisions of the Directive providing that a contracting authority:

shall not lay down technical specifications which refer to materials or goods of a specific make, or service, or a particular process or trademark, patents, types, origin or means of productions that discriminates in favour of or against particular economic operators.

Comment: Potential for corruption

While recognising the fundamentals of the EU Directive, some economic operators will try to work with their contracting authority customers to develop the specification in a way that best allows their own equipment or service to be selected by the contracting authority, perhaps by stressing one unique feature of their product. This may be an overt or covert process, and economic operators refer to it as "creating a need". Some economic operators even offer to help busy procurement officers write the specification; however, it is frequently the technical specialist or stakeholder who is easiest to influence, and procurement officers must warn their colleagues against accepting such "assistance".

Generic specifications

A generic specification aims to describe the requirement in a way that does not restrict the number of economic operators that the contracting authority may attract. It can be based on national, European or international standards (provided that equivalents are accepted) as a means of clearly opening the market.

In the context of procurement, specifications need to be developed in such a way that the requirement described can be met by any number of organisations that supply the goods or services identified. A generic specification:

- makes economic operators responsible for proposing and delivering the requirement, meeting the contracting authority's needs
- can be used to stimulate competition
- can be used where there is no need to be specific

An example of a generic specification would be a mid-range four-door saloon car. Localisation to provide an equivalent generic description of a Renault Megane.

Conformance specifications

A conformance specification lays down unambiguously the requirements that economic operators must meet. It allows no room for manoeuvre. The specification describes the product or service required in great detail and can be based on national, European or international standards (or equivalent) as a means of clearly specifying what is needed.

- For goods it may specify weight, size, finish, volume, circumference, and use with other goods.
- For services it may describe duration, number of people required, what will be done by the people, where they will do it and when they will do it.

The economic operator is required to deliver the goods or services that meet this need; they are not encouraged to do better. Conformance specifications are often supported by drawings. While in some contexts conformance specifications can work appropriately, the following dangers exist:

- The economic operator may know of a better or more cost-effective way to meet the need. If discouraged from being concerned with this aspect, economic operators will not pass on the benefit of the experience they have to the contracting authority.
- Doubt may still exist concerning exactly what is required, because the specification is still not "clear".
- Too much detail requiring "conformance" may lead to:
  - additional cost, while preventing economic operators from offering the benefit of their wider experience;
  - confrontational relationships, particularly with services.

However, where for a given reason the specification *has* to be "just so", a conformance specification may be appropriate. Additionally, if the contracting authority has a nationally recognised expert in the field they are specifying, then economic operators may genuinely learn from this expert by attempting to meet the need specified.

If a room were to be air-conditioned, a conformance specification would, among other things and without naming brands, identify the exact position of:

1. The controls on the wall
2. The place of the extractor fans
3. Where the compressor was situated on the roof

   It would also identify:
4. The size, capacity and power of the compressor.

An economic operator replying to an invitation to tender may feel that different positions for the controls, fans and compressor may be more advantageous. However, they will be concerned that if they propose the different positions, their tender may be viewed as noncompliant and they may be excluded. Therefore they will not propose the more advantageous option.

Detailed design specifications

This option develops a conformance specification a step further. A design specification defines the technical characteristics of the requirement in great detail. The economic operator has no input into the design process and is not responsible for the benefits available to the contracting authorities. This option can be used where:

- The contracting authority has the nationally recognised expert in the field they are specifying.
- Economic operator innovation is not required.
- Non-experts will be asked to deliver the requirement.
- There is a risk of ambiguity.

If a room were to be air-conditioned, a detailed design specification would, among other things and without naming brands, identify the exact position of:

1. The controls on the wall
2. The place of the extractor fans
3. Where the compressor was situated on the roof

It would also:

4. Identify the size, capacity and power of the compressor
5. Provide an electrical wiring diagram
6. Provide a flow diagram for the refrigerant
7. Provide a site diagram for the location of all of the components required.

As with conformance specifications, an economic operator may feel that different positions for the components will be more advantageous but not offer the preferable solution, for fear that noncompliance may result in their exclusion.

Performance specifications

Performance specifications are sometimes called functional or output specifications because they focus on the functionality or output to be delivered.

Performance specifications provide a clear indication of the purpose for which the item is required and this requirement is fully communicated to economic operators. The difference here is that economic operators are then encouraged to use their expertise to offer solutions (products and/or services) which, in the expert view, best meet the need as specified by the contracting authority.

If a room were to be air-conditioned, a performance specification would indicate that the requirement was that the room, containing 20 people with a computer each and two printers, should be kept at a temperature of 20 degrees centigrade when the temperature outside was between minus 10°C and 32°C. In this sense, commonality and conformity are achieved because all economic operators can attempt to provide a cost-effective solution to the requirement, without the requirement being prescriptive.

Good practice note – Performance specifications

Use of a performance specification can lead to wider competition being stimulated than with a conformance specification. EU directives encourage the use of performance specifications.

It may not always be possible to use a generic performance specification. However, for many procurement officers, they are the preferred option because they:

- encourage alternative and innovative solutions
- minimise the contracting authority's risk if performance is poor
- discourage bias
- reduce resources required by economic operators to prepare detailed responses
- minimise time, resources and effort to prepare the specification within the contracting authority

The minimum sought by a procurement officer should be a non-discriminatory specification that fully describes the need.

2.6 USING STANDARDS TO SPECIFY

It is a basic requirement under EC law that contracting authorities refer to EU or international standards where those exist. This is an excellent way of promoting competition:

- in a given industry
- when delivering a given good or service
- nationally
- in Europe
- internationally

An example is the accounting standard IFRS1 (International Financial Reporting Standard 1), to which economic operators should prepare their sets of accounts for examination by customers and regulatory bodies. Localisation – check IFRS 1 applies and/or find a more commonly understood standard

The term "standard" means a technical specification approved by a recognised standardising body (in the above case, the International Accounting Standards Board) for repeated or continuous application. Compliance may or may not be compulsory with the standard, which falls into one of the following categories:

- International standard: a standard adopted by an international standards organisation and made available to the general public
- European standard: a standard adopted by a European standards organisation and made available to the general public
- National standard: a standard adopted by a national standards organisation and made available to the general public

Equally, a simpler standard may be the weight of photocopying paper which could be specified as 80 gsm (grams per square metre) or an EDIFACT, an electronic data interchange standard. These last two are examples of industry standards. A contracting authority needing to photocopy onto heavier paper would specify that the photocopiers it needs to purchase must be able to cope with paper of 130 gsm.

2.7 ALLOWING AN OPPORTUNITY FOR AN ALTERNATIVE SOLUTION

Specifications should also leave room for economic operators to provide an alternative solution. As explained below, the Directive requires contracting authorities to accept equivalent standards where economic operators can demonstrate, to the contracting authority's satisfaction, that they are equivalent. Frequently this is achieved by reference to the words "or equivalent". While it is therefore not good practice to say "Renault Megane", Localisation by using the statement "Renault Megane or equivalent vehicle", potential tenderers know that they can offer a vehicle from a different manufacturer without being considered non-compliant.

The Directive provides that where a contracting authority defines technical specifications, it should not reject a tender on the basis that the materials, goods or services offered do not comply if an economic operator proves to the satisfaction of the contracting authority, by any "appropriate means", that one or more solutions proposed meet the requirements in an equi-valent manner. Note that:

> "Appropriate means" (above) includes a technical dossier of a manufacturer or a test report from a recognised body.
>
> "Recognised bodies" within the terms of this Directive are "test and calibration labora-tories and certification and inspection bodies which comply with applicable European standards".

2.8 CONSIDERING THE CONCEPT OF TOTAL COST OF OWNERSHIP (TCO)

The total cost of ownership principle

Where a requirement like a machine, vehicle or building will not be consumed within a short time of its arrival at the contracting authority, consideration should be given to specifying elements of the lifetime cost.

The concept of total cost of ownership (TCO), also known as whole life costing, takes into account the owning, operating and disposal costs of a requirement over its whole life. It can be that a lower purchase price incurs a higher operating cost over its life. Therefore the total cost of owning that theoretically low-cost purchase is greater than it otherwise would have been.

The Directives permit the use of the most economically advantageous tender (MEAT) criterion. This allows contracting authorities the opportunity to take advantage of the TCO concept. The table below provides an example of a bus purchase. The figures used are for illustrative purposes only.

TCO element	Element description	Cost from economic operator A	Cost from economic operator B	Cost from economic operator C
Purchase price	Actual purchase price	EUR 1,000,000	EUR 1,100,000	EUR 1,400,000
Cost of owning	Cost of loans, insurances, taxes, depreciation	EUR 200,000	EUR 210,000	EUR 205,000
Cost of operating	Cost of fuel, spares, number of people to operate the equipment. Length of service interval, tyres, replacement seats when broken over 25 years	EUR 6,500,000	EUR 6,345,000	EUR 6,001,000
Cost of disposal	Residual value upon disposal of equipment	EUR (75,000)	EUR (80,000)	EUR (92,000)
Total cost	Total cost	EUR 7,625,000	EUR 7,575,000	EUR 7,514,000

TCO and life-cycle costing are also discussed in modules A4 and E5.

Impact upon specifications

The impact of the TCO principle on specifications is that procurement officers and contract-ing authorities should not only consider the purchase cost within the specification, but also specify their requirements in terms of operating costs. This may lead economic operators to propose:

- a package reducing the cost of spares
- an option including servicing
- a lease option rather than a purchase option
- a version of the item that has a longer life
- a buy-back option at the end of the effective life of the equipment

One consideration that must be remembered is that the leverage that the contracting authority has over the economic operator is greatest when the initial procurement is being made. Once the equipment is bought, it may well be that the contracting authority has to purchase spares, consumables and ancillary equipment from the economic operator in question at the highest price. Including the whole requirement in the package can bring savings.

2.9 DRAFTING A SPECIFICATION

Introduction

Many of the statements made in this part of the narrative may seem obvious. However, in dealing with documents purporting to specify requirements, it is the experience of many procurement officers that one or more of the following are often omitted by technical specialists and other stakeholders. These notes will therefore benefit procurement officers working with stakeholder specialists to draft a specification, and it is anticipated that the majority of the activity in this section will be completed by the stakeholder.

In some cases the whole requirement may be specified accurately in the form of an engineering drawing, a service specification or a chemical recipe. The following steps assume that no such specification exists, although the text indicates the appropriate place to use such references. To draft a generic performance specification, it is necessary to:

- understand the nature of the requirement
- examine the detail of that requirement
- state the performance required from the goods or service
- communicate and test the requirement with stakeholders

A standard format for specifications and enquiries is usually found most appropriate. See Appendix A for some basic guidance on drafting specifications and a simple template.

Understand the requirement

Before it is possible to ask anyone to deliver a work, supply or service, the requirement itself must be understood. This will involve asking *and answering* questions, including:

- What is the name of our requirement? It must not be assumed that economic opera-tors will know. Equally, the name itself will send a message to economic operators. It is necessary to ensure that both the name and the message will convey the essence of the requirement to potential economic operators.
- What do we plan to do with the requirement? In some cases the use we have in mind for the item may make the offerings of some economic operators inappropriate. Our specification must leave the economic operator in no doubt as to how we intend to use the item, or what we want from the service.
- Who is going to use the requirement? Our specification needs to indicate this key fact. Economic operators will articulate their ITT differently if the requirement is for training experienced people than if it is for novices.

Examining the detail of the requirement

Even the simplest requirements have a detail that belies their image. "Bolt", "pencil" and "sandwiches" are simple ordinary requirements, yet they have almost endless variations. The following list is not exhaustive; however, it identifies typical detail variations which can include:

- Applicable standards
- Unit of measurement: size, length, height, width, volume, capacity, diameter, watt, volt, gram
- Value of unit of measurement: per 2 metres; 120 grams per square metre
- Base material: steel, brass
- Material content: a specific grade of steel: EN316
- Other key characteristics: *e.g.* hexagonal head, surface finish
- Method of operation: centrifugal, reciprocating
- Which area of the equipment the item is to be used on, in, or with other items
- Power source requirements: electrical, diesel, atomic
- Orientation: portrait, landscape, vertical, horizontal
- Language
- Duration
- People required
- Safety requirements
- Fuel
- Colour
- A modification or generation number

State the performance required from the goods and/or service

Having examined and stated the detail of the requirement, it is necessary to consider the performance criteria. This area is often assumed to be the same as the detail specification, and although sometimes it may be found within this information, it is highlighted here because of its importance.

The objective of including performance is to:

- Describe the level of effectiveness required
- Set the standard against which to measure the specified requirement once it is operating
- Ensure that the service or equipment meets the performance level of other elements with which it must interact
- Relate the requirement to legislative and other standards. Specifically this may be health and safety standards – Localisation here. However, the policy of the contracting authority may also dictate standards here
- Form part of the selection process

Performance will seek to link a number of the points in the specification to criteria by which to measure them. The following are examples:

- A restaurant service contract should specify the number of meals per day the economic operator may expect to supply (*e.g.* 240 meals per day). Further, it should indicate that a large number of staff use an alternative to the restaurant on a Friday if that is the case
- The contracting authority may require stationery delivered to a specific location at its premises or to the desks of individuals directly. This will impact economic operators' costs
- Electric forklift trucks would have a range, *i.e.* a number of kilometres, before they need to recharge
- Pumps or compressors will have an indication of a volume dealt with per second or minute

Specification of performance allows economic operators to offer their most appropriate product, or construct a service proposal most relevant to the needs of the requirement as specified.

See modules A4, B7 and G1 on setting and measuring performance.

The link to contract terms and conditions

Elements of the specification will form key terms and conditions within the contract. The performance requirements used as examples just above could become provisions in the contract. For example, the contract between the contracting authority and the economic operator may:

- Require the economic operator to provide 240 meals per day, except on Friday when the number is only 180
- Make the names and locations of people to whom stationery is delivered formal delivery points in the contract. Wise procurement officers will have these in an amendable table at the end of the contract, but they will be a provision nonetheless
- Where a forklift truck does not complete 'x' number of kilometres before a recharge, the contracting authority might seek redress from the economic operator
- A pump failing to pump the required volume of water per hour may be returned as not fit for purpose, or the economic operator asked to replace it free of charge

The specification is at the heart of the contract, and key performance indicators and service level agreements will originate from the specification.

Communicate and test the requirement with stakeholders

This area too may appear obvious. However, communications often fail, and one or more of the elements do not represent the needs of everyone who has a stake in the requirement. This can lead to downstream costs when changes need to be made. Specifications should be sent to all key stakeholders for agreement before they are issued.

A standard format for a specification should be agreed. This could include the following items as appropriate to the need being specified:

- The reference number of the item being specified – this may be different from its part number
- A version number, a date of the version and an approval of the change; in some cases, a reason for the change
- A summary description of the item
- A full description of the item
- An indication of what the item will be used for
- Quantitative details of the item (size, capacity)
- Details of other characteristics of the item (thread, finish, coating)
- Qualitative aspects of the item
- Specific performance characteristics, possibly "where used"

2.10 DIFFERENCES IN SPECIFYING GOODS, SERVICES AND WORKS

Goods, works and services all have different aspects to consider with regard to specification.

Specifying goods

Goods and materials can literally be counted, touched, weighed and tested to see whether they fit, both before specification and after delivery. If 1 000 sheets of pink A4 size, 80 gsm photocopier paper are specified in two packs of 500 sheets, then it is possible to:

1. See whether two packs have been delivered
2. Understand whether the paper has been delivered to the correct organisation and place
3. Monitor the time of delivery
4. Look at the packaging to see if it is photocopier paper
5. Count all 1 000 sheets
6. Weigh the paper to establish the gsm
7. Check that the colour is pink

The physical nature of goods means that specification and measurement can be visualised and described with less difficulty.

Specifying services

There is nothing inherent in a service – consultancy, for example – that prohibits it from being defined in functional or performance terms. Services, like goods, are required to satisfy specific needs, and specifications should be written so that the output provided by the service is measurable. However, a service has an intangible nature, which makes it more difficult to specify and even more difficult to measure.

> The service of cleaning an office can provide an example here. The view of what is "clean" to one person may result in a complaint from another person that the office is not clean.

Services differ from goods in several ways – for example:

- Services are intangible
- Services involve the performance of activities or tasks
- Services cannot be owned like a product
- Services cannot be stored
- Samples of services cannot be seen prior to purchase
- Some services cannot be performed remotely
- Services are provided by people

These differences have implications for specifications, and to overcome the difficulties that arise, service specifications must not only lay down parameters for economic operator per-formance, but also act as a quantifiable basis by which the people working for the economic operator can be measured. They will cover such aspects as:

- Details of services to be provided
- Time and point of service provision
- Names of people authorised to provide the service
- Required response times, both under normal circumstances and in emergencies
- Support and back-up arrangements
- Required documentation
- Supervision and sign-off of acceptance

Frequently, the service requirement is expressed in a service-level agreement incorporated within the contract, often as a schedule, relating to the specific nature of the service being provided. See module B5 for notes on how to use the services of consultants and service-level agreements.

Specifying works

Specifying works can be time-consuming and will require the expertise of architects, surveyors and other specialists who have specific experience of the construction being undertaken. Different works – for example bridges, buildings, airports, motorways and harbours – will all present different difficulties and require different sets of expertise. In addition to the design of the works, specifications will need to include aspects like:

- Gaining access to the site
- Defining the site facilities available and what is being done by the contracting auth-ority and the economic operator
- Access to the facilities of the contracting authority during the construction of the works
- The off-loading and storage facilities available
- What is required in terms of installation and commissioning, when will the handover be considered complete
- Where risk and liability starts and stops for the economic operator and the contract-ing authority
- Issues around sustainability and ongoing maintenance of the structure when it is complete

For further guidance see Appendix B.

2.11 MANAGING THE PROCESS OF RESPONDING TO QUESTIONS FROM ECONOMIC OPERATORS ABOUT SPECIFICATIONS DURING THE TENDER PROCESS

The following outlines some areas of good practice when dealing with questions from economic operators about specifications during the tender process. Please see module E5 for further discussion of the legal requirements in dealing with questions and clarifications.

The words "management" and "control" are key ones here. It must not be the case that different people from the same and different economic operators contact a number of people within the contracting authority using different communication channels. To allow this to happen is to risk different messages about the same aspect of the specification being sent to different people. A formal process is therefore required.

Good practice is that the process focuses on one or two people within the contracting authority; however, a number of options are available. Whichever option is chosen, in order to maintain transparency and equal treatment, all economic operators must receive information on all of the questions and answers asked by all of the economic operators unless it relates to commercially confidential issues. Options include:

1. Asking economic operators to channel all questions, in writing, about a given re-quirement through a nominated procurement officer. This means that questions can arrive via email, fax or letter. The procurement officer then seeks answers to the questions from technical stakeholders and circulates all of the questions and all of the answers to all of the economic operators.
2. Asking economic operators to channel, in writing, all technical questions about a given requirement through a nominated technical stakeholder, and all commercial questions about the requirement to a procurement officer. This means that questions can arrive via email, fax or letter. The people within the contracting authority then seek answers to the questions and circulate all of the questions and all of the answers to all of the economic operators.
3. Asking economic operators to email questions to a website. Different people from the contracting authority can then access the website and all economic operators can see the questions and the answers. Alternatively the procurement officer downloads and emails all of the questions and all of the answers to all of the economic operators. This option could be viewed unfavourably as discriminatory against countries and situations where it is not normal for all economic operators to have broadband access

Good practice note – answering questions

People from some economic operators will use a small ambiguity in a specification to start a discussion process where they aim to get the people from the contracting authority in detailed conversational discussion about the requirement or even negotiation. These situations must be refuted.

2.12 SUMMARY

An appropriate specification is vital to the success of any purchase. This Narrative has defined the term "specification", examined the different types of specification used by procurement practitioners, and considered the merits of each type. The benefits of using a standard and the possibility of allowing an opportunity for an alternative solution have been considered. The section has highlighted the concept of total cost of ownership and linked this with the use of the most economically advantageous tender (MEAT) when seeking to achieve value-for-money from purchases. The section has considered drafting a specification and the differences in specifying goods, services and works. Finally, it has reviewed managing the process of responding to questions from economic operators about specifications.

SECTION 3
EXERCISES

EXERCISE 1
SPECIFYING A REQUIREMENT

What is a specification? Can you define this term in the box below?

EXERCISE 2
SPECIFICATION MATCHING EXERCISE

See the instructions on the next page for this exercise, which involves matching the names of five different types of specification with the descriptions provided.

Take the names given to the types of specification on the left hand side below and the descriptions of those names on the right hand side and match them by drawing lines connecting the two boxes. Additionally one of these definitions is against the letter and spirit of the EU Directives. Which is it?

SPECIFICATION MATCHING EXERCISE

Take the names given to the types of specification on the left hand side below and the descriptions of those names on the right hand side and match them by drawing lines connecting the two boxes. Additionally one of these definitions is against the letter and spirit of the EU Directives. Which is it?

CONFORMANCE	Defines the technical characteristics in detail, the economic operator normally has no input into the design process and is not responsible for the benefits available to the contracting authority. Use this option if your specifier really is an expert economic operator innovation is not required, non experts will be asked to deliver the requirement, there is a risk of ambiguity
DETAILED DESIGN	Defines and describes the requirement using terms specific to one economic operator, one type or model from a given source, limits choice to that source. The economic operator is responsible for delivering the requirement selected by the contracting authority. Use this option if you wish to limit the selection criteria.
PERFORMANCE	Defines and describes the requirement in a way which does not restrict any number of economic operators which the contracting authority may attract to offer their goods, works, and services to meet their needs. The economic operator is responsible for proposing and delivering the requirement which meets the buyer's needs. Use to stimulate competition.
GENERIC	Provides a clear description of the purpose and output required from the goods, services and works to be purchased, but not a specific solution. The economic operator is responsible for the complete process from design to delivery fit for purpose. Use this option when you need to harness the economic operator's expertise, may not know what you want, have no internal expertise or have internal expertise, but not enough resources
SPECIFIC	Defines clearly and unambiguously a requirement which must be met by the economic operator. The specification describes the service or product, its make up, size and material, but ***not*** what it will be used for and not necessarily even where it will be used. The economic operator is responsible for meeting conformance criteria. Use when adherence to specification is vital.

EXERCISE 3
HANDLING DIFFICULT STAKEHOLDERS

X-RAY ALEX

Mr. Alexander Potemkin is a very important man in the hospital. He has been Head of Radiography for sixteen years and he runs a domain of twenty-five staff operating six xray machines twenty-four hours a day, seven days a week in the hospital in the capital city of the country. Essentially, what he says goes.

Last year the procurement plan identified the need for two new xray machines this year and you have been talking to Marie, one of Alex's staff, about his requirement. Marie, a very nice person, says that Alex wants two Philips XR52C machines; he has met the salesman at a convention and therefore asked you, as procurement officer, to "get on with it".

You have tried to explain good procurement practice to Marie, but she seems confused and she has managed to squeeze a fifteen-minute meeting with Alex into his tight schedule for you to "explain things".

YOUR TASK

Prepare to meet Alex and advise him on the need for a generic performance-based specification.

There is no standard answer as this is a role-play exercise.

EXERCISE 4
SPECIFICATIONS

THE RESTAURANT AT CITY HALL – 1

Background

This mini case study aims to prove how complex a simple specification can be.
The specification below is an extract from a real specification used within an outsourcing project in a city.

Your task

If you were the potential economic operator about to tender for the work specified below, what questions would you ask the contracting authority? Are there any areas of concern in the words used? Are any words less than precise?

Specification

"The city hall staff restaurant must provide appropriate hot meals from 0800 to 1430 each day and there must be three choices of main meal, including one healthy meal. Additionally, there must be a vegetarian option.

A range of hot drinks, made freshly, must be available from 0730 to 1730 each day and fruit, snacks and confectionery must be available to employees for the same duration."

EXERCISE 5
SPECIFICATIONS

THE RESTAURANT AT CITY HALL – 2

Background

You have analysed the specification for the restaurant at City Hall. Now assume that you have received a tender from a prospective economic operator. The response below is an extract from a real response to an outsourcing project in a city.

Economic operator's response

Our canteen service will commence at 0730 and close at 1730 each weekday. Three main meals will be available, including a healthy vegetarian option. We will commence service of hot drinks promptly after 0730 and continue to do this until a few minutes before the canteen closes. A wide range of sandwiches, fruit and confectionery will be available during peak times.

Your task

Indicate points that you would want to clarify with the economic operator.

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. How would you define the word specification?
2. Promoting competition is the objective of a specification. How can specifications prevent competition?
3. How would you describe a generic specification?
4. What is the advantage of a performance specification?
5. "Allowing economic operators to propose their own solution causes confusion and does not provide value-for-money." Do you agree with this statement? Back up your decision.
6. MEAT allows contracting authorities to consider total cost of ownership. What are the four component parts of total cost of ownership?
7. What is more difficult about specifying services compared to goods?
8. Read the statement below:

   "We need a module that outputs XML for EOs from our RDBMS."

   Is this a meaningful specification?
9. When writing a specification we should avoid words that are not specific and may lead to ambiguity. Can you provide three examples?
10. When would you advise using a specific specification?

Other sources

Appendix A includes notes on writing specifications, and the following websites contain useful information on this subject:

http://www.ogc.gov.uk/introduction_to_procurement_produce_requirement_3205.asp

http://www.ogc.gov.uk/procurement_briefings_central_unit_on_procurement_cup_guidance.asp

http://www.french-property.com/guides/france/building/new-build/terms/specification/

APPENDIX A
SPECIFICATION WRITING GUIDANCE AND TEMPLATE

1. INTRODUCTION

This section provides some basic guidance for writing specifications and a simple specification template. An Internet search will reveal a number of alternative templates of varying complexity, which procurement officers may download.

2. GUIDANCE ON WRITING SPECIFICATIONS

These notes aim at summaries guidance on writing a successful specification.

1. Use simple language.
2. Avoid words or phrases that are not specific or that may lead to ambiguity, *e.g.:*
    a. Should
    b. High
    c. Maybe
    d. Normal
    e. Reasonable
    f. Approximately
    g. Could
    h. Possible
    i. Not likely to
3. Do not use jargon.
4. Define terms, symbols and acronyms.
5. Write in layman's terms. Do not expect the specification to be read only by experts.
6. Use an attractive format. This will reflect your professionalism and encourage potential economic operators to read the specification.
7. Use a logical structure.
8. Be as concise as possible without reducing understanding.
9. Aim to define each aspect of the requirement in one or two paragraphs.
10. Do not explain the same requirement in more than one section.
11. Number each section and paragraph using a logical and consistent numbering method, *e.g.* 5.6.3 representing the fifth section, sixth paragraph, third sub-paragraph.
12. Ask someone who is not familiar with the specification to read it to gauge its readability and effectiveness.
13. Discuss drafts with stakeholders, colleagues and users.

3. SIMPLE SPECIFICATION TEMPLATE

SPECIFICATION

For

Insert title

Issue no.	Date	Prepared by	Approved by

Content

- Introduction
- Scope of work
- Definition of responsibilities
- Key performance indicators and service levels
- Detailed and technical requirements
- Reference to other documents
- Timescales
- Any other information

APPENDIX B
SPECIFICATION OF WORKS

Specifications and requirements must afford equal access for candidates and tenderers and not have the effect of creating unjustified obstacles to competitive tendering. They define the specific characteristics required of a product, service or material or works with regard to the purpose for which they are intended by the contracting authority. The "technical specifica-tions" as covered by the Directives may refer to physical characteristics or quality levels, to designs or to functional or performance requirements.

For works contracts, they thus indicate – where applicable, lot by lot – the nature and performance characteristics of the works. Where applicable, they also specify delivery conditions and installation, training and after-sales service.

Specifications and requirements may be determined by reference to standards. However, the contracting cannot reject offers that do not comply with the standards in question if the tenderer can prove to the satisfaction of the contracting authority that the offer will satisfy the requirement in an equivalent manner.

Works contracts, specifications and requirements are drawn up rather differently depending on the method to be used.

Traditional approach – In the traditional approach, with the contracting authority in charge of detailed design, the specifications and requirements in the tender documents typically comprise:

- the location of the site
- the scope of the works
- details of how each part of the works is required to be constructed (including construction drawings and specifications of materials, etc.); and
- possibly, a programme of work, *e.g.* if the contractor will be required to phase refurbishment work in order to allow the continuing operation of an existing facility.

Among the documents issued with the tender documents, and typically to be complemented by the tenderer in its submission (*i.e.* offering a price for the items concerned), are also:

- a bill of quantities: and
- a daywork schedule

The bill of quantities must closely reflect the design worked out by the contracting authority, with item descriptions and quantities corresponding to the drawings and other specifications. The bill of quantities must also indicate the principles and methods for measurement of the works, possibly by reference to another publication specifying them. These principles also indicate, by defining what is to be measured, the basis for valuing each item in the bill of quantities, either as a "rate" or "unit price" (say, euros per cubic metre), or as a lump sum for an item which is either provided or not but is not specifically measured.

A daywork schedule for minor or contingent work may be appropriate under any form of contract. Such a schedule, to be priced by the tenderers and included in the contract, would typically comprise a time charge rate for each category of resource used (workers, equipment, etc.) and the payment due for each category of materials (possibly on a cost-plus basis).

Design-build approach: In the design build approach, the tender documents state the client's precise requirements for the completed works. These would typically include:

- the location of the site
- the definition and purpose of the works (note that it is typically the design build contractor, not the contracting authority, who has the obligation to ensure that the completed works are fit for the intended purpose)
- quality and performance criteria
- arrangements for testing
- special obligations, such as training of operations and maintenance staff.

Note that there is normally no place for a bill of quantities in tender documents for design build.)

The specifications and requirements may well include outline drawings; however, it should then be indicated to what extent the works would have to comply with them. If at all, any design aspects should be included only after very careful consideration of the consequences, especially for the responsibilities related to such a design.

It is essential that performance requirements and other characteristics correspond to the intended purpose of the works. The crucial element in drafting specifications and requirements for a design build contract is thus to make sure that the quality and characteristics of the works are specified in terms that are not so detailed as to reduce the contractor's design responsibilities; not so imprecise as to be difficult to enforce; and not reliant on the future opinions of the contracting authority or his representative (which tenderers may consider impossible to forecast).

For describing its requirements in the tender under the design build approach and defining the works to be offered by tenderers, the contracting authority may work out a conceptual design. In response, tenderers would be required to work out preliminary designs, both for evaluation purposes and for incorporation as obligations under the contract. Some of these designs may need to be complemented later by more final designs (possibly in several stages, as general arrangement drawings and detailed construction drawings). The latter point may be regulated by and enforced under the terms of the contract, but the requirements for the nature and level of detail of the designs to be submitted with the tenders have to be defined in the instructions to tenderers, so that it can be determined if tenders are responsive or not in this respect.

For similar purposes, as a complement to the specifications and requirements described above, the contracting authority may issue questionnaires, tables or lists, requiring certain information from the tenderer to be included in the tenders.

Variants

Contract notices must indicate whether or not tenderers may submit tenders for variants. They may be taken into account both where the award criterion is most economically advantageous tender, and where it is the lowest price. If allowed, the contracting authority must clearly state in the tender documents the minimum specifications to be respected by the variants and any specific requirements for their presentation. They cannot be taken into account if they do not meet those specifications and requirements.

Sharing information about the site etc.

The contracting authority must recognise that both the contracting entity and prospective tenderers require information in order to prepare requirements and tenders, in addition to the information gathered *(e.g.)* during a feasibility study, and that there are always costs to be paid for this information.

The contracting authority would typically have carried out a number of site investigations and the like in advance of tendering, at its own cost. It is normally in the best interests of all parties concerned to make their results available to tenderers, together with other such data as may be available from other studies or public sources and are in the contracting authority's possession. Such information should be included in the tender documents. The contract may require that certain information has been submitted by the contracting authority and received by the contractor.

When the contracting authority takes responsibility for and carries out detailed design, such information is required specifically for this purpose. However, in a design build approach, tenderers will require data of similar nature, quantity and precision for carrying out their own pre-contract designs, and determine the details of the works for which a price has to be submitted. In fact, such tenderers may collectively require even more data, since they may each have a different preference, *e.g.* for the layout of a plant or the location of bridge piers.

In these circumstances they must be given sufficient time as well as access to the site for this purpose before and during tendering. Even if the contracting authority has carried out investigations and made their results available, the typical responsibilities of an economic operator under a design build contract mean that it will need to be able to verify the validity, precision and reliability of the data provided. This is particularly the case of turnkey projects contracts, where the economic operator takes full responsibility for the accuracy of such site data.

Contracting authorities should bear in mind that the money which economic operators collectively find themselves obliged as tenderers to spend on pre-tender investigations will ultimately have to be recovered from the contracting authority through the prices charged for the works actually carried out. If the required investigations or verifications are very extensive, time-consuming, difficult or costly (*e.g.* for tunnelling or similar works), it may thus be advantageous for the contracting authority to carry them out itself and rather not use the design build approach, or to consider taking on relatively more responsibility for subsoil conditions or the like than stipulated in the standard form of contract used.

A particular reason for this is that the most qualified and experienced design build contractors may well choose not to spend any resources on pre-tender investigations (meaning that they will simply refrain from participating at all, with the effect of diminishing competition to the detriment of the contracting authority), or to raise their prices to cater for this cost and uncertainty, including the risk of having wasted the money if they are not awarded the contract. (It is interesting to note that in this case, the effect may be that the lowest price tenders received could be those submitted by tenderers having spent too little resources on their own investigations and possibly underestimating real costs. The contracting authority that accepts such low tenders then runs a higher risk of getting an inadequately designed facility or suffering delays and other problems, or of the contractor going bankrupt because the costs for meeting their contractual obligations may become far too high relative to the agreed price for completing the works.)

Conducting the procurement process

MODULE E

Advertisement of contract notices

PART 2

SECTION 1
INTRODUCTION

Localisation: The structure and much of the commentary is generic but there will need to be adaptations for local use. The notes in green highlight areas where particular attention will need to be paid to local requirements. The notes in green are intended only as an aid to localisation and are not intended to be an exhaustive list of changes that will be required.

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. The importance of advertising
2. How the process can be used to improve procurement practice and deliver better value-for-money
3. When you are obliged to advertise, and where
4. How to prepare standard form advertisements
5. What can go wrong with advertising and how problems can be avoided
6. How to amend and cancel notices
7. When and how to submit contract award notices

1.2 IMPORTANT ISSUES

The most important issues in this chapter are concerned with the need to ensure that:

- Contracts are advertised in a way that engages with the economic operators and encourages competition
- The contract notice accurately reflects the contract being offered by the contracting authority to the economic operators

This means that it is critical to understand fully:

- When and where to advertise
- How to draft the advertisements
- The requirements of the contracting authority
- The way in which the advertisements will be read and understood by the economic operators

If this is not properly understood, the advertisement and subsequent procurement process may be misleading or incomplete. That could result in a disappointing level of competition, poor quality or inappropriate tenders, or a flawed procurement process that may need to be restarted.

1.3 LINKS

The advertisement is the first stage in the formal procurement process. There is a particularly strong link between this section and the following modules or sections:

- Module C on preparation of procurement – Module C steers you through the contract-specific issues that must be resolved before you advertise
- Module D5 on thresholds – which trigger the obligations to advertise
- Module E on conducting the procurement process – before the contract notice is drafted the contracting authority must understand what it wishes to purchase so that this can be clearly explained in the contract notice. This ties in closely with preparing the tender documents and, in particular, the specification as outlined in module E1

1.4 RELEVANCE

This information will be of particular relevance to those procurement professionals who are responsible for preparing advertisements. It is also important for those who are involved in planning procurements and scoping the requirements of contracting authorities.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

Adapt for local use using the format below, including listing the relevant legislation, key elements of that legislation and where standard form contract notices can be accessed. Section may need expanding to reflect particular local requirements relating to advertising. This may include adding information relating to processes required for sub-threshold and/or low-value contracts

The main legal requirements relating to advertising are set out in **Directive 2004/18/EC**:

- Article 35 sets out the general obligation to advertise and contains the main provisions relating to the use of notices
- Article 36 sets out the form and manner of publication of notices, including provisions relating to use of electronic means of publication
- Annex VII lists the content of the obligatory contract notices
- Standard format contract notices for obligatory contract notices are published by the European Commission on the Internet at the "Simap" website: http://simap.europa.eu/buyer/forms-standard_en.html
- NUTS codes
  http://simap.europa.eu/codes-and-nomenclatures/codes-nuts/codes-nuts-table_en.html
- CPV codes
  http://simap.europa.eu/codes-and-nomenclatures/codes-cpv_en.html

Utilities

A short note on the key similarities and differences applying to utilities is included at the end of Section 2.1.

SECTION 2
NARRATIVE

2.1 INTRODUCTION

Localisation is important in this section. Insert local requirements for advertising, which may be in addition to the requirement to advertise in the *Official Journal of the European Union*. Also refer to the role of the local office and any electronic system of advertising. Also pick this up in the low-value contracts section.

Why is advertising important?

Advertising is a foundation stone of public procurement. Full and open advertising:

- **facilitates appropriate competition** – by informing as many potential economic operators as possible about contract opportunities and thereby enabling them to compete, which leads to the best value-for-money outcomes for contracting authorities;
- **develops markets** – by showing potential economic operators that business opportunities are available, which encourages the development of the marketplace with new and more diverse economic operators and a wider source of economic operators at local, regional, national and international levels;
- **helps in the battle against corruption** – by increasing transparency and ensuring that economic operators, the public, the press and other stakeholders are aware of contract opportunities and have the opportunity to find out more about the contract opportunities that are available and to whom contracts have been awarded.

Sub-threshold contracts

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology. Briefly set out the requirements of the local legislation for sub-threshold contracts.

This module E2 describes the requirements for contracts of a certain type and/or value, which means that they must be advertised by using a contract notice published in the *Official Journal of the European Union - OJEU* (see module D3 for more information on the types of contract covered and see module D5 on financial thresholds).

In practice, contracting authorities award very many contracts that are not subject to the requirement to advertise in the *OJEU*. This may be the case, for example, of a particular type of contract that is not subject to those obligations or that is of small value and therefore does not meet the required thresholds (such a contract is referred to as 'sub-threshold').

The Directive does not set down specific rules that apply to the award of these types of contracts, but the basic general law and Treaty principles, including the requirement for transparency and equal treatment, do apply to the procurement process that the contracting authority follows in procuring those contracts.

EU Member States may opt to introduce their own rules for sub-threshold contracts and other contracts that are not subject to the detailed advertising requirements of the Directive. Individual contracting authorities may also be permitted or required to publish and follow their own internal purchasing rules.

Examples of processes that may be required for sub-threshold contracts and other contracts that are not subject to the detailed advertising requirements of the Directive include:

- Direct invitations
- Competitive quotes or requests for proposals from a specified number of economic operators
- Local advertising and a local competitive process

Where do you need to advertise?

Official Journal of the European Union (OJEU): Notices for contracts of a certain type and value, which means that they are subject to the Directive, must be advertised in the Supplement to the *OJEU*. Notices are published free of charge.

A free online version of the Supplement of the *OJEU* called 'TED' (Tenders Electronic Daily) is available at http://ted.europa.eu. TED is updated five times per week, and all notices are published in full and translated into all EU languages. TED provides free access to business opportunities for economic operators that use the TED database to search for tender opportunities by country, region, business sector or other categories.

Adapt for local use using the format below, referring to where advertisements must be published, how and at what cost.

Other publications: Contract opportunities may also be advertised in other international, national or local publications. Where additional advertisement is used, the Directive stipulates that this advertisement must not take place before the contract notice has been despatched to the Office of the Official Publications of the European Community and that the additional advertisement must not contain any information that is not included in the contract notice.

When do you need to advertise?

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology.

There are three main occasions when you advertise:

- **Before the start of the formal procurement process** – an optional stage, to pre-warn the marketplace of potential future opportunities, using a Prior Information Notice;
- **At the start of a contract-specific procurement process** – to invite economic operators to participate in the procurement process, using a Contract Notice;
- **At the end of a contract-specific procurement process** – to notify economic operators and others that the procurement process has been concluded, using a Contract Award Notice.

This section now goes on to look at each of those three occasions in more detail.

Advertising before the start of the formal procurement process using a Prior Information Notice

General comment: The Directive includes provisions permitting, but not obliging, a contracting authority to pre-warn the marketplace of potential future contract opportunities by advertising, using a Prior Information Notice.

Use of Prior Information Notices is therefore voluntary and not obligatory.

Good practice note

Advertising in advance in this manner provides benefits to both the contracting authority and potential economic operators.

Before advertising the contracting authority needs to have thought carefully about its requirements, and so the preparation of the Prior Information Notice can assist in ensuring that advance planning and budgeting are taken seriously.

Economic operators that have been given advance warning of potential opportunities can also plan accordingly. This planning assists in ensuring good levels of competition and better outcomes in terms of value-for-money for the contracting authority.

If a Prior Information Notice is used, then in certain circumstances statutory tender time scales can be reduced (see below and 'The Law' section for further information).

Are there any rules about when you should advertise a Prior Information Notice? Yes, the Directive sets out specific requirements about when Prior Information Notices are to be advertised. There are general requirements applying to all Prior Information Notices and specific requirements where the contracting authority wishes to rely on a Prior Information Notice to reduce statutory tender time scales. The requirements are different depending upon whether the contracting authority is advertising for works, supplies or services contracts.

See 'The Law' section for further detail.

Is there a specific content and format that must be used for a Prior Information Notice? Yes, the Directive sets out the content of a Prior Information Notice and refers to the standard format that must be used. This standard format is published by the European Commission on its website at www.simap.europa.eu. The format is the same for all types of contracts.

See the section above on 'Legal information that it is helpful to have at hand' and the details set out in 'The Law' section.

We would like to keep the market informed of future potential opportunities, but is there an alternative to advertising Prior Information Notices in the *Official Journal of the European Union*?

Localisation: This section may be deleted if the buyer profile option is not available locally.

Yes, a contracting authority can set up its own Internet-based 'buyer profile'. The buyer profile includes general information about the contracting authority together with information on ongoing invitations to tender, scheduled purchases, contracts concluded, and procedures cancelled.

A contracting authority can also use its buyer profile to publish Prior Information Notices. Where a contracting authority uses its own buyer profile to publish Prior Information Notices, it does not need to despatch a Prior Information Notice to the *OJEU*, but it must:

- despatch a Buyer Profile Notice to the *OJEU* in the form and manner specified;
- use the standard form for all Prior Information Notices published on its buyer profile;
- comply with the statutory time scales if it wishes to rely on the Prior Information Notice to reduce statutory tender periods.

Buyer's profile

Insert sample web page showing a Buyer Profile

Advertising at the start of a contract-specific procurement process by using a Contract Notice

Adapt all of this section for local use – refer to relevant local legislation.

General comment: The Directive obliges a contracting authority to advertise a contract-specific procurement process by using a Contract Notice.

The obligation to advertise applies to contracts of a certain value and type, which means that they are subject to the Directive. Information as to whether a contract is subject to the Directive and concerning the requirement to advertise is provided in modules D3 and D5.

The Contract Notice is an extremely important part of the procurement process. It marks the commencement of the formal procurement process for a specific contract and notifies potential economic operators of the opportunity to participate in the procurement process.

To ensure as much competition as possible and to comply with the basic requirements for transparency, the Contract Notice must be drafted in a way that clearly describes the nature, scope and estimated value of the contract and how economic operators can apply to participate in the process. The Contract Notice must also be completed fully and correctly. Failure to draft a clear, complete and compliant Contract Notice could result in a disappointing level of competition, poor quality or inappropriate tenders, or a flawed procurement process that might have to be re-started.

This module includes a practical section with notes on drafting a Contract Notice (see section 2.2).

Are there any rules about when you should advertise a Contract Notice?

Adapt if there are local rules requiring Contract Notices to be advertised at a specific time. Adapt to reflect local rules relating to statutory time periods.

If you wish to rely on the combination of a Prior Information Notice and a Contract Notice so as to reduce statutory tender time scales, then there are specified, statutory minimum and maximum periods permitted between publishing a Prior Information Notice and publishing the related Contract Notice.

There are no other specified minimum and maximum time periods for publishing a Contract Notice. There are statutory time limits that start on the date of despatch of the Contract Notice to the Office of the *OJEU*. These time limits include the period for return of tenders under the open procedure and the period for the return of requests to participate (see module C4 for further information on statutory time limits).

See the 'good practice' note below for suggestions about sensible time scales to allow for the preparation and publication of a Contract Notice.

Good practice note

Good practice requires the contracting authority to be fully prepared prior to advertising a Contract Notice.

This means both complying with rules or requirements relating to the contracting authority's own approval and planning processes as well as complying with other approval processes. It is of critical importance that the contracting authority's own requirements for the proposed contract are fully understood in advance of advertisement. To ensure that a streamlined and efficient tender process is run, it is also important that the full set of tender documents is prepared in advance of advertisement.

See module E1 for further information on the preparation of tender documents.

Add note on planning and budgets if there are local rules about how this ties in with expenditure and thus advertising.

There are statutory time scales setting out the minimum periods of time that must be allowed between the dispatch of Contract Notices and the closing date for requests to participate or for tender submission. See 'The Law' section and also module C4 for further details.

Is there a specific content and format that must be used for a Contract Notice?

Adapt for local use – using relevant local legislation, standard format contract notices, processes, terminology and information on where to find standard forms of contract notices.

Yes, the Directive sets out the required content for Contract Notices and refers to the standard forms that must be used. The standard format Contract Notice is used for the majority of procurement processes, but there are different formats for different types of procurement. For example, there is a specific format for the contract notice that is to be used for a design contest. These standard forms are published by the European Commission on its website at www.simap.europa.eu.

The standard format Contract Notice used for the majority of procurement processes is long and may be difficult to understand. Section 2.2 looks at how to complete a Contract Notice and explains key issues to consider.

See 'The Law' section for further details.

What can we do if the Contract Notice is incorrect or if we need to change information in the Contract Notice?

There is a standard form of Notice for Additional Information, Information on Incomplete Procedure or Corrigendum. This standard form notice is available on the Commission's Simap website (form number 14).

The notice requires the contracting authority to indicate in section VI.1 which of the following circumstances apply:

- an incomplete procedure – where a procedure has been discontinued, declared unsuccessful, or the contract has not been awarded;
- a correction;
- additional information.

The form has specific sections to be completed covering each of the above circumstances.

Good practice note

It is important to consider carefully the impact of any changes that the contracting authority proposes to refer to in the amending notice.

The standard form notice contains a reminder that reads as follows:

"Reminder: Should any corrected or added information lead to a substantial change of the conditions provided for in the original contract notice with a bearing on the principle of equal treatment and on the objective of competitive procurement, it would be necessary to extend the originally foreseen deadlines."

It is good practice in most circumstances where an amending notice is published to extend the deadlines for responses so as to allow economic operators to take into account any changes or additional information when preparing their responses or tenders.

If the changes are significant, it might be preferable to cancel the original notice and start the process again rather than relying on the amending notice.

Examples:

A contracting authority issues a contract notice for architectural design services. The contract notice includes the contact details of the responsible officer in the contracting authority. The contract notice also lists the contract award criteria and the weightings that will be applied. On the day that the contract notice is published, the procurement officer notices that (1) the telephone number in the contact details is incorrect, and (2) the weightings to be applied to the award criteria are incorrect.

In this case the errors were recognised quickly. The contracting authority immediately completed and dispatched an amending notice, correcting the telephone number and confirming the correct weightings. The contracting authority extended the deadline for responses by several days.

In another case, a contracting authority issues a contract notice for the supply of photocopiers. The estimated value of the contract is 200,000 EUR. A few days after the contract notice is published in the *OJEU*, the procurement officer learns that the budget information was incorrect and that in fact the contracting authority needs to purchase 400,000 EUR worth of photocopiers.

In this case the increase in value was significant and a higher-value contract might be of interest to many more economic operators than the original lower-value contract. It was advisable to stop the process and start again rather than publishing an amending notice so as to ensure as wide a competition as possible.

Advertising at the end of a contract-specific procurement process by using a Contract Award Notice

Adapt all of this section for local use – using relevant local legislation, information on how statistics are used, processes and terminology.

The Directive obliges a contracting authority to advertise the conclusion of a contract-specific procurement process by using a Contract Award Notice.

This final notice is important because it ensures the transparency of the process, as economic operators and others are made aware that the procurement process has been concluded and on what basis. The European Commission also uses this information to prepare statistical data on the level and nature of procurement activity and to monitor procurement processes.

The obligation to advertise a Contract Award Notice applies to all contracts where a Contract Notice has been advertised and also to some other contracts where such a notice has not been advertised. Details of the additional circumstances where a Contract Award Notice must be advertised, even though a Contract Notice was not used, are set out in 'The Law' section.

Where a procedure is discontinued because it is declared unsuccessful or where the contract has been awarded, the contracting authority should then use the Notice for Additional Information, Information on Incomplete Procedure or Corrigendum, available on the European Commission's Simap website (Form 14).

Are there any rules about when a Contract Award Notice should be advertised?

Adapt this section for local use – using relevant local legislation, standard format contract notices, references to local publications, time scales, processes and terminology. Delete references to frameworks and dynamic purchasing systems if they are not available locally.

Yes, the Directive requires the contracting authority to despatch the Contract Award Notice to the Office of the *Official Journal of the European Union* within 48 days of the award of the contract.

Special rules and time scales apply to the advertising of Contract Award Notices for framework agreements and dynamic purchasing systems. See 'The Law' section for further details.

Is there a specific content and format that must be used for a Contract Award Notice?

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology.

Yes, the Directive sets out the content for Contract Award Notices and refers to the standard forms that must be used. The standard form Contract Award Notice is used for the majority of procurement processes, but there are different formats for different types of procurement. For example, there is a different format for the contract notice to be used for a design contest. The standard forms are published by the European Commission on its website at www.simap.europa.eu.

There are some special provisions permitting some information to be withheld from publication in certain specified circumstances. See 'The Law' section for further details.

Are there rules about how quickly notices must be published?

Adapt all of this section for local use – using relevant local legislation, time scales, processes and terminology. Delete any references to accelerated procedures if they are not available locally.

Yes, all notices despatched electronically and in the correct format must be published within five days of despatch. Notices despatched by other means must be published within 12 days (article 36(3) of the Directive).

See module C4 for information about publication of notices for accelerated procedures.

Electronic procurement

Adapt all of this section for local use – using relevant local legislation, references to a local online system (if available), processes and terminology. Consider deleting this section if no local system has been set up for electronic procurement.

Can we complete and despatch contract notices electronically?

Yes, and the Directive and the European Commission encourage you to do so. There is a free online system directly available from the European Commission at www.simap.europa.eu.

To encourage electronic procurement, some of the statutory minimum time scales are reduced and there is no maximum word count if contract notices are completed and despatched to the *OJEU* by using the online system. See 'The Law' section for further details.

The format and procedure for sending notices electronically are accessible on the Simap website: www.simap.europa.eu.

Other standard form notices

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology.

There are special standard form notices for design contests, works contracts for subsidised housing schemes, and public works concessions, which are less commonly used types of procurement. For further information, see module C4.

UTILITIES

This short note highlights some of the major differences and similarities in the advertising requirements applying to utilities.

Adapt all of this section for local use – using relevant local legislation, process and terminology.

Utilities are required to advertise contracts of a specified type and value, but there is more flexibility in terms of the choice of advertising method. Utilities also have additional purchasing methods available to them.

The main legal requirements relating to advertising are set out in Directive 2004/17/EC (Utilities Directive):

- **Article 41** sets out the general obligation to advertise and contains the main provisions relating to the use of periodic indicative notices and notices on the existence of qualification systems
- **Article 42** covers the method for issuing a call for competition
- **Article 43** relates to contract award notices
- **Article 44** sets out the form and manner of publication of notices, including provisions relating to the use of electronic means of publication
- Various **Annexes XIII to XVI and XX** cover the contents of the obligatory contract notices.
- **Standard format contract notices** for obligatory contract notices are published by the European Commission on the Internet on the 'simap' website:

  http://simap.europa.eu/buyer/forms-standard_en.html

Choice of advertising: Utilities have a free choice between three main forms of competitive procedure: open procedure, restricted procedure, and negotiated procedure with a prior call for competition.

Utilities also have flexibility in terms of how they advertise – referred to in the legislation as a 'call for competition'. When conducting a restricted procedure or a negotiated procedure with a prior call for competition, utilities can choose to use:

- a contract notice or
- an annual 'periodic indicative notice' or
- a notice on the existence of a qualification system (see below).

When conducting an open procedure, utilities have no choice and must use a contract notice.

Statutory time limits apply and in each case a standard format contract notice must be used.

Local notices: Notices may also be published nationally, in which case they must not contain any information other than that contained in the notice sent to the Commission, and they must not be published locally before the date of despatch to the Commission.

Qualification systems: Utilities are permitted to set up and run qualification systems. A qualification system is a system in which economic operators interested in contracting with the utility apply to be registered as potential providers. The utility then registers some or all of those economic operators in the system. The registered economic operators then form a pool from which the utility may draw those that are to be invited or to negotiate contracts.

When setting up a qualification system, the utility uses a 'periodic indicative notice' to advertise. The periodic indicative notice can be published either in the *Official Journal of the European Union* or on the utility's own buyer profile (with a notice of publication being sent to the *OJEU*). For pre-qualification systems with a duration of three years or less, a periodic indicative notice is published only when the pre-qualification system has been established. For pre-qualification systems lasting longer than three years, an annual periodic indicative notice is required.

Framework agreements: Utilities can set up framework agreements by using the standard form Contract Notice.

Dynamic purchasing systems: Utilities are also permitted to set up dynamic purchasing systems, and calls for competition under those systems involve the use of a simplified Contract Notice containing the information set out in Annex XIII D of the Utilities Directive.

Contract award notices: Utilities are required to send a Contract Award Notice in a standard format to the Office of the *OJEU* within two months of the award of a contract or framework agreement. Contract Award Notices for dynamic purchasing systems can be grouped and sent on a quarterly basis within two months of the end of the relevant quarter.

2.2 COMPLETING A CONTRACT NOTICE

Localisation: Many of the comments in this section are generic and so can be retained but there will be adaptations throughout section for local use. This will involve, for example, referring to relevant local legislation, substituting the extracts from the OJEU contract notice with extracts from the local standard format contract notice, adding sections or deleting sections which are country specific and referring where appropriate to local processes and terminology. To assist in the localisation process, we have provided some suggestions on where changes may be required but that is not intended to be an exhaustive list.

This section runs through the standard format Contract Notice. There are numerous sections to complete and this needs to be done correctly and accurately.

Section I.1, shown below, covers basic information relating to the contracting authority and is straight forward to complete where a contracting authority is completing the notice on its own behalf.

EUROPEAN UNION
Publication of Supplement to the Official Journal of the European Union
2, rue Mercier, L-2985 Luxembourg Fax: (352) 29 29 42 670
E-mail: mp-ojs@opoce.cec.eu.int Info & on-line forms: http://simap.eu.int

CONTRACT NOTICE

SECTION I: CONTRACTING AUTHORITY

I.1) NAME, ADDRESSES AND CONTACT POINT(S)

Official name:		
Postal address:		
Town:	Postal code:	Country:
Contact point(s): For the attention of:	Telephone:	
E-mail:	Fax:	
Internet address(es) *(if applicable)* General address of the contracting authority *(URL)*: Address of the buyer profile *(URL)*:		

Further information can be obtained at: ☐ As in abovementioned contact point(s) ☐ Other: *please complete Annex A.I*
Specifications and additional documents (including documents for competitive dialogue and a dynamic purchasing system) can be obtained at: ☐ As in abovementioned contact point(s) ☐ Other: *please complete Annex A.II*
Tenders or requests to participate must be sent to: ☐ As in abovementioned contact point(s) ☐ Other: *please complete Annex A.III*

Delete comment where no provisions in legislation for lead purchasing or central purchasing bodies.

Section I.2:

☐ Ministry or any other national or federal authority, including their regional or local sub-divisions ☐ National or federal agency/office ☐ Regional or local authority ☐ Regional or local agency/office ☐ Body governed by public law ☐ European institution/agency or international organisation ☐ Other *(please specify)*: _____	☐ General public services ☐ Defence ☐ Public order and safety ☐ Environment ☐ Economic and financial affairs ☐ Health ☐ Housing and community amenities ☐ Social protection ☐ Recreation, culture and religion ☐ Education ☐ Other *(please specify)*: _____
The contracting authority is purchasing on behalf of other contracting authorities	**yes** ☐ **no** ☐

Where a contracting authority is acting as a lead authority or a central purchasing body it must clearly indicate this in the contract notice. It must also clearly identify the other authorities on whose behalf it is undertaking the procurement process. See Module D1 on central purchasing bodies and Module C4 on frameworks for further information.

Section II is where the contract is described. This is a particularly important section as, in order to complete it, the contracting authority must have fully considered and agreed a number of scoping and contract delivery issues. These are commented on further below.

Section II.1.2: The contract notice must clearly state whether the contract is for works, supplies or services. The contract must therefore have been considered and categorised. Where a contract involves a mix of two of more of these categories then there are specific rules governing how the contract is to be classified. These rules are covered in Module D3 and the decision on classification has to be made before the Contract notice is dispatched.

Thought must also be given to how the contract is delivered as the Contract Notice requires the mode of delivery to be described.

SECTION II: OBJECT OF THE CONTRACT

II.1) DESCRIPTION

II.1.1) Title attributed to the contract by the contracting authority

II.1.2) Type of contract and location of works, place of delivery or of performance

(Choose one category only - works, supplies or services - which corresponds most to the specific object of your contract or purchase(s))

(a) Works ☐	**(b) Supplies** ☐	**(c) Services** ☐
Execution ☐	Purchase ☐	Service category: No ☐☐
Design and execution ☐	Lease ☐	*(For service categories 1-27, please see Annex II to Directive 2004/18/EC)*
Realisation, by whatever means of work, corresponding to the requirements specified by the contracting authorities ☐	Rental ☐	
	Hire purchase ☐	
	A combination of these ☐	
Main site or location of works	Main place of delivery	Main place of performance
NUTS code ☐☐☐☐☐	NUTS code ☐☐☐☐☐	NUTS code ☐☐☐☐☐

Amend comments to refer to national categories, codes, web-sites - if used

Section II.1.2 (c): The Service Category refers to the list of services set out in Annex II of the Directive and the contracting authority must take care to ensure that the type of service is correctly identified using the relevant Service Category number.

Section II.1.2 (a)(b) and (c): The contracting authority must also be clear about where the contract is to be delivered as this should be stated in the Contract Notice. The NUTS code is a numerical system which describes countries and regions. The full list of NUTS codes can be accessed at www.simap.europa.eu

In order to complete **section II.1.3** the contracting authority must have decided what type of contract is to be awarded.

Delete if framework agreements or dynamic purchasing systems are not available locally.

If framework agreements and dynamic purchasing systems are available then these provide additional procurement options which must be considered as part of the pre-procurement planning and decision making process.

II.1.3) The notice involves

A public contract ☐ The setting up of a dynamic purchasing system (DPS) ☐

The establishment of a framework agreement ☐

II.1.4) Information on framework agreement *(if applicable)*

Framework agreement with several operators ☐ Framework agreement with a single operator ☐

Number ☐☐☐ *or, if applicable,* maximum number of participants to the framework agreement envisaged ☐☐☐

Duration of the framework agreement: Duration in year(s): ☐☐ or month(s): ☐☐☐

Justification for a framework agreement the duration of which exceeds four years: _____

_____

_____

Estimated total value of purchases for the entire duration of the framework agreement *(if applicable; give figures only):*

Estimated value excluding VAT: _____ Currency: _____

or range: between _____ and _____ Currency: _____

Frequency and value of the contracts to be awarded *(if known):* _____

Section II.1.4: If a framework agreement is being advertised then section II.1.4 must be completed. See Module C4 for information on framework agreements and how to complete this section.

Amend if CPV codes are not used.

Section II.1.5: It is very important to ensure that the description of the contract is clearly and accurately completed. This is critical to encourage competition and also to ensure transparency of the process. Economic operators will rely on this section and the CPV codes (see below) to decide whether or not they wish to participate in the process. The description therefore affects the number and type of economic operators who will compete in the process. The opportunity must be described in full so that economic operators understand what the contract will involve.

II.1.5) Short description of the contract or purchase(s)

II.1.6) Common procurement vocabulary (CPV)

	Main vocabulary	**Supplementary vocabulary** *(if applicable)*
Main object	□□.□□.□□.□□-□	□□□□-□ □□□□-□
Additional object(s)	□□.□□.□□.□□-□ □□.□□.□□.□□-□ □□.□□.□□.□□-□ □□.□□.□□.□□-□	□□□□-□ □□□□-□ □□□□-□ □□□□-□ □□□□-□ □□□□-□ □□□□-□ □□□□-□

Delete or amend if CPV codes are not used

Section II.1.6: The Common Procurement Vocabulary is a detailed coding system developed by the EC specifically for use in public procurement. It provides a method for describing works, supplies and services using a unique reference number. Economic operators can search for contract opportunities electronically using the CPV codes. Use of these codes also enables automatic and accurate translation into other Community languages. The aim is to make access to tender opportunities easier for economic operators.

As with the short general description in section II..1.5, it is critical to ensure that the correct CPV codes are selected so that the contract is fully and accurately described.

See "The Law" section for further detail.

Section II.1.7: See Module A3 for information on the Government Procurement Agreement. May not be applicable locally

II.1.7) Contract covered by the Government Procurement Agreement (GPA)		**yes** ☐ **no** ☐
II.1.8) Division into lots *(for information about lots, use Annex B as many times as there are lots)*		**yes** ☐ **no** ☐
If yes, tenders should be submitted for *(tick one box only)*:		
one lot only ☐	one or more lots ☐	all lots ☐
II.1.9) Variants will be accepted		**yes** ☐ **no** ☐

Section II.1.8: A key decision for the contracting authority to make as part of the pre-procurement process is whether or not the contract will be divided into lots. The pros and cons of such an approach will need to be weighed up carefully, taking in to account issues such as the market place, likely competition and economies of scale in purchasing. See Module C4 on packaging for economic issues to consider in this context.

If Lots are used then Annex B must be completed so that economic operators understand what each lot comprises

Section II.1.9: Careful thought must also be given to whether or not it is permissible or advisable to accept variants.

II. 2) QUANTITY OR SCOPE OF THE CONTRACT

II.2.1) Total quantity or scope *(including all lots and options, if applicable)*

_____

_____

If applicable, estimated value excluding VAT *(give figures only)*: _____ Currency: _____

or range: between _____ and _____ Currency: _____

Section II.2.1: The total quantity or scope of the contract must be set out accurately. Failure to do so may be in breach of the requirements for transparency. It may also reduce competition as economic operators will not have full information on which to base their decision to participate

The issue of quantity and scope ties in closely with consideration of thresholds including key issues such as calculation of the contract value and aggregation. This is looked at in detail in Module D5.

Economic operators will want to know about the quantity, scope and duration of the contract. This section sets out the duration of the contract. The decision on the duration of the contract will need to be carefully thought about by the contracting authority in the procurement planning stage.

Section II.3: The duration can be specified in a number of ways and the contracting authority is free to choose which method is most appropriate for the contract being advertised.

As with the other elements of the description it is very important to ensure that the entire potential length of the contract is described so that the full opportunity is advertised. This is to ensure transparency but also it can affect economic operators who need to plan and prepare bids on clear assumptions as to the contract length.

II.3) DURATION OF THE CONTRACT OR TIME-LIMIT FOR COMPLETION

Duration in months: ☐☐ *or* days: ☐☐☐☐ (from the award of the contract)

or starting ☐☐/☐☐/☐☐☐☐ *(dd/mm/yyyy)*

completion ☐☐/☐☐/☐☐☐☐ *(dd/mm/yyyy)*

II.2.2) Options *(if applicable)* yes ☐ no ☐

If yes, description of these options: _____

_____

_____

If known, provisional timetable for recourse to these options:

in months: ☐☐ *or* days: ☐☐☐☐ (from the award of the contract)

Number of possible renewals *(if any)*: ☐☐☐ *or* Range: between ☐☐☐ and ☐☐☐

If known, in the case of renewable supplies or service contracts, estimated time-frame for subsequent contracts:

in months: ☐☐ *or* days: ☐☐☐☐ (from the award of the contract)

Adapt if there are local provisions specifying contract duration

If you do not include reference to options to extend or renew contracts in the contract notice then you will lose the chance to do so in the future so it is critical to consider this carefully.

Section III.1.1: Economic operators need to understand in advance whether they are required to provide deposits or guarantees as part of the process so that they can prepare their responses to those requirements and submit a compliant tender. Section III.1.2: For the same reasons, they also need to know if there are specific requirements relating to financing and payments. Relevant information needs to be included in this section and these must tie in with any statutory requirements, where applicable. See also discussion in Module C3 on financial instruments and safeguards. Add cross ref to "The Law" section if there are local provisions covering deposits, guarantees, financing or payments.

SECTION III: LEGAL, ECONOMIC, FINANCIAL AND TECHNICAL INFORMATION

III.1) CONDITIONS RELATING TO THE CONTRACT

III.1.1) Deposits and guarantees required *(if applicable)*

III.1.2) Main financing conditions and payment arrangements and/or reference to the relevant provisions regulating them

III.1.3) Legal form to be taken by the grouping of economic operators to whom the contract is to be awarded *(if applicable)*

III.1.4) Other particular conditions to which the performance of the contract is subject *(if applicable)* yes ☐ no ☐

If yes, description of particular conditions

Section III.1.3: Where for commercial or legislative reasons economic operators are required to adopt a particular legal form then this must be made clear in advance so that the economic operators are pre-warned and able to prepare accordingly. Add cross ref to "The Law" section if there are local provisions covering this issue.

Section III.1.4: Where there are special or unusual contract conditions, such as social or environmental criteria, which economic operators must comply with then these must be outlined here so that they are aware of these in advance. They may choose not to tender if they know that they are unable to meet those requirements. See Module C5 for further information on the incorporation of contract conditions relating to environmental or social considerations.

III.2) CONDITIONS FOR PARTICIPATION

III.2.1) Personal situation of economic operators, including requirements relating to enrolment on professional or trade registers

Information and formalities necessary for evaluating if requirements are met:

III.2.2) Economic and financial capacity

Information and formalities necessary for evaluating if requirements are met:	Minimum level(s) of standards possibly required *(if applicable)*:

III.2.3) Technical capacity

Information and formalities necessary for evaluating if requirements are met:	Minimum level(s) of standards possibly required *(if applicable)*:

III.2.4) Reserved contracts *(if applicable)* **yes** ☐ **no** ☐

The contract is restricted to sheltered workshops ☐

The execution of the contract is restricted to the framework of sheltered employment programmes ☐

Sections III.2.2 and III.2.3: The sections on economic and financial capacity and technical capacity require the contracting authority to inform economic operators what the selection (prequalification) criteria are and also whether minimum standards/levels are required. These minimum standards/levels will in effect be pass/fail criteria: economic operators will fail to qualify if they do not meet the minimum standards/levels. Economic operators need to be aware of this in advance and they may choose not to participate in the procurement process if they know that they cannot meet those minimum standards. See Module E3 for further information on setting selection criteria.

III.3) CONDITIONS SPECIFIC TO SERVICES CONTRACTS

III.3.1) Execution of the service is reserved to a particular profession	**yes** ☐ **no** ☐
If yes, reference to the relevant law, regulation or administrative provision:	
III.3.2) Legal persons should indicate the names and professional qualifications of the staff responsible for the execution of the service	**yes** ☐ **no** ☐

Section III.3.1 and III.3.2: You need to check whether there are legal provisions which mean that the services being procured can only be delivered by a particular profession. The relevant legal provisions will not necessarily be in the public procurement law and so care needs to be taken to investigate this requirement careully. If the services are reserved to a particular profession then the correct reference to the relevant law, regulation or administrative provision must be included here so that economic operators are aware of this requirement in advance

Section IV sets out details of the procedure to be followed. Considerable care should be taken to ensure that the correct procedure and criteria are identified. See, in particular, Module C4 on types of public procurement procedures and Modules E3, E4 on tender evaluation criteria.

SECTION IV: PROCEDURE

IV.1) TYPE OF PROCEDURE

IV.1.1) Type of procedure		
Open	☐	
Restricted	☐	
Accelerated restricted	☐	Justification for the choice of accelerated procedure: _____
Negotiated	☐	Candidates have already been selected **yes** ☐ **no** ☐ **If yes**, *provide names and addresses of economic operators already selected under Section VI.3) Additional Information*
Accelerated negotiated	☐	Justification for the choice of accelerated procedure: _____
Competitive dialogue	☐	

IV.1.2) Limitations on the number of operators who will be invited to tender or to participate
(restricted and negotiated procedures, competitive dialogue)

Envisaged number of operators ☐☐☐

or envisaged minimum number ☐☐☐ and, *if applicable,* maximum number ☐☐☐

Objective criteria for choosing the limited number of candidates:

_____

_____

_____

_____

_____

IV.1.3) Reduction of the number of operators during the negotiation or dialogue
(negotiated procedure, competitive dialogue)

Recourse to staged procedure to gradually reduce the number of solutions to be discussed or tenders to be negotiated **yes** ☐ **no** ☐

Adapt for local use to outline any specified statutory minimum and/or maximum numbers

Section IV.1.2: There are specified statutory minimum numbers of economic operators which must be invited to tender. The numbers vary according to the type of procedure used; for example, for the restricted procedure it is 5 economic operators and for the negotiated procedure with prior publication of a contract notice it is 3 economic operators. You must be careful to ensure that the numbers specified in the advertisement reflect the legislation correctly. If permissible, it can be helpful to specify the maximum number of economic operators to be invited to tender. This can assist economic operators in deciding whether or not to participate in the procurement process. See Module C4 for further information on the number of economic operators invited to participate in a procurement process.

Adapt this section for local use to reflect local provisions on choice of award criteria

Section IV.2: Where the contracting authority is able to choose between awarding the contract on the basis of the lowest price or the most economically advantageous tender then the economic operators must be notified of this in advance so they understand the basis of the award. See Module C4 for details of the procedures and Module E4 on award criteria.

Where the award decision is to be made on the basis of the most economically advantageous tender then Article 53 of Directive 2004/18/EC provides that the criteria to be applied can be specified either in the contract notice or in the contract documents. The member state or contracting authority may, in addition, have its own policy or rules on where the criteria must be specified.

IV. 2) AWARD CRITERIA

IV.2.1) Award criteria *(please tick the relevant box(es))*

Lowest price ☐

or

the most economically advantageous tender in terms of ☐

☐ the criteria stated below *(the award criteria should be given with their weighting or in descending order of importance where weighting is not possible for demonstrable reasons)*

☐ the criteria stated in the specifications, in the invitation to tender or to negotiate or in the descriptive document

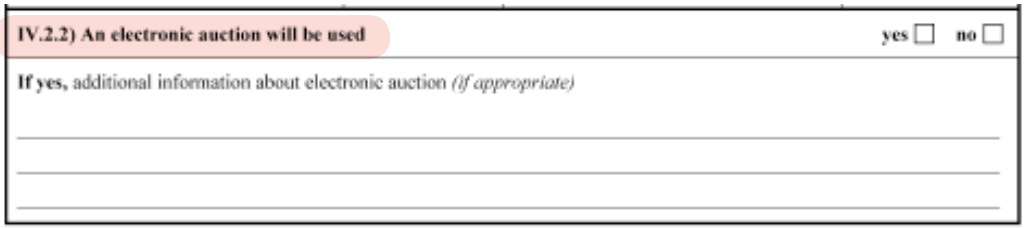
Criteria	Weighting	Criteria	Weighting
1.		6.	
2.		7.	
3.		8.	
4.		9.	
5.		10.	

Adapt for local use

Section IV.2.1: Article 53 of Directive 2004/18/EC requires that when the criteria are listed (which must be either in the contract notice or in the contract documents) then they must include details of the weightings to be applied to each criterion. Weightings can be specified using a range. In exceptional circumstances weightings are not required, in which case the criteria must be set out in order of importance. See Module E4 for further details on tender evaluation criteria.

Adapt for local use

Section IV.2.2: Where an electronic auction is to be used as part of the procurement process then economic operators must be made aware of that in advance.



It is good procurement practice to provide information to economic operators in advance about when and how the electronic procurement process will be used. They will be particularly interested, for example, in understanding the type of IT software which they will need if they wish to participate. This section provides you with the opportunity to do this. See Module C4 for further information on electronic auctions.

Section IV.3: It is important to specify clear and correct time limits to ensure an open, fair and transparent procurement process. You must make sure that the time limits which you specify in this section IV.3 comply with the requirements in the Directive (see Module C4 for details of the statutory time limits)

IV.3) ADMINISTRATIVE INFORMATION

IV.3.1) File reference number attributed by the contracting authority *(if applicable)*

_____

IV.3.2) Previous publication(s) concerning the same contract yes ☐ no ☐

If yes,

Prior information notice ☐ Notice on a buyer profile ☐

Notice number in OJ: ☐☐☐☐/S☐☐☐-☐☐☐☐☐☐ of ☐☐/☐☐/☐☐☐☐ *(dd/mm/yyyy)*

Other previous publications *(if applicable)* ☐

Notice number in OJ: ☐☐☐☐/S☐☐☐-☐☐☐☐☐☐ of ☐☐/☐☐/☐☐☐☐ *(dd/mm/yyyy)*

Notice number in OJ: ☐☐☐☐/S☐☐☐-☐☐☐☐☐☐ of ☐☐/☐☐/☐☐☐☐ *(dd/mm/yyyy)*

IV.3.3) Conditions for obtaining specifications and additional documents *(except for a DPS)* **or descriptive document** *(in the case of a competitive dialogue)*

Time-limit for receipt of requests for documents or for accessing documents

Date: ☐☐/☐☐/☐☐☐☐ *(dd/mm/yyyy)* Time: _____

Payable documents yes ☐ no ☐

If yes, price *(give figures only)*: _____ Currency: _____

Terms and method of payment: _____

_____

IV.3.4) Time-limit for receipt of tenders or requests to participate

Date: ☐☐/☐☐/☐☐☐☐ *(dd/mm/yyyy)* Time: _____

IV.3.5) Date of dispatch of invitations to tender or to participate to selected candidates *(if known)*
(in the case of restricted and negotiated procedures, and competitive dialogue)

Date: ☐☐/☐☐/☐☐☐☐ *(dd/mm/yyyy)*

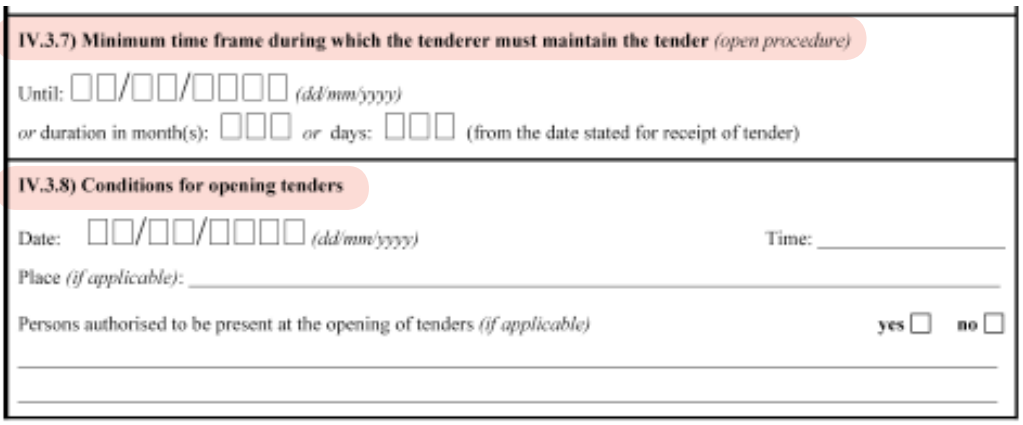
IV.3.6) Language(s) in which tenders or requests to participate may be drawn up

ES	CS	DA	DE	ET	EL	EN	FR	IT	LV	LT	HU	MT	NL	PL	PT	SK	SL	FI	SV
☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐

Other: _____

Adapt for local use to reflect local requirements such as provisions obliging tender to be held open for a minimum time period.

Section IV.3.7: The Directive does not contain specific requirements relating to a minimum time frame during which the bidder must maintain the tender.



IV.3.7) Minimum time frame during which the tenderer must maintain the tender *(open procedure)*

Until: ☐☐/☐☐/☐☐☐☐ *(dd/mm/yyyy)*

or duration in month(s): ☐☐☐ *or* days: ☐☐☐ (from the date stated for receipt of tender)

IV.3.8) Conditions for opening tenders

Date: ☐☐/☐☐/☐☐☐☐ *(dd/mm/yyyy)* Time: _____

Place *(if applicable)*: _____

Persons authorised to be present at the opening of tenders *(if applicable)* **yes** ☐ **no** ☐

_____

_____

Adapt for local use to reflect local requirements on tender opening procedures

Section IV.3.8: The Directive does not contain specific requirements relating to conditions, location or arrangements for tender opening. See Module E5 for further information about receipt and opening of tenders.

The additional information **section at VI.3** can be used to provide further information where either there is insufficient space in previous sections or where additional information not covered elsewhere needs to be provided.

Where additional information set out at VI.3 relates to information provided in previous sections then it is good procurement practice to cross refer to the relevant section when providing that additional information.

SECTION VI: COMPLEMENTARY INFORMATION

VI.1) THIS IS A RECURRENT PROCUREMENT *(if applicable)* yes ☐ no ☐

If yes, estimated timing for further notices to be published: _____

VI.2) CONTRACT RELATED TO A PROJECT AND/OR PROGRAMME FINANCED BY COMMUNITY FUNDS yes ☐ no ☐

If yes, reference to project(s) and/or programme(s): _____

VI.3) ADDITIONAL INFORMATION *(if applicable)*

VI.4) PROCEDURES FOR APPEAL

VI.4.1) Body responsible for appeal procedures

Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:	Telephone:	
Internet address (URL):	Fax:	

Body responsible for mediation procedures *(if applicable)*

Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:	Telephone:	
Internet address (URL):	Fax:	

VI.4.2) Lodging of appeals *(please fill heading VI.4.2 OR if need be, heading VI.4.3)*

Precise information on deadline(s) for lodging appeals:

VI.4.3) Service from which information about the lodging of appeals may be obtained

Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:	Telephone:	
Internet address (URL):	Fax:	

VI.5) DATE OF DISPATCH OF THIS NOTICE: ☐☐/☐☐/☐☐☐☐ *(dd/mm/yyyy)*

ANNEX

This Annex cross refers to Section I.1 of the contract notice. Be careful with the cross references.

ANNEX A

ADDITIONAL ADDRESSES AND CONTACT POINTS

I) ADDRESSES AND CONTACT POINTS FROM WHICH FURTHER INFORMATION CAN BE OBTAINED

Official name:		
Postal address:		
Town:	Postal code:	Country:
Contact point(s): For the attention of:		Telephone:
E-mail:		Fax:
Internet address (URL):		

II) ADDRESSES AND CONTACT POINTS FROM WHICH SPECIFICATIONS AND ADDITIONAL DOCUMENTS (INCLUDING DOCUMENTS FOR COMPETITIVE DIALOGUE AS WELL AS A DYNAMIC PURCHASING SYSTEM) CAN BE OBTAINED

Official name:		
Postal address:		
Town:	Postal code:	Country:
Contact point(s): For the attention of:		Telephone:
E-mail:		Fax:
Internet address (URL):		

III) ADDRESSES AND CONTACT POINTS TO WHICH TENDERS/REQUESTS TO PARTICIPATE MUST BE SENT

Official name:		
Postal address:		
Town:	Postal code:	Country:
Contact point(s): For the attention of:		Telephone:
E-mail:		Fax:
Internet address (URL):		

This Annex cross refers to section II.1.8 of the contract notice. A separate annex B must be prepared for each lot.

ANNEX B

INFORMATION ABOUT LOTS

LOT NO ☐☐☐ TITLE _____

1) SHORT DESCRIPTION

_____

_____

_____

2) COMMON PROCUREMENT VOCABULARY (CPV)

	Main vocabulary	Supplementary vocabulary *(if applicable)*
Main object	☐☐.☐☐.☐☐.☐☐-☐	☐☐☐☐-☐ ☐☐☐☐-☐
Additional object(s)	☐☐.☐☐.☐☐.☐☐-☐ ☐☐.☐☐.☐☐.☐☐-☐ ☐☐.☐☐.☐☐.☐☐-☐ ☐☐.☐☐.☐☐.☐☐-☐	☐☐☐☐-☐ ☐☐☐☐-☐ ☐☐☐☐-☐ ☐☐☐☐-☐ ☐☐☐☐-☐ ☐☐☐☐-☐ ☐☐☐☐-☐ ☐☐☐☐-☐

3) QUANTITY OR SCOPE

_____

_____

If known, estimated cost excluding VAT *(give figures only)*: _____ Currency: _____

or range: between _____ and _____ Currency: _____

4) INDICATION ABOUT DIFFERENT DATE FOR DURATION OF CONTRACT OR STARTING/COMPLETION *(if applicable)*

Duration in months: ☐☐ *or* days: ☐☐☐ (from the award of the contract)

or starting ☐☐/☐☐/☐☐☐☐ *(dd/mm/yyyy)*

completion ☐☐/☐☐/☐☐☐☐ *(dd/mm/yyyy)*

5) ADDITIONAL INFORMATION ABOUT LOTS

_____

_____

_____

_____

---------- *(Use this Annex as many times as there are lots)* ----------

SECTION 3
EXERCISES

EXERCISE 1

Here is a quick test: you have 10 minutes.

In which section of the standard form do you find the following ten items of information?

1. How long the contract will last
2. How many bidders you will invite to tender in a restricted procedure
3. The closing date for submissions of tenders in an open procedure
4. Whether the contract will be awarded on the basis of lowest price or most economically advantageous tender
5. Where the contract is to be delivered
6. What the subject matter of the contract is
7. Whether the contract is divided into lots
8. What minimum levels of standards are required of economic operators
9. The total contract value
10. What type of procedure is being used

EXERCISE 2

If CPV codes are not used in the country where training is being provided, delete this exercise.

If no online search facility or CD-Rom is available at the training, consider providing paper copies of extracts from CPV codes.

You have been asked to complete a standard form Contract Notice for a stationery and office consumables contract. The items required are listed below. Using the [online search facility] find the relevant CPV references.

Pencils

Ballpoint pens

Printer ribbons

Toner for photocopiers

Staples

Paper

EXERCISE 3
CASE STUDY

You work for X Town Council. X Town Council is running a tender process for the award of a contract for computer equipment and software. The contract notice was despatched electronically and published last week. A copy of the contract notice has been provided to you. A number of questions have now been raised and you are asked to advise.

1. The Head of the Information Technology (IT) department asks you to confirm how long the procurement process will take and, in particular, what the statutory timescales are.
2. The Head of IT explains that he has been thinking about the delivery of the contract and he is of the view that it would be sensible to see if there are economic operators who are interested in tendering to supply software only. Is this possible?
3. The Head of the Finance department is concerned to ensure that strong competition is maintained, and has asked whether it is acceptable to invite at least 8 economic operators to tender. Please advise her.

EXERCISE 4
CASE STUDY

Using the same facts and contract notice as provided for Exercise 3, consider the following.

The contract was awarded 6 months ago to Super Computer Company, which since then has been providing equipment and software to X Town Council.

Based on the information set out in the contract notice provided to you, please answer the following questions.

1. The Head of IT explains that he has been speaking to the local representative for the Super Computer Company. The local representative has told him that the company can supply 200 new laptop computers at a very good price and has suggested that this is done using the existing contract for IT equipment and software. Is this possible?
2. The Head of the Finance department has assessed the contract awarded to Super Computer Company and is of the view that it represents very good value-for-money. She understands that the contract is for two years only and she thinks it would be a good idea to extend it for an additional two years. Is this possible?
3. The Head of the IT department says that he has been speaking to a colleague at Y Town Council. The Head of IT has asked whether it is possible for Y Town Council to use the contract awarded by X Town Council to purchase some software from the Super Computer Company. The value of the software to be purchased exceeds the EU supplies threshold. What advice would you give to the Head of IT at X Town Council?

SECTION 4
THE LAW

The following structure and layout can be used but this section will need significant adaptation to reflect local requirements - using relevant local legislation, standard format contract notices, processes, websites and terminology.

This section provides further detail on issues raised in earlier sections.

LAW AND REGULATIONS

The main legal requirements relating to advertising are set out in Directive 2004/18/EC:

Recital 36 explains the main aim behind the requirement to advertise which is to ensure development of effective competition. Economic operators must be able to determine whether the proposed contracts are of interest to them and this is to be done by providing sufficient information to allow them to make that decision. CPV codes improve visibility of these opportunities.

Article 35 contains the main provisions relating to the use of Prior Information Notices, Contract Notices and Contract Award Notices.

The following is a summary of the issues covered in Article 35:

35 (1): Prior information Notices and Buyer Profiles
Contracting authorities have the option to use a Prior Information Notice or Buyer Profile for notifying economic operators of forthcoming contracts or framework agreements. Timescales and financial thresholds for Prior Information Notices are set out.

Article 35(2): Contract Notices
Contracting authorities are obliged to advertise all public contracts and framework agreements

Article 35(3): Dynamic Purchasing Systems
Contracting authorities are permitted to set up dynamic purchasing systems and requires them to advertise if they do so. Simplified contract notices for the award of contracts can be used.

Article 35(6): Contract Award Notices
Contracting authorities that have awarded a public contract or concluded a framework agreement must publish a contract award notice within 48 days. There are special provisions applying to the award of contracts using framework agreements and dynamic purchasing systems and also for services listed in Annex II, Part B. In certain specified circumstances some information may be withheld from publication

Article 36 sets out the form and manner of publication of notices including provisions relating to use of electronic means of publication.

The following is a summary of the issues covered in Article 36:

Article 36(1): Content of notices
Notices must contain the information which is listed in Annex VII A and, where appropriate, any other information deemed useful by the contracting authority. It also requires contracting authorities to use the standard format notices adopted by the Commission.

Article 36(2): Despatch of notices
Contracting authorities have a choice: Notices can be despatched either by electronic means in accordance with the format and procedures set out in Annex VIII or by other means. There is an obligation to use fax or electronic means where an accelerated procedure is being followed.

Article 36(3): Publication of notices
Notices sent electronically and in the required format must be published within 5 days of despatch. Notices sent by other means must be published within 12 days of despatch.

Article 36(4): Language
The contracting authority can choose the language for publication and the notice will be published in full in the chosen language. A summary will be published in the other official languages. The cost of publication of notices is borne by the European Community.

Article 36(5): Notices published at national level – including notices on a buyer profile
Notices published at a national level may not be published before the date on which the notice is despatched for publication to the Commission. National notices must not contain more or different information to that set out in the EU notice. National notices must refer to the date of dispatch of the EU notice or the date of publication on the buyer profile.

Article 36(6): Word limit
There is no word limit for notices sent using electronic means. There is a 650 word limit for notices not sent using electronic means.

Article 36(7): Proof of despatch
Contracting authorities must be able to supply proof of the dates on which notices are dispatched.

Article 36(8): Confirmation of publication
The Commission is required to give the contracting authority confirmation of publication and confirm the date when the notice is published. This confirmation constitutes proof of publication.

Article 37: Non mandatory publication
Contracting authorities may choose to publish prior information notices, contract notices and contract award notices for public contracts that are not subject to an obligation to publish a notice.

Annex VII: Information that must be included in notices

Lists the information that must be included in contract notices. Different lists are included for each type of notice.

Annex VIII: Features concerning publication

Annex VIII (1): refers to the requirement on contracting authorities to use standard format notices and on the Office of the Official Publications of the EC to provide confirmation of publication.

Annex VIII (2): Contracting authorities are encouraged to publish specifications and additional documents in their entirety on the internet. The use and content of buyer profiles is referred to.

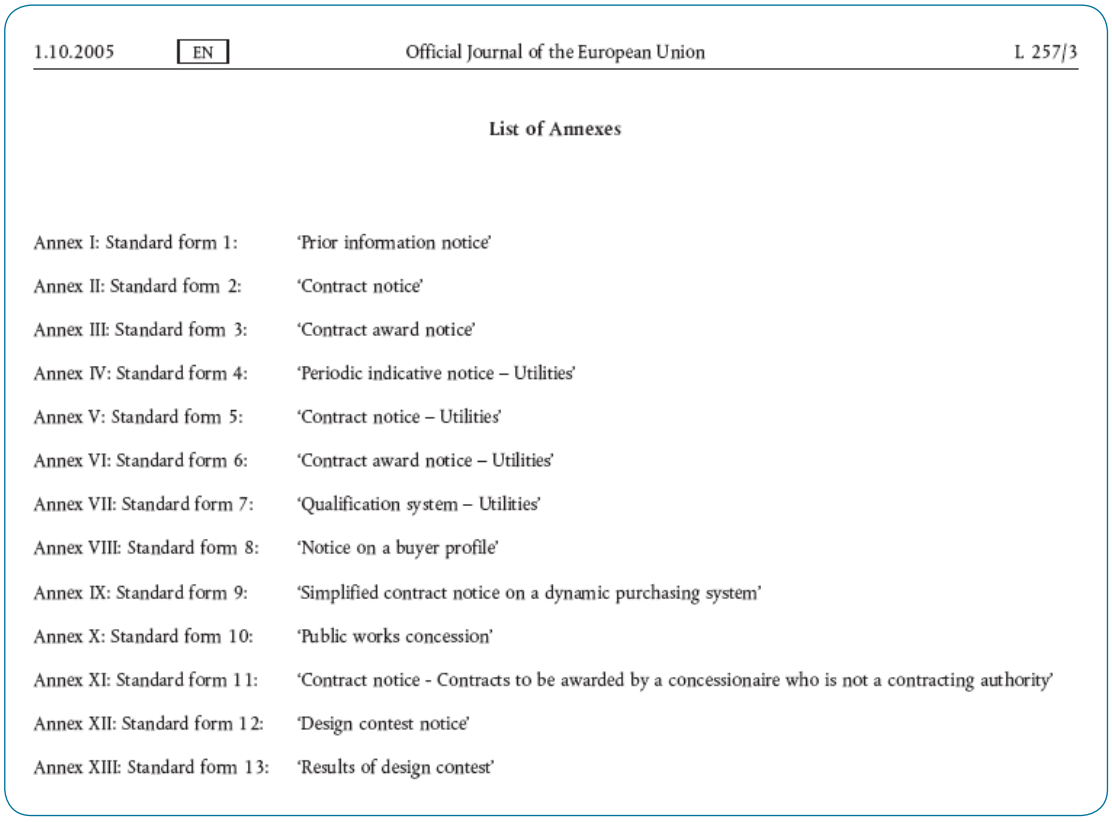
Annex VIII (3): refers to where contracting authorities can access the format and procedure for sending notices electronically.

Standard format notices

Article 36(1) states that notices must contain the information which is listed in Annex VII A and, where appropriate, any other information deemed useful by the contracting authority. It also requires contracting authorities to use the standard form notices adopted by the Commission.

Commission Regulation (EC) 1564/2005 establishes the standard forms for standard form notices in Annexes I to XIII.

There are 13 different types of notices:



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List of Annexes

Annex I: Standard form 1:	'Prior information notice'
Annex II: Standard form 2:	'Contract notice'
Annex III: Standard form 3:	'Contract award notice'
Annex IV: Standard form 4:	'Periodic indicative notice – Utilities'
Annex V: Standard form 5:	'Contract notice – Utilities'
Annex VI: Standard form 6:	'Contract award notice – Utilities'
Annex VII: Standard form 7:	'Qualification system – Utilities'
Annex VIII: Standard form 8:	'Notice on a buyer profile'
Annex IX: Standard form 9:	'Simplified contract notice on a dynamic purchasing system'
Annex X: Standard form 10:	'Public works concession'
Annex XI: Standard form 11:	'Contract notice - Contracts to be awarded by a concessionaire who is not a contracting authority'
Annex XII: Standard form 12:	'Design contest notice'
Annex XIII: Standard form 13:	'Results of design contest'

The notices can be accessed for on-line completion and in PDF format at the simap website: http://simap.europa.eu/buyer/forms-standard_en.html

Advertisement of notices – issues arising from Section 2

Are there any rules about when you should advertise a Prior Information Notice? Yes, the Directive sets out specific requirements about when Prior Information Notices are advertised. There are general requirements applying to all Prior Information Notices and specific requirements where the contracting authority wishes to rely on a Prior Information Notice to reduce statutory tender timescales. The requirements are different depending upon whether you are advertising for works, supplies or services contracts.

See "The Law" section for further detail.

It is not obligatory to advertise Prior Information Notices but where you choose to do so then Article 35(1) provisions apply and Prior Information notices shall be published in the following circumstances:

Prior Information Notices for supplies and services contracts are advertised annually as soon as possible after the start of the budgetary year and comprise a summary of all contracts which the contracting authority intends to award for the following 12 months. Prior Information Notices divide contracts into product area or service type and specified financial thresholds apply (see Module D2 on financial thresholds):

- **Supplies contracts:** where the estimated total value of contracts or framework agreements by product area which the contracting authority intends to award in the next 12 months is equal to or greater than the current specified threshold value (Article 35(1)(a))
- **Services contracts:** where the estimated total value of contracts or framework agreements in each category of services listed in Annex II A of the Directive which the contracting authority intends to award in the next 12 months is equal to or greater than the current specified threshold value. (Article 35(1)(b))

Prior information notices for works contracts are advertised as soon as possible after the decision approving the planning of the works contracts or framework agreements which the contracting authority intends to award. Again this is by reference to the current specified threshold value. (Article 35(1)(b))

Reducing statutory tender timescales

If you wish to rely on the combination of a Prior Information Notice and a Contract Notice to reduce statutory tender timescales then the Prior Information Notice must be sent for publication a minimum of 52 days and a maximum of 12 months before the Contract Notice is sent for publication. (see below for detail of the reduced timescales). (Article 38(4))

Is there a specific content and format which must be used for a Prior Information Notice? Yes, the Directive sets out the content of a Prior Information Notice and refers to the standard format which must be used. This standard format is published by the European Commission on its website at www.simap.europa.eu The format is the same for all types of contracts.

See the section above on "Legal information which it is helpful to have to hand" and the detail set out in "The Law" section.

Article 36(1) states that notices must contain the information which is listed in Annex VII A and, where appropriate, any other information deemed useful by the contracting authority. It also requires contracting authorities to use the standard format notices adopted by the Commission.

Commission Regulation (EC) 1564/2005 establishes the standard forms for the publication of notices and sets out those notices in Annexes I to XIII.

The information required to be included in Prior Information Notices is set out in Annex VII A as follows:

PRIOR INFORMATION NOTICE

1. The name, address, fax number and email address of the contracting authority and, if different, of the service from which additional information may be obtained and, in the case of services and works contracts, of the services, e.g. the relevant governmental internet site, from which information can be obtained concerning the general regulatory framework for taxes, environmental protection, employment protection and working conditions applicable in the place where the contract is to be performed.
2. Where appropriate, indicate whether the public contract is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes.
3. In the case of public works contracts: the nature and extent of the works and the place of execution; if the work is to be subdivided into several lots, the essential characteristics of those lots by reference to the work; if available, an estimate of the range of the cost of the proposed works; Nomenclature reference No(s).

   In the case of public supply contracts: the nature and quantity or value of the products to be supplied, Nomenclature reference No(s).

   In the case of public services contracts: the total value of the proposed purchases in each of the service categories in Annex II A; Nomenclature reference No(s).
4. Estimated date for initiating the award procedures in respect of the contract or contracts, in the case of public service contracts by category.
5. Where appropriate, indicate whether a framework agreement is involved.
6. Where appropriate, other information.
7. Date of dispatch of the notice or of dispatch of the notice of the publication of the prior information notice on the buyer profile.
8. Indicate whether the contract is covered by the Agreement.

The standard form Prior Information Notice is published as Standard Form 1 in Annex 1 of Commission Regulation (EC) 1564/2005. This can also be accessed for on-line completion and in PDF format (Standard Form 1) at the simap website: http://simap.europa.eu/buyer/forms-standard_en.html

Where the contracting authority opts to use a buyer profile to advertise its Prior Information Notices then it must also send a short buyer profile notice for publication. The information required to be included in the Buyer Profile Notice is set out in Annex VII A as follows:

NOTICE OF THE PUBLICATION OF A PRIOR INFORMATION NOTICE ON A BUYER PROFILE

1. Country of the contracting authority
2. Name of the contracting authority
3. Internet address of the 'buyer profile' (URL)
4. CPV Nomenclature reference No(s)

The standard form Prior Information Notice is published as Standard Form 8 in Annex 1 of Commission Regulation (EC) 1564/2005. This can also be accessed for on-line completion and in PDF format (Standard Form 8) at the simap website: http://simap.europa.eu/buyer/forms-standard_en.html

Are there any rules about when you should advertise a Contract Notice? There are no specific rules about when you should go ahead and advertise a Contract Notice.

If you wish to rely on the combination of a Prior Information Notice and a Contract Notice to reduce statutory tender timescales then there are specified statutory minimum and maximum periods permitted between publishing a Prior Information notice and the related Contract Notice.

See "The Law" section for further detail.

If you wish to rely on the combination of a Prior Information Notice and a Contract Notice to reduce statutory tender timescales then the Prior Information Notice must be sent for publication a minimum of 52 days and a maximum of 12 months before the Contract Notice is sent for publication. (see below for detail of the reduced timescales). (Article 38(4)).

This is provided that the Prior Information Notice contains all of the information listed in Annex VII A insofar as that information is available at the time of publication.

The following reductions in statutory tender timescales can then be applied:

Open procedure: the time from despatch of Contract Notice to return of tenders can be reduced from 52 days to, as a general rule, 36 days but in no event to less than 22 days

Restricted procedure and negotiated procedure with publication of a notice: the time from despatch of invitation to tender to return of tenders can be reduced from 40 days to, as a general rule, 36 days but in no event to less than 22 days.

Is there a specific content and format which must be used for a Contract Notice? Yes, the Directive sets out the content for Contract Notices and refers to the standard forms which must be used. The standard form Contract Notice is used for the majority of procurements but there are different formats for different types of procurement processes. For example there is a different format for the contract notice to be used for a design contest. The standard forms are published by the European Commission on its website at www.simap.europa.eu

The standard format Contract Notice used for the majority of procurements is long and can be difficult to understand. Section 3 looks at how to complete a Contract Notice and explains key issues to consider.

See "The Law" section for further detail

Article 36(1) states that notices must contain the information which is listed in Annex VII A and, where appropriate, any other information deemed useful by the contracting authority. It also requires contracting authorities to use the standard format notices adopted by the Commission.

There are a number of different types of Contract Notices and the appropriate Contract Notice must be selected and used.

The information required to be included in Contract Notices is set out in Annex VII:

Annex VII A	Contract Notice
Annex VII A	Simplified Contract Notice on a Dynamic Purchasing System
Annex VII B	Public Works Concession
Annex VII D	Design Contest Notice

Commission Regulation (EC) 1564/2005 establishes the standard forms for the publication of notices and sets out those notices as follows:

Standard form 2	Contract Notice
Standard form 9	Simplified Contract Notice on a Dynamic Purchasing System
Standard form 11	Public Works Concession
Standard form 12	Design Contest Notice

These can also be accessed for on-line completion and in PDF format at the simap website: http://simap.europa.eu/buyer/forms-standard_en.html

Note: Standard form 2 Contract Notice is used for the majority of procurements. The long list of information required to be included in this Contract Notice is set out in Annex VII A and is reflected in the drafting of the standard form notice.

The standard form Contract Notice is published as Standard Form 2 in Annex 1 of Commission Regulation (EC) 1564/2005. This can also be accessed for on-line completion and in PDF format (Standard Form 1) at the simap website: http://simap.europa.eu/buyer/forms-standard_en.html

Advertising at the end of a contract specific procurement process using a Contract Award Notice

The Directive obliges a contracting authority to advertise when a contract specific procurement process is concluded, using a Contract Award Notice.

This final notice is important because it ensures transparency of the process, as economic operators and others are made aware that the procurement process has been concluded and on what basis. The European Commission also uses this information to prepare statistical data on the level and nature of procurement activity and to monitor procurement processes.

The obligation to advertise a Contract Award Notice applies to all contracts where a Contract Notice has been advertised and also to some other contracts where a Contract Notice has not been advertised. Details of the additional circumstances where a Contract Award Notice must be advertised, even though a Contract Notice was not used, are set out in "The Law" section.

A Contract Award Notice must be advertised where a contracting authority awards a contract for services listed in Annex II B of the Directive where the relevant threshold at the time is exceeded (see x.x. for details of the relevant thresholds. (Article 35(4))

Are there any rules about when you should advertise a Contract Award Notice? Yes, the Directive requires the contracting authority to despatch the Contract Award Notice to the Office of the *Official Journal of the European Union* within 48 days of award of the contract.

There are special rules and time scales applying to the advertising of Contract Award Notices for framework agreements and dynamic purchasing systems. See "The Law" section for further detail.

Framework agreements: contracting authorities are required to advertise a Contract Award Notice within 48 days of the conclusion of the framework agreement *i.e.* at the time at which the framework agreement is set up. The contracting authority is not required to advertise a Contract Award Notice each time that a contract is awarded under the framework agreement.(Article 35 (4))

Dynamic purchasing systems: contracting authorities are required to advertise a Contract Award Notice within 48 days of the award of each contract under the system but they are permitted to send grouped notices on a quarterly basis rather than a separate notice for each contract awarded. Grouped notices must be sent within 48 days of the end of each quarter (Article 35(4))

Is there a specific content and format which must be used for a Contract Award Notice? Yes, the Directive sets out the content for Contract Award Notices and refers to the standard forms which must be used. The standard form Contract Award Notice is used for the majority of procurements but there are different formats for different types of procurement processes. For example there is a different format for the contract notice to be used for a design contest. The standard forms are published by the European Commission on its website at www.simap.europa.eu

There are some special provisions permitting some information to be withheld from publication in certain specified circumstances. See "The Law" section for further detail.

Specified content and form

Article 36(1) states that notices must contain the information which is listed in Annex VII A and, where appropriate, any other information deemed useful by the contracting authority. It also requires contracting authorities to use the standard format notices adopted by the Commission.

There are two types of Contract Award Notices and the appropriate Contract Award Notice must be selected and used.

The information required to be included in Contract Award Notices is set out in Annex VII:

Annex VII A	Contract Award Notice
Annex VII D	Design Contest Award Notice

Commission Regulation (EC) 1564/2005 establishes the standard forms for the publication of notices and sets out those notices as follows:

Standard form 3	Contract Award Notice
Standard form 13	Results of Design Contest Notice

These can also be accessed for on-line completion and in PDF format at the simap website: http://simap.europa.eu/buyer/forms-standard_en.html

Witholding information

Article 35(4): Certain information on the contract award or conclusion of the framework can be withheld from publication. This is where publication would impact in one of the following ways:

- impede law enforcement
- be contrary to the public interest
- would harm the legitimate commercial interests of economic operators (economic operators or public sector)
- might prejudice fair competition

Electronic procurement

Can we complete and despatch contract notices electronically? Yes, and the Directive and the European Commission encourage you to do so. There is a free on-line system directly available from the European Commission at www.simap.europa.eu

To encourage electronic procurement some of the statutory minimum timescales are reduced and no maximum word count if contract notices are completed and despatched to the *Official Journal of the European Union* using the on-line system. See "The Law" section for further detail.

Article 38(5): Where contract notices are despatched electronically in the prescribed form and manner then the statutory tender timescales can then be applied:

Open procedure: the time from despatch of Contract Notice to return of tenders can be reduced by 7 days.

Restricted procedure and negotiated procedure with publication of a notice: the time from despatch of the Contract Notice to receipt of requests to participate can be reduced by 7 days.

See section on accelerated procedures at Module C4 for further time reductions where accelerated procedures are used.

Advertisement of notices – issues arising from Section 3

The Common Procurement Vocabulary is a detailed coding system developed by the EC specifically for use in public procurement. It provides a method for describing works, supplies and services using a unique reference number. Economic operators can search for contract opportunities electronically using the CPV codes. Use of these codes also enables automatic and accurate translation into other Community languages. The aim is to make access to tender opportunities easier for economic operators.

As with the short general description in section II.1.5, it is critical to ensure that the correct CPV codes are selected so that the contract is fully and accurately described.

See "The Law" section for further detail.

Regulation (EC) No. 2195/2002 establishes a single classification system: the Common Procurement Vocabulary (CPV). The classification endeavours to cover all requirements for supplies, works and services.

The CPV codes were updated in 2008 and were adopted under Regulation (EC) No. 213/2008 and have been in use since September 2008

The CPV attaches to each numerical code a description of the subject of the contract, for which there is a version in each of the official languages of the EU.

The CPV attaches to each numerical code a description of the subject of the contract, for which there is a version in each of the official languages of the EU.

The CPV consists of:

- **a main vocabulary** containing a series of numerical codes comprising eight digits each and subdivided into divisions, groups, classes and categories. A ninth digit serves to verify the previous digits;
- **a supplementary vocabulary** expanding the description of the subject of a contract by adding further details regarding the nature or destination of the goods to be purchased.

The CPV codes are subject to ongoing updating. The up to date list of CPV codes and the tables of correspondence between the CPV and other nomenclatures can be consulted at www.simap.europa.eu

The European Commission has issued a Guidance Note on the CPVs and also Explanatory notes on the 2008 CPV update. These documents are available a the Simap website under the "CPV" heading.

Deposits, guarantees, financing and payment arrangements (*OJEU* notice section III.1.1 and III.1.2) – insert information here if local provisions apply

Particular legal form (*OJEU* notice section III.1.3 - – insert information here if local provisions apply

SECTION 5
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. What are the advertising requirements for contracts under the EU financial thresholds?

For contracts over the EU financial thresholds:

2. Where must you advertise?
3. How much does it cost to advertise in the Official Journal?
4. What is a PIN?
5. When should you publish a PIN?
6. What are the advantages of using a PIN?
7. Where is the content of the contract notice specified?
8. Where can you find the standard form contract notices online?
9. Which standard form contract notice do you use to start a contract-specific procurement?
10. How quickly must the contract notice be published?
11. What are the CPV codes? What do they identify and how are they used?
12. What are the NUTS codes? What do they identify and how are they used?
13. Which standard form contract notice do you use to amend an earlier notice?
14. How soon after award of the contract must you despatch a contract award notice?

Conducting the procurement process

MODULE E

Selection (qualification) of candidates

PART 3

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. The importance of the selection (qualification) of economic operators
2. The difference between selection and award
3. Which selection criteria you may apply
4. Which evidence you may require from economic operators to prove that the selection criteria are satisfied
5. When and where you should disclose the selection criteria and the evidence required
6. What can go wrong with setting the selection criteria and the corresponding evidence to be required, and how problems can be avoided
7. The main steps that you should follow and the main principles you should respect in the process of selecting economic operators
8. The difference between selection criteria and eligibility requirements

1.2 IMPORTANT ISSUES

The most important issues in this chapter are concerned with the need to ensure that:

- The selection criteria to be applied and the evidence to be requested are non-discriminatory
- The selection criteria to be applied and the evidence to be requested are determined taking into account the specific practical context of each case and not in an abstract way (they must be relevant to the procurement concerned and they must be proportionate to the nature, size and complexity of the contract to be awarded)
- Only evidence that is *strictly* necessary to establish if the selection criteria are satisfied is requested
- The process of selecting economic operators is conducted in the respect of the basic public procurement principles of equal treatment, non-discrimination and transparency

This means that it is critical to understand fully:

- How to determine which selection criteria to apply
- How to determine which evidence to request
- When and how to disclose the selection criteria to be applied and the evidence to be requested

- The way the selection criteria and the corresponding evidence/information required will be read and understood by economic operators
- How the process of selection of economic operators should be conducted
- The way in which the advertisements will be read and understood by the economic operators

If this is not properly understood, the process of selection may lead to misleading results – for example, to the selection of economic operators that, in practice, are not qualified to perform the contract, or (conversely) to the rejection of economic operators that, in practice, are qualified to perform the contract. The ultimate result could even be cancellation of the whole tender process. It must be kept in mind that the selection criteria applied and the evidence requested will determine the intensity and effectiveness of competition in the tender process.

1.3. LINKS

There is a particularly strong link between this section and the following modules or sections:

- Module A1 on the basic public procurement general law principles and the EC Treaty principles
- Module B4 on the role of the evaluation panel/tender committee
- Module C4 on public procurement procedures and techniques
- Module C5 on social and ecological considerations
- Module E1 on the preparation of tender documents/technical specifications
- Module E2 on advertisement of contract notices
- Module E4 on setting the contract award criteria
- Module E5 on tender evaluation and contract award
- Module E6 on transparency, reporting, and informing unsuccessful tenderers and candidates

1.4 RELEVANCE

This information will be of particular relevance to those procurement professionals who are responsible for setting out the selection criteria. It is also important for those involved in procurement planning, in the choice of the public procurement procedures and techniques, in the preparation of contract notices and tender documentation – including technical specifications – and for those involved in the evaluation process. It will also be of particular relevance to those persons who, within a contracting authority, have the responsibilities and decision-making powers, including delegation powers, to make procurement decisions (*e.g.* to approve the launch of a tender process, approve the list of selected economic operators, make award decisions, etc.).

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

Adapt for local use using the format below, including listing the relevant national legislation, key elements of that legislation and, where pre-qualification questionnaires exist, where they can be accessed. This section may need expanding to reflect particular local requirements relating to the selection of economic operators. This may include adding information relating to sub-threshold and/or low-value contracts

The main legal requirements relating to the selection of economic operators are set out in **Directive 2004/18/EC**:

- Article 44 sets out how and when the selection of economic operators should take place. It also lays down the rules on the number of economic operators to be invited to tender in case of restricted procedures, negotiated procedures with prior publication of a contract notice, or competitive dialogue procedures
- Article 45 sets out the grounds for mandatory exclusion and the grounds for optional exclusion of economic operators. It also sets out the documents that contracting authorities must accept as sufficient evidence of the above-mentioned grounds for exclusion
- Article 46 sets out the rules relating to how contracting authorities may check economic operators' suitability to pursue the professional activity
- Article 47 sets out a non-exhaustive list of the evidence/references that contracting authorities may require economic operators to submit to prove that they satisfy the set economic and financial standing requirements
- Article 48 sets out an exhaustive list of the evidence/references that contracting authorities may require economic operators to submit to prove that they satisfy the set technical and/or professional ability requirements
- Article 49 sets out the type of evidence of quality assurance standards that contracting authorities must accept
- Article 50 sets out the type of evidence of environmental management standards that contracting authorities must accept
- Article 51 allows contracting authorities to invite economic operators to supplement or clarify the certificates and documents submitted pursuant to articles 45 to 50
- Article 52 sets out the rules on the methods whereby member states may operate official registration systems of economic operators, and on how economic operators may use their registration on official lists or certification to prove to contracting authorities their satisfaction of the relevant selection criteria

The following articles of **Directive 2004/18/EC** are also relevant:

- Article 1(8) defines the concept of economic operators
- Article 4 sets out provisions on whether economic operators (not in a group) and groups of economic operators may be imposed by contracting entities to assume a specific legal form to participate in a procurement process
- Article 19 allows member states to reserve contracts to sheltered workshops, or to provide for such contracts to be performed in the context of sheltered employment programmes, in order to support the employment of persons with disabilities
- Article 25 establishes that contracting authorities may require economic operators to disclose how they intend to subcontract and any proposed subcontractor
- Article 41 establishes *inter alia* that contracting authorities must inform unsuccessful economic operators about the reasons for their rejection

Utilities

A short note on the key similarities and differences applying to utilities is included at the end of Section 2.

SECTION 2
NARRATIVE

Adapt all of this section using relevant local legislation, processes and terminology.

2.1 INTRODUCTION

It is important for a contracting authority to ensure that it will enter into a contract with an economic operator that has the ability to perform and complete the contract.

Thus a contracting authority may want to check, for example, the financial resources, experience, skills and technical resources of economic operators and exclude from the procurement process those economic operators that do not satisfy such checks. However, a contracting authority may also want to exclude those economic operators that are in a specific personal situation (for example, they have not paid social security contributions or taxes, or have been convicted of an offence relating to their professional conduct). In these cases, public procurement is also used to achieve secondary objectives that are not always directly linked to the risk of non-performance of the contract, *i.e.* it is also used to prevent and penalise specific behaviour of those economic operators that want to do business with the public sector.

Selection (qualification) of economic operations refers to the process of assessing and deciding which economic operators are qualified to perform the contract (referred to also as the selection stage). This process of selection of economic operators must be carried out by applying objective, non-discriminatory and transparent criteria (referred to as selection criteria), which are set by the contracting authority in advance.

The Directive limits in a significant way a contracting authority's discretion in this area. In fact, it lists the selection criteria on the basis of which the selection of economic operators may be carried out, it lays down the evidence or references that a contracting authority may require from economic operators to verify that the set selection criteria are satisfied, and it also lays down general rules concerning the process of selection.

The Directive seeks to ensure that the selection of economic operators does not provide opportunities for contracting authorities to conceal discrimination and that fair opportunities of participation are given to economic operators. The main objective of the Community Legislator is to ensure that intra-Community trade is not restricted and that the Treaty principles on freedom to provide services and freedom of establishment are respected (see module A1 for more information on the basic public procurement principles and the Treaty provisions relevant to public procurement).

However, the Directive does not require a contracting authority to apply the specified selection criteria (except for limited, specified cases where economic operators have been involved in certain criminal activities, as explained further below). The selection criteria are left to member states to regulate.

This section will examine the various aspects linked to the selection (qualification) of economic operators. It will also touch upon the difference between selection and award and the difference between selection criteria and eligibility requirements.

It is important to read this section in conjunction, in particular, with module C4, which examines in detail the different procurement procedures (open procedure, restricted procedure, competitive dialogue, negotiated procedures with and without prior publication of a contract notice) and techniques (framework agreements, electronic auctions and dynamic purchasing systems) allowed under the Directive, as well as how the selection (qualification) of economic operators interlinks with each procedure and technique concerned.

Contracts below the EU thresholds

Adapt this section for local use – using relevant local legislation, processes and terminology. Briefly set out the requirements of the local legislation for contracts below the relevant national thresholds.

The Directive does not apply to public procurement procedures relating to contracts that are below certain financial thresholds set by the Directive itself.

Generally speaking, with regard to the above-mentioned types of contracts, it is left to member states to introduce their own rules. Individual contracting authorities may also be permitted or required to publish and follow their own internal purchasing rules.

However, the general principles of law, including the requirements of transparency, equal treatment and proportionality, as well as the Treaty principles of non-discrimination, free movement, freedom of establishment and freedom to provide services must also be respected in the context of selection (qualification) of economic operators in the case of contracts below the thresholds set in the Directive.

N.B. *The provisions of the Directive concerning the selection of economic operators also do not apply to those services listed in Annex II B of the Directive – referred to as "non-priority services" - (see article 21 of the Directive).*

See module D5 for more information on the financial thresholds applicable and on the types of contracts covered by the Directive. See also module A1 for more information on the basic public procurement principles and the Treaty provisions relevant to public procurement.

2.2 THE DIFFERENCE BETWEEN SELECTION AND AWARD

Adapt this sub-section for local use – using relevant local legislation, processes and terminology.

It is important to note that the selection of economic operators and the award of the contract are two different exercises in the procedure for the award of a public contract.

Selection (or selection stage) – is about determining *which economic operators* are qualified to perform the contract to be awarded on the basis of the selection criteria pre-established by the contracting authority.

Award (or award stage) - is about determining *which tender* is the best one meeting the award criteria set in advance by the contracting authority (which may be either the lowest price or the most economically advantageous tender).

In terms of timing, the selection of economic operators takes place before the award (article 44(1) of the Directive).

N.B. *If an economic operator has been excluded because it does not meet the set selection criteria, it cannot be re-admitted to the procurement process just because its tender is the least expensive or most economically advantageous one, as the case may be.*

See modules E4 and E5 for more information on the award criteria, tender evaluation and contract award.

Case Note: Beentjes

Case C-31/87, *Gebroeders Beentjes v State of The Netherlands* [1988], E.C.R. 4631. This case is also available on www.curia.europa.eu.

This case concerned a request by a court in the Netherlands to the ECJ for a preliminary ruling. Beentjes contended before the national court that its tender had been rejected on grounds that were prohibited under Directive 71/305 on public works contracts (a predecessor to the current Directive). The national court referred several questions to the ECJ concerning the interpretation of the Directive.

In this case, the ECJ stressed, *inter alia*, that the selection and the award were two different operations in the procedure for the award of a public contract; that selection took place before the award (even though - in practice – the two operations might also take place simultaneously); and that the two operations were governed by different rules.

2.3 THE SELECTION OF ECONOMIC OPERATORS IN OPEN PROCEDURES VS TWO-STAGE PROCEDURES

Adapt all of this sub-section for local use – using relevant local legislation, processes and terminology.

Open procedure ("single-stage" procedure) – Under this procedure, the contracting authority publishes a contract notice inviting economic operators to submit tenders that will include information about the economic operators' qualifications (depending on the selection criteria that have been set). The selection of economic operators (tenderers) is carried out once tenders have been submitted. All tenders received (and that have not been excluded for reasons other than the selection criteria) are first evaluated against the set selection criteria in order to determine which economic operators are qualified to perform the contract and, secondly, against the set award criteria in order to determine which economic operator, amongst the qualified tenderers, has submitted the best tender.

N.B. *Under the open procedure, selection and award are carried out one after the other as part of the same process, even though they remain two separate exercises.*

Restricted procedure, negotiated procedure with prior publication of a contract notice, and competitive dialogue ("two-stage" procedures) – Under these procedures, the contracting authority advertises the contract and invites economic operators to submit information about their qualifications. No submission of tenders is required at this stage. The selection of economic operators (candidates) is carried out during the *first stage* (referred to as the pre-qualification or selection stage process). Only those economic operators that meet the pre-established selection criteria (*i.e.* that pre-qualify) may be invited to submit a tender/negotiate/conduct a dialogue. The *second stage* consists of issuing the invitation to tender/negotiate/conduct a dialogue to the selected economic operators.

N.B. *Under these procedures, selection and award take place in two completely separate processes.*

It must be noted that, where the contracting authority has considered it appropriate not to invite all economic operators that qualify, the *first stage* of a two-stage procedure may itself be characterised by two steps: a first step, where the economic operators that meet the set selection criteria are identified, and a second step (which may also be referred as shortlisting), where the economic operators to be invited are selected on the basis of criteria and methodologies set in advance (see sub-section 2.6 below on this issue).

Framework agreements

In the case of procurement of framework agreements, one of the four main competitive procedures (open procedure, restricted procedure, competitive dialogue, and negotiated procedure with prior publication of a contract notice) may be used. Therefore the above considerations with regard to the selection of economic operators may also apply to framework agreements. It is only when it comes to awarding contracts under the framework agreement that different, specific framework agreement provisions apply.

Negotiated procedure without publication of a contract notice: special considerations (see module C4 for further information on this procedure)

Special considerations must be made with regard to the negotiated procedure without publication of a contract notice, even though, in principle, the provisions of the Directive concerning the selection of economic operators also apply to this procedure. In broad terms:

- Where the negotiated procedure without publication of a contract notice is used because an open or restricted procedure has failed, the selection of the economic operator will already have taken place under the original procedure (unless no tender was received). This situation also applies in the case where a design contest has been held.
- There are also cases where the economic operators invited to negotiate are chosen by the contracting authority (this is the case, for example, of extreme urgency). In this case, the contracting authority normally chooses/invites known economic operators. However, when the contracting authority applies selection criteria, the invitation to tender must be made in accordance with the procedural and evidential rules contained in the Directive, and the selection and award take place in the context of the same process.
- If the procedure is used because only one economic operator is available or because the contract is awarded to an existing contractor, the economic operator has already been selected. In this case, the procedure is mainly aimed at fixing the terms and conditions of the contract to be awarded.

See module C4 for more detailed information on the above-mentioned procedures.

2.4 THE SELECTION CRITERIA

Adapt all of this sub-section for local use – using relevant local legislation, processes and terminology.

Only the selection criteria listed below may be used by a contracting authority to establish whether an economic operator is qualified to perform a specific contract (article 44(1)):

- Personal situation of the economic operator:
  - mandatory grounds for exclusion
  - optional grounds for exclusion
- Suitability to pursue the professional activity
- Economic and financial standing
- Technical and/or professional ability

This section analyses:

- each of the above-mentioned selection criteria;
- the evidence that a contracting authority may request from an economic operator to prove that it satisfies those criteria;
- the disclosure obligations relating to both selection criteria and evidence.

REMINDER: Treaty principles and general law principles that must be respected when setting the selection requirements (selection criteria and evidence)

Equal treatment and non-discrimination – The selection criteria must be objective. Criteria and evidence must be non-prejudicial to fair competition and non-discriminatory, especially on the grounds of nationality. Regardless of nationality, economic operators must be treated equally.

Proportionality – The principle of proportionality requires that any measure chosen be both *necessary* and *appropriate* in the light of the objectives sought. In particular, the selection criteria to be applied must be proportionate to the size, nature and complexity of the contract. Also, the evidence requested must be only that which is strictly necessary to establish whether the set selection criteria are satisfied.

Mutual recognition – The principle of mutual recognition requires an EU Member State to accept the products and services supplied by economic operators from another member state. It must also accept the diplomas, certificates and qualifications required in another member state if these are recognised as equivalent.

Transparency – To ensure a level playing field for all economic operators interested in a given public contract award procedure, the contracting authority must disclose in advance the selection criteria to be applied and the evidence to be submitted. This also permits stakeholders to check that the criteria and evidence requested are fair and non-discriminatory.

It must also be mentioned that the **Treaty principle of freedom of establishment** and the **Treaty principle of freedom to provide services** are important in the context of selection (qualification) of economic operators**. *N.B.*** *These principles are aimed at ensuring that intra-Community trade is not restricted.*

See module A1 for more detailed information on the above-mentioned principles.

2.4.1 Personal situation of economic operators

2.4.1.1 Mandatory grounds for exclusion

Adapt all of this sub-section for local use – using relevant local legislation, processes and terminology.

A contracting authority is obliged to exclude from participation in a contract award procedure those economic operators that *are known* to have been convicted by *final judgment* for one or more of the following criminal activities (article 45(1)): (Adapt for local use by indicating the mandatory grounds for exclusion applicable under national law.)

- Participation in a criminal organisation
- Corruption
- Fraud
- Money-laundering

(see Section 5 – The Law - Part 2 for further details on this issue)

Comment:

Only if the contracting authority has knowledge of the conviction of the economic operator for one or more of the above criminal activities is it required to exclude that operator from participating in the procurement process. The Directive does not require a contracting authority to be proactive or to investigate whether an economic operator has been convicted of such activities.

N.B. *Through the mandatory grounds for exclusion, contracting authorities support European Community policies linked to the fight against fraud, corruption, organised crime and money-laundering ("secondary policies").*

Derogation from the requirement of mandatory exclusion - The Directive explicitly leaves it to member states to provide for a derogation from the requirement of mandatory exclusion if there is an overriding requirement that is in the general interest (article 45(1)) (Adapt for local use – indicate if a derogation from the requirement of mandatory exclusion is allowed under national law and the grounds for its application.)

Some important points to consider:

- Period of time during which the criminal convictions in question may be considered relevant
- Permanent or temporary nature of the mandatory exclusion of economic operators

The Directive does not deal with the above points.

Member states would normally specify:

- the period of time during which the criminal convictions in question may be considered relevant;

Comment:

The Commission's original text of the Directive stated that *"any economic operator shall be excluded from participation in the contract who at any time during a five-year period preceding the start of the contract award procedure, has been convicted by definitive judgment"*.

However, this provision was not included in the final text of the Directive, and this has resulted in different practices in different member states.

- whether the mandatory exclusion is permanent or temporary and, in the latter case, for what period it is valid.

Extract concerning different practices of EU Member States on the period of time for exclusion

UNICORN (UNITED AGAINST CORRUPTION) – Global Political Research Group, Cardiff University School of Social Sciences (www.againstcorruption.org) – *The Challenges Facing Debarment: The EU Public Procurement Directives* – OECD Global Forum on Governance, "Fighting Corruption and Promoting Public Integrity in Public Procurement", 29-30 November 2004:

"An EU study on public procurement and organised crime (White, S., 2000) found that *there is no consistency on the period of time for exclusion*. Some member states only allow exclusion from the current tender (Austria, Denmark, Finland, Ireland, the United Kingdom, the Netherlands and Sweden); others allowed for indefinite exclusion (France, Greece and Italy); whilst others for a set period of time (Belgium, Germany, Portugal, Spain and Luxembourg) but varying, for example, from 3-10 years in the case of Belgium to five years or less in the case of Spain."

N.B. *The Directive explicitly requires member states to specify, in accordance with their national laws and in compliance with Community law, the conditions for the implementation of the provisions on the mandatory grounds for exclusion (article 45(1)). This requirement is intended to ensure a transparent system for the selection of economic operators. The points considered above are only some of the conditions of implementation that are likely to be addressed by member states.* - (Adapt for local use – making reference to any local rules on these issues and add any other relevant issues addressed by local legislation.)

Mandatory grounds for exclusion and groups of economic operators/consortia

The Directive does not give any guidance as to whether the mandatory grounds for exclusion apply to each member of a group of economic operators/consortium.

Normally, national legislation would explicitly deal with this point. (Adapt for local use by indicating the rules applicable under national law.)

Comment:

In principle, since "economic operators" may also be "groups of economic operators", a contracting authority would have to apply the mandatory grounds for exclusion to each member of a group of economic operators/consortium. Therefore, even if only one member of the group/consortium falls under one or more of these grounds for exclusion, it entails the exclusion of the whole group/consortium.

For reasons of legal certainty and transparency, the way in which the mandatory grounds for exclusion apply to groups of economic operators/consortia should be specified in the contract notice and/or tender documents.

(See sub-section 2.12.1 below for more information on groups of economic operators.)

Mandatory grounds for exclusion and sub-contractors

The Directive does not indicate whether the mandatory grounds for exclusion apply to sub-contractors. In fact, strictly speaking, the Directive applies only to the selection of the parties to the contract.

Normally, national legislation would explicitly deal with this point. (Adapt for local use by indicating the rules applicable under national law.)

Comment:

In principle, there is nothing that precludes a contracting authority from requiring economic operators to propose sub-contractors that do not fall under any of the mandatory grounds for exclusion.

If a proposed sub-contractor falls under one or more of the mandatory grounds for exclusion, it would not normally entail the exclusion of the economic operator as such but only the replacement of the proposed sub-contractor.

However, in some EU Member States, such as Hungary, if a proposed sub-contractor falls under one or more of the mandatory grounds for exclusion, it entails the exclusion of the economic operator that proposed the sub-contractor.

For reasons of legal certainty and transparency, the way in which the mandatory grounds for exclusion apply to sub-contractors and the legal repercussions on economic operators as such should be specified in the contract notice and/or tender documents.

(See sub-section 2.12.2 below for more information on sub-contracting.)

■ Exclusion of an economic operator in case of conviction of its director(s) or of other persons having managerial/control power over the economic operator

The Directive explicitly leaves it to member states to decide whether to allow for the exclusion of an economic operator when its director(s) or any other person (legal and/or natural) having powers of representation, decision or control over the economic operator has been convicted of one or more of the criminal activities in question (article 45(1)). (Adapt for local use by indicating the rules applicable under national law.)

Comment:

For reasons of legal certainty and transparency, if an economic operator is to be excluded in the case where its director(s) or any other person(s) having managerial/control power over the economic operator has been convicted of one or more of the criminal activities in question, it should be specified in the contract notice and/or tender documents.

2.4.1.1.1 Evidence that may be requested from an economic operator to prove that it does not fall under any of the mandatory grounds for exclusion

As proof that an economic operator does not fall under any of the mandatory grounds for exclusion, a contracting authority is obliged to accept as sufficient evidence the types of evidence listed in article 45(3) of the Directive. In general terms, this evidence must take the form of an extract from the judicial record or its equivalent or, where a country does not issue such documents, a declaration on oath or solemn declaration. Each EU Member State is obliged to inform the Commission of the identity of the authorities that are authorised to issue the listed evidence (article 45(4)). Where there are doubts as to the personal situation of an economic operator, the contracting authority is allowed to apply directly to the competent authorities (article 45(1)). ***See Section 5 – The Law – Part 2 for further details on these issues.*** (Adapt for local use by indicating the rules applicable under national law.)

In accordance with the Directive, however, the contracting authority – *where appropriate* – is to ask the economic operator to supply evidence that it does not fall under any of the mandatory grounds for exclusion (article 45(1)).

Comment:

The meaning of the term *'where appropriate'* is not clear.

The prevailing interpretation is that this term implies that a contracting authority is to ask an economic operator to submit evidence that it does not fall under the mandatory grounds for exclusion, but only in the case where the contracting authority has an actual suspicion of a conviction or where it should have such a suspicion.

Where there is no such suspicion, a contracting authority should in any event at least request the economic operator to submit a self-declaration confirming that it does not fall under any of the mandatory grounds for exclusion.

Extract from, Sue Arrowsmith - *The Law of Public and Utilities Procurement* – (Sweet and Maxwell, 2005), p. 1310:

"……one of the objectives of the directives is to avoid imposing unreasonable burdens on providers, which may deter them from participation. To require actual evidence of convictions from every provider for every contract would be disproportionately burdensome for providers and also for the procuring entity. On the other hand, it is arguably necessary at least to ask providers to confirm that they do not have relevant convictions and to exclude those who do not confirm this."

Economic operators based in other member states - It may be difficult in practice for a contracting authority to establish the types of documents/evidence that economic operators based in other member states are able to submit in order to prove that they do not fall under any of the mandatory grounds for exclusion and to identify the authorities that are authorised to issue these documents/evidence under their national laws.

To facilitate access to this information in the various EU Member States, the Commission Services (DG-Internal Market) designed a questionnaire, which has been completed by a number of member states. The completed questionnaires can be downloaded from the following website:

http://ec.europa.eu/internal_market/publicprocurement/2004_18/index_en.htm

N.B. *These questionnaires concern both mandatory and optional grounds for exclusion.*

Extract from
ec.europa.eu/internal_market/publicprocurement/2004_18/index_en.htm

"By downloading the questionnaire of the Member State where the candidate or tenderer is based, the contracting authority can verify what kind of document a candidate or tenderer can submit and which institution issues such document. Therefore, this publication is a useful tool for contracting authorities that have to verify the eligibility of a candidate or tenderer based in another country. The risk of unjustified exclusions of candidates or tenderers will be reduced.

We would like to draw attention to the fact that the questionnaires distinguish between certificates for natural persons, legal persons and public entities. Some countries have provided model certificates and other relevant information.

The questionnaires have been completed by the respective countries without further editing of the Commission services. They may not, in any circumstances, be interpreted as stating an official position of the Commission…."

N.B. *It should be noted that member states would normally specify the form that the evidence should take, for example whether they should be submitted in the original copy, certified copy, simple copy or in electronic form, in which language they should be submitted, if they should be accompanied by a translation, etc. The Directive is silent on these issues.* (Adapt this point for local use – making reference to any local rules on these issues and adding any other relevant issues addressed by local legislation.)

2.4.1.1.2 Disclosure obligations with regard to mandatory grounds for exclusion

In compliance with the principle of transparency, a contracting authority must indicate in the contract notice the grounds for mandatory exclusion that apply and the evidence required from economic operators proving that they do not fall under these cases justifying exclusion.

See Annex VII A of the Directive (item 17) – on the information to be included in the c ontract notice.

See also module E2 for more information on the content of contract notices.

2.4.1.2 Optional Grounds for Exclusion

Adapt all of this sub-section for local use – using relevant local legislation, processes and terminology.

A contracting authority is permitted (and not obliged) to exclude from participation in the procurement process those economic operators that (article 45(2)): (Adapt for local use by indicating the optional grounds for exclusion applicable under national law.).

a) are bankrupt or are under any analogous situation in accordance with national laws or regulations
b) are the subject of proceedings for a declaration of bankruptcy or similar proceedings under national laws and regulations
c) have been convicted by a judgment that has the force of res judicata of an offence relating to their professional conduct, in accordance with the legal provisions of the country concerned;
d) have been guilty of grave professional misconduct proven by any means that the contracting authority can demonstrate;
e) have failed to fulfil obligations relating to the payment of social security contributions in their countries of establishment or that of the contracting authority in accordance with the legal provisions of the country concerned;
f) have failed to fulfil obligations relating to the payment of taxes in their countries of establishment or that of the contracting authority, in accordance with the legal provisions of the country concerned;
g) have been guilty of serious misrepresentation in supplying information required for the purpose of the selection of economic operators or have not supplied such information.

Some important points to consider:

- The period of time during which the above-mentioned situations may be considered relevant
- The period of time during which the exclusion is valid

The Directive does not deal with these points.

Member states would normally specify:

- the period of time during which the above-mentioned situations may be considered relevant (probably excluding only the situations listed under a and b above);
- the period of time during which the exclusion is valid.

Different member states have adopted different practices on the above-mentioned points.

N.B. *The Directive explicitly requires member states to specify, in accordance with their national laws and in compliance with Community law, the conditions for the implementation of the provisions on the optional grounds for exclusion (article 45(2)). This requirement is intended to ensure a transparent system for the selection of economic operators. The points considered above are only some of the conditions for implementation that are likely to be addressed by member states.* - (Adapt for local use – making reference to any local rules on these issues and adding any other relevant issues addressed by local legislation.)

■ Optional grounds for exclusion and groups of economic operators/consortia

The Directive does not give guidance as to whether the optional grounds for exclusion apply to each member of a group of economic operators/consortium.

Normally, national legislation would explicitly deal with this point. (Adapt for local use by indicating the rules applicable under national law.)

Comment:

In principle, since "economic operators" may also be "groups of economic operators", a contracting authority would have to apply the optional grounds for exclusion to each member of a group of economic operators/consortium. Therefore, even if only one member of the group/consortium falls under one or more of these grounds for exclusion, it entails the exclusion of the whole group/consortium.

For reasons of legal certainty and transparency, the way in which the optional grounds for exclusion apply to groups of economic operators/consortia should be specified in the contract notice and/or tender documents.

See sub-section 2.12.1 below for more information on groups of economic operators/consortia.

■ Optional grounds for exclusion and sub-contractors

The Directive does not indicate whether the optional grounds for exclusion apply to sub-contractors. In fact, strictly speaking, the Directive applies only to the selection of the parties to the contract.

Normally, national legislation would explicitly deal with this point. (Adapt for local use by indicating the rules applicable under national law.)

Comment:

In principle, there is nothing that precludes a contracting authority from requiring economic operators to propose sub-contractors that do not fall under the optional grounds for exclusion.

If a proposed sub-contractor falls under one or more of the specified optional grounds for exclusion, it would not normally entail the exclusion of the economic operator as such but only the replacement of the proposed sub-contractor.

However, in some EU Member States, such as Hungary, if a proposed sub-contractor falls under one or more of the mandatory grounds for exclusion, it entails the exclusion of the economic operator that proposed the sub-contractor.

For reasons of legal certainty and transparency, the way in which the optional grounds for exclusion apply to sub-contractors and the legal repercussions on economic operators as such should be announced in the contract notice and/or tender documents.

See sub-section 2.12.2 below for more information on sub-contracting.

■ Exclusion of an economic operator in the case where its director(s) or other persons in charge of it fall under the optional grounds for exclusion

The Directive does not give any guidance on this issue. Normally, national legislation would explicitly deal with it. (Adapt for local use by indicating the rules applicable under national law.)

Comment:

By analogy with the Directive's provisions with regard to the mandatory grounds for exclusion, it can be stated that it is left to the member states to decide whether or not to allow for the exclusion of an economic operator if, for example, its company director(s) or another person (natural or legal) having managerial power/control over it falls under one or more of the applicable optional grounds for exclusion. For reasons of legal certainty and transparency, this possible exclusion should be specified in the contract notice and/or tender documents.

2.4.1.2.1 Evidence that may be requested from economic operators to prove that they do not fall under the optional grounds for exclusion

A contracting authority is obliged to accept as sufficient evidence that an economic operator does not fall under any of the optional grounds for exclusion the types of evidence listed in article 45(3) of the Directive.

These types of evidence vary depending on the optional grounds for exclusion concerned. With regard to grave professional misconduct and serious misrepresentation of information, it is for the contracting authority to determine the acceptable types of evidence. Each EU Member State is obliged to inform the Commission of the identity of the authorities that are authorised to issue the listed evidence (article 45(4)).

See Section 5 – The Law – Part 2 for further details on these issues.

(Adapt for local use by indicating the rules applicable under national law.)

Economic operators based in other member states – It may be difficult in practice for a contracting authority to establish the types of documents/evidence that economic operators based in other member states are able to submit in order to prove that they do not fall under any of the optional grounds for exclusion and to identify the authorities that are authorised to issue these documents/evidence under their national laws.

To facilitate access to this information in the various EU Member States, the Commission Services (DG-Internal Market) designed a questionnaire, which has been completed by a number of member states. The completed questionnaires can be downloaded from the following website:

http://ec.europa.eu/internal_market/publicprocurement/2004_18/index_en.htm

***N.B**. These questionnaires concern both mandatory and optional grounds for exclusion. Please refer to sub-section 2.4.1.1.1 above on mandatory grounds for exclusion for more information on this issue.*

***N.B**. It should be noted that EU Member States would normally specify the form that the evidence should take, for example whether they should be submitted in the original copy, certified copy or simple copy or in electronic form, in which language they should be submitted, if they should be accompanied by a translation, etc. The Directive is silent on these issues.* (Adapt for local use – making reference to any local rules on these issues and adding any other relevant issue addressed by local legislation.)

2.4.1.2.2 Disclosure obligations with regard to optional grounds for exclusion

In compliance with the principle of transparency, a contracting authority must indicate in the contract notice the grounds for optional exclusion that will be applied and the information required from economic operators proving that they do not fall under the cases justifying exclusion.

See Annex VII A of the Directive (item 17) concerning the information to be included in the contract notice.

See also module E2 for more information on the content of contract notices.

2.4.2 Suitability to pursue the professional activity

Adapt all of this sub-section for local use – using relevant local legislation, processes and terminology.

2.4.2.1 General principles

A contracting authority is allowed to check if economic operators are generally suitable and fit to carry out the professional activity by asking them to prove that they are enrolled on trade or professional registers in their member state of establishment. In the case where no relevant register exists in these states, economic operators may produce a declaration on oath or a certificate, in accordance with the provisions of their national laws (article 46(1)). The registers and corresponding declarations or certificates for each EU Member State are listed in the relevant annexes of the Directive. ***See Section 5 – The Law – Part 2 for further details on this issue.***

With regard to procedures for the award of public service contracts, if economic operators are obliged to obtain a particular authorisation or to be members of a particular organisation in order to perform the services concerned in their country of origin, a contracting authority may require them to prove that they hold such an authorisation or membership (article 46(2)).

N.B. *A contracting authority may not require an economic operator established in another EU Member State to be enrolled on a trade or professional register in the country of the contracting authority. This requirement would be in breach of the Directive itself but also of the principle of the freedom to provide services within the Community.*

2.4.2.2 Disclosure obligations with regard to suitability of economic operators to pursue professional activity

In compliance with the principle of transparency, a contracting authority must indicate in the contract notice the requirements relating to enrolment on professional or trade registers and the relevant information to be provided.

See Annex VII A of the Directive (item 17) on the information to be included in the contract notice.

See also module E2 for more information on the content of contract notices.

2.4.3 Economic and Financial Standing

Adapt all of this sub-section for local use – using relevant local legislation, processes and terminology.

In accordance with Directive 2004/18/EC, a contracting authority is allowed (but not obliged) to consider the economic and financial standing of economic operators.

The rules concerning economic and financial standing are contained in article 47 of the Directive.

2.4.3.1 Specific criteria relating to economic and financial standing

The specific economic and financial standing criteria must be aimed at assessing whether economic operators have adequate financial resources (throughout the contract period), as cash in hand, as a credit line or in any other way, to handle and complete the *contract to be awarded*.

Article 47 of the Directive does not indicate the criteria relating to economic and financial standing that a contracting authority may apply, but it contains a non-exhaustive list of evidence that a contracting authority may request from economic operators to prove that the economic and financial standing criteria that have been set are satisfied (article 47(1)).

Thus a contracting authority may derive some of the criteria that it may apply from this list of evidence (this is the case, for example, of the turnover criterion). However, a contracting authority may also apply other relevant criteria, which are not limited to the criteria that may be derived from this non-exhaustive list. This was made clear by the ECJ in the joined cases *CEI and Bellini* (see box below).

Case Note: CEI and Bellini

Joined cases 27-29/86 Constructions et Enterprises Industrielles (CEI) v Société Coopérative "Association Intercommunales pour les Autoroutes des Ardennes", (1987) E.C.R. 3347 - These cases are also available on www.curia.europa.eu.

These cases concerned requests from the Belgian Council of State for a preliminary ruling on various issues relating to the interpretation of Directive 71/305 on public works, a predecessor to the current Directive.

In these cases, one issue concerned a decision to reject CEI's tender for work on a motorway. This rejection was based on a Belgian decree, which had established that tenders must be rejected where the total value of a contractor's work in hand plus the value of the contract exceeded a prescribed maximum. One purpose of this provision was to prevent firms from overstretching themselves financially. CEI's tender was rejected because it exceeded this limit. This rejection was challenged by CEI and certain questions on the matter were referred to the ECJ.

One of the questions concerned whether a firm could be excluded because the value of its commitments exceeded the level set by the Belgian authorities. An issue considered by the ECJ was whether there was any limit to the contracting authority's discretion to determine the nature of the criteria to be used in assessing financial and economic standing. The ECJ concluded that the Directive did not limit the criteria that could be applied in assessing financial and economic standing.

In any event, the contracting authority must determine the criteria relating to economic and financial standing to be applied by taking into account the specific practical context of each case.

N.B. *The principle of proportionality is very important in the context of setting the selection criteria to be applied. Setting economic and financial standing criteria that are not necessary or are inappropriate may attract economic operators that, in practice, are not qualified or deter efficient economic operators from participation. This situation will produce misleading results in the process of selection of economic operators.*

Thus, depending on the nature of the contract, its complexity and size, a contracting authority may need to consider a wide range of factors and analyse various financial statistics, ratios and figures in order to assess the economic and financial standing of economic operators with regard to the contract to be awarded.

Some general examples of criteria relating to economic and financial standing

Turnover – The turnover may be a useful indicator for determining, *inter alia*, whether economic operators have the financial strength to cope financially with the size of the contract put out to tender, have adequate financial stability, and are not overly dependent on obtaining the specific contract. (This criterion is derived from the list of evidence contained in article 47(1).)

N.B.: *When using the turnover as one of the economic and financial standing criteria, a contracting authority may only take into account the turnover during the period in which the economic operator has been operating and in any event for a period no longer than the last three years (see article 47(1)(c) from which this criterion is derived).*

Operating profit – The operating profit (profit before interest and taxes) is a good indicator for measuring the profitability of economic operators, *i.e.* their ability to make a profit.

Solvency – The solvency of an economic operator corresponds to its cash availabilities to deliver the goods, works, or services concerned in the procurement. To measure the solvency of economic operators, a contracting authority may require them to satisfy, for example, a net cash position at a certain level (cash availabilities net of short-term debts). More sophisticated ratios may also be used for this purpose.

Value of works undertaken – The total value of works undertaken by an economic operator, at a particular moment, may be a useful factor in determining its economic and financial standing in relation to its obligations. Therefore, fixing the maximum value of works that economic operators may carry out at one time is an acceptable requirement (see joined cases *CEI and Bellini* examined above).

2.4.3.2 Minimum capacity levels

A contracting authority is allowed to require economic operators to meet minimum capacity levels with regard to economic and financial standing criteria (article 44(2)).

Example:

A contracting authority may require, for example, that economic operators have an X amount of euro as a minimum annual turnover in the last three years or an X amount of euro as a minimum annual operating profit in the last two years. If economic operators do not meet these minimum requirements, they have to be excluded.

Good practice note

If allowed by the specific characteristics of the contract and in general terms, it is considered to be good practice to fix minimum capacity levels for economic operators.

Minimum capacity levels minimise discretion, the possibility of discriminatory assessment, and also make the assessment process easier and faster. At the same time, they allow economic operators to know in advance, in a very clear way, whether or not to participate in a specific procurement process.

It is left to the discretion of the contracting authority to fix the minimum capacity levels that economic operators must meet.

Case note: *CEI and Bellini*

Joined cases 27-29/86 Constructions et Enterprises Industrielles (CEI) v Société Coopérative "Association Intercommunales pour les Autoroutes des Ardennes", (1987) E.C.R. 3347 - These cases are also available on www.curia.europa.eu.

The ECJ held that the Directive did not limit the criteria that could be applied in assessing financial and economic standing *or the standards that economic operators were required to meet.*

Thus the ECJ held that it was up to the contracting authority to both set a maximum work requirement and decide on the level at which that requirement should be set.

However, if a contracting authority decides to fix minimum capacity levels, the Directive explicitly requires that they be:

- related and
- proportionate

to the *subject matter* of the contract (article 44(2)).

N.B. *Thus a contracting authority cannot determine minimum capacity levels in isolation or in an abstract way; it must take into account the specific practical context of each case, for instance the requirements of the specific procurement and its complexity, value, sensitivity, scope and nature, as well as the estimated risks.*

Comment:

In respect of the principles of non-discrimination and equal treatment, minimum capacity levels must be actually aimed at assessing the economic operator's financial resources to carry out the contract to be awarded. Thus a contracting authority is not allowed to fix minimum capacity levels in order to exclude certain economic operators and to favour a specific economic operator.

2.4.3.3 Possibility for an economic operator to rely on the resources of other entities to prove its economic and financial standing

An economic operator, where appropriate and with regard to a specific contract, may rely on the capacities of other entities, regardless of the legal nature of the links that it may have with them. It must in this case prove that it will have at its disposal the resources necessary, for example by producing an undertaking by those entities to that effect (article 47(2)).

N.B. *This possibility allows an economic operator to rely on the economic and financial resources of affiliated entities but also of sub-contractors or any other entity that has actually made its resources available to the economic operator.*

A group of economic operators may also, under the same conditions, rely on the capacities of participants in the group or of other entities (article 47(3)). See sub-section 2.12 below on groups of economic operators.

N.B. *Therefore, in the case where the economic operator is a member of a group of economic operators/consortium, it is sufficient that the set economic and financial standing requirements are satisfied by the group of economic operators/consortium as a whole and not by each individual member. This possibility fosters the participation of SMEs (small and medium-sized enterprises) in the procurement process.*

In this context, it is important to examine the relevant case law of the ECJ from which the main provisions of article 47(2) and (3) of the Directive are derived in order to understand the ratio behind these provisions. (The same case law resulted in the main provisions of article 48(3) and (4) of the Directive on technical and/or professional ability – see sub-section 2.4.4.3 below.)

Case notes

Ballast Nedam I

Case C-389/92, *Ballast Nedam Groep NV v The State ("Ballast Nedam")* (1994) ECR I-1289. This case is also available on www.curia.europa.eu.

This case concerned a request by a Belgian court for a preliminary ruling from the ECJ. The Belgian authorities had decided that Ballast Nedam Group (BNG) was not qualified to undertake public works contracts in Belgium and refused to renew the registration of BNG as a contractor. This decision was based on the grounds that the company could not be regarded as a works contractor because, as a holding company, it did not itself execute works but, for the purpose of proving its standing and competence, referred to works carried out by its subsidiaries, which were separate legal persons.

The ECJ ruled that a holding company that does not itself execute works may not be excluded from participating in public works contracts based on the fact that its subsidiaries, which do carry out the works, are separate legal persons.

Furthermore, the ECJ ruled that, in assessing the economic and financial standing and technical capacity of such a firm, account must be taken of the companies belonging to the same group, where the firm in question *actually has available the resources of those companies to carry out the work.*

Ballast Nedam II

Case C-5/97, *Ballast Nedam Groep NV v The State (1997)* ECR I-75. This case is also available on www.curia.europa.eu.

The Belgian court considered that there was an ambiguity in the wording of the *Ballast Nedam I* judgment. Therefore it asked the ECJ to clarify whether contracting authorities were required to consider the resources of subsidiaries in the circumstances set out in *Ballast Nedam I* or whether they were merely *permitted* to do so.

The ECJ made it clear in its ruling that contracting authorities were required to consider the resources of subsidiaries in such circumstances.

Holst Italia

Case C-176/98, *Holst Italia v Ruhrwasser AG International Water Management* (1999) ECR I-8607. This case is also available on www.curia.europa.eu.

This case concerned a request by the Italian Regional Administrative Court for Sardinia for a preliminary ruling from the ECJ. This case concerned a procurement procedure carried out by an Italian public body under Services Directive 92/50, a predecessor to the current Directive. The procedure concerned the award of a contract for the management of water purification and sewage disposal plants.

Two selection (qualification) criteria were laid down by the contracting authority for those wishing to tender, which were:

- that the tenderer had met a specified average annual turnover during the period from 1993 and 1995, and
- that the tenderer had had experience of managing at least one purification plant during the previous three years.

Ruhrwasser, the winning tenderer, which had been registered as a company since only 9 July 1996, was unable to show any turnover whatsoever for the period from 1993 to 1995 or to show that it had actually managed at least one domestic waste water purification plant during the previous three years.

However, in order to establish its standing in order to be eligible to take part in the tendering procedure, Ruhrwasser provided documentation relating to the financial resources of another entity, the German public-law body Ruhrverband. Ruhrverband was the (100%) owner of one of six equal shareholders in Ruhrwasser, which had been set up by these six companies/shareholders with the object of enabling those companies to be awarded contracts abroad for the collection and treatment of water.

Holst Italia, which had also participated in the tender procedure, brought proceedings before the Italian Regional Administrative Court for Sardinia for the annulment of the decision of the contracting authority to award the contract to Ruhrwasser, on the grounds that the latter had not produced the documentation needed in order to be eligible to submit a tender.

The Italian Regional Administrative Court for Sardinia argued that it was not clear whether in this case the rulings contained in Ballast Nedam I and Ballast Nedam II would apply since:

- firstly, they concerned works contracts, not services contracts as in the present case, and
- secondly, unlike in this case, the tenderer in those cases had enjoyed, the Italian court claimed, a *dominant position* in the group of companies that had the requisite standing as the parent company of its subsidiaries.

The ECJ (by referring to its findings in *Ballast Nedam I*) reiterated that a party could not be eliminated from a procedure for the award of a public service contract solely on the grounds that the party had proposed, in order to carry out the contract, to use resources that were not its own but that belonged to one or more other entities. The ECJ stressed that the basic principle was that a firm could rely on the qualifications of other entities in any case where it could show that *it actually had the resources of those other entities at its disposal.* The ECJ emphasised that the legal nature of the link between the tenderer and the entities that it relied on was irrelevant.

Siemens

Case C-314/01, *Siemens AG Osterreich v Hauptverband der sterreichischen Sozialverischerungstrger* (2004) ECR I-2549.
This case is also available on www.curia.europa.eu.

This case concerned a request by an Austrian review body for a preliminary ruling from the ECJ. The proceedings before the Austrian review body concerned the award of a supply and services contract by the *Hauptverband der sterreichischen Sozialverischerungstrger* (Central Association of Austrian Social Security Institutions) for a smart card-based electronic data processing system. Siemens claimed that the procedure included an unlawful clause prohibiting subcontracting. In a first set of proceedings the Austrian review body accepted this claim, but the *Haupteverband* nevertheless awarded the contract. Siemens then challenged the award of the contract as unlawful. In this second set of proceedings the Austrian review body referred several questions to the ECJ, but only one was held to be admissible. This question required the ECJ to consider both the legality of a clause prohibiting subcontracting and the legal effect of unlawful clauses in the documents.

As a confirmation of the principles stated in *Ballast Nedam II*, the ECJ stressed that the contract documents could not exclude a firm solely because it proposed to rely on the resources of subcontractors to perform the contract. It also went on to stress that a tenderer claiming to have at its disposal the technical and economic capacities of third parties, on which it intended to rely if it were awarded the contract, could be excluded only if it failed to demonstrate that those capacities were in fact at its disposal.

2.4.3.4 Evidence that may be requested from economic operators as proof of their economic and financial standing

The Directive provides a list of the types of evidence that, as a general rule, a contracting authority may request from economic operators as proof of their economic and financial standing (article 47(1)). However, this list is only indicative and not exhaustive. Therefore a contracting authority may also require other evidence than that listed in the Directive (this requirement must of course respect the basic public procurement principles).

See Section 5 – The Law – Part 2 for further details on this issue.

In any event, the Directive explicitly requires the evidence/information sought from economic operators to be:

- related and
- proportionate

to the *subject matter* of the contract (article 44(2)).

N.B. *Thus a contracting authority cannot determine the evidence/information to be requested in an abstract way but must take into account the specific practical context of each case. Only evidence that is strictly necessary in order to assess whether the set selection criteria are satisfied must be requested from economic operators. Requesting evidence that is not necessary and that will not be evaluated is against the principle of proportionality.*

N.B. *It should also be noted that EU Member States would normally specify the form that the evidence should take, for example whether it should be submitted in the original copy, certified copy or simple copy or in electronic form, in which language it should be submitted, if it should be accompanied by a translation, etc. The Directive is silent on these issues.* (Adapt this point for local use – making reference to any local rules on these issues and adding any other relevant issues addressed by local legislation.)

2.4.3.5 Disclosure obligations with regard to economic and financial standing criteria

In compliance with the principle of transparency, a contracting authority should disclose in the contract notice the selection criteria relating to economic and financial standing that it will apply.

Comment:

The Directive itself does not contain a specific obligation to disclose the selection criteria relating to economic and financial standing to be applied.

However, this obligation could be derived from the need to safeguard the principles of equal treatment and transparency and to limit the possibility of abuse by contracting authorities.

This obligation could also be derived from recital 39 of the Directive, which reads as follows: *"……In the same spirit of transparency, the contracting authority should be required, as soon as a contract is put out to competition, to indicate the selection criteria it will use and the level of specific competence it may or may not demand of the economic operators before admitting them to the procurement procedure."*

The Directive explicitly obliges a contracting authority to specify, in the contract notice or invitation to tender, the evidence/references that economic operators are required to submit to prove that they satisfy the economic and financial standing requirements (article 47(4)).

If a contracting authority has fixed minimum capacity levels concerning the economic and financial standing of economic operators, it must announce them in the contract notice, together with the information on evidence/references and any necessary formalities to assess whether the criteria are met (art. 44(2) and Annex VII A of the Directive (item 17) on the information to be included in the contract notice). –

See also module E2 for more information on the content of contract notices.

2.4.4 Technical and/or professional ability

Adapt all of this sub-section for local use – using relevant local legislation, processes and terminology.

In accordance with the Directive, a contracting authority is allowed (but not obliged) to consider the technical and/or professional ability of economic operators.

The provisions concerning technical and/or professional ability are contained in article 48 of the Directive.

2.4.4.1 Specific criteria relating to technical and/or professional ability

The specific technical and/or professional ability criteria must be aimed at assessing whether economic operators have the relevant technical and/or professional ability (skills, equipment, tools, manpower, past experience, etc.) to perform the *contract to be awarded*.

Article 48 of the Directive does not indicate the criteria relating to technical and/or professional ability that a contracting authority may apply, but it contains an *exhaustive* list of evidence that a contracting authority may request from economic operators to prove that the set technical and/or professional ability criteria are satisfied (article 48(2)). Since this list of evidence is exhaustive, a contracting authority may apply only the criteria that are derived from such a list. However, within these limits, it is left to the discretion of the contracting authority to determine the specific criteria to apply.

In any event, the contracting authority must determine the criteria relating to technical and/or professional ability to be applied by taking into account the specific practical context of each case.

N.B. *The principle of proportionality is very important in the context of setting the selection criteria. Setting technical and/or professional ability criteria that are not necessary or are inappropriate may attract economic operators that, in practice, are not qualified or deter efficient economic operators from participation. This will produce misleading results in the process of selection of economic operators.*

Thus, depending on the nature of the contract, its complexity and size, a contracting authority may need to consider a wide range of factors in order to assess the technical and/or professional ability of economic operators with regard to the contract to be awarded.

Some general examples of criteria relating to technical and/or professional ability
(which are derived from the exhaustive list of evidence that may be requested from economic operators)

Past experience – This criterion allows a contracting authority to assess the technical competence of economic operators and to foresee their capability to perform future contracts. A contracting authority would normally want to know if economic operators have fulfilled requirements of a similar type, scale and/or complexity and if the performance was satisfactory.

Availability of tools, plant and technical equipment – A contracting authority may want to know if economic operators have available specific tools, plant and technical equipment for the performance of the contract. A contracting authority may further want to know the details of the age and condition of the required tools, plant and technical equipment in order to establish whether they are adequate for the performance of the contract. This criterion is particularly important, for example for works contracts.

Educational and professional qualifications of the persons who will be providing the services or carrying out the works – This criterion allows a contracting authority to assess the technical competence and expertise of the persons who will be employed under the contract to be awarded and who will be providing the services or carrying out the works. This criterion is particularly important, for example for consultancy services.

Compliance with Quality Assurance Standards – This criterion allows a contracting authority to assess whether economic operators have in place systems for carrying out tasks that directly affect product quality. This criterion is particularly important for supplies, for example. An example of a quality assurance standard is ISO 9001.

2.4.4.2 Minimum capacity levels

A contracting authority is allowed to require economic operators to meet minimum capacity levels with regard to technical and/or professional ability (article 44(2)).

Example:

A contracting authority may require economic operators to have successfully completed at least X number of projects of a specified X minimum value and of the same nature as the project in question in the last X number of years, or it may require that the persons who will be providing the services under the contract have an X minimum number of years of professional experience in the field in question. If economic operators do not meet these minimum requirements, they will have to be excluded.

Good practice note

If the specific characteristics of the project allow for it, in general terms it is considered to be good practice to fix minimum capacity levels.

Minimum capacity levels minimise discretion and the possibility of discriminatory assessment, and they also make the assessment process easier and faster. At the same time, they allow economic operators to know in advance, in a very clear way, whether or not they should participate in a specific procurement process.

It is left to the discretion of the contracting authority to fix the minimum capacity levels that economic operators must meet.

However, if a contracting authority decides to fix minimum capacity levels, the Directive explicitly requires that these capacity levels be:

- related and
- proportionate

to the *subject matter* of the contract (article 44(2)).

N.B.: *Thus, a contracting authority cannot determine minimum capacity levels in isolation or in an abstract way, but it must take into account the specific practical context of each case, for instance the requirements of the specific procurement, its complexity, value, sensitivity, scope and nature as well as the estimated risks.*

Comment:

Minimum capacity levels must be *actually* aimed at assessing the economic operator's technical and/or professional ability to perform the contract to be awarded in that procurement. Thus a contracting authority is not allowed to fix minimum capacity levels in order to exclude certain economic operators and to favour a specific economic operator.

2.4.4.3 Possibility for an economic operator to rely on the resources of other entities to prove its technical and/or professional ability

An economic operator, where appropriate and with regard to a specific contract, may rely on the capacities of other entities, regardless of the legal nature of the links that it has with them. It must in this case prove that it will have at its disposal the resources necessary, for example by producing an undertaking by those entities to that effect (article 48(3)).

N.B. This possibility allows economic operators to rely on the economic and financial resources actually made available to them by affiliated entities as well as by subcontractors or any other entity.

A group of economic operators may also, under the same conditions, rely on the capacities of participants in the group or of other entities (article 48(4)).

See sub-section 2.12 on groups of economic operators.

N.B. *Therefore, in the event that the economic operator is a member of a group of economic operators/consortium, it is sufficient that the set technical and/or professional ability requirements are satisfied by the group of economic operators/consortium as a whole rather than by each individual member. This possibility fosters the participation of SMEs (small and medium-sized enterprises) in the procurement process.*

The main provisions of articles 48(3) and (4) – as in the case of articles 47(2) and (3) on economic and financial standing – derive from the same rich case law of the ECJ listed in the box below. Please refer to sub-section 2.4.3.3 above for detailed information on the case law in question.

Ballast Nedam I – Case C-389/92, *Ballast Nedam Groep NV v The State* ("*Ballast Nedam*") (1994) ECR I-1289

Ballast Nedam II – Case C-5/97, *Ballast Nedam Groep NV v The State* (1997) ECR I-75

Holst Italia – Case C-176/98, *Holst Italia v Ruhrwasser AG International Water Management* (1999) ECR I-8607

Siemens – Case C-314/01, *Siemens AG Osterreich v Hauptverband der sterreichischen Sozialverischerungstrger* (2004) ECR I-2549

2.4.4.4 Evidence that may be requested from economic operators as proof of their technical and/or professional ability

The Directive lays down an exhaustive list of evidence that a contracting authority may request from economic operators as proof of their technical and/or professional ability (article 48(2)). As the list is exhaustive, a contracting authority may not request any other evidence than that listed. However, a contracting authority is not obliged to request all of the listed evidence but only the evidence that is necessary to assess the technical and/or professional ability of economic operators in relation to the contract to be awarded. This list of evidence is divided according to the subject matter of the contract (*i.e.* supplies, works or services). ***See Section 5 – The Law – Part 2 for further details on this issue.***

In any event, the Directive explicitly requires that the evidence/information sought from economic operators be:

- related and
- proportionate

to the *subject matter* of the contract (article 44(2)).

N.B. *Thus a contracting authority cannot determine the evidence/information to be requested in an abstract way but must take into account the specific practical context of each case. Only the evidence that is strictly necessary to assess whether the set selection criteria are satisfied must be requested from economic operators. Requesting evidence that is not necessary and that will not be evaluated is against the principle of proportionality.*

N.B. *It should also be noted that EU Member States would normally specify the form that the evidence should take, for example whether it should be submitted in original copy, certified copy or simple copy or in electronic form, in which language it should be submitted, if it should be accompanied by a translation, etc. The Directive is silent on these issues.* (Adapt this point for local use – making reference to any local rules on these issues and adding any other relevant issues addressed by local legislation.)

2.4.4.5 Disclosure obligations with regard to technical and/or professional ability criteria

In compliance with the principle of transparency, a contracting authority should disclose in the contract notice the selection criteria relating to technical and/or professional ability that are to be applied.

Comment:

The Directive itself does not contain a specific obligation to disclose the selection criteria relating to technical and/or professional ability that are to be applied.

However, this obligation could be derived from the need to safeguard the principles of equal treatment and transparency and to limit the possibility of abuse by contracting authorities.

This obligation could also be derived from recital 39 of the Directive, which reads as follows: *"……In the same spirit of transparency, the contracting authority should be required as soon as a contract is put out to competition, to indicate the selection criteria it will use and the level of specific competence it may or may not demand of the economic operators before admitting them to the procurement procedure."*

The Directive explicitly obliges a contracting authority to specify, in the contract notice or invitation to tender, the evidence/references that economic operators are required to submit to prove that they satisfy the technical and/or professional ability requirements (article 48(6)).

If a contracting authority has fixed minimum capacity levels concerning the technical and/or professional ability of economic operators, it must announce them in the contract notice, together with the information on evidence/references and on any necessary formalities to assess whether these selection criteria are met (art. 44(2) and Annex VII A of the Directive (item 17) on the information to be included in the contract notice).

See also module E2 for more information on the content of contract notices

Main important points to be kept in mind when determining the selection criteria to be applied

Adapt all of this sub-section for local use – using relevant local legislation, processes and terminology.

The choice of the selection criteria to be applied will determine the number and type of economic operators that a contracting authority will attract and, therefore, the intensity and effectiveness of competition in the procurement process.

Unnecessary and inappropriate criteria may, on the one hand, deter efficient economic operators from participation in the procurement process and, on the other hand, lead to the selection of economic operators that, in practice, are not able to perform and complete the specific contract.

Listed below are some important points that, in general terms, a contracting authority is advised to keep in mind when determining the selection criteria to be applied:

- A sound market survey should be carried out. Such a survey helps to establish the types and number of providers of the specific subject of procurement that are on the market. See modules B2 and B3 for further information on market surveys before the start of a procurement process.
- Previous experience of contracting in the same specific field of procurement should be taken into account.
- The necessary expertise (for example, financial analysis, sector-specific technical expertise or legal) should be considered when designing the selection criteria.
- The selection criteria must be determined by taking into account the specific practical context of each case, and they must be relevant to the specific contract to be awarded. They must not be determined in an abstract way.
- The selection criteria should be designed in such a way that economic operators (including SMEs) that have the potential to be efficient or effective providers would not be deterred from participating in the procurement process.
- All relevant selection criteria for a specific contract must be taken into account to ensure that those economic operators that can truly fulfil the contract are selected.
- The selection criteria should be formulated in a simple way so that they can be easily understood by economic operators.
- The selection criteria must be determined in accordance with national laws and basic public procurement principles, including the relevant Treaty principles.

Main important points that should be kept in mind when determining the evidence to be requested from economic operators

Adapt all of this sub-section for local use – using relevant local legislation, processes and terminology – in many states the evidence required is set out in a statute and so procurement officers have little or no discretion.

Extensive requests for evidence can be burdensome to economic operators and raise the costs of participating in the procurement process. This administrative and financial burden may result in deterring economic operators, especially SMEs, from tendering or submitting expressions of interest/applications. Increased tendering costs will finally be borne by the contracting authority itself.

Listed below are some important points that, in general terms, a contracting authority is advised to keep in mind when it determines the evidence to be requested from economic operators:

- The necessary expertise (for example, financial analysis, sector-specific technical, or legal) should be considered when determining the evidence to be requested. See modules B1, B2, B3 and B4 for further discussion on experts and the constitution of an evaluation panel.
- Previous experience of contracting in the same area of procurement should be taken into account.
- The evidence to be requested must be determined by taking into account the specific practical context of each case, and it must be relevant to the specific procurement. It must not be determined in an abstract way.
- Only evidence that will be assessed and that is strictly necessary to establish whether the set selection criteria are satisfied should be requested.
- The evidence/documents to be requested shall be determined in accordance with national laws and basic public procurement principles, including relevant Treaty principles.

2.4.6 Evidence submitted: possibility of requiring economic operators to supplement or clarify evidence and the issue of missing evidence

Article 51 of the Directive explicitly states that a contracting authority is allowed to invite economic operators to *supplement* or *clarify* the evidence (certificates and documents) submitted pursuant to articles 45 to 50.

Supplementary evidence - The Directive does not indicate what is meant by "supplementary evidence", and the ECJ has not given any guidance on this issue.

Comment:

Generally speaking, supplementary evidence means that additional information/evidence may be requested. However, this supplementary information/evidence must *relate* to the evidence submitted and to the corresponding selection criteria that have been set. Therefore the assessment of this evidence must be *relevant* to the determination of whether the set selection criteria are satisfied.

Extract from Sue Arrowsmith - *The Law of Public and Utilities Procurement* – (Sweet and Maxwell, 2005) p. 744:

"What it is clear is that supplementary information must relate to the evidence and criteria in the lists…Thus, for example, in seeking information supplementary to certificates or declarations of completion of past contracts, entities can only seek information that concerns the completion of those contracts."

Clarification of evidence submitted – The Directive does not indicate what is meant by "clarification" of evidence or to what extent clarifications of the evidence submitted may be requested.

In general terms, to assist in the assessment of the evidence submitted with a view to establishing whether economic operators meet the set selection criteria, a contracting authority may, at its discretion, ask economic operators to clarify this evidence. Clarifications may be requested, for example, when the evidence submitted contains inconsistent or contradictory information, is not clear, or contains omissions.

For further details on clarifications, see also module E5 on tender evaluation and contract award.

Missing evidence – In practice, it is rare that economic operators submit all of the evidence requested by a contracting authority. The evidence is often incomplete. Neither the Directive nor the ECJ gives any guidance as to whether a contracting authority may allow economic operators to submit the missing evidence. Therefore this issue remains without a clear-cut answer.

Comment:

A pragmatic approach may be to allow economic operators to submit the missing evidence. Rejecting an advantageous expression of interest/application or rejecting a tender because an economic operator fails to submit a specific evidence requested by the contracting authority may be against the principle of effective procurement. However, on the other hand, the search for missing evidence may be very time-consuming and prolong the time allotted to the assessment of expressions of interest/applications or to the evaluation of tenders by having to wait until all evidence requested has been submitted.

In practice and in order to reduce the burden on economic operators but also the burden on contracting authorities, it may be appropriate to limit the verification of the evidence submitted so that it concerns only the selected economic operators or the winning tenderer. However, the Directive is silent on this issue.

In some EU Member States, however, national legislation specifically establishes how contracting authorities should deal with this issue. See the example of Hungary in the box below.

Example of Hungary concerning missing evidence

In Hungary, in accordance with the Public Procurement Law (PPL) currently in force, contracting authorities are *obliged* to allow economic operators to supply missing information/evidence concerning the mandatory and optional grounds for exclusion, economic and financial standing, and technical and/or professional ability.

The Hungarian PPL regulates the procedure for requesting missing information/evidence. In broad terms, the PPL stresses, *inter alia*, that missing information/evidence must be provided under identical conditions by all economic operators. Contracting authorities are to inform all economic operators, at the same time and in writing, concerning the supply of missing information/evidence, setting out the time limit for their supply as well as the information/evidence that is missing for each tender or expression of interest/application under examination. A second round of requests for missing information/evidence may only concern information/evidence that was not requested in the first round.

N.B. *In requesting supplementary evidence, clarifications or submission of missing evidence, the basic public procurement principles of equal treatment and non-discrimination must be respected. Also, any request and response must be documented in writing, as this is important in order to leave an audit trail.*

Selection criteria in design contests

With regard to design contests, there are no detailed rules covering the selection of economic operators. The Directive limits itself to stating that where design contests are restricted to a limited number of participants, the selection of those to be invited must be made on the basis of "clear and non-discriminatory criteria", which must be announced in advance in the contract notice (article 72). In any event, the number of the candidates invited to participate must be sufficient to ensure genuine competition.

See module C4 for more information on design contests.

2.5 OFFICIAL LISTS OF APPROVED ECONOMIC OPERATORS

Adapt all of this sub-section for local use – using relevant local legislation, processes and terminology.

The Directive allows EU Member States to introduce official lists of approved economic operators and certification by certification bodies complying with European certification standards. In very general terms, these registration systems must be set up and operated in compliance with the rules on the permissible selection criteria laid down in the Directive. Economic operators registered on an official list are not to be treated more favourably than those that are not registered, and the registration system must allow economic operators to ask at any time to be registered. Economic operators on such lists in their member state of establishment may claim, within certain limits, such registration as alternative evidence that they fulfil the selection criteria on the basis of which the registration took place (article 52). ***See Section 5 – The Law – Part 2 for further details on these issues.***

The main purpose of using official registration systems is to streamline the procurement process.

N.B. *It should be noted that the provisions of the Directive concerning official lists and certification by certification bodies do not affect a contracting authority's freedom to fix its own selection criteria and minimum capacity levels with regard to those criteria.*

2.6 RESTRICTED PROCEDURE, NEGOTIATED PROCEDURE WITH PRIOR PUBLICATION OF A CONTRACT NOTICE, AND COMPETITIVE DIALOGUE: special considerations on decisions that should be made when defining the overall strategy for the selection of economic operators

Adapt all of this sub-section for local use – using relevant local legislation, processes and terminology.

In the case of the 'two-stage' procedures, a contracting authority, when deciding the overall strategy for the selection of economic operators for a specific contract award procedure, has to determine, amongst other decisions, not only the selection criteria to be applied and the evidence to be requested, but also the number of economic operators that will be invited to tender/negotiate/conduct a dialogue, as indicated below.

2.6.1 Decision concerning the minimum number of economic operators that are invited to tender/negotiate/conduct a dialogue

A contracting authority must decide the minimum number of economic operators that it intends to invite to tender, negotiate or conduct a dialogue. This minimum number must be no fewer (but can be more) than five in restricted procedures, and no fewer (but can be more) than three in a negotiated procedure with prior publication of a contract notice and in a competitive dialogue, and this minimum number must be announced in the contract notice (article 44(3)).

See module E2 for more information on the content of contract notices.

2.6.2 Decision concerning the maximum number of economic operators that are invited to tender/negotiate/conduct a dialogue

A contracting authority may decide, *where it considers it appropriate*, to set the maximum number of economic operators that will be invited to tender/negotiate/conduct a dialogue. This maximum number must be announced in the contract notice (article 44(3)). See module E2 for more information on the content of contract notices.

If a contracting authority has fixed the maximum number of economic operators that it will invite to tender/negotiate/conduct a dialogue, it may result, in practice, in a situation where, during the selection process, the actual number of economic operators that meet the selection criteria (*i.e.* that are qualified) is higher than the fixed maximum number to be invited. In that event, not all of the qualified economic operators will be invited to tender/negotiate/conduct a dialogue, but only those selected by the contracting authority on the basis of criteria (or methodologies) set in advance (this process is also referred to as shortlisting).

Good practice note

It is considered to be good practice for a contracting authority to establish the criteria (or methodologies) that it will apply for the selection, from among the economic operators that are qualified, of those economic operators that will be invited to tender/negotiate/conduct a dialogue, at the same moment as it fixes the maximum number of economic operators to be invited. (Note, however, that there is not an explicit requirement in this regard in the Directive.)

2.6.2.1 Criteria (or methodologies) that may be applied in order to choose the economic operators to be invited to tender/negotiate/conduct a dialogue from among the qualified economic operators

In choosing the economic operators to be invited to tender/negotiate/conduct a dialogue from among those economic operators that are qualified, a contracting authority must keep in mind the following issues:

- It must apply objective and non-discriminatory criteria (or methodologies) (article 44(3)).
- Only the objective and non-discriminatory criteria that are allowed by the Directive may be applied for the selection of economic operators. Therefore, any criteria that extend beyond the criteria allowed by the Directive itself are not permitted. This restriction was explicitly clarified by the ECJ in the case Commission v Italy, referred to in the box below.

Case note: *Commission v Italy*

Case C-360/89, *Commission v Italy* (1992) E.C.R. I-3401 (see in particular paragraph 18). This case is also available on www.curia.europa.eu.

This case concerned an Italian law that provided that, where more than 15 undertakings sought invitations for a works contract, at least 15 had to be invited, and that, when choosing the undertakings to be invited to tender, preference should be given to temporary associations and consortia involving undertakings that carried out their main activities in the region in which the works were to be carried out.

This law was challenged by the Commission, in proceedings under ex-Article 169 EC, as being contrary to the Treaty and to Directive 71/305 on public works, a predecessor to the current Directive.

The ECJ held, *inter alia*, that this provision of the Italian law violated the Works Directive since, in restricted procedures, entities awarding contracts had to choose the candidates that they intended to invite to tender (from among the candidates that met the selection criteria) only on the basis of the *"information relating to the personal position of the contractor and the minimum economic and technical standards which the entities awarding contracts require of contractors for their selection."*

Relative financial or technical capacity – As a result of the above-mentioned judgment, when choosing the economic operator to be invited to tender/negotiate/conduct a dialogue from among the qualified economic operators, a contracting authority must take into account their *relative* financial or technical capacity. This analysis would result in a *relative* ranking of the qualified economic operators, thereby enabling the contracting authority to identify those economic operators that were *best qualified to perform the contract to be awarded.*

Example:

In a restricted procedure for the award of a contract to supply computers to a university, one of the selection criteria (relating to technical capacity) to be applied might require that:

"Technical capacity criterion:

a) Past experience: economic operators have successfully completed at least two contracts for the supply of computers of a minimum value of 100,000 EUR each in the last two years".

As an example, and supposing that the contracting authority has fixed at eight the maximum number of economic operators to be invited to tender, the contracting authority might state the following:

"If more than eight economic operators meet the set selection criteria, their relative past experience is examined to identify the eight economic operators that best qualify to perform the contract and that therefore will be invited to tender. The only factors that will be taken into consideration during this examination are the following:

(i) Highest total number of successfully completed contracts meeting the technical capacity criterion stated under a) above;

(ii) Highest total value of successfully completed contracts meeting the technical capacity criterion stated under a) above.

Note: (i) is applied first and then (ii) is applied in the event that two or more economic operators have the same number of successfully completed contracts for (i)."

Comment:

The prevailing interpretation is that the criteria that may be taken into account to determine the *relative ranking* of the qualified economic operators do not need to be the same as those used for establishing whether economic operators are qualified. *Additional* criteria (chosen from among the admissible selection criteria listed by the Directive) could also be used. In any event, these additional criteria are to be aimed at identifying those economic operators that are best qualified to perform the contract. Therefore, they must relate to the contract to be awarded.

Example:

With reference to the technical capacity selection criterion mentioned in the box above, when choosing from among qualified economic operators, the contracting authority could take into account the relative level of past computer supply experience *with universities*. Note, however, that past computer supply experience specifically *with universities* is not one of the selection criteria to be applied.

As an example, the contracting authority might state the following:

"If more than eight economic operators meet the set selection criteria, the relative level of their past experience is examined to identify the eight economic operators that best qualify to perform the contract and that therefore will be invited to tender. The only factor that will be taken into consideration during this examination is the following:

- Highest total number of successfully completed contracts meeting the technical capacity criterion stated under a) above and that were concluded with universities."

In order to identity the relative ranking of the qualified economic operators and to determine which economic operators to invite to tender/negotiate/conduct a dialogue from among qualified operators, a contracting authority may also develop methodologies based on a weighting/scoring system. The possibility of using such methodologies is recognised in recital 40 of the Directive and also by the ECJ in the case *Universale-Bau*, which is referred to in the box included in the sub-section below.

Random choice and rotation systems – It is recognised that a *random choice or a rotation system* would not be acceptable methods for choosing which economic operators to invite to tender/negotiate/conduct a dialogue from among those operators that are qualified. This is because those methods are based simply on chance and not on the identification of the economic operators that are best able to perform the contract.

2.6.2.2 Disclosure obligations with regard to the criteria (or methodologies) to be applied in order to choose the economic operators to be invited to tender/negotiate/conduct a dialogue from among the economic operators that are qualified

A contracting authority is required to indicate in the contract notice the objective and non-discriminatory criteria and methodologies that it *intends* to apply (article 44(3) and recital 40). This requirement is aimed at safeguarding the principles of equal treatment and transparency and at limiting the possibilities of abuse and discretion by contracting authorities.

Case Note: *Universale-Bau*

Case C-470/99 *Universale-Bau v EBS* (2002) E.C.R. I-11617. This case is also available on www.curia.europa.eu.

This case arose out of proceedings before an Austrian review body concerning a contract that had been tendered under a restricted procedure by an Austrian contracting authority for building part of a sewerage treatment plant. The procedure had been run under Works Directive 93/37, a predecessor to the current Directive.

Under this restricted procedure, the Austrian contracting authority had informed economic operators that the five highest-ranked candidates would be invited to tender and that, for the ranking of the candidates, it would take into account the technical operating capacity over the last five years, with reference to five different types of works, listed in the following order: sewage treatment plants, pre-stressed components, large-scale foundations supported by columns in gravel, oscillating pressure compaction, and high-pressure soil consolidation. The contracting authority also had informed the candidates that the required references would be evaluated according to a scoring method lodged with a notary.

The Austrian review body referred several questions to the ECJ concerning the interpretation of the Directive. The ECJ stressed, *inter alia*, that in the context of a restricted procedure, if the contracting authority has laid down in advance the rules for weighting the criteria for the selection of the candidates that will be invited to tender, it is obliged to state these rules in the contract notice or tender documents.

2.7 LOTS: THE APPLICATION OF SELECTION CRITERIA

Adapt all of this sub-section for local use – using relevant local legislation, processes and terminology.

The Directive does not deal with how the selection criteria should be applied in the case where a tender process has been divided into several lots. This is normally left to the discretion of the contracting authorities in the member state.

Generally speaking and in practice, economic operators may normally tender for one or more lots, and it is common for lots to be awarded lot by lot as separate contracts (this depends, however, on the provisions of the tender documentation). If this is the case, the selection (qualification) criteria are also normally set lot by lot.

2.8 THE USE OF PREQUALIFICATION QUESTIONNAIRES (PQQs)

Adapt all of this sub-section by making reference to local standard PQQ templates (if they exist). Indicate whether the use of any local standard PQQ template is mandatory and for what types of contracts. Indicate the website from which the local standard PQQ template can be downloaded (if applicable).

The Directive neither contains rules on the use of prequalification questionnaires (PQQs) nor sets out standard PQQ templates. These issues are left to member states to regulate. Within a member state, individual contracting authorities may also be permitted to develop their own standard PQQ templates.

See module E1 for more information on the preparation of tender documents.

Good practice note

For complex and strategic procurement the use of PQQs is generally recommended. For such procurement, the contract notice announces that a separate PQQ will be issued to those economic operators requesting to participate or expressing an interest in participating.

The main advantages of the PQQ approach can be listed as follows:

- It enables contracting authorities to provide more details about the contract requirements than is possible in a contract notice. There is a 650-word limit for contract notices sent without using electronic means. See module E2 for more information on contract notices.
- It allows contracting authorities to set the format, length and nature of responses of economic operators on their qualifications in direct relation to the requirements of the specific contract. This targeted information on qualifications means that contracting authorities avoid having to deal with less useful or irrelevant general information.
- The responses from economic operators are ordered, structured, consistent and comprehensive, making the assessment of qualifications easier.

Generally speaking, it is of utmost importance that all PQQ questions:

- be formulated in a simple way that can be easily understood by economic operators;
- be carefully checked and adjusted to the specific practical context of each case (especially when a standard PQQ is used) and ask only for information that will be assessed;
- be consistent with what is allowed under applicable national laws, general law principles and the relevant Treaty principles.

In broad terms, the PQQ is normally issued to interested economic operators together with specific instructions on the way in which the prequalification process will take place and on the procedural rules that will govern it. The PQQ will then have to be duly filled in and returned (with all requested documents in attachment) to the contracting authority within the set deadline.

2.9 DEFINITION OF THE OVERALL STRATEGY FOR THE SELECTION OF ECONOMIC OPERATORS: CHECKLIST OF THE *MAIN* POINTS THAT SHOULD BE ADDRESSED

Adapt all of this sub-section for local use – using relevant local legislation, processes and terminology.

The overall strategy for the selection of economic operators should be determined before the tender is launched. Its definition goes hand in hand with the definition of the tender requirements and the choice of the particular procurement procedure to be used. *It must be established in a manner that respects national laws and general law principles, including the relevant Treaty principles.*

See module E1 on the preparation of tender documents/technical specifications.

See module C4 on public procurement procedures and techniques.

Listed below is a checklist of the *main* points that, in general terms, a contracting authority should address when defining the overall strategy for the selection of economic operators:

- Have you identified the category of selection criteria that you will apply?
- Have you defined the specific criteria that you will apply within each category of selection criteria chosen?
- Do you consider it appropriate to fix minimum capacity levels with regard to any economic and financial standing criteria or to any technical and/or professional capacity criteria to be applied? If so, have you defined these minimum capacity levels?
- Have you identified the evidence/references to be required from economic operators to prove that they satisfy the set selection criteria?

- In the case of restricted procedures, negotiated procedures with prior publication of a contract notice, and competitive dialogue procedures, the contracting authority should address the following issues:
  - ☐ Have you set the minimum number of economic operators to be invited to tender/negotiate/conduct a dialogue?
  - ☐ Do you consider it appropriate to fix the maximum number of economic operators to be invited to tender/negotiate/conduct a dialogue? If so, then:
    - – have you fixed this maximum number?
    - – have you determined the criteria or methodologies to be applied in order to choose the economic operators that are to be invited to tender/negotiate/conduct a dialogue from among the economic operators that are qualified?
  - ☐ Have you established whether there are mandatory PQQ templates that you are required to use?

- Have you identified, in accordance with the requirements of the applicable law, when, where and how you should disclose:
  - ☐ the selection criteria that you will apply?
  - ☐ any minimum capacity level that you will apply?
  - ☐ the evidence/references that you will request?
  - ☐ the minimum number of economic operators that you intend to invite to tender/negotiate/conduct a dialogue?*
  - ☐ any maximum number of economic operators that you will invite to tender/negotiate/conduct a dialogue?* and
  - ☐ any criteria or methodologies that you will apply in order to choose the economic operators to be invited to tender/negotiate/conduct a dialogue from among the economic operators that are qualified?*

N.B. *When determining this strategy, attention must also be given to whether the tender will be divided into lots and to the way in which the selection requirements will be applied to lots.*

* *This concerns only restricted procedures, negotiated procedures with prior publication of a contract notice, and competitive dialogue procedures.*

2.10 CHANGE OF THE SET SELECTION REQUIREMENTS DURING THE TENDER PROCESS

Adapt all of this sub-section for local use – using relevant local legislation, processes and terminology.

During the tender process, a contracting authority may need to correct an omission or mistake or take into account new circumstances that have an impact on the set selection requirements (*i.e.* selection criteria and evidence requested) and that arose only during the tender process.

The Directive is silent as to whether or not a contracting authority can change the set selection requirements during the tender process. This issue is left to member states to regulate in accordance with the principles of equal treatment and transparency.

Comment:

Changes may be divided into material and non-material changes.

A change in the set selection requirements is *material* when it is likely to have a repercussion on the identity of the economic operators that would participate in the tender process. Broadly speaking, when a *material* change occurs, it is necessary to go back to the stage in which the change was made. For example, when the contracting authority needs to add a new selection criterion to the criteria that were published in the contract notice, taking into account new circumstances that were not known at the moment of launching the tender, the tender process is to be cancelled and a new contract notice published.

A change is *non-material* when it is not likely to have a repercussion on the identity of the economic operators that would participate in the tender process (this is the case, for example, of a minor mistake). A *non-material* change is in principle allowed. In that event, a corrigendum to the contract notice and to the tender documents, accompanied by an adequate extension of the deadline for submission of tenders or expressions of interest/applications duly notified to the economic operators concerned, would in general terms suffice. See module E2 for details of the contract notice to be used and published in the *Official Journal of the European Union*.

The determination of whether a change is material or non-material must be made by taking into account the specific circumstances of each case.

N.B. *To reduce mistakes, omissions or poor determination of selection requirements, it is helpful to keep in mind the points listed in the two boxes at the end of sub-section 2.4.4.5. In any event, changes should be limited to a minimum, and any possibility to make changes should not be abused. Changes must be exclusively linked to objective reasons.*

Good practice note

It is good practice for the contracting authority to duly justify any change and to keep the justifying note in the internal records in order to leave an audit trail.

N.B. *Under no circumstances may the set selection criteria be changed or waived during the process of selection of economic operators. At this stage, the set selection criteria are to be applied as they stand.*

2.11 PROCESS OF SELECTION OF ECONOMIC OPERATORS (SELECTION STAGE): SOME GENERAL PRINCIPLES AND CONSIDERATIONS

Adapt all of this sub-section for local use – using relevant local legislation, processes and terminology.

As explained at the beginning of this section, the process of selection of economic operators (selection stage) takes place before the process for the award of the contract (award stage) – see sub-section 2.2 above. The selection process may also take place at different times of the procurement process, depending on whether an open procedure or a two-stage procedure is used (see sub-section 2.3 above).

2.11.1 Steps that should be followed in the process of selection of economic operators

The Directive sets out the steps that a contracting authority should follow in carrying out the process of selection of economic operators. They are as follows (see article 44(1)):

First – Economic operators are to be checked against the grounds for mandatory exclusion, any grounds for optional exclusion, and any suitability requirement to pursue the professional activity (*i.e.* enrolment on trade or professional registers).

Second – Only those economic operators that have not been excluded from the procurement process, after having being checked against the above-mentioned criteria, are to be checked against any criteria of economic and financial standing or of technical and/or professional ability.

Third – In the case of restricted procedures, negotiated procedures with prior publication of a contract notice, and competitive dialogue procedures, *where appropriate and applicable,* only those economic operators that are qualified are to be checked against the criteria or methodologies set in order to reduce the number of economic operators to be invited to tender/negotiate/conduct a dialogue (see sub-section 2.6 above).

2.11.2 Basic general law and Treaty principles that must be applied in the process of selection of economic operators

The process of selection of economic operators must be conducted in accordance with the general law and Treaty principles of equal treatment, non-discrimination and transparency. The requirement of confidentiality must also be respected (*i.e.* the confidentiality of the information acquired by those involved in the process of selection of economic operators must be guaranteed).

See module A1 for more information on general law and Treaty principles.

2.11.3 The "team" in a contracting authority responsible for carrying out the process of selection of economic operators

The Directive is silent as to who is responsible within a contracting authority to carry out the process of selection of economic operators. This issue is left to member states to regulate.

In principle, the process of selection of economic operators is carried out by a suitably competent evaluation team, which may be either the relevant unit of the line organisation of the contracting authority or a specially established evaluation panel/tender committee (Adapt for local use by using relevant local legislation and terminology.)

In this context, the role of the evaluation team is to assess whether the economic operators that have submitted an expression of interest/application (in the case of the restricted procedure, negotiated procedure with prior publication of a notice, and competitive dialogue procedure) or a tender are qualified to perform the contract on the basis of the set selection criteria.

See module B4 on the composition, role and accountability of the evaluation panel/tender committee.

See also module E5 on tender evaluation and contract award.

2.11.4 Evaluation report/qualitative selection report

In accordance with the principle of transparency, a contracting authority must ensure that the whole process of selection of economic operators is documented in writing in the form of a report.

In cases where restricted procedures, negotiated procedures with prior publication of a contract notice, or competitive dialogue procedures are used (where a pre-qualification takes place), a qualitative selection report must be prepared. Conversely, in procedures where a pre-qualification does not take place, such as the open procedure, the selection process is normally documented in the evaluation report itself.

See module E5 on tender evaluation and contract award.

(Adapt for local use by making reference to any evaluation report/qualitative selection report standard template that is in use locally. Add the evaluation report/qualitative selection report standard template or introduce the link to the website from which such templates may be downloaded.)

Through the qualitative selection report, the evaluation team makes a recommendation to the contracting authority on the list of economic operators to be invited to tender/negotiate/conduct a dialogue. The qualitative selection report must be approved in writing by the authorised officer of the contracting authority (with clear indication of the officer's full name and position and the date) before the invitation to tender, negotiate or conduct a dialogue may be issued. (Adapt for local use by using relevant local legislation and terminology.)

N.B. *The written approval of the authorised officer is a very important element, which will be checked by the auditors and/or other control bodies as a necessary authorisation to proceed with the invitation to tender/negotiate/conduct a dialogue.*

In broad terms, the qualitative selection report or the evaluation report, as the case may be, will include, *inter alia*, the following information with regard to the process of selection of economic operators: (Adapt for local use by making reference to the main elements that must be included in the report and also to the documents that should be attached to the report.)

- an accurate assessment of each economic operator's qualifications;
- a summary of any requests for clarification and the corresponding responses (with indication of dates of expedition, deadlines for reply, dates of receipt of the responses, and indications as to whether the responses received were satisfactory or not and if not, then reasons why);
- a list of those economic operators that meet the qualitative selection criteria and of those selected to proceed to the next stage in the case of restricted procedure, negotiated procedure with publication of a notice, and competitive dialogue;
- a list of those economic operators that have not been selected, with clear indications of the reasons for non-selection/rejection;

  N.B. *It is very important that the reasons for non-selection of economic operators are clearly and exhaustively explained and documented so that if they are challenged or in the event of debriefing these reasons are backed up by full documentary evidence showing that the process of selection was properly conducted. See module E6 for details on informing candidates and tenderers.*
- names and functions of those involved in the process of selection of economic operators and their signatures.

REMINDER of the number of economic operators to be invited to tender/negotiate/conduct a dialogue in two-stage procedures

- Where the number of economic operators meeting the selection criteria is *below the set minimum number*, a contracting authority may continue the procedure with the economic operators that qualify (in any event, the number of economic operators to be invited must be sufficient to ensure genuine competition). However, it may not include other economic operators that did not request to participate or that did not have the required capabilities (article 44(3) - see also sub-section 2.6 above).

- Where the number of economic operators meeting the set selection criteria is *higher than the set maximum number*, the contracting authority will apply the criteria or methodologies set in advance in order to choose the economic operators that it will invite to tender/negotiate/conduct a dialogue (see sub-section 2.6 above).

See module C4 on public procurement procedures and techniques for more information on these issues.

2.11.5 Obligation to inform unsuccessful economic operators of the reasons for their rejection

A contracting authority must ensure that unsuccessful economic operators are *promptly* informed of the reasons for their rejection, upon their request (article 41(2)).

See modules E6 and F1 for details on informing tenderers and candidates.

2.12 SPECIAL CONSIDERATIONS CONCERNING THE PARTICIPATION OF ECONOMIC OPERATORS IN CONTRACT AWARD PROCEDURES: ELIGIBILITY

Adapt all of this sub-section for local use – using relevant local legislation, processes and terminology.

Unlike the selection criteria, the eligibility requirements are aimed at determining whether economic operators may participate in a contract award procedure, regardless of their ability to perform the contract to be awarded. These requirements concern the economic operator as such.

The requirement for an economic operator to be of a specific nationality and for its products to be from a specified geographical origin are typical examples of eligibility requirements. Under the Directive and in accordance with the Treaty principles, eligibility requirements linked to the nationality of economic operators and to the origin of goods or services are prohibited within the EU.

N.B. *It should be noted that there is no express provision within the Directives that restricts eligibility to EU economic operators. Therefore, in principle non-EU economic operators are also allowed to participate in public contract award procedures within the EU. However, they would not have standing, according to the remedies directives. See module F1 on remedies.*

However, eligibility requirements are not limited to the nationality of economic operators or to the origin of goods but may also concern various other conditions, which are examined below and which may also be linked to social reasons (as in the case of reserved contracts).

2.12.1 Legal structure of economic operators

The Directive explicitly states that an economic operator can be a natural or legal person or a public entity or a group of such persons and/or bodies that offers on the market the execution of works and/or a work, products or services (article 1(8)).

2.12.1.1 Legal form of groups of economic operators/consortia

A contracting authority is not allowed to require groups of economic operators/consortia to assume a specific legal form in order to be eligible to participate in a contract award procedure. However, a contracting authority is allowed to require them to assume a specific legal form if they are awarded the contract (article 4(2)). In that event, the contracting authority must have announced in the contract notice the legal form that these groups/consortia would be required to assume if awarded the contract.

See module E2 for more information on the content of contract notices.

N.B.: As explained in previous sub-sections, the economic and financial standing criteria and the technical and/or professional ability criteria must be satisfied by the group of economic operators/consortium as a whole and not by each member of the group/consortium. Conversely, the grounds for mandatory exclusion and for optional exclusion apply to each individual member of the group/consortium.

2.12.1.2 Legal form of economic operators (not in a group)

A contracting authority may require national economic operators (not in a group), under national law, to assume a specific legal form (*i.e.* to be considered as either natural or legal persons) in order to be able to provide the relevant service and therefore to be eligible to participate in the corresponding contract award procedure. However, a contracting authority is not allowed to apply the same requirement to foreign economic operators that are legally established and authorised to provide the relevant service in their member state of establishment. This is in line with the Treaty principle of freedom to provide services and is explicitly recognised by the Directive. ***See Section 5 – The Law – Part 2 for further details on this issue.***

2.12.2 Subcontracting: can it be prohibited?

The Directive explicitly establishes that a contracting authority may require economic operators to indicate the share of the contract that they intend to subcontract as well as any proposed subcontractors (article 25). However, it does not indicate whether subcontracting can be prohibited. According to the *Siemens* ECJ judgment (see the box below), a contracting authority is not allowed to impose a *general prohibition* on economic operators to have recourse to subcontracting.

Case Note: *Siemens*

Case C-314/01 *Siemens AG v Hauptverband der Österreichischen Sozialverischerungsträger* (2004) E.C.R. I-2549. See in particular paragraphs 43 to 47 of the case in question. This case is also available on www.curia.europa.eu.

In this case, the ECJ considered, *inter alia*, the legality of a clause prohibiting subcontracting (the facts of this case were examined in more detail in sub-section 2.4.3.3 above). This clause, which was contained in the contract notice and in the invitation to tender, stated that a maximum of 30% of the contract could be subcontracted, and also that certain parts of the work could not be subcontracted at all.

First of all, the ECJ stressed the following: that a contracting authority may not exclude an economic operator *simply* because that economic operator proposes to rely on the resources of other parties to perform the contract; and that a tenderer claiming to have at its disposal the technical and economic capacities of third parties on which it intends to rely if it is awarded the contract may be excluded only if it fails to demonstrate that those capacities are in fact available to it.

N.B. *Therefore, from the above statements of the ECJ, it can be deduced that an absolute prohibition on subcontracting is not allowed.*

Secondly, the ECJ also indicated that the clause in question relating to subcontracting: "[does] not appear to relate to the examination and selection phase of the procedure for award of the contract, but rather to the phase of performance of that contract and [is] designed precisely to avoid a situation in which the performance of essential parts of the contract is entrusted to bodies whose technical and economic capacities the contracting authority was unable to verify at the time when it selected the successful tenderer" (para. 47).

2.12.3 Company groups: can a firm within the same company group participate in the same contract award procedure?

The Directive does not deal with this issue, but the ECJ considered it in the *Assitur* case (see the box below).

Case Note: *Assitur*

Case C-538/07 *Assitur Srl v Camera di Commercio, Industria Artigianato e Agricoltura di Milano* - judgment of 19 May 2009. Unreported, but available at www.curia.europa.eu.

This case concerned a request by an Italian court for a preliminary ruling from the ECJ. An Italian law prohibited undertakings linked by a relationship of control from participating in the same tendering procedure. The ECJ was asked to rule on whether this law was compatible with EU procurement rules.

This case arose from an invitation to tender issued by Camera di Commercio, Industria Artigianato e Agricoltura di Milano ("CCIAAM") for the award, on a lowest-price basis, of a courier-service contract for a three-year period. The basic bidding price was worth approximately 530,000 EUR, excluding VAT. Three companies were admitted to the tendering procedure: SDA Express Courier SpA (SDA), Poste Italiane SpA (Poste Italiane) and Assitur Srl (Assitur).

The entire share capital of SDA was owned by Attività Mobiliari SpA, which in turn was a wholly-owned subsidiary of Poste Italiane. In December 2003 CCIAAM decided to award the contract to SDA, the lowest-priced bidder. Assitur then brought an action before an Italian court seeking annulment of the contract award decision.

The ECJ considered that the Italian law at issue was intended to prevent potential collusion between tenderers and was intended to ensure equal treatment and transparency. As it had no objection to the aim of the law, the ECJ then proceeded to consider whether the principle of proportionality had been respected.

Referring to previous case law, the ECJ held, *inter alia*, that such legislation, which was based on an *absolute* presumption that tenders submitted for the same contract by affiliated undertakings would necessarily have been influenced by one another, breached the principle of proportionality.

This ruling was made because the law did not allow those undertakings an opportunity to demonstrate that, in this case, there was no real risk of occurrence of practices capable of jeopardising transparency and distorting competition between tenderers. Therefore, the ECJ concluded that: "Community law precludes a national provision which, while pursuing legitimate objectives of equality of treatment of tenderers and transparency in procedures for the award of public contracts, lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control, without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure".

2.12.5 RESERVED CONTRACTS (SHELTERED WORKSHOPS OR SHELTERED EMPLOYMENT PROGRAMMES)

The Directive recognises that EU Member States may provide for reserved contracts. Even though these contracts are subject to the Directive, participation in the contract award procedures may be restricted in order to support the employment of persons with disabilities. The contract notice must indicate that the contract is reserved (article 19). ***See Section 5 – The Law – Part 2 for further details on this issue.***

See module C5 for more information on social considerations in public procurement and reserved contracts.

See also module E2 for more information on the content of the contract notices.

UTILITIES

This short note highlights some of the major differences and similarities in the selection of economic operators in the utilities sector.

Adapt all of this sub-section for local use – using relevant local legislation, process and terminology.

Utilities have more flexibility in terms of the choice of the selection criteria that may be appled and of the evidence that may be requested from economic operators. Utilities can also set up and operate qualification systems. These systems must be operated on the basis of objective criteria, and the rules for qualification are to be established by the contracting entity. The qualification systems are similar to official lists of economic operators under the Directive, except for the fact that they are set up by contracting entities for their own use.

In very general terms, a qualification system is a system under which economic operators that are interested in contracting with the utility apply to be registered as potential providers. The utility then registers some or all of those economic operators in the system. The registered economic operators then form a pool, from which the utility may draw those to be invited to tender or to negotiate a contract.

The main legal requirements relating to selection (qualification) of economic operators are set out in Directive 2004/17/EC:

- **Article 51** sets out general provisions on how and when the selection of economic operators takes place
- **Article 52** deals with mutual recognition concerning administrative, technical or financial conditions, and certificates, tests and evidence
- **Article 53** deals with qualification systems
- **Article 54** sets out general principles on the selection criteria that may be applied. As a general rule, contracting entities that establish selection criteria in open, restricted or negotiated procedures must do so in accordance with objective rules and criteria

It should be noted that, in this context, the following provisions of Directive 2004/17/EC are also relevant:

- **Article 1(7)** defines the concept of economic operator
- **Article 11** sets out provisions as to whether economic operators (not in a group) and groups of economic operators may be obliged by contracting entities to assume a specific legal form in order to participate in a procurement process
- **Article 28** allows EU Member States to reserve contracts to sheltered workshops or to provide for such contracts to be performed in the context of sheltered employment programmes in order to support the employment of persons with disabilities
- **Article 37** establishes that contracting entities may require economic operators to disclose how they intend to subcontract and any proposed subcontractor
- **Article 49** establishes *inter alia* that contracting entities must inform unsuccessful economic operators about the reasons for their rejection

MODULE E3: SELECTION (QUALIFICATION) OF CANDIDATES

EXAMPLE OF PQQ EVALUATION TABLE

Localisation: The PQQ evaluation table provided below is an example only.

Adapt all this section replacing it with a local PQQ evaluation table (if applicable)

Criteria	Weighting	PQQ Question number	PQQ Question – evidence required	Scoring notes
Economic and financial standing				
Financial details and financial experience	Pass/fail	1.1	Evidence of overall annual turnover threshold of euro x	Turnover threshold - Pass/Fail
	25%	1.2	3 years annual accounts	Economic and financial standing assessment Note: Use key ratios to assess profitability, liquidity, gearing and significance of the contract.
		1.3	Information on annual turnover in respect of the Finance, Human Resources and IT services which are the subject of this contract	
		1.4	Bankers references	
		1.5	Information on insurance policies held	
Technical or professional ability				
Financial experience	5%	2	Evidence of experience of raising relevant finance	
Health and Safety and Environmental Protection	10%	3.1	Health and safety certificates	
		3.2	Evidence of health and safety convictions and remedial actions taken	
		3.3	Environmental protection certificates	

Criteria	Weighting	PQQ Question number	PQQ Question – evidence required	Scoring notes
Quality	20%	4.1	Quality assurance standards certificates	
		4.2	Quality and experience of key staff – CVs of key staff showing relevant education and experience to ensure quality delivery	
		4.3	Information on average numbers of staff and staff turnover in previous three years	
		4.4	Information on equipment available to deliver the services	
Functional areas - specific experience				
4.1 Finance	10%	5.1	Information on finance contract experience over last 3 years – list of contracts, subject matter of contracts what for, who with, value. Relevant references.	
4.2 Human Resources	15%	5.2	Information on human resources contract experience over last 3 years – list of contracts, subject matter of contracts what for, who with, value. Relevant references.	
4.3 IT	15%	5.3	Information on IT contract experience over last 3 years – list of contracts, subject matter of contracts what for, who with, value. Relevant references.	

Evaluation methodology for all questions scored 0-5:

0 Not acceptable
1 Weak
2 Satisfactory: below expectations
3 Slightly exceeds expectations
4 Good
5 Excellent

SECTION 3
EXERCISES

Check each exercise for local relevance and adapt for local use

EXERCISE 1
CASE STUDY

The Tax Administration Office is about to launch a tender process under an open procedure for the award of a contract for the supply of printing machines. When determining the selection criteria and evidence/information to be requested, the Tax Administration team asks you, in your role as a Procurement Officer, to advise on a number of questions.

1. The Tax Administration team explains that it will use past experience as one of the technical and/or professional ability criteria, and it asks you to advise on whether it is possible to request that past contracts for supplies of the printing machines concerned must have been successfully carried out in the country of the Tax Administration office. Please advise.
2. The Tax Administration team explains that, as proof that economic operators have the requested past experience in the supply of the printing machines concerned and in order to be on the safe side, it would like to request economic operators to submit all the evidence for supplies listed in the applicable Article of the law with regard to technical and/or professional ability. You are requested to advise.
3. The Tax Administration team explains that it would like to set minimum capacity levels with regard to economic and financial standing and technical and/or professional ability criteria, but that it would like to set them after the publication of the contract notice because it needs more time to establish them. Please advise if this is possible.

EXERCISE 2
GROUP DISCUSSION

Discuss in two separate groups the main points that should be addressed when setting the overall strategy for the selection of economic operators.

At the end of the discussions, each group is to present its conclusions for comparison.

EXERCISE 3
CASE STUDY

Y Hospital has launched a restricted procedure for the award of a contract for the supply of specialised laboratory equipment. The contract notice indicates that economic operators must not fall under any of the mandatory grounds for exclusion and the optional grounds for exclusion specified. The contract notice also sets out that economic operators must have a EUR X minimum annual turnover in the past 3 financial years and that they must have successfully completed a minimum number of 3 contracts of similar nature and of a minimum value of EUR X each in the past 3 years. The contract notice also indicates the evidence/information that economic operators have to submit as documentary proof that the selection criteria are satisfied.

The deadline for submission of the expressions of interest/applications has now expired and assessment of the expressions of interest/applications has started. Three expressions of interest/applications have been received within the set deadline. One of the expressions of interest/applications has been submitted by a consortium composed of 3 members.

A number of questions have been raised by the team responsible for the assessment of the tenderers' qualifications, and you are asked to provide advice in your role as the Chairperson of the evaluation team.

1. The evaluation team asks you to advise on whether the expression of interest/application submitted by the consortium should be excluded. It explains that the EUR X minimum annual turnover is not satisfied by each member of the consortium but only by two out of the three members. However, the tender documents are not clear on whether the annual turnover requirement must be satisfied by the consortium as a whole or by each member of the consortium.
2. The evaluation team explains that two economic operators out of three have failed to submit the evidence required to prove that one of the selection criteria is satisfied. It asks you if it is possible to ask these economic operators to submit the missing evidence.
3. The evaluation team explains that one economic operator has indicated in its expression of interest/application that he has successfully completed three contracts of a similar nature and involving the required minimum amount in the past six years instead of the past three years, as required in the contract notice. In particular, he has successfully completed two out of the three contracts concerned in the past three years. The evaluation team asks you to advise if this economic operator can be accepted.

SECTION 4
THE LAW

Adapt all this section using relevant local legislation, processes and terminology.

1. LAW

Adapt all this section for local use – using relevant local legislation (including secondary legislation), process and terminology.

The main legal requirements relating to selection (qualification) of economic operators are set out in Directive 2004/18/EC

Recital 39 – stresses that the process of selection of economic operators must be carried out in a transparent way and using non-discriminatory criteria and means of proof. In the same spirit of transparency, contracting authorities should be required to disclose to economic operators, as soon as a contract is put out to tender, and before they are admitted to the procurement procedure, the selection criteria that will be applied.

Recital 40 – explains that in case of restricted procedure and negotiated procedure with prior publication of a contract notice, and in the competitive dialogue, contracting authorities may limit the number of economic operators to be invited to tender. This reduction should be performed on the basis of objective criteria which must be indicated in the contract notice and which do not necessarily imply weighting.

Recital 42 – stresses that the EC principle of mutual recognition of diplomas, certificates or other evidence of formal qualifications apply when evidence of a particular qualification is required for participation in a procurement process or a design contest.

Recital 43 – explains that a conviction, by final judgement or by a decision having equivalent effect, of non-compliance with environmental legislation or with legislation on unlawful agreements in public contracts as well as with legislation concerning equal treatment of workers may be considered an offence concerning the professional conduct of the economic operator or grave misconduct.

Recital 44 - stresses that environmental management schemes (when applied), whether or not they are registered under Community instruments such as EMAS, can demonstrate that the economic operator has the technical ability to perform the contract.

Recital 45 – stresses that official lists of economic operators (contractors, suppliers or service providers) or a system of certification by a public or private bodies are allowed.

Article 44 – Verification of the suitability and choice of participants and award of contracts - sets out how and when the selection of economic operators should take place. It also lays down the rules on the number of economic operators to be invited to tender in case of restricted procedures, negotiated procedures with prior publication of a contract notice or competitive dialogue procedures.

The following is a summary of the main issues covered by the *relevant* paragraphs of Article 44:

- **44(1): How and when the selection of economic operators should take place**

  Contracts shall be awarded on the basis of the award criteria allowed by the Directive, after the process of selection of economic operators has taken place on the basis of the rules laid down in the Directive.

- **44(2): Minimum capacity levels**

  Contracting authorities may require economic operators to meet minimum capacity levels with regard to economic and financial standing and technical and/or professional ability criteria.

- **44(3): Minimum and maximum number of economic operators to be invited to tender/negotiate/conduct a dialogue with**

  In restricted procedures, negotiated procedures with prior publication of a contract notice and competitive dialogue procedures, contracting authorities are obliged to fix the minimum number of economic operators they intend to invite to tender/negotiate/conduct a dialogue with, which cannot be less than the minimum specified number. Contracting authorities are allowed to fix, where they consider it appropriate, the maximum number of economic operators to be invited to tender/negotiate conduct a dialogue with.

Article 45 – Personal situation of the candidate or tenderer - sets out the grounds for mandatory exclusion and the grounds for optional exclusion of economic operators. It also sets out the documents that contracting authorities must accept as sufficient evidence of the above mentioned grounds for exclusion.

The following is a summary of the main issues covered by each paragraph of Article 45:

- **45(1): Mandatory Grounds for Exclusion**

  Contracting authorities shall exclude from participation in a public contract award procedure those economic operators that are known to have been convicted by final judgement of participation in a criminal organisation, corruption, fraud and money laundering.

- **45(2): Optional Grounds for Exclusion**

  Contracting authorities may exclude from participation in a public contract award procedure those economic operators that: are bankrupt, are subject to bankruptcy proceeding or similar, are convicted of an offence concerning their professional conduct, are guilty of grave professional misconduct, have failed to pay social security contributions or taxes, are guilty of serious misrepresentation in supplying information or refuse to supply it.

- **45(3): Evidence**

  Contracting authorities must accept the documents listed in this paragraph as sufficient evidence that the mandatory grounds for exclusion and the optional grounds for exclusion do not apply to economic operators.

- **45(4): Authorities and bodies authorised to issue the documentary evidence**

  Member States are required to designate the authorities and bodies competent to issue the documentary evidence listed in paragraph 3 above and shall inform the European Commission thereof.

Article 46 – Suitability to pursue the professional activity - sets out the rules relating to how contracting authorities may check economic operators' suitability to pursue the professional activity.

The following is a summary of the main issues covered by each paragraph of Article 46:

- **46(1): Enrolment on trade or professional registers in the Member States of establishment**

  Contracting authorities may request economic operators to prove, as prescribed in their Member States of establishment, that they are enrolled on trade or professional registers or to provide a declaration on oath or a certificate.

- **46(2): Possession of a particular authorisation or membership of a particular organisation in procedures for the award of public service contracts**

  In case of procedures for the award of public service contracts, contracting authorities may request economic operators to prove that they hold a particular authorisation or are members of a particular organisation as required in their Member States of establishment.

Article 47 – Economic and financial standing - sets out a non-exhaustive list of references that contracting authorities may require economic operators to submit to prove that they satisfy the economic and financial standing requirements.

The following is a summary of the main issues covered by each paragraph of Article 47:

- **47(1): Evidence**

  Proof of the economic operator's economic and financial standing may be furnished by one or more of the listed references. The list is non-exhaustive but only indicative.

- **47(2): Possibility for an economic operator to rely on the capacities of other entities**

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

- **47(3): Possibility for a group of economic operators to rely on the capacities of participants in the group or of other entities**

  A group of economic operators as referred to in Article 4 may rely on the capacities of participants in the group or of other entities.

- **47(4): Disclosure of the evidence requested by contracting authorities**

  Contracting authorities must specify in the contract notice or in the invitation to tender which reference or references economic operators must provide.

- **47(5): Alternative evidence if the economic operator is unable to provide the evidence requested**

  If, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.

Article 48 – Technical and/or professional ability - sets out an exhaustive list of the evidence/references that contracting authorities may require economic operators to submit to prove that they satisfy the set technical and/or professional ability requirements.

The following is a summary of the main issues covered by each paragraph of Article 48:

- **48(1): Assessment of technical and/or professional abilities**

  The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.

- **48(2): Evidence**

  Evidence of the economic operators' technical abilities may be furnished by one or more of the listed means in accordance with the nature, quantity or importance, and use of the works, supplies or services.

- **48(3): Possibility for an economic operator to rely on the capacities of other entities**

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

- **48(4): Possibility for a group of economic operators to rely on the capacities of participants in the group or of other entities**

  A group of economic operators as referred to in Article 4 may rely on the capacities of participants in the group or of other entities.

- **48(5): Supplies requiring siting or installation services, services and/or works**

  In procurement procedures for supplies requiring siting or installation operations, services and/or works, the ability of economic operators to provide the service or to execute the installation or work may be assessed with particular reference to their skills, efficiency, experience and reliability.

- **48(6): Disclosure of the evidence requested by contracting authorities**

  Contracting authorities must specify in the contract notice or in the invitation to tender which references under paragraph 2 it wishes to receive.

Article 49 – Quality assurance standards - sets out the type of evidence of quality assurance standards that contracting authorities must accept.

Article 50 - Environmental management standards - sets out the type of evidence of environmental management standards that contracting authorities must accept.

Article 51 – Additional documentation and information - allows contracting authorities to invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50.

Article 52 – Official lists of approved economic operators and certification by bodies established under public or private law - sets out the rules on the methods whereby Member States may operate official registration systems of economic operators and on how economic operators may use their registration on official lists or certification to prove to contracting authorities their satisfaction of the relevant selection criteria.

The following is a summary of the main issues covered by each paragraph of Article 52:

- **52(1): Official lists and certification**

  Member States may introduce either official lists of approved economic operators or certification by certification bodies established under public or private law which must be drawn in compliance with the rules on the permissible selection criteria (except for the payment of social security contributions and taxes) laid down in the Directive.

- **52(2): Certificates of registration as evidence of economic operators' satisfaction of the relevant selection criteria**

  When tendering for a contract, economic operators may submit to the contracting authority a certificate of registration on an official list issued by the competent authority or the certificate issued by the competent certification body as evidence of their satisfaction of the relevant selection criteria.

- **52(3): Presumption of economic operators' suitability for contracting authorities of other Member States**

  Certified registration on official lists or a certificate issued by the certification body represents, for contracting authorities of other Member States, a presumption of suitability only with regard to some of the selection criteria allowed by the Directive and which are specified in this paragraph.

- **52(4): No possibility of questioning without justification information that can be deduced from registration on official lists or certification**

  Information which can be deduced from registration on official lists or certification cannot be questioned without justification. However, with regard to the payment of social security contributions and taxes, an additional certificate may be required of any economic operator wherever a contract is offered.

- **52(5): Non-obligation for economic operators from other Member States to be registered in the host Member State**

  Economic operators from other Member States may not be obliged to be registered or certified in the host Member State in order to participate in a public contract award procedure but they must be allowed to seek registration if they require so. Contracting authorities in the host Member State shall recognise equivalent certificates from bodies established in other Member States and also accept other equivalent means of proof.

- **52(6): Open access to the lists/certification**

  Economic operators may ask at any time to be registered on an official list or for a certificate to be issued. They must be informed within a reasonably short period of time of the decision of the authority drawing up the list or of the competent certification body.

- **52(7): Certification bodies**

  The certification bodies referred to in paragraph 1 above shall be bodies complying with European certification standards.

- **52(8): Obligation to inform the Commission and the other Member States**

  Member States which have official lists or certification bodies as referred in paragraph 1 above are obliged to inform the Commission and other Member States of the address of the body to which applications should be sent.

The following Articles of Directive 2004/18/EC are also relevant:

Article 1(8) – Definitions - defines the concept of economic operator.

Article 4 – Economic operators - sets out provisions on whether economic operators (not in a group) and groups of economic operators may be imposed by contracting entities to assume a specific legal form to participate in a procurement process.

The following is a summary of the main issues covered in each paragraph of Article 4:

- **4(1): Legal form of economic operators**

  Economic operators cannot be excluded from participation in a public contract award procedure solely on the basis of the fact that the national law of the Member State in which the contract is to be awarded requires economic operators to be either natural or legal persons, if under the law of the Member State in which they are established they are entitled to provide the relevant services.

- **4(2): Groups of economic operators**

  Groups of economic operators may not be required by contracting authorities to assume a specific legal form in order to be eligible to participate in a public contract award procedure. However, contracting authorities may require them to assume a specific legal form if they are awarded a contract.

Article 19 – Reserved contracts – allows Member States to reserve contracts to sheltered workshops or to provide for such contracts to be performed in the context of sheltered employment programmes in order to support the employment of persons with disabilities.

Article 25 – Subcontracting – establishes that contracting authorities may require economic operators to disclose how they intend to subcontract and any proposed subcontractor.

Article 41 – Informing candidates and tenderers - establishes *inter-alia* that contracting authorities must inform unsuccessful economic operators about the reasons for their rejection

2. ISSUES ARISING FROM SECTION 2 - NARRATIVE

Adapt all this section for local use – using relevant local legislation, process and terminology.

This section provides further details on issues raised in Section 2 – Narrative

2.4.1.1 Mandatory grounds for exclusion *(from Section 2 – Narrative)*

A contracting authority is obliged to exclude from participation in a contract award procedure those economic operators that *are known* to have been convicted by *final judgement* for one or more of the following criminal activities (Article 45(1) of Directive 2004/18/EC):

a) participation in a criminal organisation
b) corruption
c) fraud
d) money laundering.

(see Section 5 – The Law - Part 2 for further details on this issue)

Article 45(1) of Directive 2004/18/EC provides the definitions of each of the grounds for mandatory exclusion by *referring to the relevant EC legislation* as follows:

a) participation in a criminal organisation, *as defined* in Article 2(1) of Council Joint Action 98/733/JHA (1) (published in OJ L 351, 29.12.1998, p.1);

b) corruption, *as defined* in Article 3 of the Council Act of 26 May 1997 (2) (published in OJ C 195, 25.6.1997, p. 1) and Article 3(1) of Council Joint Action 98/742/JHA (3) (published in OJ L 358, 31.12.1998, p. 2) respectively;

c) **fraud** *within the meaning* of Article 1 of the Convention relating to the protection of the financial interests of the European Communities (published in OJ C 316, 27.11.1995, p. 48);

d) **money laundering**, *as defined* in Article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (published in OJ L 166, 28.6.1991, p. 77. Directive as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 (published in OJ L 344, 28.12.2001, p. 76)).

2.4.1.1.1 The evidence that you may request from economic operators to prove that they do not fall under any of the mandatory grounds for exclusion *(from Section 2 – Narrative)*

As a proof that economic operators do not fall under any of the mandatory grounds for exclusion, a contracting authority is obliged to accept as sufficient evidence the types of evidence listed in Article 45(3) of Directive 2008/18/EC. In general terms, this evidence must take the form of an extract from the judicial record or equivalent or, where a country does not issue such documents, a declaration on oath or solemn declaration. Each Member State is obliged to inform the European Commission of the identity of the authorities that are authorised to issue the listed

evidence (Article 45(4)).Where there are doubts on the personal situation of economic operators a contracting authority is allowed to apply directly to the competent authorities (Article 45(1)). ***See Section 5 – The Law – Part 2 for further details on these issues***

Documents that you shall accept as sufficient evidence

As a proof that economic operators do not fall under any of the mandatory grounds for exclusion, a contracting authority is obliged to accept as sufficient evidence the documents listed in Article 45(3). They are as follows:

- an *extract from the "judicial record"* or failing that, *an equivalent document* issued by a judicial or administrative authority designated as competent to issue this documentary evidence by the State of establishment of the economic operator concerned
- or, where a country does not issue such documents, *a declaration on oath*
- or, in those Member States where there is no provision for declarations on oath, a *solemn declaration* made by the economic operator concerned before a judicial or administrative authority designated as competent for this purpose by the State of establishment of the economic operator, a notary or a professional or trade body designated as competent for this purpose by the State of establishment of the economic operator.

Authorities and bodies authorised to issue the documentary evidence

Each Member State is obliged to inform the European Commission of the identity of the authorities and bodies that it has designated as competent to issue the above mentioned documentary evidence (Article 45(4)).

Investigations

In case a contracting authority has doubts concerning the personal situation of an economic operator, it may also apply directly to the competent authorities to obtain any information it considers necessary on the personal situation of the economic operators. This applies also with regard to economic operators established in a State other than that of the contracting authority (Article 45(1)).

2.4.1.2.1 The evidence that you may request from economic operators to prove that they do not fall under the optional grounds for exclusion *(from Section 2 – Narrative)*

A contracting authority is obliged to accept as sufficient evidence that economic operators do not fall under some of the optional grounds for exclusion, the types of evidence listed in Article 45(3) of Directive 2008/18/EC. These types of evidence vary depending on the optional ground for exclusion concerned. With regard to grave professional misconduct and serious misrepresentation of information it is for the contracting authority to determine the acceptable type of evidence. Each Member State is obliged to inform the European Commission of the identity of the authorities that are authorised to issue the listed evidence (Article 45(4)) - ***See Section 5 – The Law – Part 2 for further details on these issues***

In accordance with the provisions of Article 45(3), a contracting authority is obliged to accept as sufficient evidence that economic operators:

a) are not bankrupt or similar, not subject of proceedings for declaration of bankruptcy or similar, and have not been convicted of an offence concerning the professional conduct by a judgement which has the force of *res judicata*

- an *extract from the "judicial record"* or failing that, an equivalent document issued by a judicial or administrative authority designated as competent to issue this documentary evidence by the State of establishment of the economic operator concerned

b) have not failed to fulfil their obligations to pay social security contributions and taxes

- a *certificate* issued by the authority designed as competent for this purpose by the State of establishment of the economic operator concerned

Where a country does not issue the documents or certificates mentioned under letters a) and b) above, they may be replaced by a *declaration on oath* or, in those Member States where there is no provision for declarations on oath, by a *solemn declaration* made by the economic operator concerned before a judicial or administrative authority designated as competent for this purpose by the State of establishment of the economic operator, a notary or a professional or trade body designated as competent for this purpose by the State of establishment of the economic operator.

N.B. *It should be noted that no specific documentary evidence is indicated by Article 45(3) with regard to* ***grave professional misconduct and serious misrepresentation of information or failure to supply such information****. In these cases, it is left to the contracting authority to determine which type of evidence would be acceptable (this must be done, of course, in the respect of the basic public procurement principles). For example, for some contracting authorities, a declaration on oath or a solemn declaration (as referred above) or a simple self-declaration made by the economic operator concerned that it does not fall under these grounds for exclusion would suffice.*

Authorities and bodies authorised to issue the documentary evidence

Each Member State is obliged to inform the European Commission of the identity of the authorities and bodies it has designated as competent to issue the above mentioned documentary evidence (Article 45(4)).

2.4.2 Suitability to pursue the professional activity

2.4.2.1 General principles *(from Section 2 – Narrative)*

A contracting authority is allowed to check if economic operators are generally suitable and fit to carry out the professional activity by asking them to prove that they are enrolled on trade or professional registers in their Member States of establishment. In case no relevant registers exist

in these States, economic operators may produce a declaration on oath or a certificate in

accordance with what is prescribed by their national laws (Article 46(1)). The registers and corresponding declarations or certificates for each Member State are listed in the relevant Annexes of Directive 2004/18/EC - ***See Section 5 – The Law – Part 2 for further details on this issue.***

Directive 2004/18/EC lists down, for each Member State, the trade and/or professional registers and corresponding declarations or certificates referred to in Article 46(1). These lists are contained in Annex IX A (for public works contracts), Annex IX B (for public supply contracts) and Annex C (for public service contracts) of Directive 2004/18/EC. They are as follows:

ANNEX IX A (1)

PUBLIC WORKS CONTRACTS

The professional registers and corresponding declarations and certificates for each Member State are:

— in Belgium, the 'Registre du commerce'/'Handelsregister';

— in Denmark, the 'Erhvervs-og Selskabsstyrelsen';

— in Germany, the 'Handelsregister' and the 'Handwerksrolle';

— in Greece, the 'Μητρώο Εργοληπτικών Επιχειρήσεων' – ΜΕΕΠ of the Ministry for Environment, Town and Country Planning and Public Works (ΥΠΕΧΩΔΕ);

— in Spain, the 'Registro Oficial de Empresas Clasificadas del Ministerio de Hacienda';

— in France, the 'Registre du commerce et des sociétés' and the 'Répertoire des métiers';

— in Ireland, the contractor may be requested to provide a certificate from the Registrar of companies or the Registrar of Friendly Societies or, if this is not the case, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place and under a given business name;

— in Italy, the 'Registro della Camera di commercio, industria, agricoltura e artigianato';

— in Luxembourg, the 'Registre aux firmes' and the 'Rôle de la chambre des métiers';

— in the Netherlands, the 'Handelsregister';

— in Austria, the 'Firmenbuch', the 'Gewerberegister', the 'Mitgliederverzeichnisse der Landeskammern';

— in Portugal, the 'Instituto dos Mercados de Obras Públicas e Particulares e do Imobiliário' (IMOPPI)(CAEOPP);

— in Finland, the 'Kaupparekisteri'/ 'Handelsregistret';

— in Sweden, 'aktiebolags-, handels- eller föreningsregistren';

— in the United Kingdom, the contractor may be requested to provide a certificate from the Registrar of Companies or, if this is not the case, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place and under a given business name.

ANNEX IX B

PUBLIC SUPPLY CONTRACTS

The relevant professional or trade registers and the corresponding declarations and certificates are:

— in Belgium, the 'Registre du commerce/Handelsregister';

— in Denmark, 'Erhvervs- og Selskabsstyrelsen';

— in Germany, the 'Handelsregister' and 'Handwerksrolle';

— in Greece, the 'Βιομηχανικό ή Εμπορικό ή Βιοτεχνικό Επιμελητήριο';

— in Spain, the 'Registro Mercantil' or, in the case of non-registered individuals, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question;

— in France, the 'Registre du commerce et des sociétés' and 'Répertoire des métiers';

— in Ireland, the supplier may be requested to provide a certificate from the Registrar of companies or the Registrar of Friendly Societies that he is certified as incorporated or registered or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place under a given business name and under a specific trading name;

— in Italy, the 'Registro della Camera di commercio, industria, agricoltura e artigianato', and 'Registro delle commissioni provinciali per l'artigianato';

— in Luxembourg, the 'Registre aux firmes' and 'Rôle de la chambre des métiers';

— in the Netherlands, the 'Handelsregister';

— in Austria, the 'Firmenbuch', the 'Gewerberegister', the 'Mitgliederverzeichnisse der Landeskammern';

— in Portugal, the 'Registo Nacional das Pessoas Colectivas';

— in Finland, the 'Kaupparekisteri' and 'Handelsregistret';

— in Sweden, 'aktiebolags-, handels- eller föreningsregistren';

— in the United Kingdom, the supplier may be requested to provide a certificate from the Registrar of Companies stating that he is certified as incorporated or registered or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established in a specific place under a given business name and under a specific trading name.

ANNEX IX C

PUBLIC SERVICE CONTRACTS

The relevant professional and trade registers or declarations or certificates are:

— in Belgium, the 'Registre du commerce/Handelsregister' and the 'Ordres professionels/Beroepsorden';

— in Denmark, 'Erhvervs- og Selskabsstyrelsen';

— in Germany, the 'Handelsregister', the 'Handwerksrolle', the 'Vereinsregister', 'Partnerschaftsregister' and the 'Mitgliedsverzeichnisse de Berufskammern der Ländern';

— in Greece, the service provider may be asked to provide a declaration on the exercise of the profession concerned made on oath before a notary; in the cases provided for by existing national legislation, for the provision of research services as mentioned in Annex I A, the professional register 'Μητρώο Μελετητών' and 'Μητρώο Γραφείων Μελετών';

— in Spain, the 'Registro Oficial de Empresas Clasificadas del Ministerio de Hacienda';

— in France, the 'Registre du commerce' and the 'Répertoire des métiers';

— in Ireland, the service provider may be requested to provide a certificate from the Registrar of companies or the Registrar of Friendly Societies or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place under a given business name and under a specific trading name;

— in Italy, the 'Registro della Camera di commercio, industria, agricoltura e artigianato', the 'Registro delle commissioni provinciali per l'artigianato' or the 'Consiglio nazionale degli ordini professionali';

— in Luxembourg, the 'Registre aux firmes' and the 'Rôle de la chambre des métiers';

— in the Netherlands, the 'Handelsregister';

— in Austria, the 'Firmenbuch', the 'Gewerberegister', the 'Mitgliederverzeichnisse der Landeskammern';

— in Portugal, the 'Registo nacional das Pessoas Colectivas';

— in Finland, the 'Kaupparekisteri' and 'Handelsregistret';

— in Sweden, 'aktiebolags-, handels- eller föreningsregistren';

— in the United Kingdom, the service provider may be requested to provide a certificate from the Registrar of Companies or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established in a specific place under a given business name.

2.4.3.4 The evidence that you may request from economic operators as proof of their economic and financial standing *(from Section 2 – Narrative)*

Directive 2004/18/EC lists down the evidence that, as a general rule, a contracting authority may request from economic operators as proof of their economic and financial standing (Article 47(1)). However, this list is only indicative and not exhaustive. Therefore a contracting authority may also require other evidence than that listed in the Directive (this must be done, of course, in the respect of the basic public procurement principles). - ***See Section 5 – The Law – Part 2 for further details on this issue***

Non-exhaustive list of evidence that you may request from economic operators

A contracting authority may, *as a general rule*, request as a proof of the economic operators economic and financial standing the references listed in Article 47(1). These references are as follows:

(a) appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;

(b) the presentation of balance-sheets or extracts from the balance-sheets, where publication of the balance-sheet is required under the law of the country in which the economic operator is established;

(c) a statement of the undertaking's overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, as far as the information on these turnovers is available.

N.B. *A contracting authority may choose amongst the above mentioned references which one(s) to request from economic operators. Also, since the above mentioned list is only indicative and non-exhaustive, a contracting authority may also ask for references that are different from the listed ones. Obviously, this must be done in the respect of the basic public procurement principles.*

Evidence that third party resources are available

As explained in Section 2 Narrative sub-section 2.4.3.3, in case an economic operator relies on the capacities of other entities for a particular contract, this may be proved to the contracting authority, for example, by producing an undertaking by those entities to that effect (Article 47(2)).

Alternative evidence

If, for any valid reason, an economic operator is unable to provide the reference(s) requested by the contracting authority, then he is allowed to prove his economic and financial standing by any other document which the contracting authority considers appropriate (Article 47(5) of the Directive).

2.4.4.4 The evidence that you may request from economic operators as proof of their technical and/or professional ability (*from Section 2 – Narrative)*

Directive 2004/18/EC lays down an exhaustive list of evidence that a contracting authority may request from economic operators as proof of their technical and/or professional ability (Article 48(2)). Being the list exhaustive, a contracting authority may not request other evidence than that listed. However, a contracting authority is not obliged to request all the listed evidence but only that evidence that is necessary to assess the technical and/or professional ability of economic operators in relation to the contract to be awarded. This list of evidence is divided depending on the subject-matter of the contract (*i.e.* supplies, works or services) - See Section 5 – The Law – Part 2 for further details on this issue

Exhaustive list of evidence that you may request from economic operators

As a proof of the technical and/or professional ability of economic operators, a contracting authority may request only the references listed in Article 48(2). These references are as follows:

1. **For works:**
   - a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where appropriate, the competent entity shall submit these certificates to the contracting authority direct (Article 48(2)(a)(i))
2. **For supplies and services:**
   - a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, whether public or private, involved. Evidence of delivery and services provided shall be given:
     - where the recipient was a contracting authority, in the form of certificates issued or countersigned by the competent authority,
     - where the recipient was a private purchaser, by the purchaser's certification or, failing this, simply by a declaration by the economic operator (Article 48(2)(a)(ii)
   - a description of the technical facilities and measures used by the supplier or service provider for ensuring quality and the undertaking's study and research facilities (Article 48(2)(c))
   - where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authorities or on their behalf by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, on the production capacities of the supplier or the technical capacity of the service provider and, if necessary, on the means of study and research which are available to it and the quality control measures it will operate (Article 48(2)(d))

3. For products to be supplied:

- samples, descriptions and/or photographs, the authenticity of which must be certified if the contracting authority so requests (Article 48(2)(j)(i))
- certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to specifications or standards (Article 48(2)(j)(ii))

N.B: *It should be noted that in case contracting authorities required the production of certificates drawn up by independent bodies attesting the compliance of economic operators with certain quality assurance standards, they must refer to the quality assurance systems based on the European standards series certified by bodies conforming to the European standard series concerning certification. They must also recognise equivalent certificates from bodies established in other Member States and accept evidence of equivalent quality assurance measures from economic operators (Article 49 of the Directive).*

4. For works and services

- the educational and professional qualifications of the service provider or contractor and/or those of the undertaking's managerial staff and, in particular, those of the person or persons responsible for providing the services or managing the work (Article 48(2)(e))
- for public works contracts and public services contracts, and only in appropriate cases, an indication of the environmental management measures that the economic operator will be able to apply when performing the contract (Article 48(2)(f))

N.B. *It should be noted that if contracting authorities require the production of certificates drawn up by independent bodies attesting the compliance of the economic operators with certain environmental management standards, they shall refer to the Community Eco-Management and Audit Scheme (EMAS) or to environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification. They must also recognise equivalent certificates from bodies established in other Member States and accept other evidence of equivalent environmental management measures from economic operators (Article 50 of the Directive).*

- a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last three years (Article 48(2)(g))
- a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract (Article 48(2)(h))

5. For services

- an indication of the proportion of the contract which the service provider intends possibly to subcontract (Article 48(2)(i))

6. For all contracts

- an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work (Article 48(2)(b))

N.B. *The above mentioned list of references is exhaustive. Therefore a contracting may not require other means of proof/references that those listed above. However, a contracting authority is not obliged to request all the above listed references. On the contrary, the contracting authority must choose from the above mentioned list of references only those (one or more) that are strictly necessary to assess the economic operators' technical and/or professional ability taking into account the nature, quantity, or importance, and use of the works, supplies or services.*

Comment

The evidence listed above is divided depending on the subject-matter of the contract (*i.e.* supplies, works or services). It must be noted, however, that Article 48(2) does not take into account the situation where there are mixed contracts (for example, services are provided under a supply contract or where supplies are provided under a service contract etc.). The prevailing interpretation is that appropriate evidence may be requested taking into account the specific nature of the mixed contract. Therefore, a contracting authority may request, for example, the educational and professional qualifications of the persons responsible for the provision of a specific service to be provided under a supply contract.

Evidence that third party resources will be available

As explained in Section 2 Narrative sub-section 2.4.4.3, in case an economic operator relies on the capacities of other entities for a particular contract, this may be proved to the contracting authority, for example, by producing an undertaking by those entities to that effect (Article 48(3)).

Supplies requiring siting or installation services, services and/or works

Article 48(5) of the Directive, with regard to those procedures that have as their object supplies requiring siting or installation work, the provision of services and/or the execution of works, specifies that a contracting authority may evaluate the ability of economic operators to provide the service or to execute the installation or work with regard to their skills, efficiency, experience and reliability (Article 48(5)). It is submitted that economic operators' skills, efficiency, experience and reliability are to be assessed only on the basis of the references listed in Article 48(2) and examined above.

2.5 Official lists of approved economic operators (from Section 2 – Narrative)

Directive 2004/18/EC allows Member States to introduce official lists of approved economic operators and certification by certification bodies complying with European certification standards. In very general terms, these registration systems must be set up and operated in compliance with the rules on the permissible selection criteria laid down in Directive 2004/18/EC. Registered economic operators shall not be treated more favourably than those that are not registered and the registration system must allow economic operators to ask at any time to be registered. Economic operators on such lists in their Member State of establishment may claim, within certain limits, such registration as alternative evidence that they fulfil the selection criteria on the basis of which the registration took place (Article 52) - ***See Section 5 – The Law – Part 2 for further details on these issues***

Article 52 of Directive 2004/18/EC recognises that Member States may introduce either official lists of approved economic operators or certification by certification bodies established under public or private law and complying with European certification standards (Article 52(1) and 52 (7)).

General principles concerning the drawing up of official lists/certification

These registration systems must be drawn up in compliance with the rules on the permissible selection criteria (except for the payment of social security contributions and taxes) laid down in the Directive. The rules on reliance by an economic operator on the resources of other entities which are laid down by the Directive must also be applied when registration is sough by economic operators relying on these resources. In this latter case, economic operators must prove that the resources relied on will be available to them throughout the period of registration/certification (Article 52(1)).

Certificates of registration as evidence of economic operators' satisfaction of the relevant selection criteria

When economic operators, which are registered on official lists or are in possession of a certificate in their Member State of establishment, tender for a specific contract in their home State, they may submit to the contracting authority concerned the certificates of registration issued by the competent authorities as alternative evidence that they comply with the relevant selection criteria. The certificates shall state the references which enabled them to be registered in the list/to obtain certification, and the classification given in that list (Article 52(2)).

When economic operators are registered on official lists or are in possession of a certificate in their Member State of establishment, a contracting authority of another Member State must accept those certificates as evidence that the relevant selection criteria are met (Article 52(3) and 52(4)). However, this is the case only with regard to some of the selection criteria allowed by the Directive (see Article 52(3)).

N.B. *It is important to stress that the evidential value of a certificate of registration on an official list of approved economic operators or a certificate issued by a certification body is limited to the selection criteria on the basis of which the registration was made or the certificate was issued. For example, where registration depends on the proof that economic operators are registered in a professional/trade register, or that have not been convicted of an offence concerning their professional conduct, the registration must be accepted by a contracting authority as conclusive evidence of the selection criteria in question only.*

Non-obligation for economic operators from other Member States to be registered in the host Member State in order to tender

Economic operators from other Member States cannot be obliged to be registered on an official list of the host Member State as a condition for participation in a procurement process. However, they may themselves ask for registration. This registration must be done on the basis of the same evidence required from national economic operators and in any event, on the basis only of the evidence provided for by the Directive (Article 52(5)).

Open access to the official lists/certification

Economic operators may ask at any time to be registered on an official list or for a certificate to be issued. They must be informed within a reasonably short period of time of the decision of the authority drawing up the list or of the competent certification body (Article 52(6)).

Obligation to inform the European Commission and other Member States

Member States which have official lists or certification bodies are obliged to inform the Commission and other Member States of the address of the body to which applications should be sent (Article 52(8)).

2.12.1.2 Legal form of economic operators (not in a group)

A contracting authority may require national economic operators, under national law, that they assume a specific legal form (*i.e.* to be either a natural or legal person) in order for them to provide the relevant service and therefore in order for them to be eligible to participate in the corresponding contract award procedure. However, a contracting authority is not allowed to apply the same requirement to foreign economic operators which are legally established and authorised to provide the relevant service in their Member States of establishment. This is in line with the EC Treaty principle of freedom to provide services and it is explicitly recognised by Directive 2004/18/EC - ***See Section 5 – The Law – Part 2 for further details on this issue***

Article 4(1) of Directive 2004/18/EC explicitly establishes that a contracting authority cannot exclude from participation in a public contract award procedure economic operators solely on the basis of the fact that the national law of the contracting authority requires them to be either natural or legal persons, if under the law of the Member State in which they are established they are entitled to provide the relevant services.

However, in case the economic operators are legal persons, a contracting authority is allowed to require that they indicate in the tender or request to participate, the names and relevant professional qualifications of the staff that will be responsible for the performance of the contract in question. This provision applies in case of public service and public works contracts, as well as in case of public supply contracts which include services and/or siting and installation operations (Article 4(1)).

2.12.5 Reserved contracts (sheltered workshops or sheltered employment programmes) ***(from Section 2 – Narrative)***

Directive 2004/18/EC recognises that Member States may provide for reserved contracts. Even though these contracts are subject to the Directive, participation in the contract award procedures may be restricted in order to support the employment of persons with disabilities. The contract notice shall indicate if the contract is reserved (Article 19). – ***See Section 5 – The Law – Part 2 for further details on this issue***

Article 19 of Directive 2004/18/EC explicitly states that Member States are allowed to reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.

On the next few pages you can see the judgments of the ECJ in the following cases, referred to in the Narrative:

C-389/92 Ballast Nedam Groep NV v Belgian State

C-5/97 Ballast Nedam Groep NV v Belgian State

C-176/98 Holst Italia SpA v Comune di Cagliari, intervener: Ruhrwasser AG International Water Management

C-314/01 Siemens AG Österreich, ARGE Telekom & Partner v Hauptverband der österreichischen Sozialversicherungsträger, joined party: Bietergemeinschaft EDS/ORGA

Judgment of the Court (Fifth Chamber) of 14 April 1994.

Ballast Nedam Groep NV v Belgian State.

Reference for a preliminary ruling: Raad van State - Belgium.

Freedom to provide services - Public works contracts - Registration of contractors - Relevant entity.

Case C-389/92.

European Court reports 1994 Page I-01289

Keywords

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Approximation of laws - Procedures for the award of public works contracts - Directives 71/304/EEC and 71/305/EEC - Registration of contractors - Application by a holding company not itself carrying out the works but availing itself, for the purpose of proving its standing and competence, of references relating to its subsidiaries - Whether permissible - Conditions - Assessment by the national court

(Council Directives 71/304 and 71/305)

Summary

Directive 71/304 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches and Directive 71/305 concerning the coordination of procedures for the award of public works contracts must be interpreted as meaning that they permit, for the purposes of the assessment of the criteria to be satisfied by a contractor when an application for registration by the dominant legal person of a group is being examined, account to be taken of companies belonging to that group, provided that the legal person in question establishes that it actually has available the resources of those companies which are necessary for carrying out the works.

In a disputed case, it is for the national court to assess, in the light of the factual and legal circumstances before it, whether such proof has been produced.

Parties

In Case C-389/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Raad van State, Belgium, for a preliminary ruling in the proceedings pending before that court between

Ballast Nedam Groep NV

and

Belgian State

on the interpretation of Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches (Official Journal, English Special Edition 1971 (II), p. 678) and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682),

THE COURT (Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, R. Joliet, G.C. Rodríguez Iglesias, F. Grévisse (Rapporteur) and M. Zuleeg, Judges,

Advocate General: C. Gulmann,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Ballast Nedam Groep NV, the applicant in the main proceedings, by Marc Senelle, of the Brussels Bar,

- the Commission of the European Communities, by Hendrik van Lier, Legal Advisor, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the applicant in the main proceedings and the Commission at the hearing on 13 January 1994,

after hearing the Opinion of the Advocate General at the sitting on 24 February 1994,

gives the following

Judgment

Grounds

1 By a judgment of 29 September 1992, which was received at the Court on 6 November 1992, the Raad van State, Belgium, referred to the Court for a preliminary ruling pursuant to Article 177 of the EEC Treaty a question concerning the interpretation of Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches (Official Journal, English Special Edition 1971 (II), p. 678) and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682).

2 The question arose in the course of a dispute between Ballast Nedam Groep, a company governed by Netherlands law (hereinafter referred to as "BNG"), and the Belgian State concerning the non-renewal of BNG' s registration as a contractor.

3 In the course of a review of the position of registered contractors provided for by a Royal Decree of 9 August 1982 laying down measures for the application of a Decree-Law of 3 February 1947 organizing the registration of contractors, the Minister for Public

Works decided in 1987 not to renew the registration hitherto granted to BNG. The Minister' s decision, which followed an adverse opinion by the Committee for the Registration of Contractors, was taken on the grounds that the company could not be regarded as a works contractor because, as a holding company, it did not itself execute works but, for the purpose of proving its standing and competence, referred to works carried out by its subsidiaries, which were separate legal persons.

4 BNG applied to the Raad van State for the annulment of both the Registration Committee' s opinion and the decision of the Minister for Public Works.

5 The Raad van State considered that the case turned on the interpretation of the Community directives concerning public works contracts and decided to refer the following question to the Court for a preliminary ruling:

"Do Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches and Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, in particular Articles 1, 6, 21, 23 and 26, permit, in the event of the Belgian rules on the registration of contractors being applied to the dominant legal person within a 'group' governed by Netherlands law, in connection with the assessment of the criteria relating inter alia to technical competence which a contractor must satisfy, account to be taken only of that dominant legal person as a legal entity and not of the 'companies within the group' each of which, having its own legal personality, belongs to that 'group' ?"

6 Directives 71/304 and 71/305 are designed to ensure freedom to provide services in the field of public works contracts. Thus the first of those directives imposes a general duty on Member States to abolish restrictions on access to, participation in and the performance of public works contracts and the second directive provides for coordination of the procedures for the award of public works contracts (see the judgment in Case 76/81 Transporoute [1982] ECR 417, at paragraph 7).

7 In regard to such coordination, Title IV of Directive 71/305 has laid down a number of common rules on the participation of contractors in public works contracts. Amongst those rules are to be found in particular Article 21, which authorizes groups of contractors to submit tenders and Article 28 which, in connection with the drawing up of official lists of recognized contractors, refers to the criteria for qualitative selection defined by Articles 23 to 26, which also specify the manner in which undertakings may furnish proof that they satisfy those criteria (see the judgment in Transporoute, cited above, at paragraph 8).

8 The applicant in the main proceedings and the Commission maintain, in essence, that for the purposes of the assessment of the criteria which must be satisfied by a contractor when an application for registration submitted by the dominant legal person in a group governed by Netherlands law is being examined, those directives permit account to be taken of companies which, while each retaining its own legal personality, belong to the group.

9 In order to reply to the question raised by the national court, consideration must be given to whether a holding company may be precluded from participating in procedures for public works contracts on the ground that it does not itself carry out such works and, if that is not the case, under what conditions it may show that it has the necessary standing and competence to participate.

10 It is clear from the actual wording of Directive 71/304 that public works contracts may be awarded to persons covered by that directive who carry out the work through agencies or branches.

11 Article 21 of Directive 71/305, one of the common rules on participation in contract award procedures, expressly authorizes groups of contractors to submit tenders and the awarding authority may not require such groups to assume a specific legal form before the contract is awarded. Article 16(k) of Directive 71/305, which is one of the common rules for advertising tendering procedures, provides only that, in open procedures, the notice is to lay down the specific legal form which will, if necessary, be assumed by the group of contractors to whom the contract is awarded.

12 Finally, the sole purpose of the criteria for qualitative selection laid down in Articles 23 to 26 of Directive 71/305, to which Article 28 of that directive on official lists of recognized contractors refers, is to define the rules relating to the objective assessment of the standing and, in particular, technical knowledge and ability of contractors. Article 26(e) provides expressly that a statement of the technicians or technical divisions which the contractor can call upon for carrying out the work, whether or not they belong to the firm, may be furnished as proof of such technical knowledge or ability.

13 As the Commission rightly points out, it is clear from all those provisions that not only a natural or legal person who will himself carry out the works but also a person who will have the contract carried out through agencies or branches or will have recourse to technicians or outside technical divisions, or even a group of undertakings, whatever its legal form, may seek to be awarded public works contracts.

14 Moreover, it should be noted that Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC (Official Journal 1989 L 210, p. 1), in particular with the aim of defining more precisely what is meant by public works contracts, expressly stated in Article 1 that such contracts have as their object either the execution, or both the execution and design, of works or a work, or "the execution by whatever means of a work corresponding to the requirements specified by the contracting authority". That definition confirms that a contractor who has neither the intention nor the resources to carry out the works himself may participate in a procedure for the award of a public works contract.

15 Accordingly a holding company which does not itself execute works may not, because its subsidiaries which do carry out works are separate legal persons, be precluded on that ground from participation in public works contract procedures.

16 However, it is for the authorities awarding contracts, as Article 20 of Directive 71/305 specifies, to check the suitability of contractors in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 25 to 28 of that directive.

17 When, in this connection, a company produces references relating to its subsidiaries in order to prove its economic and financial standing and technical knowledge and ability for the purpose of registration on the official list of recognized undertakings, it must establish that, whatever the nature of its legal link with those subsidiaries, it actually has available to it the resources of the latter which are necessary for carrying out the contracts. It is for the national court to assess, in the light of the factual and legal circumstances before it, whether such proof has been produced in the main proceedings.

18 The reply to the question referred to the Court for a preliminary ruling must therefore be that Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts must be interpreted as meaning that they permit, for the purposes of the assessment of the criteria to be satisfied by a contractor when an application for registration by the dominant legal person of a group

is being examined, account to be taken of companies belonging to that group, provided that the legal person in question establishes that it actually has available the resources of those companies which are necessary for carrying out the works. It is for the national court to assess whether such proof has been produced in the main proceedings.

Decision on costs

Costs

19 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Raad van State, Belgium, by judgment of 29 September 1992, hereby rules:

Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts must be interpreted as meaning that they permit, for the purposes of the assessment of the criteria to be satisfied by a contractor when an application for registration by the dominant legal person of a group is being examined, account to be taken of companies belonging to that group, provided that the legal person in question establishes that it actually has available the resources of those companies which are necessary for carrying out the works. It is for the national court to assess whether such proof has been produced in the main proceedings.

JUDGMENT OF THE COURT (Third Chamber)

18 December 1997 (1)

(Freedom to provide services — Public-works contracts — Registration of contractors — Entity to be taken into account)

In Case C-5/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Raad van State, Belgium, for a preliminary ruling in the proceedings pending before that court between

Ballast Nedam Groep NV

and

Belgian State

on the interpretation of the judgment of the Court of 14 April 1994 in Case C-389/92 *Ballast Nedam Groep* [1994] ECR I-1289,

THE COURT (Third Chamber),

composed of: J.C. Moitinho de Almeida, acting for the President of the Chamber, J.-P. Puissochet (Rapporteur) and L. Sevón, Judges,

Advocate General: A. La Pergola,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Ballast Nedam Groep NV, the applicant in the main proceedings, by Marc Senelle, of the Brussels Bar,

— the Belgian Government, by Jan Devadder, General Adviser at the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,

— the Commission of the European Communities, by Hendrik van Leer, Legal Adviser, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 23 October 1997,

gives the following

Judgment

1. By judgment of 18 December 1996, received at the Court on 13 January 1997, the Raad van State (Council of State), Belgium, referred to the Court under Article 177 of the EC Treaty a question concerning the interpretation of the judgment given by the Court in Case C-389/92 *Ballast Nedam Group* v *Belgian State* [1994] ECR I-1289 (hereinafter '*BNG I*').

2. The question has been raised in proceedings between Ballast Nedam Groep, a company incorporated under Netherlands law (hereinafter 'BNG'), and the Belgian State concerning non-renewal of the registration of that undertaking. Those proceedings have already given rise to the submission of a preliminary question on the interpretation of Council Directive 71/304/EEC of 26 July 1971 concerning the abolition

of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches (OJ, English Special Edition 1971 (II), p. 678) and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682).

3. The question submitted by the Raad van State in its first reference for a preliminary ruling was as follows:

'Do Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, in particular Articles 1, 6, 21, 23 and 26, permit, in the event of the Belgian rules on the registration of contractors being applied to the dominant legal person within a "group" governed by Netherlands law, in connection with the assessment of the criteria relating *inter alia* to technical competence which a contractor must satisfy, account to be taken only of that dominant legal person as a legal entity and not of the "companies within the group" each of which, having its own legal personality, belongs to that "group"?'

4. In its judgment in *BNG I*, the Court replied to that question that Directives 71/304 and 71/305 had to be interpreted as permitting, for the purposes of the assessment of the criteria to be satisfied by a contractor when an application for registration by the dominant legal person of a group was being examined, account to be taken of companies belonging to that group, provided that the legal person in question established that it actually had available the resources of those companies which were necessary for carrying out the works. It was for the national court to assess whether such proof had been produced in the main proceedings.

5. Since the parties to the proceedings cannot agree on the meaning of that ruling, the Raad van State has decided to refer to the Court a further question for a preliminary ruling, worded as follows:

'Should the word "permit" in the phrase "permit ... account to be taken ..." appearing in the operative part of the judgment given on 14 April 1994 in Case C-389/92 be understood as meaning "require"?

If the word "permit" in the abovementioned phrase is not to be understood as being equivalent to the word "require", does that mean that the Member State in question enjoys a discretionary power in the matter, even where the condition laid down by the Court is satisfied?

In which cases and on what grounds is it then appropriate to take account of the companies belonging to a dominant legal person of a group?'

6. By this question the national court is asking in effect whether it follows from the judgment in *BNG I* that Directives 71/304 and 71/305 are to be interpreted as meaning that the authority competent to decide on an application for registration submitted by a dominant legal person of a group is under an obligation, where that person is established as having actual power of disposition over the resources of the companies belonging to the group necessary for performing works contracts, to take account of those companies.

7. BNG and the Commission consider that that question calls for an affirmative reply. In their view, where proof is produced that the dominant legal person of a group has actual power of disposition over the resources of the companies belonging to that group, the competent authority must necessarily take account of those companies.

8. For its part, the Belgian Government contends, with reference to the judgment of the Court in Joined Cases 27/86, 28/86 and 29/86 *CEI and Others* [1987] ECR 3347, that the Member States enjoy a margin of discretion in assessing the classification criteria to be satisfied by a contractor upon examination of an application for registration lodged by a dominant legal person of a group, even if the condition laid down by the Court is satisfied.

9. The reference to that case is not relevant. Whilst, as the Court pointed out at paragraph 22 of the judgment in *CEI and Others*, the criteria for classification in the various official lists of recognized contractors provided for in Article 28 of Directive 71/305 are not harmonized, that is not true of some of the qualitative selection criteria laid down in Articles 23 to 28, in particular references attesting to contractors' financial and economic standing and their technical knowledge and ability provided for in Articles 25 and 26. It is clear from the judgment in *BNG I* that the condition laid down by the Court therein specifically relates to references for demonstrating the technical, financial and economic standing of a company seeking registration on an official list of approved contractors.

10. In that judgment, the Court stated first that a holding company which does not itself execute works may not, because its subsidiaries which do carry out works are separate legal persons, be precluded on that ground from participation in public works contract procedures (paragraph 15).

11. It went on to state that it is for the contract-awarding authorities, as Article 20 of Directive 71/305 specifies, to check the suitability of contractors in accordance with the criteria referred to in Articles 25 to 28 of that directive (paragraph 16).

12. Finally, the Court explained that when a company produces references relating to its subsidiaries in order to prove its economic and financial standing and technical knowledge, it must establish that, whatever the nature of its legal link with those subsidiaries, it actually has available to it the resources of the latter which are necessary for carrying out the contracts. It is for the national court to assess, in the light of the factual and legal circumstances before it, whether such proof has been produced in the main proceedings (paragraph 17).

13. It follows from all the foregoing considerations that a holding company which does not itself carry out works may not be precluded from participating in procedures for the award of public works contracts, and, therefore, from registration on an official list of approved contractors if it shows that it actually has available to it the resources of its subsidiaries necessary to carry out the contracts, unless the

references of those subsidiaries do not themselves satisfy the qualitative selection criteria mentioned in Articles 23 to 28 of Directive 71/305.

14. The reply to the question submitted must therefore be that Directives 71/304 and 71/305 are to be interpreted as meaning that the authority competent to decide on an application for registration submitted by a dominant legal person of a group is under an obligation, where it is established that that person actually has available to it the resources of the companies belonging to the group that are necessary to carry out the contracts, to take account of the references of those companies in assessing the suitability of the legal person concerned, in accordance with the criteria mentioned in Articles 23 to 28 of Directive 71/305.

Costs

15. The costs incurred by the Belgian Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the question referred to it by the Raad van State, Belgium, by judgment of 18 December 1996, hereby rules:

Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts are to be interpreted as meaning that the authority competent to decide on an application for registration submitted by a dominant legal person of a group is under an obligation, where it is established that that person actually has available to it the resources of the companies belonging to the group that are necessary to carry out the contracts, to take account of the references of those companies in assessing the suitability of the legal person concerned, in accordance with the criteria mentioned in Articles 23 to 28 of Directive 71/305.

Moitinho de Almeida
Puissochet
Sevón

Delivered in open court in Luxembourg on 18 December 1997.

R. Grass

J.C. Moitinho de Almeida

Registrar

For the President of the Third Chamber

1: Language of the case: Dutch.

JUDGMENT OF THE COURT (Fifth Chamber)

2 December 1999 (1)

(Directive 92/50/EEC — Public service contracts — Proof of standing of the service provider — Possibility of relying on the standing of another company)

In Case C-176/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunale Amministrativo Regionale per la Sardegna, Italy, for a preliminary ruling in the proceedings pending before that court between

Holst Italia SpA

and

Comune di Cagliari,

intervener:

Ruhrwasser AG International Water Management,

on the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT (Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Sixth Chamber, acting as President of the Fifth Chamber, L. Sevón, C. Gulmann, J.-P. Puissochet (Rapporteur) and M. Wathelet, Judges,

Advocate General: P. Léger,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Holst Italia SpA, by C. Colapinto, of the Rimini Bar, P. Leone, of the Rome Bar, and A. Tizzano and G.M. Roberti, of the Naples Bar,

— the Municipality of Cagliari, by F. Melis and G. Farci, of the Cagliari Bar,

— Ruhrwasser AG International Water Management, by M. Vignolo and G. Racugno, of the Cagliari Bar, and R.A. Jacchia, of the Milan Bar,

— the Italian Government, by Professor U. Leanza, Head of the Contentious Diplomatic Affairs Department in the Ministry of Foreign Affairs, acting as Agent, assisted by F. Quadri, Avvocato dello Stato,

— the Netherlands Government, by T.T. van den Hout, acting Secretary- General of the Ministry of Foreign Affairs, acting as Agent,

— the Austrian Government, by W. Okresek, Sektionschef in the Federal Chancellor's Office, acting as Agent,

— the Commission of the European Communities, by P. Stancanelli, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Holst Italia SpA, represented by C. Colapinto, P. Leone, G.M. Roberti and F. Sciaudone, of the Naples Bar; of the Municipality of Cagliari, represented by F. Melis and G. Farci; of Ruhrwasser AG

International Water Management, represented by M. Vignolo and R.A. Jacchia; of the Italian Government, represented by F. Quadri; and of the Commission, represented by P. Stancanelli, at the hearing on 20 May 1999,

after hearing the Opinion of the Advocate General at the sitting on 23 September 1999,

gives the following

Judgment

1. By order of 10 February 1998, received at the Court on 11 May 1998, the Tribunale Amministrativo Regionale per la Sardegna (Regional Administrative Court for Sardinia) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

2. That question was raised in proceedings between Holst Italia SpA ('Holst Italia') and the Municipality of Cagliari concerning the award by the latter to Ruhrwasser AG International Water Management ('Ruhrwasser'), by negotiated tender procedure, of a contract for the collection and purification of domestic waste water.

The Community legislation

3. Directive 92/50 lays down qualitative selection criteria for the determination of candidates admitted to take part in procedures for the award of a public service contract.

4. Article 31 of that directive provides:

'1. Proof of the service provider's financial and economic standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from banks or evidence of relevant professional risk indemnity insurance;

(b) the presentation of the service provider's balance sheets or extracts therefrom, where publication of the balance sheets is required under company law in the country in which the service provider is established;

(c) a statement of the undertaking's overall turnover and its turnover in respect of the services to which the contract relates for the previous three financial years.

2. The contracting authorities shall specify in the contract notice or in the invitation to tender which reference or references mentioned in paragraph 1 they have chosen and which other references are to be produced.

3. If, for any valid reason, the service provider is unable to provide the references requested by the contracting authority, he may prove his economic and

financial standing by any other document which the contracting authority considers appropriate.'

5. Article 32 of Directive 92/50 is in the following terms:

'1. The ability of service providers to perform services may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

2. Evidence of the service provider's technical capability may be furnished by one or more of the following means according to the nature, quantity and purpose of the services to be provided:

(a) the service provider's educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for providing the services;

(b) a list of the principal services provided in the past three years, with the sums, dates and recipients, public or private, of the services provided;

— where provided to contracting authorities, evidence to be in the form of certificates issued or countersigned by the competent authority,

— where provided to private purchasers, delivery to be certified by the purchaser or, failing this, simply declared by the service provider to have been effected;

(c) an indication of the technicians or technical bodies involved, whether or not belonging directly to the service provider, especially those responsible for quality control;

(d) a statement of the service provider's average annual manpower and the number of managerial staff for the last three years;

(e) a statement of the tool, plant or technical equipment available to the service provider for carrying out the services;

(f) a description of the service provider's measures for ensuring quality and his study and research facilities;

(g) where the services to be provided are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authority or on its behalf by a competent official body of the country in which the service provider is established, subject to that body's agreement, on the technical capacities of the service provider and, if necessary, on his study and research facilities and quality control measures;

(h) an indication of the proportion of the contract which the service provider may intend to subcontract.

3. The contracting authority shall specify, in the notice or in the invitation to tender, which references it wishes to receive.

4. The extent of the information referred to in Article 31 and in paragraphs 1, 2 and 3 of this Article must be confined to the subject of the contract; contracting authorities shall take into consideration the legitimate interests of the service providers as regards the protection of their technical or trade secrets.`

6.

Article 25 of Directive 92/50 further provides:

'In the contract documents, the contracting authority may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties.

This indication shall be without prejudice to the question of the principal service provider's liability.`

7.

Lastly, Article 26 of Directive 92/50 provides:

'1. Tenders may be submitted by groups of service providers. These groups may not be required to assume a specific legal form in order to submit the tender;

however, the group selected may be required to do so when it has been awarded the contract.

2. Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to carry out the relevant service activity, shall not be rejected solely on the grounds that, under the law of the Member State in which the contract is awarded, they would have been required to be either natural or legal persons.

3. Legal persons may be required to indicate in the tender or the request for participation the names and relevant professional qualifications of the staff to be responsible for the performance of the service.'

The main proceedings

8. In 1996 the Municipality of Cagliari conducted a negotiated tendering procedure for the award, on the basis of the most advantageous tender submitted, of a three-year contract for the management of water purification and sewage disposal plants.

9. The invitation to tender, published in the *Official Journal of the European Communities* on 3 January 1997, provided that interested undertakings were to provide proof, in particular, of (a) an average annual turnover equal to or greater than ITL 5 000 million during the period from 1993 to 1995 in the field of the management of water purification and sewage disposal plants and (b) actual management of at least one domestic waste water purification plant for a period of two consecutive years during the previous three years, and that, in the absence of such proof, such undertakings were to be excluded from the tendering procedure.

10. Ruhrwasser, which had been registered as a company since only 9 July 1996, was unable to show any turnover whatsoever for the period from 1993 to 1995 or to show that it had actually managed at least one domestic waste water purification plant during the previous three years.

11. In order to establish its standing to take part in the tendering procedure, on the conclusion of which it was awarded the contract, Ruhrwasser provided documentation relating to the financial resources of another entity, the German public-law body Ruhrverband. That body is the sole shareholder in the undertaking RWG Ruhr-Wasserwirtschafts-Gesellschaft, which, together with five other companies, set up Ruhrwasser as a joint venture undertaking in the form of a company limited by shares and governed by German law, owned as to one sixth by each of the parent companies, the object of which is to enable those companies to win contracts abroad for the collection and treatment of water.

12. Holst Italia also took part in the procedure, but its offer was regarded as less advantageous by the committee awarding the contract. It thereupon brought proceedings before the Tribunale Amministrativo Regionale per la Sardegna for annulment of the decision of the Cagliari Municipal Council approving the award of the contract to Ruhrwasser, on the ground that the latter had not produced the documentation needed in order to be eligible to submit a tender.

13. Ruhrwasser intervened in the proceedings before the Tribunale and lodged an interlocutory application for a declaration that the invitation to tender was illegal in so far as it prohibited a candidate undertaking from producing references concerning another undertaking with a view to establishing its own standing to submit a tender.

14. Following examination of the relationship between Ruhrwasser and the companies by which it had been formed, the Tribunale considered that there was a 'close connection between Ruhrverband and Ruhrwasser which allows the latter to avail itself of the facilities and organisation of the former'. In those circumstances, it took the view that

it was necessary to verify whether Directive 92/50 was to be interpreted as meaning that references concerning an entity connected with the candidate undertaking could be accepted as proof of the latter's standing.

15. According to the Tribunale, although the Court accepted, in its judgments in Case C-389/92 *Ballast Nedam Groep* v *Belgian State* [1994] ECR I-1289 ('*Ballast Nedam Groep I*') and Case C-5/97 *Ballast Nedam Groep* v *Belgian State* [1997] ECR I-7549 ('*Ballast Nedam Groep II*') that an undertaking may prove that it has the necessary standing by furnishing references in respect of other companies within the same group, the situation at issue in those judgments is to be distinguished from that in the present case, inasmuch as, first, it concerned public works contracts governed by Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches (OJ, English Special Edition 1971 (II), p. 678) and Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), and not public service contracts, and, second, the company concerned in *Ballast Nedam Groep I* and *Ballast Nedam Groep II*, unlike Ruhrwasser, enjoyed a dominant position within the group of companies which, it claimed, had the requisite standing as the parent company of its subsidiaries.

16. In order to ascertain whether, despite those differences of law and fact, the decision reached by the Court in its previous judgments was also applicable to a situation such as that in issue in the main proceedings, the Tribunale Amministrativo Regionale per la Sardegna decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts permit a company to prove that it possesses the technical and financial qualifications laid down for participation in a procedure for the award of a public service contract by relying on the references of another company which is the sole shareholder of one of the companies having a holding in the first-mentioned company?'

The question referred for a preliminary ruling

17. According to Holst Italia, references concerning an entity other than the candidate undertaking may be relied on, in the context of Directive 92/50, only if that company can show the existence of a clear structural link connecting it with the company possessing the standing needed for performance of the contract.

18. Such a structural link, constituting, according to the plaintiff in the main proceedings, a fundamental guarantee for the contracting authority, presupposes, according to the Court's case-law, that the company submitting the tender exerts a dominant influence on the entity whose references it uses and actually has at its complete disposal all the latter's resources. That is not the case where the tenderer merely relies on obligations of a commercial nature entered into by an entity

indirectly holding a minority share of its capital. To accept, in such circumstances, that the standing of a third party may be taken into account would mean that the standing claimed would cease to be personal in character.

19. The Italian Government likewise doubts that a subsidiary indirectly owned by an entity is capable of claiming that it has at its disposal the technical and financial resources of that entity. It acknowledges, however, that it is for the national court to assess the evidence provided in that connection by the tenderer.

20.

By contrast, Ruhrwasser, like the Netherlands and Austrian Governments, considers that the legal nature of the link established between associated undertakings cannot in any circumstances be asserted against those undertakings as a ground for refusing to take into account, in favour of one member of the group, the standing of another member. Irrespective of the nature of the organisation found to exist, the only relevant consideration is the consequences to which it gives rise in terms of the availability of its resources.

21. It follows, according to Ruhrwasser, that where, in addition to structural links relating, in particular, to possession of the capital, there exist mandatory obligations requiring resources to be made available to the subsidiary participating in the tendering procedure, that effectively proves actual possession of the resources needed to perform the contract.

22. According to the Commission, the basic ruling arrived at by the Court in its judgments in *Ballast Nedam Groep I* and *Ballast Nedam Groep II* is applicable by analogy to a situation such as that in the present case. However, it emphasises that a tenderer cannot be presumed actually to have at its disposal the resources necessary for the performance of the contract, whatever the nature of its legal relationship with the members of the group of which it forms part, and that the availability of those resources must be the subject of a careful examination by the national court of the evidence which the party concerned is required to provide. The order for reference does not conclusively show that any such examination has been carried out in the main proceedings on the basis of adequate documentation.

23. The Court observes first of all that, as is apparent from the sixth recital in the preamble thereto, Directive 92/50 is designed to avoid obstacles to freedom to provide services in the award of public service contracts, just as Directives 71/304 and 71/305 are designed to ensure freedom to provide services in the field of public works contracts (*Ballast Nedam Groep I*, paragraph 6).

24. To that end, Chapter 1 of Title VI of Directive 92/50 lays down common rules on participation in procedures for the award of public service contracts, including the possibility of subcontracting part of the contract to third parties (Article 25) and of the submission of tenders by groups of service providers without their being required to assume a specific legal form in order to do so (Article 26).

25. In addition, the criteria for qualitative selection laid down in Chapter 2 of Title VI of Directive 92/50 are designed solely to define the rules governing objective assessment of the standing of tenderers, particularly as regards financial, economic and technical matters. One of those criteria, provided for in Article 31(3), allows tenderers to prove their financial and economic standing by means of any other document which the contracting authority considers appropriate. A further provision, contained in Article 32(2)(c), expressly states that evidence of the service provider's technical capability may be furnished by an indication of the technicians or technical bodies, whether or not belonging directly to the service provider, on which it can call to perform the service (see, to the same effect, as regards Directive 71/305, *Ballast Nedam Groep I*, paragraph 12).

26. From the object and wording of those provisions, it follows that a party cannot be eliminated from a procedure for the award of a public service contract solely on the ground that that party proposes, in order to carry out the contract, to use resources which are not its own but belong to one or more other entities (see, to the same effect, as regards Directives 71/304 and 71/305, *Ballast Nedam Groep I*, paragraph 15).

27. It is therefore permissible for a service provider which does not itself fulfil the minimum conditions required for participation in the procedure for the award of a

public service contract to rely, *vis-à-vis* the contracting authority, on the standing of third parties upon whose resources it proposes to draw if it is awarded the contract.

28. However, such recourse to external references is subject to certain conditions. As stated in Article 23 of Directive 92/50, the contracting authority is required to verify the suitability of the service providers in accordance with the criteria laid down. That verification is intended, in particular, to enable the contracting authority to ensure that the successful tenderer will indeed be able to use whatever resources it relies on throughout the period covered by the contract.

29. Thus, where, in order to prove its financial, economic and technical standing with a view to being admitted to participate in a tendering procedure, a company relies on the resources of entities or undertakings with which it is directly or indirectly linked, whatever the legal nature of those links may be, it must establish that it actually has available to it the resources of those entities or undertakings which it does not itself own and which are necessary for the performance of the contract (see, to the same effect, as regards Directives 71/304 and 71/305, *Ballast Nedam Groep I*, paragraph 17).

30. It is for the national court to assess the relevance of the evidence adduced to that effect. In the context of that assessment, Directive 92/50 does not permit the exclusion, without due analysis, of specific types of proof or the assumption that the service provider has available to it resources belonging to third parties merely by virtue of the fact that it forms part of the same group of undertakings.

31. Consequently, the answer to be given to the question referred must be that Directive 92/50 is to be interpreted as permitting a service provider to establish that it fulfils the economic, financial and technical criteria for participation in a tendering procedure for the award of a public service contract by relying on the standing of other entities, regardless of the legal nature of the links which it has with them, provided that it is able to show that it actually has at its disposal the resources of those entities which are necessary for performance of the contract. It is for the national court to assess whether the requisite evidence in that regard has been adduced in the main proceedings.

Costs

32. The costs incurred by the Italian, Netherlands and Austrian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Tribunale Amministrativo Regionale per la Sardegna by order of 10 February 1998, hereby rules:

Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts is to be interpreted as permitting a service provider to establish that it fulfils the economic, financial and technical criteria for participation in a tendering procedure for the award of a public service contract by relying on the standing of other entities, regardless of the legal nature of the links which it has with them, provided that it is able to show that it actually has at its disposal the resources of those entities which are

necessary for performance of the contract. It is for the national court to assess whether the requisite evidence in that regard has been adduced in the main proceedings.

Moitinho de Almeida
Sevón

Gulmann

Puissochet
Wathelet

Delivered in open court in Luxembourg on 2 December 1999.

R. Grass

D.A.O. Edward

Registrar

President of the Fifth Chamber

JUDGMENT OF THE COURT (Sixth Chamber)
18 March 2004 (1)

(Public contracts – Directive 89/665/EEC – Review procedures concerning the award of public contracts – Effects of a decision by the body responsible for review procedures annulling the decision by the contracting authority not to revoke the procedure by which a contract was awarded – Restriction on the use of subcontracting)

In Case C-314/01,
REFERENCE to the Court under Article 234 EC by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that tribunal between
Siemens AG Österreich,
ARGE Telekom & Partner

and

Hauptverband der österreichischen Sozialversicherungsträger,
joined party:
Bietergemeinschaft EDS/ORGA,
on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT (Sixth Chamber),

composed of: V. Skouris, acting for the President of the Sixth Chamber, C. Gulmann, J.-P. Puissochet, R. Schintgen (Rapporteur) and N. Colneric, Judges,
Advocate General: L.A. Geelhoed,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

–
ARGE Telekom & Partner, by M. Öhler, Rechtsanwalt,
–
Hauptverband der österreichischen Sozialversicherungsträger, by G. Lansky, Rechtsanwalt,
–
Bietergemeinschaft EDS/ORGA, by R. Regner, Rechtsanwalt,
–
the Austrian Government, by M. Fruhmann, acting as Agent,
–
the Commission of the European Communities, by M. Nolin, acting as Agent, assisted by R. Roniger, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of Hauptverband der österreichischen Sozialversicherungsträger, represented by T. Hamerl, Rechtsanwalt; of the Austrian Government, represented by M. Fruhmann; and the Commission, represented by M. Nolin, assisted by R. Roniger, at the hearing on 18 September 2003,

after hearing the Opinion of the Advocate General at the sitting on 20 November 2003,

gives the following

Judgment

1 By order of 11 July 2001, received at the Court on 9 August 2001, the Bundesvergabeamt (Austrian Federal Procurement Office) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) ('Directive 89/665').

2 Those questions have arisen in a dispute between the companies Siemens AG ('Siemens') and ARGE Telekom & Partner ('ARGE Telekom'), on the one hand, and, on the other, the Hauptverband der österreichischen Sozialversicherungsträger (Central Association of Austrian Social Security Institutions) ('the Hauptverband'), in its capacity as contracting authority, concerning an adjudication procedure for the award of a public supply and service contract.

Legal framework

Community law

3 Article 1(1) of Directive 89/665 provides:
'The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the provisions set out in the following articles and, in particular, Article 2(7), on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.'

4 Article 2 of Directive 89/665 sets out in this regard the obligations devolving on Member States. Article 2(1), (6) and (7) provides:
'1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:
(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;
(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;
(c) award damages to persons harmed by an infringement.
…
6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.'

5

Directive 92/50 sets out common rules on participation in the procedure for the award of public service contracts. These include the possibility of sub-contracting part of the contract to third parties. Thus, Article 25 of Directive 92/50 provides:

'In the contract documents, the contracting authority may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties. This indication shall be without prejudice to the question of the principal service provider's liability.'

6

Directive 92/50 also sets out qualitative selection criteria which make it possible to determine the candidates admitted to participate in the procedure for the award of a public service contract. Article 32 of Directive 92/50 is worded as follows:

'1. The ability of service providers to perform services may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

2. Evidence of the service provider's technical capability may be furnished by one or more of the following means according to the nature, quantity and purpose of the services to be provided:

…

(c) an indication of the technicians or technical bodies involved, whether or not belonging directly to the service provider, especially those responsible for quality control;

…

(h) an indication of the proportion of the contract which the service provider may intend to sub-contract.

3. The contracting authority shall specify, in the notice or in the invitation to tender, which references it wishes to receive.

…'

National legislation

7

Directives 89/665 and 92/50 were transposed in Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Procurement Law), BGBl. I 1997/56, in the version published in BGBl. I 2000/125 ('the BVergG').

8

Paragraph 31 of the BVergG, relating to services to be performed by subcontracting undertakings, provides:

'1. The documents relating to the invitation to tender shall specify whether subcontracting is permitted. The subcontracting of the whole contract is not permitted except in the case of purchase agreements and subcontracting to undertakings associated with the contractor. In the case of building contracts the subcontracting of the majority of the services constituting the object of the undertaking is not permitted. ... The contracting authority shall ensure that the contractor's subcontractors themselves perform the greater part of contracts subcontracted to them. In exceptional cases the contracting authority may specify in the contract documents, stating its reasons, that it is permissible for the majority of the contract to be subcontracted. Subcontracting parts of the contract is, moreover, permitted only if the subcontractor is qualified to perform his share of the work.

2. The contracting authority should ask the tenderer in the documents relating to the invitation to tender to indicate in his tender the proportion of the contract which he may intend to subcontract to third parties. This information shall be without prejudice to the issue of the contractor's liability.'

9

Paragraph 40(1) of the BVergG, which concerns the withdrawal of an invitation to tender, provides as follows:
'During the tendering period the invitation to tender may be withdrawn for compelling reasons, especially if before the end of the tendering period circumstances become known which, had they been known earlier, would not have led to an invitation to tender or would have led to an invitation to tender essentially different in substance.'

10 Paragraph 52 et seq. of the BVergG deals with the examination of tenders. Paragraph 52(1) provides:
'Before the contracting authority proceeds to the selection of the tender qualifying for the award of the contract, it should immediately eliminate the following tenders on the basis of the results of the assessment:
…
(9) tenders received from applicants who, immorally or contrary to the principle of effective competition, have come to agreements with other applicants which are disadvantageous to the contracting authority;
...'.

11 Paragraph 113 of the BVergG sets out the powers of the Bundesvergabeamt. Paragraph 113(2) and (3) provides:
'2. In order to preclude infringements of this Federal Law and of the regulations implementing it, the Bundesvergabeamt is authorised until the time of the award:
(1) to adopt interim measures and
(2) to set aside unlawful decisions of the contracting authority.
3. After the award of the contract or the close of the contract award procedure, the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations issued under it, the contract has not been awarded to the best tenderer. ...'

12 Under Paragraph 117(1) and (3) of the BVergG:
'1. The Bundesvergabeamt shall set aside, by way of administrative decision, taking into account the opinion of the Conciliation Committee in the case, any decision of the contracting authority in an award procedure where the decision in question:
(1) is contrary to the provisions of this Federal Law or its implementing regulations and
(2) significantly affects the outcome of the award procedure.
...
3. After the award of the contract, the Bundesvergabeamt shall, in accordance with the conditions of subparagraph 1, determine only whether the alleged illegality exists or not.'

13 Under Paragraph 125(2) of the BVergG a claim for damages, which must be brought before the civil courts, is admissible only if there has been a prior determination by the Bundesvergabeamt under Paragraph 113(3) of the BVergG. The civil court which is required to rule on such a claim for damages is bound by that determination, as are the parties to the proceedings before the Bundesvergabeamt.

14 Article 879(1) of the Allgemeines Bürgerliches Gesetzbuch (Austrian General Civil Code) provides:
'A contract shall be null and void if it infringes a statutory prohibition or is contrary to acceptable moral values.'

The dispute in the main proceedings and the questions referred for preliminary ruling

15 On 21 September 1999 the Hauptverband announced in the supplement to the *Official Journal of the European Communities* that it intended to initiate a two-stage contract award procedure for the award of a contract for the design, planning and implementation of a smart-card-based electronic data processing system, including

the delivery, initialisation, personalisation, distribution and disposal of cards throughout Austria, delivery, installation and maintenance of sector terminals, support for a call-centre unit, card management and other services necessary for the operation of the system.

16 On 22 February 2000 the Hauptverband decided to invite five of the six groups of candidates which had taken part in the first phase of the procedure to submit tenders. At the same time the Hauptverband decided to eliminate the sixth candidate. Point 1.8 of the invitation to tender of 15 March 2000, which replicated Point 1.9 of the contract notice of 21 September 1999, stated:
'A maximum of 30% of the services may be subcontracted, provided that the characteristic parts of the contract, namely, project management, system design, development, construction, delivery and management of the central components of the overall system specific to the project development, delivery and management of the life-cycle of the cards and development and delivery of the terminals remain with the tenderer or tender consortium'.

17 According to the order for reference, this clause, which stresses the personal responsibility of the card provider, was retained in order to guarantee proper technical performance of the contract.

18 Three of the four tender consortia which submitted tenders, namely, Siemens, ARGE Telekom and Debis Systemhaus Österreich GmbH ('Debis'), included the card provider Austria Card, Plastikkard und Ausweissysteme GmbH ('Austria Card'), which was to be responsible for supplying the cards. The fourth consortium, to which Austria Card did not belong, was Bietergemeinschaft EDS/ORGA ('EDS/ORGA'); which consisted of the undertakings Electronic Data Systems (EDS Austria) GmbH, Electronic Data Systems (EDS Deutschland) GmbH and ORGA Kartensysteme GmbH.

19 By letter of 18 December 2000, the first three tender consortia were informed that the Hauptverband was minded to award the contract to EDS/ORGA.

20 After having unsuccessfully attempted to have arbitration proceedings instituted before the Bundesvergabekontrollkommission (Federal Procurement Review Commission), the three unsuccessful consortia lodged review applications with the Bundesvergabeamt in which they sought, principally, annulment of the decision of the Hauptverband to award the contract to EDS/ORGA and, in the alternative, cancellation of the invitation to tender.

21 By decision of 19 March 2001, the Bundesvergabeamt dismissed all of the review applications brought before it as being inadmissible on the ground of lack of *locus standi* and interest in bringing proceedings inasmuch as the applicants' tenders ought in any event to have been eliminated by the Hauptverband pursuant to Paragraph 52(1) of the BVergG on the ground that Austria Card's membership of the three tender consortia in question was liable to distort free competition by reason of the exchange of information and negotiations on the terms of the tenders which such threefold membership made possible.

22 It appears from the case-file that this decision of the Bundesvergabeamt was annulled by judgment of the Verfassungsgerichtshof (Austrian Constitutional Court) of 12 June 2001 on the ground that the constitutional rights of the three consortia in question to have their case properly adjudged before a judicial body had been infringed inasmuch as the Bundesvergabeamt had, prior to taking its decision, failed to refer the matter to the Court of Justice for a preliminary ruling.

23 On 28 and 29 March 2001, Debis and ARGE Telekom lodged a second series of review applications before the Bundesvergabeamt in which they sought, inter alia, annulment of the Hauptverband's decision refusing to cancel the invitation to tender and, by way of interim measure, a prohibition on awarding the contract during a period of two

months calculated from the instigation of proceedings, in the case of the application brought by Debis, or until such time as the Bundesvergabeamt had reached its decision in the main proceedings, in regard to the application brought by ARGE Telekom.

24 By decision of 5 April 2001, the Bundesvergabeamt, ruling on the applications for interim measures, prohibited the Hauptverband from awarding the contract until 20 April 2001.

25 By decision of 20 April 2001, the Bundesvergabeamt upheld the principal applications of Debis and ARGE Telekom and, pursuant to Paragraph 113(2)(2) of the BVergG, annulled the decision of the Hauptverband not to cancel the invitation to tender. As the essential grounds for its decision, it stated that the invitation to tender included an unlawful selection criterion inasmuch as the prohibition of subcontracting set out in Point 1.8 of the invitation to tender infringed the subcontractor's right, derived from Community legislation as interpreted by the Court (see, inter alia, Case C-176/98 *Holst Italia* [1999] ECR I-8607), also to have recourse to a subcontractor in order to justify its capacity to perform the contract in question. In the present case, if the invitation to tender had not laid down this condition, the consortia which had been eliminated could have had recourse to a subcontractor for the supply of the cards.

26 Notwithstanding that decision, the Hauptverband decided, on 23 April 2001, to award the contract to EDS/ORGA. As it took the view that the effects of the interim measure adopted on 5 April 2001 by the Bundsvergabeamt had expired on 20 April 2001 without being extended and that the Bundesvergabeamt's decision of 20 April 2001 contained no more than a statement on 'setting aside the failure to cancel' which was difficult to understand, the Hauptverband took the view that no legally binding decision had been taken that its own decision to award the contract to the tender consortium which had submitted the lowest tender was invalid or ought to have been annulled.

27 The Hauptverband also decided to bring proceedings before the Verfassungsgerichtshof for annulment of the decision taken by the Bundesvergabeamt on 20 April 2001. According to the case-file forwarded by the Bundesvergabeamt and the observations lodged with the Court, the Verfassungsgerichtshof initially rejected, by order of 22 May 2001, the request by the Hauptverband that its application be recognised as having the effect of suspending operation of that decision, on the ground that the disputed contract had in any event already been awarded, and, subsequently, by judgment of 2 March 2002, the Verfassungsgerichtshof annulled that decision on the ground that it was logically impossible to annul a decision requiring something not to be done and that the proceedings brought by Debis and ARGE Telekom to secure that end ought to have been declared inadmissible.

28 On 30 April 2001, Siemens brought a fresh application before the Bundesvergabeamt by which it sought the annulment of several decisions taken by the Hauptverband after its decision to award the contract to EDS/ORGA. Siemens essentially argued in these proceedings that the annulment by the Bundesvergabeamt of the decision by the contracting authority not to annul the contract award procedure rendered unlawful the Hauptverband's decision to award the contract because it took place within the context of a second award procedure which had not been publicised in the requisite manner.

29 On 17 May 2001 ARGE Telekom also applied for annulment of 11 decisions taken by the Hauptverband after the latter had decided not to annul the disputed award procedure notwithstanding the decision of the Bundesvergabeamt of 20 April 2001.

30 As it took the view that resolution of this third series of disputes required an interpretation of several provisions of Directive 89/665, the Bundesvergabeamt decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

(1) Is … Directive 89/665 … , and in particular Article 2(1)(b) thereof, if necessary in conjunction with Article 2(7) thereof, to be interpreted as meaning that the legal effect of a decision taken by a national review body within the meaning of Article 2(8) of Directive 89/665 relating to the setting aside of a contracting authority's decision not to cancel a contract award procedure is that if national law does not provide any basis for the effective and compulsory enforcement of the review body's decision against the contracting authority, the contract award procedure is automatically terminated by the national review body's decision, without the need for any further act by the contracting authority?

(2) Is Directive 89/665, in particular Article 2(7) thereof, if necessary in conjunction with … Directive 92/50… , in particular Articles 25 and 32(2)(c) thereof, or any other provisions of Community law, in particular having regard to the *effet utile* doctrine relating to the interpretation of Community law, to be construed as meaning that a provision in an invitation to tender which prohibits subcontracting material parts of the service concerned and, contrary to the case-law of the Court of Justice, in particular Case C-176/98 *Holst Italia* [1999] ECR I-8607, prevents the tenderer from using his contract with his subcontractor to prove that the services of a third party are actually available to him and which thus deprives him of his right to prove his own capability by relying on the services of a third party or to prove that he actually has available a third party's services, is so clearly contrary to Community law that a contract concluded on the basis of such an invitation to tender is to be regarded as invalid, in particular where national law in any case provides that illegal contracts are invalid?

(3) Is Directive 89/665, in particular Article 2(7) thereof, or any other provision of Community law, in particular having regard to the *effet utile* doctrine relating to the interpretation of Community law, to be construed as meaning that a contract concluded contrary to a decision by a national review body within the meaning of Article 2(8) of Directive 89/665 relating to the setting aside of a contracting authority's decision not to cancel a contract award procedure is invalid, in particular where national law in any case provides that immoral or illegal contracts are void but does not provide any basis for the effective and compulsory enforcement of the review body's decision against the contracting authority?

(4a) Is Directive 89/665, in particular Article 2(1)(b) thereof, if necessary in conjunction with Article 2(7), to be interpreted as meaning that where national law does not otherwise provide any basis for the effective and compulsory enforcement of the review body's decision against the contracting authority, the review body has, by virtue of the direct application of Article 2(1)(b) in conjunction with Article 2(7), the power to issue a compulsory, enforceable order to the contracting authority to ensure that the unlawful decision is set aside, even though national law authorises the review body to issue only non-compulsory, non-enforceable orders to set aside contracting authorities' decisions in tenderers' applications for review within the meaning of Article 1(1) of Directive 89/665?

(4b) If Question 4a is answered in the affirmative: does Article 2(7) of Directive 89/665, if necessary in conjunction with other provisions of Community law, give the review body the power in such a case to threaten contracting authorities and the members of their executive organs with, and to impose on them, such fines or fines and imprisonment by way of coercive penalties as are necessary to enforce their orders and are calculated in accordance with judicial discretion, where the contracting authorities and the members of their executive organs do not comply with the orders issued by the review body?'

The admissibility of the reference for a preliminary ruling

31 It is clear from all of the questions submitted by the Bundesvergabeamt that the latter is unsure as to the compatibility with Directive 89/665 of the procedural rules contained in the Austrian legislation governing public contracts inasmuch as those rules are not adequate effectively to guarantee implementation of the decisions taken by the body responsible for review proceedings as, in the case in the main proceedings, notwithstanding the decision of the Bundesvergabeamt of 20 April 2001

setting aside the Hauptverband's decision not to annul the call for tenders, the contract in dispute was none the less awarded to EDS/ORGA.

32 It is common ground that the Verfassungsgerichtshof, by judgment of 2 March 2002, annulled the decision of 20 April 2001 taken by the Bundesvergabeamt.

33 According to settled case-law in this regard, the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts (see, inter alia, Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 14, and Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 30, and the case-law cited therein).

34 In the context of that cooperation, it is for the national court or tribunal seised of the dispute, which alone has direct knowledge of the facts giving rise to the dispute and must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, inter alia, *Lourenço Dias*, cited above, paragraph 15, Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 18, and *Schmidberger*, cited above, paragraph 31).

35 The fact none the less remains that it is for the Court, if need be, to examine the circumstances in which the case was referred to it by the national court or tribunal, in order to assess whether it has jurisdiction and in particular to determine whether the interpretation of Community law which is requested bears any relation to the actual nature and subject-matter of the main proceedings, in order that the Court will not be required to give opinions on general or hypothetical questions. If it should appear that the question raised is manifestly irrelevant for the purposes of deciding the case, the Court must declare that there is no need to proceed to judgment (Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21; *Lourenço Dias*, paragraph 20; *Canal Satélite Digital*, cited above, paragraph 19; and judgment of 30 September 2003 in Case C-167/01 *Inspire Art* [2003] ECR I-0000, paragraphs 44 and 45).

36 In the light of the foregoing, it is appropriate to examine whether the questions referred by the Bundesvergabeamt have remained relevant for the resolution of the disputes in the main proceedings, even though the Verfassungsgerichtshof annulled the Bundesvergabeamt's decision of 20 April 2001.

37 In this regard, it is clear from the order for reference that it is the fact that this decision of 20 April 2001 was not mandatorily enforceable in Austrian law that provided the essential grounds for the present request for a preliminary ruling, with the result that, since the annulment of that decision, those questions have become purely hypothetical, as is, moreover, emphasised by the Verfassungsgerichtshof in its judgment of 2 March 2002.

38 It must, however, be acknowledged that the possibility cannot be discounted that a reply to the second question, which incidentally concerns the scope of the *Holst Italia* judgment, will have a bearing on the resolution of the disputes in the main proceedings, particularly in the event that those disputes, following a finding that the award procedure followed by the Bundesvergabeamt pursuant to Paragraph 113(3) of the BVergG, was unlawful, were to be continued before the civil courts, which, under Austrian legislation, are the courts having jurisdiction to rule on a claim for compensation following the award of a contract.

39 In the light of the foregoing, the first, third and fourth questions need not be answered and the Court's reply should be confined to the second question.

The second question

40

By this question, the Bundesvergabeamt is seeking essentially to ascertain whether Article 2(7) of Directive 89/665, read in conjunction with Articles 25 and 32(2)(c) of Directive 92/50, must be construed as meaning that a contract concluded at the end of the procedure for the award of a public supply and service contract, the proper conduct of which is affected by the incompatibility with Community law of a provision in the invitation to tender, must be treated as void if the applicable national law declares contracts that are illegal to be void.

41 This question is based on the premiss that a provision in an invitation to tender which prohibits recourse to subcontracting for material parts of the contract is contrary to Directive 92/50, as interpreted by the Court in *Holst Italia*.

42 It must be borne in mind in this regard that Directive 92/50, which is designed to eliminate obstacles to the freedom to provide services in the award of public service contracts, expressly envisages, in Article 25, the possibility for a tenderer to subcontract a part of the contract to third parties, as that provision states that the contracting authority may ask that tenderer to indicate in its tender any share of the contract which it may intend to subcontract. Furthermore, with regard to the qualitative selection criteria, Article 32(2)(c) and (h) of Directive 92/50 makes express provision for the possibility of providing evidence of the technical capacity of the service provider by means of an indication of the technicians or technical bodies involved, whether or not belonging directly to the undertaking of that service provider, and which the latter will have available to it, or by indicating the proportion of the contract which the service provider may intend to subcontract.

43 As the Court ruled in paragraphs 26 and 27 of *Holst Italia*, it follows from the object and wording of those provisions that a party cannot be eliminated from a procedure for the award of a public service contract solely on the ground that that party proposes, in order to carry out the contract, to use resources which are not its own but belong to one or more other entities. This means that it is permissible for a service provider which does not itself fulfil the minimum conditions required for participation in the procedure for the award of a public service contract to rely, vis-à-vis the contracting authority, on the standing of third parties upon whose resources it proposes to draw if it is awarded the contract.

44 However, according to the Court, the onus rests on a service provider which relies on the resources of entities or undertakings with which it is directly or indirectly linked, with a view to being admitted to participate in a tendering procedure, to establish that it actually has available to it the resources of those entities or undertakings which it does not itself own and which are necessary for the performance of the contract (*Holst Italia*, paragraph 29).

45 As the Commission of the European Communities has correctly pointed out, Directive 92/50 does not preclude a prohibition or a restriction on the use of subcontracting for the performance of essential parts of the contract precisely in the case where the contracting authority has not been in a position to verify the technical and economic capacities of the subcontractors when examining the tenders and selecting the lowest tenderer.

46 It follows that the premiss on which the second question is based would prove to be accurate only if it were to be established that Point 1.8 of the invitation to tender prohibits, during the phase of the examination of the tenders and the selection of the successful tenderer, any recourse by the latter to subcontracting for the provision of essential services under the contract. A tenderer claiming to have at its disposal the technical and economic capacities of third parties on which it intends to rely if the contract is awarded to it may be excluded only if it fails to demonstrate that those capacities are in fact available to it.

47

Point 1.8 of the invitation to tender does not appear to relate to the examination and selection phase of the procedure for award of the contract, but rather to the phase of performance of that contract and is designed precisely to avoid a situation in which the performance of essential parts of the contract is entrusted to bodies whose technical and economic capacities the contracting authority was unable to verify at the time when it selected the successful tenderer. It is for the Bundesvergabeamt to establish whether that is indeed the case.

48 If it were to transpire that a clause in the invitation to tender is in fact contrary to Directive 92/50, in particular inasmuch as it unlawfully prohibits recourse to subcontracting, it would then be sufficient to point out that, under Articles 1(1) and 2(7) of Directive 89/665, Member States are required to take the measures necessary to ensure that decisions taken by the contracting authorities may be reviewed effectively and as rapidly as possible in the case where those decisions may have infringed Community law in the area of public procurement.

49 It follows that, in the case where a clause in the invitation to tender is incompatible with Community rules on public contracts, the national legal system of the Member State must provide for the possibility of relying on that incompatibility in the review procedures referred to in Directive 89/665.

50 The answer to the second question must therefore be that Directive 89/665, and in particular Articles 1(1) and 2(7) thereof, must be construed as meaning that, in the case where a clause in an invitation to tender is incompatible with Community rules on public contracts, the national legal systems of the Member States must provide for the possibility of relying on that incompatibility in the review procedures referred to in Directive 89/665.

Costs

51 The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national tribunal, the decision on costs is a matter for that tribunal.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 11 July 2001, hereby rules:

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, and in particular Articles 1(1) and 2(7) thereof, must be construed as meaning that, in the case where a clause in an invitation to tender is incompatible with Community rules on public contracts, the national legal systems of the Member States must provide for the possibility of relying on that incompatibility in the review procedures referred to in Directive 89/665.

Skouris	Gulman	Puissochet
Schintgen		Colneric

Delivered in open court in Luxembourg on 18 March 2004.

R. Grass	V. Skouris
Registrar	President

SECTION 5
CHAPTER SUMMARY

SELF-TEST QUESTIONS

Check each question for local relevance and adapt accordingly

1. What is the difference between selection and award?
2. When does the selection of economic operators take place in open procedures?
3. When does the selection of economic operators take place in restricted procedures, negotiated procedures with prior publication of a contract notice, and competitive dialogue procedures?
4. What are the categories of selection criteria that you may apply?
5. What are the mandatory grounds for exclusion?
6. What are the optional grounds for exclusion?
7. Are you free to establish the specific economic and financial standing criteria to be applied?
8. Are you free to establish the specific technical and/or professional ability criteria t o be applied?
9. What does it mean that the minimum capacity levels with regard to economic and financial standing and technical and/or professional ability must be related and proportionate to the subject matter of the contract?
10. Can an economic operator rely on the resources of other entities to prove its economic and financial standing or its technical and/or professional ability to perform the contract to be awarded?
11. Are you free to establish the types of evidence to be requested from economic operators to prove that they do not fall under any of the mandatory or optional grounds for exclusion?
12. Are you free to establish the types of evidence to be requested from economic operators to prove that they satisfy the set economic and financial standing criteria?
13. Are you free to establish the types of evidence to be requested from economic operators to prove that they satisfy the set technical and/or professional ability criteria?
14. What does it mean that the evidence you may request from economic operators as proof of their economic and financial standing or of their technical and/or professional ability must be related and proportionate to the subject matter of the contract to be awarded?
15. What are the disclosure obligations with regard to the set selection criteria and the corresponding requested evidence?
16. Are you allowed to request economic operators to supplement or clarify the evidence submitted?

17. Can registration on an official list of approved economic operators be used to prove, by an economic operator registered in such a list in its member state of establishment, that it satisfies the set selection criteria?
18. In case of two-stage procedures, where the maximum number of economic operators has been fixed, what are the criteria and methodologies you may apply in order to choose whom to invite to tender/negotiate/conduct a dialogue with the economic operators that are qualified?
19. Are you allowed to change the selection criteria once the tender process has been launched?
20. What are the main steps that you should follow in the process of selecting economic operators?
21. What are the main elements that the evaluation report/qualitative selection report should contain?
22. What is the difference between selection criteria and eligibility requirements?
23. Can you require a group of economic operators/consortium to assume a specific legal form in order to be eligible to participate in a specific contract award procedure?
24. Can you prohibit economic operators from having recourse to subcontracting?
25. Can you reserve participation in contract award procedures to persons with disabilities?

Conducting the procurement process

MODULE E

Setting contract award criteria

PART 4

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. The importance of setting appropriate award criteria
2. The importance of disclosing the award criteria that you will apply
3. The methods for determining the most economically advantageous tender
4. What can go wrong with setting the award criteria, and how problems can be avoided

1.2 IMPORTANT ISSUES

The most important issues in this chapter are concerned with the need to ensure that the chosen award criteria:

- Take into account the nature and the specific characteristics of the contract concerned
- Are objective, non-discriminatory and not prejudicial to fair competition
- Are disclosed so that tenderers can prepare more responsive tenders. The evaluation of tenders should be as objective as possible, and the relevant stakeholders should be able to monitor the process to ensure that discriminatory or non-authorised criteria are not applied

This means that it is critical to understand fully:

- The main considerations that you should take into account when you determine the award criteria that you will apply
- Where and how you should disclose the award criteria that you will apply
- The way the award criteria will be read and understood by economic operators

If this is not properly understood, the tender process, the evaluation of tenders and the contract award decision may be flawed. This could mean that the tender process needs to be cancelled and restarted, or that the best tender is not selected..

1.3 LINKS

There is a particularly strong link between this section and the following modules or sections:

- Module A1 on the basic principles of public procurement
- Module B4 on the role of the evaluation panel/tender committee
- Module C5 on social and environmental considerations
- Module E1 on the preparation of tender documents/specifications
- Module E3 on selection (qualification) of economic operators
- Module E5 on tender evaluation and contract awar

1.4 RELEVANCE

This information will be of particular relevance to those procurement professionals who are responsible for setting the award criteria. It is also important for those involved in procurement planning, in the preparation of contract notices and in tender documentation including specifications, as well as for those involved in the evaluation process. It will also be of particular relevance to those persons that, within a contracting authority, have both the responsibility and the power, including delegation power, to make procurement decisions (*e.g.* to approve the launch of a tender process, make award decisions, sign contracts, etc.).

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

Adapt for local use using the format below, including listing the relevant national legislation and the key elements of that legislation. This section may need expanding to reflect particular local requirements relating to setting award criteria. That may include adding information relating to sub-threshold and/or low-value contracts.

The main legal requirements relating to the selection of economic operators are laid down in **Directive 2004/18/EC:**

- Article 53 sets out the award criteria on the basis of which contracting authorities may award public contracts. It also lays down general rules on setting and disclosing the criteria used to determine the most economically advantageous tender (MEAT).

(For further information on the main legal requirements, see Section 4 – The Law.)

Utilities

A short note on the key similarities and differences applying to the utilities is included at the end of Section 2, Narrative.

SECTION 2
NARRATIVE

Adapt all of this section using relevant local legislation, processes and terminology.

2.1 INTRODUCTION

Adapt this sub-section using relevant local legislation, processes and terminology.

The award criteria are the criteria that constitute the basis on which a contracting authority chooses the best tender – the tender that best meets the set requirements – and consequently awards a contract. These criteria must be established in advance by the contracting authority and must not be prejudicial to fair competition.

The Directive limits the criteria that a contracting authority may apply to award a public contract to either the lowest-price criterion or the most economically advantageous tender (MEAT) criterion. It sets out general rules concerning the formulation of the specific criteria that may be applied when the MEAT criterion is used, and it also lays down disclosure obligations concerning these criteria.

The main objective of the Community legislator is to ensure that intra-Community trade is not restricted by discriminatory award criteria.

This section will examine the various aspects linked to the formulation of the criteria that a contracting authority may apply for the award of a public contract and to the disclosure of these criteria.

Contracts below the EU thresholds

Adapt this sub-section for local use – using relevant local legislation, processes and terminology. Briefly set out the requirements of the local legislation for contracts below the relevant national thresholds.

The Directive does not apply to public procurement procedures relating to contracts that are below certain financial thresholds set by the Directive itself.

Generally speaking, with regard to contracts below the EU thresholds, it is left to EU Member States to introduce their own rules. Individual contracting authorities may also be permitted or required to publish and follow their own internal purchasing rules.

However, the general law and Treaty principles, including the requirements of transparency, equal treatment and non-discrimination, must also be respected in the context of setting the award criteria in the case of contracts below the thresholds set in the Directive.

N.B. *The provisions of the Directive concerning the award criteria also do not apply to the non-priority services listed in Annex II B of the Directive (see article 21).*

See Module D for more information on the applicable financial thresholds and on the types of contracts covered by the Directive.

See also Module A1 for more information on the general law and Treaty principles that are relevant for public procurement.

2.2 PRELIMINARY CONSIDERATIONS: GENERAL LAW AND TREATY PRINCIPLES THAT MUST BE KEPT IN MIND WHEN SETTING THE CRITERIA TO BE APPLIED FOR THE AWARD OF A CONTRACT

Adapt this sub-section using relevant local legislation, processes and terminology.

When setting the criteria to be applied for the award of a contract ('award criteria'), a contracting authority is to operate in particular with respect to the following general law and Treaty principles:

Equal treatment and non-discrimination – The award criteria must be non-discriminatory (especially on the grounds of nationality) and not prejudicial to fair competition.

Transparency – The award criteria must be set in advance and duly disclosed. The purpose of establishing and formally disclosing the award criteria to be applied is to ensure that:

- potential tenderers can prepare their tenders in a more appropriate way, trying to best meet the stated priorities of the contracting authority;
- the evaluation of tenders is carried out by a contracting authority in a transparent and reliable way and as objectively as possible;
- the relevant stakeholders (for example, audit bodies, review bodies, other government bodies or economic operators) can monitor the process so as to prevent discriminatory or non-authorised award criteria from being used.

N.B. *Recital 46 of the Directive explicitly states that contracts are to be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment and that guarantee the assessment of tenders under conditions of effective competition.*

See module A1 for more information on the general law and Treaty principles that are relevant for public procurement.

2.3 CRITERIA THAT MAY BE APPLIED FOR THE AWARD OF A CONTRACT

Adapt all of this sub-section using relevant local legislation, processes and terminology.

Article 53(1) of the Directive provides that the criteria on which a contracting authority is to base the award of public contracts for supplies, works or services must be either:

Lowest price – in this case, the contract is awarded on the basis of the price only (see sub-section 2.4 below for more information on this criterion); or

Most economically advantageous tender (MEAT) – in this case, other criteria in addition to or rather than price – for example, quality, delivery time, after-sales services – can be taken into account to award the contract (see sub-section 2.5 below for more information on this criterion).

2.3.1 Choice between the lowest-price criterion and the MEAT criterion

The choice between the lowest-price criterion and the MEAT criterion is left to the discretion of the contracting authority. This provision was confirmed by the European Court of Justice (ECJ) in the *Sintesi* case (see box below).

Case note: Sintesi

(Case C-247/02, *Sintesi SpA vs. Autorita' per la Vigilanza sui Lavori Pubblici* [2004] E.C.R. I-9215. This case is also available on www.curia.europa.eu.)

This case concerned a request of an Italian court to the ECJ for a preliminary ruling. In this case, the subject of dispute was an Italian law that imposed the award of all works contracts launched under an open or restricted procedure to be made on the basis of the lowest price only.

The ECJ held, *inter alia*, that national legislation could not impose such a general and *abstract* requirement since it deprived contracting authorities of the possibility of taking into consideration *the nature* and *the specific characteristics* of such contracts and of the possibility of choosing the best tender.

Cases where the MEAT criterion must be used:

- Competitive dialogue

  When competitive dialogue is used as the award procedure, the only award criterion allowed is the MEAT criterion (article 29(4) of the Directive). See module C4 for information on the competitive dialogue procedure.

- Variants

  Where a contracting authority decides to authorise the submission of variants, the criterion for award must be the MEAT (article 24(1)). A contracting authority must announce in the contract notice whether or not it authorises variants.

Economic issues and the choice of lowest price or MEAT

When exercising its discretion over whether to use the lowest price or the MEAT criterion, the contracting authority needs to bear in mind the impact of that decision on how and what it can evaluate. See the 'Additional Information Box – Part 1' at the end of this narrative section for further discussion on the impact of this choice and on economic arguments. See also module A4.

2.3.2 Disclosure obligations with regard to the criteria to be applied for the award of a contract

For those procurement procedures requiring a contract notice, the contracting authority must announce in the contract notice whether it is going to apply the lowest price criterion or the MEAT criterion (see annex VII A, item 23, of the Directive on the information to be included in the contract notice).

N.B. *The contracting authority must award a public contract on the basis of the disclosed award criterion.*

On the specific disclosure obligations regarding the criteria constituting the MEAT, see sub-section 2.5.5 below.

See module E2 for more information on the content of contract notices.

2.4 LOWEST-PRICE CRITERION

Adapt this sub-section using relevant local legislation, processes and terminology.

When a contracting authority chooses to apply the lowest-price criterion, the contract is awarded to the tenderer offering the lowest price for a compliant tender. See module E5 for more information on tender evaluation and contract award. The price is the only factor that is taken into consideration when choosing the best compliant tender. Tenders received are evaluated against the set specifications on the basis of a pass or fail system, and no quality considerations can come into play in this choice.

Example - Procurement of Plastic Ballpoint Pens

Specifications	Offered specifications	Evaluation
Quantity: 200	Name of Manufacturer: Name of Model (if applicable)	Pass/Fail
Click pens ballpoint		
Plastic barrel		
Colour of ink: black		

Column 1 is completed by the contracting authority and shows the required specifications (not to be modified by the tenderer).

Column 2 is to be filled in by the tenderer and must indicate in detail what is offered. It must also contain a clear indication of the name of the manufacturer and the name of the model offered, if applicable.

Column 3 is completed by the evaluation team during the evaluation process, whereby the evaluation of the items offered is made on a pass or fail basis.

N.B. *The tenders that comply with the set specifications are compared only on the basis of the prices offered.*

N.B. *When the lowest price criterion applies, a contracting authority would normally use detailed specifications (see module E1 on the different types of specifications that a contracting authority may use). This type of specifications, in fact, allows tenders that are technically compliant to be easily compared on the basis of the price only.*

Lowest-price criterion and cost-analysis – The lowest-price criterion refers only to the situation where a contract is awarded on the basis of the *tendered price*, *i.e.* the price indicated in each tender submitted (after correction of any computational error and application of any discount – see on these issues module E5 on tender evaluation and contract award). The lowest-price criterion cannot be used whenever a contracting authority wants to apply cost-analysis. In this case, the MEAT criterion must be applied. This provision was confirmed by the Advocate General Jacobs in the *SIAC* case examined in the box below.

Case note: SIAC

(Case C-19/00 *SIAC Construction Ltd v County Council of the County of Mayo* [2001] ECR I-7725. The ECJ judgment and the Opinion of the Advocate General Jacobs are also available on www.curia.europa.eu.)

This case concerned a public works contract that was to be awarded by open procedure. The contract was a measure-and-value contract, according to which the quantities *estimated* for each item were set out in the bill of quantities by the contracting authority. For this type of contract, the tenderers had to complete the bill of quantities by filling in a rate for each item and a total price for the *estimated* quantity. The price payable was determined by measuring the *actual* quantities *on completion* of the work and valuing them at the rates quoted in the tender. The award criterion applicable was the most economically advantageous tender based on "cost" and "technical merit".

Advocate General Jacobs, in his Opinion addressed to the ECJ, stressed that the term 'lowest price only' referred to *the price stated in the tender* and could not refer to the *ultimate cost* to be paid (once the actual quantities were known). The Advocate General went on to point out that any alternative interpretation would detract from the clarity of the lowest-price criterion, which was obviously intended to enshrine an absolutely objective standard. (However, it must be noted that the ECJ did not consider the latter issue.)

Limitations of the lowest-price criterion – The lowest price criterion has the advantage of simplicity and rapidity, but it presents some limitations, including in particular the following:

- It does not allow the contracting authority to take into account qualitative considerations. Apart from the quality requirements built into the specifications, which must be met by all tenders, the quality of the items being procured is not subject to evaluation.

  N.B. *A tender that exceeds the set specifications (and offers a better quality) but is set at a slightly higher price than a tender that simply meets (but does not exceed) the set specifications cannot be chosen as the winning tender.*

- It does not allow the contracting authority to take into account innovation and innovative solutions. Tenders that meet the set specifications are compliant.
- For requirements that have a long operating life, it does not allow the contracting authority to take into account the life-cycle costs (*i.e.* costs over the duration of the life cycle) of the requirement procured. When the lowest-price criterion is used, only the direct cost of the purchase (or the initial purchase price) within the set specifications can be taken into consideration. (See sub-section 2.5.1 below for more information on life-cycle costs.)

Some cases where it may be considered appropriate to use the lowest-price criterion

Procurement of goods – For the procurement of simple, standardised off-the-shelf products (for example, stationery), the price is normally and typically the only relevant factor on which the contract award decision is based.

Procurement of works – 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 as the award criterion to be applied.

Procurement of services – For some services (for example, cleaning services for buildings and publishing services), a contracting authority is often in a position and may prefer to specify in detail the exact contract and specification requirements and then select the compliant tender that offers the lowest price.

See also 'Additional Information Box – Part 1' at the end of this narrative section for a discussion from an economic perspective of cases where the use of the lowest-price criterion may or may not be appropriate.

N.B. *The above-mentioned cases are examples only. It is the sole responsibility of the contracting authority to make an informed decision as to whether or not to use the lowest-price criterion, taking into account the nature and the specific characteristic of the contract concerned.*

N.B. *Normally, the lowest-price criterion is not suitable for the assessment of complex services, supplies and works tenders.*

2.4.1 Use of specific templates to be included in tender documents to obtain the quotation of tendered prices from tenderers

The Directive is silent as to whether tender documents should contain specific templates to obtain the quotation of tendered prices from tenderers. This issue is left to national legislation to regulate.

In practice, a contracting authority may want to include in the tender documents a specifically designed table listing all of the elements to be quoted as part of the tendered price. Such a table is normally referred to as a "breakdown of the tendered price" or "schedule of prices" or, in the case of works, as a "bill of quantities" (different names are also used in practice). The breakdown of tendered price/schedule of prices/bill of quantities has to be completed by the tenderers and submitted to the contracting authority as part of their tender offers (see module E1 for more information on the preparation of tender documents).

(Adapt for local use – making reference to any local rules on this issue and add any template that is to be used locally or introduce a weblink from which this template may be downloaded.)

Good practice note

The use of a breakdown of tender prices/schedule of prices/bill of quantities allows a contracting authority to set out in a clear and unequivocal way all of the elements that must be quoted as part of the tendered price. This reduces the possibility of mistakes or omissions by tenderers when quoting their prices and enhances the chances of obtaining responsive tenders.

2.5 MEAT CRITERION

Adapt this sub-section using relevant local legislation, processes and terminology.

When the most economically advantageous tender (MEAT) criterion is used, a contracting authority can take into account other criteria in addition to – or rather than – the price, such as the quality, delivery time, and after-sales services. Each chosen criterion is given a relative weighting by the contracting authority, which reflects the relative importance that it has. The purpose of the MEAT criterion is to identify the tender that offers best value-for-money (Recital 46 of the Directive).

Value-for-money – The term value-for-money means the optimum combination between the various criteria (cost-related and non-cost related criteria) that together meet the contracting authority's requirements. However, the elements that constitute the optimum combination of these various criteria differ from procurement to procurement and depend on the outputs required by the contracting authority for the procurement exercise concerned.

As explained in module A1, the concept of value-for-money recognises that goods, works and services are not homogenous, *i.e.* that they differ in quality, durability, longevity, availability and other terms of sale. The point of seeking value-for-money is that contracting authorities should aim to purchase the optimum combination of features that satisfy their needs. Therefore the different qualities, intrinsic costs, longevity, durability, etc. of the various products on offer are measured against their cost. It may be preferable to pay more for a product that has low maintenance costs than a cheaper product that has a higher maintenance cost. (See module A1, where the concept of value-for-money is further illustrated.)

Advantages of the MEAT criterion – The MEAT criterion, as opposed to the lowest-price criterion, presents a series of advantages, including in particular the following:

- It allows contracting authorities to take into account qualitative considerations. The MEAT criterion is typically used when quality is important for the contracting authority.
- It allows contracting authorities to take into account innovation or innovative solutions. This is particularly important for small and medium-sized enterprises (SMEs), which are a source of innovation and important research and development activities.
- For those requirements with a long operating life, it allows the contracting authority to take into account the life cycle costs (*i.e.* costs over the life cycle) of the requirement purchased and not only the direct cost of the purchase (or initial purchase price) within the set specifications. (See sub-section 2.5.1 below for more information on life-cycle costs.)

Some cases where it may be considered appropriate to use the MEAT criterion

Procurement of goods – For public supplies contracts that involve significant and specialised product installation and/or maintenance and/or user training activities, it is usual for the award to be made on the basis of the MEAT criterion. For this type of contract, in fact, the quality of the above-mentioned services is normally of particular importance.

Procurement of works – For works designed by the tenderer, the MEAT criterion is often used.

Procurement of services – For the procurement of consultancy services and more generally intellectual services, the quality is normally very important. Experience has shown that when procuring this type of services, best results in terms of best value-for-money are achieved when the MEAT criterion is used rather than the lowest-price criterion.

N.B. *The above-mentioned cases are examples only. It is the sole responsibility of the contracting authority to make an informed decision as to whether or not to use the MEAT criterion, taking into account the nature and the specific characteristic of the contract concerned.*

Comment: The MEAT criterion is typically used for complex supplies, services and works contracts, where there are various products/solutions available and where it would therefore not be appropriate to evaluate the tenders on the basis of price only.

2.5.1 Criteria that may be taken into account to determine the MEAT

A contracting authority may take into account various criteria to determine the most economically advantageous tender (MEAT). Article 53(1) of the Directive contains an *illustrative* list of these criteria, which are:

- quality
- price
- technical merit
- aesthetic and functional characteristics
- environmental characteristics
- running cost
- cost-effectiveness
- after-sales service and technical assistance
- delivery date and delivery period or period of completion

N.B. *However, since the above list is only illustrative, it is left to the contracting authority to establish the criteria to be applied in order to determine the most economically advantageous tender from its point of view, taking into account the specific circumstances of each case and within certain specified limitations. See sub-section 2.5.1.1 below for further discussion of these limitations.*

The criteria that may be taken into account by a contracting authority to determine which tender is the most economically advantageous one may be divided into two broad categories: cost-related criteria and non-cost related criteria.

Cost-related criteria – The cost-related criteria (also referred to as economic criteria) allow the contracting authority to determine the cost - in monetary terms - for the acquisition of the object of the procurement and also, for example, for using and operating it.

Examples of cost-related criteria

- **price** - the initial purchase price stated in each individual tender
- **running costs** - costs related to the use of the object of the procurement, which may include the cost of spare parts and consumables, maintenance costs, licences, etc.
- **costs for after-sales services** - costs related to the technical support required with regard to the object of the procurement

In this context, it is important to examine the concept of **life-cycle costs**. Life-cycle costs are the costs of the goods, works or services that are being procured through the duration of their life cycle.

Where a requirement is, for example, a machine, vehicle or building that has a working life over several years, there may be a need to ensure that it is cost-effective over its whole working life. This means looking not only at the lowest purchase price but taking a long-term view in order to guarantee long-term value-for-money. In these cases, in fact, it may be the case that the direct cost of purchase is only a small proportion compared to the total cost of the requirement procured through the duration of its life cycle.

In broad terms, the life-cycle costs comprise all costs to the contracting authority relating to the:

- acquisition
- operational life and
- end of life (such as disposal)

of the goods, works or services being procured. It should be noted, however, that for certain assets there are no end-of-life costs since there is no disposal but, for example, instead there may be a resale value. The type of life-cycle cost is linked to and depends on the different types of goods, services or works being procured.

N.B. *The life-cycle costs must include the costs to the contracting authority only and not to external persons.*

Example of life-cycle costs related to the construction of a school

- Construction costs as indicated in the tender
- Maintenance costs (major replacement, minor replacement, redecoration, etc.)
- Operation costs (energy consumption, etc.)
- End-of-life costs (disposal, reinstatement, continued value, etc.)

The life-cycle costs can be either "one-off" costs or "recurrent" costs.

- **One-off costs** are those that are paid only once with the acquisition of the requirement being procured.

Examples of one-off costs

- Initial price
- Delivery and installation
- Acceptance
- Initial training
- Documentation
- Disposal

- **Recurrent costs** are those that are paid throughout the life cycle of the requirement being procured. They depend on its longevity and they normally increase with time (for example, the maintenance and repair costs normally increase with the ageing of the object of the procurement).

Examples of recurrent costs

- Retraining
- Service charges
- Maintenance and repair
- Consumables
- Spare parts
- Energy consumption

Life-cycle costing (also known as total cost of ownership – TCO) means the methodology for the economic evaluation of the life-cycle costs over a period of time, as defined in the agreed scope (with regard to life-cycle costing, see also module E1 on the preparation of tender documentation and specifications).

Life-cycle costing is therefore:

- an economic evaluation method;
- a methodology that accounts for all relevant costs;
- an evaluation of costs over a defined period of time.

With regard to life-cycle costing concerning the procurement of a specific requirement, a contracting authority should ask itself the following questions:

- What do I need now and how much will it cost me?
- What will I need to do in the future and how much will that cost me?
- How long is the 'future'?
- How do I evaluate future costs against current costs?

Non-cost related criteria - The non-cost related criteria concern key performance requirements and adherence to specifications.

Examples of non-cost related criteria

- **quality** - the quality characteristics that the object of the procurement must satisfy (for example, the number of pages per minute of a printer or its durability)
- **technical merit** - if the object of the procurement is fit for purpose and how well it performs
- **aesthetic and functional characteristics** - how the object of the procurement looks and feels and how easy it is to use
- **delivery date** - the guaranteed turnaround time from order to delivery and the ability to meet the set deadline
- **after-sales services** - what support is required and available to the contracting authority after the contract has been signed

Sub-criteria – A contracting authority may also decide to sub-divide the criteria that are chosen to determine the MEAT into sub-criteria. The sub-criteria indicate the specific factors that are taken into account by the contracting authority within a specific criterion.

Example of sub-criteria

In the case of a works tender for the construction of a bridge, the contracting authority may want to sub-divide the "technical merit" criterion into sub-criteria, which may include, for example, elasticity and stability.

Good practice note

The identification of the criteria (and any sub-criteria) to be applied must be carried out with due care. Failure to include relevant criteria or mistakenly including inappropriate ones may mean that the tender offering best value-for-money is not selected.

Also, the criteria chosen to determine the most economically advantageous tender must be clearly formulated so that tenderers have a clear common understanding of these criteria and are in a position to prepare their tenders in an appropriate way.

The criteria will generally be scored by using a scoring system or a "scoring rule", which assigns weightings to the criteria used. See the Additional Information Box – Part 2 at the end of this narrative section for more information on the variousd types of scoring rules.

2.5.1.1 Limitations to the contracting authority's discretion when establishing the criteria to be applied to determine the MEAT

Article 53(1) of the Directive refers to the tender that is the most economically advantageous *"from the point of view of the contracting authority"*, thus putting stress on the contracting authority's discretion in choosing the criteria to be applied. However, this discretion is not unrestricted and has some limitations:

- The criteria chosen must be linked to the *subject matter* of the public contract in question (this is explicitly stated in article 53(1) of the Directive).

  N.B. *Thus a contracting authority cannot determine the criteria to be applied in an abstract way. The various criteria chosen must be directly linked to the specific contract that is the subject of the tender and therefore to the supplies, works and services being procured.*

Comment

The requirement that the criteria must be linked to the subject matter of the public procurement in question prevents the contracting authority from choosing criteria relating to secondary policies, such as environmental or social policies, if these criteria are chosen simply to promote and foster such policies in general and are not linked to the subject matter of the contract. Thus, for example, a contracting authority cannot give extra points to a tender simply because the tenderer that has submitted it applies in general a good environmental policy in carrying out its activities. This provision has been confirmed by the European Court of Justice in the ***Wienstrom*** case, examined below.

Case note: *Wienstrom*

(Case C-448-01, *EVN AG and Wienstrom GmbH vs. Austria* [2003] E.C.R. I – 14527. This case is also available on www.curia.europa.eu.)

This case concerned a tender for the award of a public contract for the supply of electricity to the Austrian State. The electricity supplier had to undertake to supply the Federal offices with electricity produced from renewable energy sources. The estimated amount of energy needed under the contract was 22.5 gigawatt hours (GWh) per annum. The award criterion to be applied was the MEAT. The criteria laid down were: price, with a weighting of 55%, and energy produced from renewable energy sources, with a weighting of 45%. It was stated in relation to the latter criterion that only the amount of energy that could be supplied from renewable energy sources in excess of 22.5 GWh per annum (and therefore in excess of the contracting authority's needs) would be taken into account.

The ECJ held that environmental criteria could be used by contracting authorities as award criteria for determining the most economically advantageous tender only if, *inter alia*, they were linked to the *subject matter* of the contract.

However, in the case at issue, the ECJ found that the award criterion applied did not relate to the service that was the subject matter of the contract. The service that was the subject matter of the contract was the supply of an amount of electricity from renewable energy sources to the contracting authority. The award criterion in question related instead to the amount of electricity that the tenderers had supplied or would supply to other customers, since it related solely to the amount of electricity produced from renewable sources in excess of the expected annual consumption of the contracting authority.

See module C5 for more information on award criteria and social and environmental considerations.

- The criteria chosen must be aimed at identifying the most economically advantageous tender, *i.e.* the tender that offers the best value-for-money, and they cannot be aimed at other purposes. This has been repeatedly stressed by the European Court of Justice in its case law. See in the box below some ECJ judgments in this regard.

Case notes

Beentjes

(Case C-31/87, *Gebroeders Beentjes v State of The Netherlands* [1988], E.C.R. 4631 - see in particular paragraph 19. This case is also available on www.curia.europa.eu.) The facts of this ECJ case are examined in module C5. See also module E3.

SIAC

(Case C-19/00 *SIAC Construction Ltd v County Council of the County of Mayo* [2001] ECR I-7725 - see in particular paragraph 36. This case is also available on www.curia.europa.eu.) The facts of this ECJ case are examined in sub-section 2.4 above.

Wienstrom

(Case C-448-01, *EVN AG and Wienstrom GmbH vs. Austria* [2003] E.C.R. I – 14527 – see in particular paragraphs 37-38. This case is also available on www.curia.europa.eu). The facts of this ECJ case are examined in the box above.

In all of the cases listed above, the ECJ held, *inter alia*, that even though it was left to the authorities awarding contracts to choose the criteria on which they proposed to base their award of the contract, their choice was limited to criteria aimed at identifying the offer that was economically the most advantageous.

- The criteria chosen must be objective and objectively quantifiable.

In the *Beentjes* case, the ECJ indicated, *inter alia*, that the contracting authority's discretion had to be restricted by establishing objective criteria of the kind provided by the Directive's illustrative list.

In the same *Beentjes* case, the ECJ further stressed that the award criteria to be applied must not confer "unrestricted freedom of choice" on the contracting authority. This has also been confirmed in subsequent ECJ case law, for example in the *SIAC* case (referred to in sub-section 2.4 above) and in the *Concordia Buses* case (C-513/99 Concordia Bus Finland v Helsinki – This case is available on www.curia.europa.eu. For a summary of this case, refer to module C5 on social and environmental considerations).

Comment: As explained in module C5, in practice, the requirement of "unrestricted freedom of choice" has been interpreted as a requirement to set specific, product-related and *measurable* criteria – which will limit a contracting authority's discretion when undertaking the evaluation.

Thus, in order to guarantee the objectivity of the criteria to be applied and to prevent the unrestricted freedom of choice being conferred on the contracting authority, these criteria must be formulated in a precise and (as far as possible) measurable way, *i.e.* in a way that allows tenderers to plan their tenders and to take account of the way in which the assessment/evaluation of the tenders would be made (see also the *Lianakis* case, which is examined in sub-section 2.5.5 below).

N.B. *The more objective, precise and quantifiable the criteria are, the more difficult it is to conceal arbitrary and discriminatory decisions. This effect is further reinforced by the disclosure obligation of the criteria to be applied, as examined in sub-section 2.5.5 below.*

See also sub-section 2.2 above on the basic public procurement principles that must be respected when setting the criteria for the award of a contract.

2.5.2 Selection criteria and award criteria: can selection criteria be used as criteria to determine the most economically advantageous tender?

As explained in module E3, the selection of economic operators and the award of a contract are two different operations in the procedure for the award of a public contract; they are governed by different rules and are distinct from a conceptual point of view.

Selection criteria – are applied to determine *which economic operators (tenderers or candidates)* are qualified and able to perform the contract. They therefore relate to the *economic operators (tenderers or candidates)* as such (see module E3 for more information on the selection criteria allowed under the Directive).

Award criteria – are applied to determine which *tender* meeting the set specifications and requirements is the best one. These criteria therefore relate to the *tenders*.

The difference between selection criteria and award criteria for the award of the most economically advantageous tender has been specifically dealt with in *Beentjes'* Advocate General Opinion (but this issue has not been addressed by the ECJ itself).

Case note: *Beentjes*

The *Beentjes* case is referred to above. The Opinion of the Advocate General is available on www.curia.europa.eu – see in particular paragraphs 35 and 36.

The Advocate General stressed, *inter alia*, that the criteria for the award to the most economically advantageous tender concerned the *product* and not the *producer,* the quality of the *work* and not that of the *contractor.* The Advocate General went on to point out that, therefore, the Directive drew *a clear distinction* between the criteria for checking whether a contractor as such was qualified to perform the contract and the criteria for awarding the contract, which related to the qualities of the service which –the contractor offered and of the works it proposed to carry out.

Can selection criteria be used as criteria to determine the MEAT? – As explained above, conceptually, the distinction between selection criteria and award criteria is clear. These two types of criteria serve different purposes. Thus selection criteria **cannot** be used as criteria for determining the MEAT.

However, in practice, there may be overlaps between these two types of criteria.

Examples of selection criteria that may also be relevant as criteria for determining the MEAT

- **Educational and professional qualifications of the persons responsible for providing the services** – this criterion is particularly important as a criterion for determining the MEAT in the case of consultancy services (see the box on consultancy services at the end of this sub-section)
- **Past experience in similar contracts** – on the use of past experience as an award criterion, see the ECJ judgment in *GAT* in the box below)

Comment: Both of the criteria mentioned above are selection criteria under the Directive. As selection criteria, they may be used to establish whether economic operators have the capability of performing the contract according to the set minimum standards. However, in some cases, these criteria may also affect the quality of the performance and its cost.

Thus, a crucial issue relates to whether, *in practice,* certain selection criteria may be used also as criteria for determining the most economically advantageous tender.

The Directive does not explicitly regulate this issue. Also, the ECJ case law is ambiguous and has not provided a clear-cut answer. See the box below on the main relevant ECJ case law dealing with this issue.

Case notes

GAT

(Case C-315/01, *Gesellschaft fur Abfallentsorgungs-Technik (GAT) v Osterreichische Autobahnen und Schnellstrassen AG* [2003] E.C.R. I-6351. This case is also available on www.curia.europa.eu.)

This case concerned an application for a preliminary ruling from the ECJ by the Austrian Federal Procurement Office. This request for a preliminary ruling arose out of a case for the supply of a new, ready-to-use and officially approved road sweeper for mountain roads. The contract was to be awarded on the basis of the most economically advantageous tender. One of the award criteria to be applied concerned the number of references that tenderers could provide from customers of road sweeper vehicles in the Alps region of the EU. A weighting of 20 was given to this award criterion. Furthermore, it was stated that the evaluation formula to be applied with regard to this criterion would be the following: the highest number of customers divided by the next highest number multiplied by 20. The tender process was launched under Supplies Directive 93/36, a predecessor to the current Directive, and was undertaken as an open procedure.

In this case, the ECJ was asked whether Directive 93/36 precluded the contracting authority, in a procedure for the award of a public supply contract, from taking account of the *number of references* relating to the products offered by the tenderers to other customers, not as a criterion for establishing their suitability for carrying out the contract but as a *criterion for awarding the contract.*

First of all, the ECJ stressed that the issue at stake in this case concerned whether the contracting authority, in determining the most economically advantageous tender, had to take account of the number of references relating to the product offered by the tenderers to other customers, *without considering whether the customers' experiences of the products purchased had been good or bad.*

The ECJ then held that a *simple list* of references, containing only the names and the number of the tenderers' previous customers *without other details* relating to the deliveries effected to those customers, could not be used as a criterion for awarding the contract since it could not provide any information that would allow the identification of the most economically advantageous tender.

However, the ECJ stressed that, in any event, the submission of a list of references might be required to establish the tenderers' technical capacity (*i.e.* it could be used as a selection criteria).

Comment: In this judgment, the ECJ seemed to imply that if the references provided quality-related information and therefore allowed the identification of the most economically advantageous tender, they might be taken into account as award criteria. It is obvious that a *simple list of references* does not provide any such kind of information.

Lianakis

(Case C-532/06, *Lianakis AE and Others v Alexandroupolis and Others*, which is available on www.curia.europa.eu.)

This case concerned an application for a preliminary ruling from the European Court of Justice (ECJ) by a Greek review body. The proceedings before the Greek review body related to the procedure for the award of a service contract to carry out a project in respect of the cadastre, town plan and other related services in the municipality of Alexandroupolis (which was the contracting authority). The tender process was launched under the Services Directive 92/50/EC, a predecessor to the current Directive, and was undertaken as an open procedure.

In this case the contract was to be awarded on the basis of the MEAT criterion by applying the following criteria, which had been set out in the contract notice in descending order of importance:

1. proven experience on projects carried out in the previous three years;
2. the firm's manpower and equipment;
3. the ability to complete the project within the anticipated time frame, taking into consideration the firm's commitments and professional resources.

In this case, the ECJ pronounced, *inter alia*, on the legality of the criteria applied. The ECJ distinguished, on the one hand, the criteria that were aimed at identifying the most economically advantageous tender, and, on the other hand, the criteria that were *essentially linked* to the evaluation of the tenderers' ability to perform the contract in question, and it held that only the former were award criteria. The ECJ went on to state that, in the case in question, the criteria that had been selected as award criteria were criteria that were *essentially linked* to the tenderers' ability to perform the contract, and they therefore did not have the status of award criteria. As a result, they could not be taken into account as award criteria instead of selection criteria (see in particular paragraphs 30-32 of the judgment in question).

Comment: In this case, the ECJ did not deal with the issue of whether criteria that were linked to the tenderers' ability to perform a contract could be taken into account as award criteria if they were actually aimed at identifying the quality of the performance and therefore the most economically advantageous tender. This case seems to have brought back doubts about the specific issue at stake.

Comments on consultancy services

(*N.B. The Directive does not specifically address the particularity of consultancy services.*)

The issue of whether the qualifications and experience of the persons responsible for providing the services may be used to determine the most economically advantageous tender is particularly important for consultancy services where the criteria that are to be applied to determine the MEAT are price and quality.

In the case of consultancy services, in practice the quality measures that contracting authorities will be concerned about are, on the one hand, the methodology and organisation proposed for delivering the services (which could also probably be covered under technical merit) and, on the other hand, the qualifications and experience of the individual experts /consultants who will be providing the services in accordance with the requirements contained in the specifications/terms of reference (see example provided below).

Example of a simplified evaluation grid/matrix for assessing quality in consultancy services (based on the requirements of the specifications/terms of reference)

	Maximum points
Organisation and methodology	
Rationale	20
Strategy	20
Timetable of activities	10
Total score for Organisation and methodology	50
Individual experts/consultants	
Individual expert/consultant 1 (Max 30 points)	
Qualifications	5
Specific professional experience	25
Individual expert/consultant 2 (Max 20 points)	
Qualifications	2
Specific professional experience	18
Total score for individual experts/consultants	50
Overall total score	100

The equation price/quality is fundamental in consultancy services: a contracting authority may choose to pay more for higher quality performance or less for lower quality performance. This is the whole point of the MEAT criterion. (See the Additional Information Box – Part 2 at the end of this narrative section for further information on scoring and weighting.)

However, after the *Lianakis* case, there are doubts as to whether this way of operating is allowed.

The reverse situation: can criteria for determining the MEAT be used as selection criteria?

There is no doubt that award criteria cannot be used as selection criteria. The ability of economic operators to perform a contract cannot be established on the basis of the merits (for example, quality and price) of their offers.

N.B. *As explained in module E3, if an economic operator has been excluded because it does not meet the set selection criteria, it cannot be re-admitted into the tender process just because its tender is the least expensive or the most economically advantageous, as the case may be.*

2.5.3 MEAT criterion and contract specifications: some important considerations

In practice, the criteria that a contracting authority may apply to determine the MEAT must be chosen in such a way that they match the contract specifications. All specifications subject to evaluation should have criteria associated with them.

N.B. *The preparation of the specifications and of the criteria to be applied to determine the MEAT goes hand in hand. The contract specifications cannot be prepared without taking into account the criteria to be applied and, vice versa, the criteria to be applied cannot be determined without taking into account the contract specifications.*

When the MEAT criterion is used, in general terms, a contracting authority may decide to operate in particular in one of the following manners:

- Fix the minimum mandatory specifications that all tenders must meet, which will be evaluated on the basis of a pass or fail system, and then award scores to those tenders that have achieved a pass. The scores will reflect the degree to which a tender exceeds the minimum specifications.

  N.B*. Usually a contracting authority is not interested in scoring tenders' compliance with all minimum specifications that are exceeded but only with some of them, depending on the circumstances of each case.*

- Fix, in addition or as an alternative to mandatory specifications, specifications that do not entail the application of a minimum "threshold" and that will be scored on the basis of the level of compliance of tenders with the contracting authority's requirements. In this case, some variability with regard to the level of compliance is acceptable.

See module E1 on the different types of specifications that may be used by a contracting authority.

2.5.4 Methods that may be used to identify the most economically advantageous tender

The methods or methodologies for applying the chosen criteria are the 'systems' that a contracting authority may use to identify the most economically advantageous tender.

2.5.4.1 Weighting

The Directive requires the contracting authority to specify the relative weight that it gives to each criterion chosen in order to determine the most economically advantageous tender (article 53(2)).

N.B. *Through the weighting system, the contracting authority makes potential tenderers know the relative importance that it attaches to each criterion chosen and it allows them to prepare more appropriate tenders. At the same time, through the weighting system, the contracting authority structures its discretion and restricts the possibilities for arbitrary decisions during the process of evaluation of tenders.*

The contracting authority may express the relative weighting of the criteria used by providing for a range with an 'appropriate' maximum spread (article 53(2)).

Example

The contracting authority may state that criterion X will be weighted between 1% and 10%, while criterion Y will be weighted between 10% and 20%.

N.B. *The spread must be appropriate in the sense that it cannot be so broad (for example between 10% and 90%) that it would result in a breach of the transparency principle and that it would not provide any valuable indication to potential tenderers of the actual relative importance that the contracting authority attaches to each criterion used.*

Good practice note

The weighting of the various criteria to be applied in order to determine the most economically advantageous tender must be carried out with due care. Inappropriate weighting would cause problems when carrying out the evaluation of tenders, and could mean that the tender offering the best value-for-money would not be selected.

See the 'Additional Information Box – Part 2' at the end of this narrative section for further information on scoring and weighting.

2.5.4.2 Descending order of importance

The Directive explicitly states that where weighting, in the opinion of the contracting authority, is not possible for demonstrable reasons, the contracting authority is to indicate the criteria applied in descending order of importance (article 53(2)).

(Adapt for local use – making reference to whether or not the use of the descending order of importance is allowed under national legislation.)

One of the reasons why weighting may not be possible is the complexity of the contract (as indicated in Recital 46 of the Directive).

Good practice note

It is good practice to avoid indicating the criteria to be applied in descending order of importance. This system, in fact, does not allow tenderers to know in advance the relative importance that the contracting authority attaches to each criterion applied. As a result, this system makes it more difficult for potential tenderers to prepare appropriate tenders, while at the same time making it easier for a contracting authority to conceal arbitrary or discriminatory decisions during the process of evaluation of tenders.

2.5.5 Disclosure obligations with regard to the criteria to be applied to determine the MEAT and with regard to the methods for applying them

The contracting authority must announce in the *contract notice* or *contract documents* or, in the event of a competitive dialogue, in the *descriptive document* the following:

- the criteria representing the most economically advantageous tender, and
- their relative weighting or the descending order of importance of such criteria (where, in the opinion of the contracting authority, weighting is not possible).

See article 53(2) of the Directive and Annex VIIA, Contract Notice, point 23. See also module E2 for more information on the content of contract notices.

With regard to **restricted procedures, competitive dialogue procedures and negotiated procedures with prior publication of a contract notice**, the contracting authority must include the above-mentioned information *in the invitation to submit a tender, to participate in the dialogue or to negotiate* if it has not included this information in the contract notice, contract documents or, in the case of competitive dialogue, in the descriptive documents (see article 40(5) of the Directive). See also module C4 for more information on public procurement procedures and techniques.

Except for the explicit disclosure obligations mentioned above, the Directive does not specifically require a contracting authority to formulate a detailed evaluation methodology in advance. However, where a contracting authority has formulated such a detailed evaluation methodology in advance, this methodology must be entirely disclosed to tenderers. On the formulation and disclosure of the criteria used to determine the most economically advantageous tender, see the *Lianakis* case in the box below. **(See also the 'Additional Information Box – Part 2' at the end of this narrative section for further information on scoring methods.)**

Case note: Lianakis

Case C-532/06, *Lianakis AE and Others v Alexandroupolis and Others*, which is available on www.curia.europa.eu. The facts of this case are examined in sub-section 2.5.2 above.)

In this case, the ECJ pronounced not only on the legality of the criteria applied as award criteria, as explained in sub-section 2.5.2 above, but also on another issue, *i.e.* whether a contracting authority may stipulate at a later stage the weighting factors and sub-criteria to be applied to the criteria to be used to determine the most economically advantageous tender and previously announced in the contract notice or contract documents.

As previously explained, in this case, the contract was to be awarded on the basis of the MEAT criterion by applying certain award criteria that had been announced in the contract notice in descending order of importance. Only after the submission of tenders, and during the evaluation process, did the committee responsible for the evaluation of the tenders (Council's Project Award Committee) set out the weighting factors and the sub-criteria to be applied to those award criteria.

The ECJ stressed that, in the light of the principle of equal treatment and the ensuing obligation of transparency, potential tenderers should be aware when preparing their tenders of *all of the elements* and their relative importance that a contracting authority would take into account when identifying the most economically advantageous tender. Thus the ECJ held that a contracting authority could not apply weighting rules or sub-criteria to the award criteria referred to in the contract documents or contract notice if it had not previously brought them (weighting rules and sub-criteria) to the tenderers' attention (see in particular paragraphs 38 and 45 of the judgment).

Comment: As explained above, the obligation to disclose in advance the relative weighting of the criteria chosen to determine the most economically advantageous tender is now explicitly mentioned in article 53 of the Directive. However, the Services Directive 92/50, a predecessor to the current Directive and to which this judgment relates, had required that a contracting authority disclose only in the contract notice or in the contract documents the criteria to be applied. The Lianakis case made it clear that a contracting authority had to disclose in advance the *weightings* and *sub-criteria* that would be applied to the award criteria used, as otherwise the award criteria couldnot be relied on. However, it is not entirely clear from the *Lianakis* judgment whether a contracting authority must also state in advance the weightings of the sub-criteria that are to be applied. In light of the principle of transparency, it is argued that also the weighting of sub-criteria should be disclosed in advance.

2.5.5.1 Use of specific evaluation grids/matrices to be included in tender documents

In practice, the contracting authority will include in the tender documents the evaluation grid/matrix that is to be used during the process of evaluation of tenders by the members of the evaluation team/panel, together with the criteria and any sub-criteria to be applied and their respective weightings. (See module E1 for more information on preparing tender documents and on the content of tender documents. See also the 'Additional Information Box – Part 2' at the end of this narrative section for further information on scoring rules.)

(Adapt for local use – making reference to any local rules on this issue and add any evaluation grid/matrix template that is to be used locally or introduce a weblink from which this template may be downloaded.)

N.B. *The tender documents should bring as much transparency as possible by providing clear information on how the evaluation process will take place and on all factors that will be taken into account (including their relative weightings) and the methodologies that will be applied to determine the most economically advantageous tender.*

This will not only help potential tenderers in preparing more responsive tenders, but it will also make the whole tender process, including the evaluation process, more transparent. It will also allow the relevant stakeholders (in particular tenderers, audit bodies and other government bodies) to monitor the tender process in order to identify situations where the criteria or methodologies for evaluation have been developed and/or applied in a discriminatory manner.

Main important points to be kept in mind when determining the criteria to be applied and their relative weighting

A contracting authority must choose the criteria to be applied and their relative weighting with due care. Inappropriate criteria and/or weighting and failure to include relevant criteria cause problems when carrying out the evaluation of tenders. It could also mean that the tender offering the best value-for-money would not be selected.

Listed below are some important points that, in general terms, should be kept in mind when determining the criteria to be applied and their relative weighting:

- The necessary expertise should be involved when determining the criteria to be applied and their relative weighting.
- The contracting authority's staff, who will ultimately be using the procured requirement, must be actively involved in the determination of the criteria to be applied and of their relative weighting.
- The criteria to be applied and their relative weighting must be chosen on a case-by-case basis, depending on the nature, type and priorities of the project as well as on the specific procurement context, with the purpose of identifying the most economically advantageous tender from the point of view of the contracting authority. Thus these criteria and their weighting must not be determined in an abstract way.

  N.B. *The practice of some contracting authorities of determining the criteria to be applied and their relative weighting by simply copying them from contract notices/documents of other contracting authorities or of previous tender processes – or by simply copying contract notice templates without adjusting them to the specific circumstances of each case – is against good practice and against the principle of best value-for-money.*
- The relative weightings assigned to the criteria to be used must reflect the relative importance that the contracting authority gives to these criteria in the specific case in question.
- The criteria chosen must be directly linked to the goods, services or works to be procured and not to the ability of economic operators to perform the contract.
- The criteria must be chosen in such a way that they match the contract's specifications. All specifications subject to evaluation must have criteria associated with them.
- In an evaluation matrix, not every criterion has necessarily to be weighted. Matrices will rather contain a combination of minimum criteria (pass/fail), which have to be satisfied by all tenders, and criteria that are weighted.
- The criteria should be clearly defined and they should be formulated in a simple way so that there is a clear understanding of what they mean, by both the economic operators and the evaluation panel/team.
- The criteria (and, more generally, any factors) that have not been announced in advance cannot be applied during the evaluation process.
- The criteria must be determined in accordance with national laws and general law principles of Community law as well as with Treaty principles.

2.6 AWARD OF DIFFERENT LOTS LAUNCHED UNDER THE SAME TENDER PROCESS

Adapt all of this sub-section using relevant local legislation, processes and terminology.

The Directive does not deal with the issue of how lots launched under the same tender process may be awarded.

In practice and broadly speaking, a contracting authority may have various options, for example:

- it may award each lot separately and therefore treat each lot as a separate contract (this is very common in practice), or
- it may decide to award the contract to the best combination of tenders received for all lots (for example, the overall lowest price or the overall most economically advantageous tender).

N.B. *In any event, the option applied must be duly disclosed in advance.*

2.7 DEFINING THE OVERALL STRATEGY CONCERNING THE AWARD CRITERIA TO BE APPLIED: CHECKLIST OF THE MAIN POINTS TO BE ADDRESSED

Adapt all of this sub-section using relevant local legislation, processes and terminology.

The overall strategy concerning the award criteria to be applied should be determined before a tender is launched. Listed below is a checklist of the main points that, in general terms, a contracting authority is advised to address when it defines its overall strategy:

- Choose which award criterion to apply, *i.e.* the lowest-price criterion or the MEAT criterion*
- Whenever the MEAT criterion has been chosen:
- Identify the individual criteria that will be applied and their relative weighting (or their descending order of importance in the case where weighting cannot be applied for demonstrable reasons).
- Where it has been decided to break each criterion down into sub-criteria, identify these sub-criteria and their relative weighting within the weighting given to that individual criterion.
- Where it has been decided to apply a more detailed evaluation methodology, define it in a clear way.
- Identify, in accordance with the requirements of the applicable law, where and how the following elements should be disclosed:
  - use of the lowest-price criterion or the MEAT criterion, as the case may be;
  - whenever the MEAT criterion has been chosen:
    - the individual criteria that will be applied and their relative weighting (or their descending order of importance if weighting cannot be applied for demonstrable reasons);
    - any sub-criteria into which each criterion to be applied is broken down and their relative weighting within the weighting given to that individual criterion;
    - any evaluation methodology that has been developed.

N.B. *When determining this strategy it must also be taken into account whether the tender will be divided into lots and how lots will be awarded.*

**The MEAT criterion must be applied whenever the competitive dialogue procedure is used and also whenever the contracting authority allows the submission of variants.*

2.8 CHANGE OF THE ANNOUNCED AWARD CRITERIA DURING THE TENDER PROCESS

Adapt all of this sub-section using relevant local legislation, processes and terminology.

During the tender process, a contracting authority may need to take into account new circumstances that have an impact on the announced award criteria (including the specific criteria used to determine the most economically advantageous tender and their relative weighting), or it may need to correct an omission or a mistake.

The Directive is silent as to whether changes in the announced award criteria are allowed. This is left to EU Member States to regulate in accordance with the basic public procurement principles of equal treatment and transparency.

Comment

Changes in the aware criteria may be divided into material and non-material changes.

A change is *material* when it is likely to have repercussions on the identity of the economic operators that would participate in the tender process. Broadly speaking, when a change occurs that is *material*, it is necessary to go back to the stage at which the change was made. For example, if a contracting authority wishes to use the MEAT criterion instead of the lowest-price criterion as previously announced in the contract notice (which is clearly a material change), it is necessary to cancel the tender process and re-advertise the contract, since the contract award criterion was announced in the contract notice itself.

A change is *non-material* when it is unlikely to have repercussions on the identity of the economic operators that would participate in the tender process. A non-material change is in principle allowed. In this case, a corrigendum to the contract notice and/or contract documents, as the case may be, which should be accompanied by an adequate extension of the deadline for submission of tenders duly notified to tenderers, would in general terms suffice. See module E2 for information on the amending notice that can be submitted to the *Official Journal of the European Union* (*OJEU*).

The determination as to whether a change is material or non-material must be made taking into account the specific circumstances of each case.

N.B. *To reduce mistakes, omissions or poor determination of the award criteria to be applied, it is important to keep in mind the main points listed in the box at the end of sub-section 2.5. In any event, changes should be limited to a minimum, and any possibility for change should not be abused. Changes should be exclusively linked to objective reasons.*

Good practice note

It is good practice to duly justify any change and to keep the justifying note in the internal records of the contracting authority in order to leave an audit trail and to ensure transparency.

N.B. *Under no circumstances may the announced award criteria (including their relative weighting, any sub-criteria applied and their relative weighting, and a more detailed evaluation methodology that has been announced) be changed or waived during the process of evaluation of tenders. At this stage, they must be applied as they stand.*

Award criteria in framework agreements: REMINDER

As explained in module C4, in the case of procurement of framework agreements, one of the four main competitive procedures (open procedures, restricted procedures, competitive dialogue, and negotiated procedures with prior publication of a contract notice) may be used. It is only when awarding contracts under a framework agreement that different, specific provisions apply. Therefore, the considerations made above with regard to the award criteria to be applied are also valid with regard to the procurement of framework agreements.

Multi-provider framework agreements **with re-opening of competition using a mini-tender procedure** – It should be noted that, with regard to multi-provider framework agreements where individual call-off contracts are awarded with re-opening of competition through a mini-tender procedure, the award criteria that a contracting authority may use for the award of the individual call-off contracts may be different from those applied for the award of the framework agreements themselves. However, this is possible only on condition that the award criteria to be applied for the award of individual call-off contracts are set out in advance in the specifications of the framework agreement itself (article 32(4)(d)).

Extract from the European Commission's Explanatory Note: *Framework Agreements – Classic Directive* (CC/2005/03_rev1 of 14.7.2005), pages 9 and 10, which is available on the following website: http://ec.europa.eu/internal_market/publicprocurement/docs/explan-notes/classic-dir-framework_en.pdf.):

"It should be emphasised that the award criteria do not have to be the same as those used for the conclusion of the framework agreement itself. Thus, it would be entirely possible to conclude a framework agreement exclusively on the basis of 'qualitative' criteria, in terms of the most economically advantageous tender, and to base the award of specific contracts solely on the lowest price, naturally on condition that this criterion was set out in the specifications of the framework agreement. Let us take the example of a framework agreement relating to computers and peripherals (printers, scanners, etc.), concluded on the basis of the most economically advantageous tender using criteria such as price, technical value and cost of use. For awarding a specific contract solely for the supply of printers, however, the contracting authority could conceivably set out in the specifications of the framework agreement that, for such a contract, 'technical value' will be measured in terms of 'pages/minute' while 'cost of use' will take account of energy consumption, the life of ink cartridges and their price."

See module C4 for more information on framework agreements.

UTILITIES

This short note highlights the main differences and similarities concerning the principles and requirements applying to the setting of award criteria in the utilities sector.

Adapt all of this sub-section for local use – using relevant local legislation, processes and terminology.

The rules and principles governing the award criteria under Directive 2004/17/EC (Utilities Directive) are substantially the same as those examined above and governing the award criteria under the Directive (*i.e.* Public Sector Directive, 2004/18/EC). The above-mentioned case law of the ECJ above is also valid for the award criteria under the Utilities Directive.

The main legal requirements relating to the award criteria are set out in the Utilities Directive:

- **Article 55** sets out the criteria on the basis of which contracting entities operating in the utilities sector may award contracts (*i.e.* lowest price or most economically advantageous tender). It also lays down general rules on setting and disclosing the criteria that may be used to determine the most economically advantageous tender as well as an illustrative list of those criteria.

  N.B. *It should be noted that the list stipulated by art. 55 is slightly different from the illustrative list contained in the corresponding article 53 of Directive 2004/18. In fact, it also includes commitments with regard to spare parts and to the security of supply. There is no doubt, however, that the additional examples of criteria are also allowed in the case of contract award procedures launched under Directive 2004/18. Additionally, it must also be noted that, as under the Directive, the MEAT criterion must be applied in the case where the contracting authority decides to allow the submission of variants (article 36 of the Utilities Directive).*

Additional Information Box – Part 1

1. Lowest price or most economically advantageous tender - economic issues and scoring rules

Competition for procurement contracts is widely recognised to have a multidimensional nature. For the acquisition of goods and services and also for works, the contracting authority often cares about both price and other non-price attributes.

In some cases, the contracting authority decides to award the contract on the basis of the lowest price. This means that it sets only minimum quality standards and then awards the contract to the economic operator that meets those minimum standards and submits the lowest price.

In many other settings, however, the contracting authority evaluates – that is, rewards – different levels of quality/technical aspects, and then the award is determined on the basis of the 'most economically advantageous tender'. Classical examples of criteria for evaluations on this basis are as follows:

i) the evaluation of additional memory capacity, larger screens, lower weight, or lower energy consumptions in the procurement of a PC/laptop;

ii) the number and distribution of customer assistance centres in a given geographical area for car rental/purchase;

iii) the quality of materials and the time schedule in public works.

When evaluation is made on this basis, economic operators submit both financial and technical offers. The contracting authority then selects the winner using a *scoring rule* that weighs price and quality so as to achieve the best quality-price combination.

Designing a scoring-based competitive tendering process involves, in most cases, higher procedural costs than price-only competitive tendering, since it requires the evaluation of many and potentially complex quality/technical attributes. However, it provides the contracting authority with more flexibility in handling the trade-off between price and quality, exploiting the competitive process to determine the most convenient price/quality combination.

2. Award on the basis of the lowest price – economic issues

2.1 Impact of minimal quality standards on competition

Let us start this section by asking a straightforward, although extremely important, question: when is it most appropriate to award a contract to the lowest-price economic operator? The following two examples are meant to provide some food for thought.

Example 1. Procurement of desktop computers for government tax collection service

The government tax collection service is planning to buy 1,000 new desktop computers for several groups of employees working on extremely homogenous tasks, such as word processing and database entry/analysis. The contracting authority's needs can be easily translated into a minimal computer configuration (speed of the microprocessor, extensions, screen, etc.) that is compatible with several existing models on the market.

Example 2. Procurement of photocopiers for libraries

A city council is considering buying 100 professional colour photocopiers for local libraries. Users' needs analysis reveals that the required functionalities (scanning, number of pages copied per minute, variety of copying sizes, etc.) can be satisfied by only one known brand on the market. There exist, however, three other brands with similar but lower quality standards. The contracting authority is insistent that the contract is to be awarded on the basis of the lowest price.

Comment: At first sight, the situations depicted in examples 1 and 2 are fairly alike. Why?

- In both cases, users' needs are so precise that it is possible to define a set of minimal quality standards for a desktop computer and for a colour photocopier that would satisfy those needs.
- However, while a lowest-price competitive tendering seems feasible in example 1 (due to the existence of several producers in a position to fulfil the minimal requirements), it would lead to a false competition in example 2 since it appears that there would be only one economic operator fulfilling the minimal requirements.

In order to set a *truly* competitive process, the contracting authority in example 2 should lower the minimum quality standards so as to attract other economic operators (producers or retailers). One of the economic operators offering a lower-quality product is likely to be awarded the contract, since the economic operator offering a high-quality product would demand a premium for quality and submit a higher price. Thus the contracting authority would end up buying less expensive photocopiers that might not entirely satisfy users' needs in the local libraries. In that case, the award on the basis of lowest price only would not deliver the best solution.

2.2 Comparing savings

The following example, while mirroring the one just described, will also be instrumental in introducing those circumstances under which contracting authorities ought to evaluate different quality levels in competitive tendering processes.

Example 3: Mobile phone services

Two local authorities, L1 and L2, located in two fairly distant regions (1 and 2) have awarded two contracts (one each) for mobile phone services. L1 and L2 have awarded the contracts at the lowest price by setting similar minimum-quality standards, with the noticeable exception of the degree of coverage by the mobile phone operator. L1 has set this value at 60%, whereas L2 has set it at 90% of its territory. Knowing that L1 has obtained phone rates 20% lower than L2, would one conclude that L1 has obtained a higher value-for-money than L2?

Comment: Are the two contracts *really* the same contracts? Almost. They differ in a one basic dimension, which is possibly a crucial quality aspect: network coverage. When L1's employees move around in their region, they are 50% more likely to be unable to receive or make phone calls than their colleagues in region 2. Basically, they are using a lower-quality service. It would then be incorrect to say that L1 has been more efficient in buying mobile phone services than L2. Having purchased quite similar, but not completely identical, services makes the comparison between awarding prices somewhat misleading.

2.3 When different quality levels matter

The following example contains several ingredients that would make the choice of the lowest-price criterion a possibly harmful strategy for the contracting authority.

Example 4. Procurement of restaurant vouchers

Central government departments are planning to buy restaurant vouchers for their employees. In many countries, vouchers are treated as a substitute for a canteen service and can be used mainly in restaurants, supermarkets and snack bars that are willing to accept them as a form of payment. Thus vouchers represent a substitute for money, but only when the seller has signed an agreement with the firms issuing vouchers.

In order to make this last point more clear, let us suppose that each voucher's nominal value is 5 EUR. When going out for lunch, employees usually look for a cafeteria within a 20-minute walk. Inside this area, 16 out of 20 cafeterias accept vouchers issued by firm A, whereas only 2 out of 20 accept those issued by firm B. Although voucher A and voucher B share the same nominal value, the former is eight times more likely to be used than the latter. This 'quality' dimension directly affects the departments' willingness to pay for voucher services. In general, the higher the number of food-serving shops, the higher the quality of the voucher service, which in turn implies that the contracting authority is willing to buy this service at a higher price.

Comment: Notice that the fraction of cafeterias accepting, say, brand-A voucher bears some resemblance to the mobile phone operator's network coverage in example 3. The main difference is that network coverage is relatively more often driven by technological aspects than a commercial strategy is.

Would it be advisable to award a contract for voucher services at the lowest price? If such is the procurement strategy, then the contracting authority should set a minimum threshold for the number of cafeterias willing to accept any given brand of voucher. If different brands have quite heterogeneous "networks", then:

- a low threshold would raise the number of potential participants, but employees are unlikely to use the voucher in most of the neighbouring restaurants;
- a high threshold would reduce participation, possibly generating high awarding prices, especially if firms are not willing to make the necessary up-front investments to expand the size of their networks (thus fulfilling the minimum requirement).

2.4 Summary

To summarise some of the main economic arguments developed so far:

Guidelines on the lowest-price award criterion

A contracting authority should favour the lowest-price criterion if:

- final users' needs are homogeneous in terms of technical requirements;
- the set of minimum technical requirements that are consistent with final users' needs does not restrict participation in the competitive tendering process;
- the set of minimum technical requirements are mostly related to firms' investment decisions, which can be modified in a short period of time a t a reasonable cost.

Additional information Box – Part 2

1. Scoring rules for evaluating the most economically advantageous tender

Where the contracting authority uses the most economically advantageous tender criterion, it must set minimum quality standards (*e.g.* minimum degree of resolution for a monitor), but it must also establish a *weighting scheme* for all technical/quality improvements that the contracting authority wishes to consider (*e.g.* how many additional inches will be considered for a PC screen).

Weighting technical aspects requires setting up a *scoring* rule, that is, a mechanism assigning a score or points[1] to each improvable technical characteristic. The sum of these scores determines the total maximum score. The total score is the crucial 'number' that allows the contracting authority to rank suppliers' price–quality offers in order to determine the winner.

Example 1. A simple scoring rule for ultrasound machines

A hospital is interested in procuring screens for ultrasound machines, taking into account only the price and the resolution of the monitor. A natural scoring rule for this two-dimensional procurement context is the following:

$$\textit{Total score} = \textit{price score} + \textit{resolution score}$$

The total score is composed of two 'sub-scores', one for each dimension of the contract. Sub-scores are the (absolute) weights that the contracting authority attaches to the each technical attribute.

Comment: The scoring rule should reflect the contracting authority's preferences, namely the relative importance it attributes to the technical aspects evaluated in the tender. In the spirit of the example illustrated above, if the monitor resolution is perceived as being very important, the contracting authority will attach a considerable weight to it with respect to price. Instead, if price matters more because, say, the main procurement goal is to obtain as low a purchasing cost as possible, the contracting authority will attach a relatively larger weight to price.

2. A simple scoring rule: The linear scoring rule

The linear scoring rule is the simplest way to 'shape' the contracting authority's preferences. It is particularly suitable for standardised products and in general in those procurement settings where the contracting authority can easily define its willingness to pay for additional quality. As we will see, this type of scoring rule assumes that the contracting authority's preferences over price-quality pairs are 'linear', that is, that the *benefit* the contracting authority obtains from additional quality levels (above the minimum requirement) increases proportionally with quality.

How much is the contracting authority willing to pay for additional quality?[2] This is the critical question that the contracting authority should answer so as to optimally design the scoring rule. To this end, we introduce the concepts of *contracting authority's monetary equivalent* for quality ('BME') and *the monetary value of a point* ('MVP').

[1] In the remainder of this ‚Additional Information Box - Part 2 we will use score and points interchangeably.

[2] Note that additional quality can be interpreted either as an improvement over the minimum requirement (*e.g.*, additional RAM of 256 with respect to the minimum of 125) or new technical aspects (*e.g.*, ergonomic keyboard, low-sound emissions, wireless mouse).

Example 2. Monetary value of a point

A contracting authority wishes to purchase a powerful server. The server has a market value of EUR 150,000. Procurement officials set a total of 100 points: 50 for the financial and 50 for the technical aspects. Suppose economic operator A gets 50 points by submitting a price of EUR 100 000, while economic operator B gets 40 points for a price of EUR 110,000. Neglecting for the time being the technical aspects, we can easily conclude that economic operator A obtains 10 extra points for a discount of EUR 10 000 with respect to economic operator B's tender: basically, each point is worth EUR 1 000 . Thus, *EUR 1 000 is the monetary value of a point*.

The monetary value of a point (MVP) is defined as the money/discount necessary for any economic operator to obtain one additional point. If MVP = EUR 1 000 is multiplied by the total points allocated to technical aspects (50 points), we obtain the amount of EUR 50 000. This value is the *contracting authority's monetary equivalent* of all technical aspects considered in the tender, that is, the value that the contracting authority attaches to the best performing server considered in its tender.

For the sake of simplicity, we have defined the MVP before the contracting authority's monetary equivalent for quality (BME); however, as we will see in the procedure described below, the BME should be defined in advance in order to appropriately set up the scoring rule.

2.1 Constructing a linear scoring rule

Suppose the contracting authority wishes to purchase one laptop. Minimum technical requirements indicate that the market value of the laptop is EUR 3 500. Suppose that the contracting authority is interested in evaluating price but also the screen dimension. Suppose the minimum required is 14 inches, and that contracting authority is interested in improvements up to 17 inches. So the contracting authority wishes the market to reveal what is the best price/screen dimension combination. Each additional inch is worth EUR 500. Therefore, the maximum value of an additional inch is EUR 500 up to 15, EUR 1 000 up to 16 and EUR 1 500 up to 17.

Therefore, the maximum value of technical quality is EUR 1 500. This value is the BME. We are now in condition to establish the weight of price and that of the screen dimension in our tender for the laptop. The weights are obtained by solving the following equation

$$5.000/EP = 1.5000/(100 - EP)$$

which implies EP = 77 and TP = 23, where EP represents the number of economic points and (100-EP) = TP the number of technical points. Intuitively, one has to equalize the ratio (reserve price/number of economic points) to the ratio (BME/number of technical points). Solving the equation one gets that the weight of price (measured by EP) is 77% and that of the technical aspect is 23%.

The weights are obtained by solving an equation that imposes the equivalence of the MVP on the price and the economic side. In other words, the weights must satisfy the condition that the MVP on the price side (EUR 5 000 /77 = EUR 65) equals that of the technical side given by EUR 1 500 /23 = EUR 65. This means that the scoring rule is set in a way that contracting authority is indifferent between one economic operator offering, for instance, the smallest-screen laptop at EUR 3 500 and another economic operator offering the largest screen (17 inches) at the reserve price of EUR 5 000.

The Figure below provides a graphical illustration of the scoring rule. The rule satisfy two conditions: economic operators offering the reserve price will obtain 0 economic points, while economic operators offering the laptop for free (100% discount) will get the maximum economic points (77). Intermediate prices receive a score proportional to the discount with respect to the reserve price. Table 1 also illustrates the technical point schedule for the screen dimensions. When offering no more than the minimum requirement (14 inches) economic operators obtain 0 TP, whereas those offering the largest screen obtain the maximum of 23 points. Mathematically, the scoring rule of our example can be written as follows:

EP = 77 · [(Reserve price – Price tender)/Reserve price]*100 = 77 · (% discount)

Figure 1

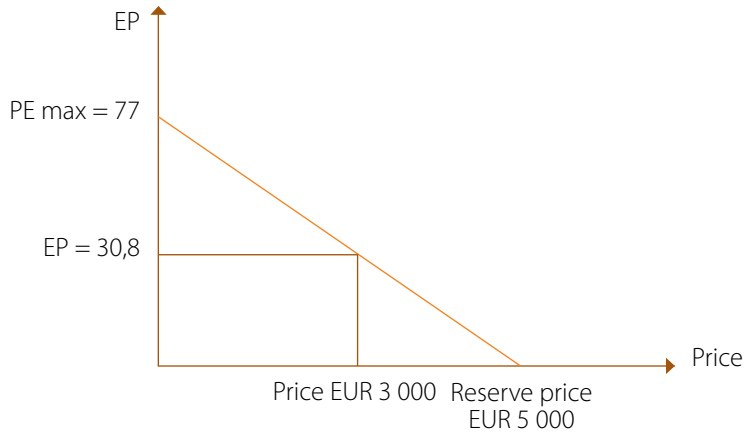


Figure 2

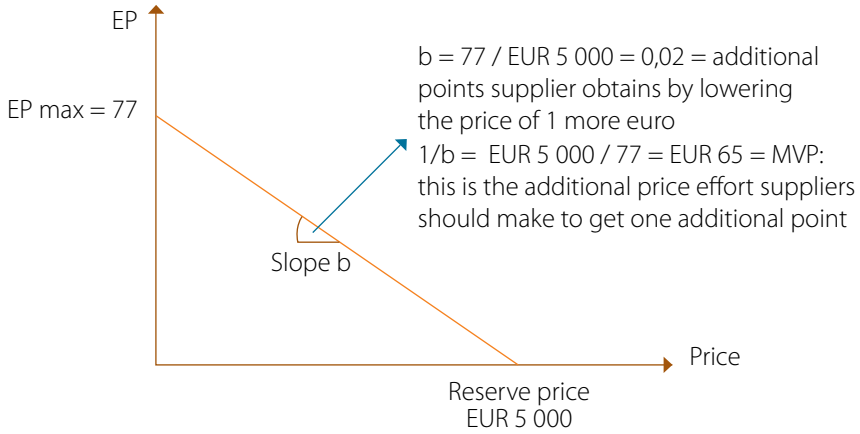


Figure 2 provides a graphical interpretation of the MVP. The MVP is the inverse of the slope (b) of the plotted scoring rule (the straight line). While the slope measures the additional economic points one economic operator obtains by lowering the price by EUR 1, the inverse of the slope (1/b) measures the price reduction/discount that is necessary to get one additional point. Following our example, b = 0,02, that is, by lowering the price by EUR 1 (respectively EUR 100) allows the economic operator to get 0,02 (respectively 2) additional points; 1/b = EUR 65, that is one additional point costs the economic operator EUR 65 of further price discount. This is indeed a measure of the additional economic effort necessary to get 1 additional economic point.

Table 1 below illustrates the allocation of points between price and quality and the incremental score for discrete price reductions and improvements of the screen dimension.

Table 1

Linear scoring rule. Allocation of point for the procurement of a laptop with EUR 5 000 of reserve price and BME of EUR 500			
Price		**Screen dimension**	
Bid	EP	Bid	TP
EUR 5 000	0,0	14'	0 (minimum required)
EUR 4 500	7,7	15'	8
EUR 4 000	15,4	16'	15
EUR 3 500	23,1	17'	23
EUR 3 000	30,8	Total points = 77 + 23 = 100	
EUR 2 500	38,5		
EUR 2 000	46,2		
EUR 1 500	53,9		
EUR 1 000	61,6		
EUR 500	69,3		
0	77,0		

What if the BME is EUR 600 instead of EUR 500? Table 2 below illustrates how the scoring rule has to modified. Notice that now the MVP in EUR 5 000 /73,6 = EUR 68 > EUR 65, which is the MVP when the BME is EUR 500. This means that the contracting authority considers the screen dimensions more important than before; consequently the scoring rule incorporates this new price/quality choice, attaching to the screen dimension 26,4 points rather than 23. Figure 3 depicts the new scoring rule. A price offer of EUR 3 000 is now worth 29,4 < 30,8 (of the previous example).

Table 2

Linear scoring rule. Allocation of point for the procurement of a laptop with EUR 5 000 of reserve price and BME of EUR 600			
Price		**Screen dimension**	
Bid	EP	Bid	TP
EUR 5 000	0,0	14'	0 (minimum required)
EUR 4 500	7,4	15'	8,8
EUR 4 000	14,7	16'	17,6
EUR 3 500	22,1	17'	26,4
EUR 3 000	29,4	Total points = 73,6 + 26,4 = 100	
EUR 2 500	36,8		
EUR 2 000	44,1		
EUR 1 500	51,5		
EUR 1 000	58,8		
EUR 500	66,2		
0	73,6		

Figure 3

3. Non-linear Scoring Rules

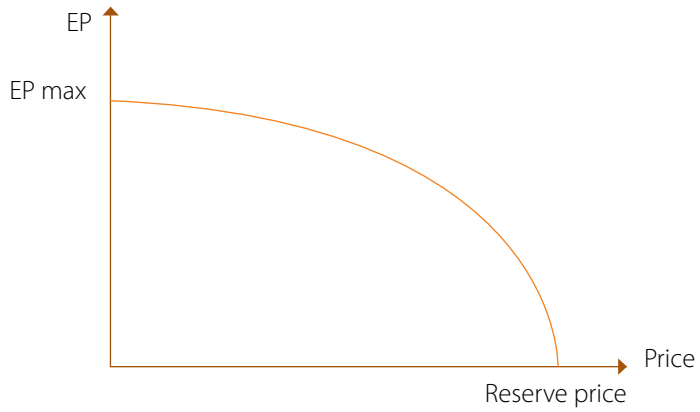
Under non-linear scoring, the economic score does not increase proportionally with price reductions; starting from prices close to the reserve price, subsequent price reductions raise the score more than proportionally. However, as price discounts get larger and larger the economic score goes up but less than proportionally.

Non-linear scoring can be written as follows:

$$EP = EP_{max} \cdot \left[1 - \left(\frac{Price}{Reserve\ Price}\right)^{\alpha}\right],\ 0 \le Price \le Reserve\ Price,$$

where EP_{max} is the maximum number of economic points and α (greater than zero, but strictly lower than 1) is a parameter shaping the scoring rule. Given the reserve price and EP_{max}, the parameter α can be used to draw the most suitable curve. Figure 4 below illustrates graphically the shape of non-linear scoring.

Figure 4



The following box summarizes the main differences between linear and non-linear scoring rules.

Comment. ***The main differences between linear and non-linear scoring rules***

The monetary value of a point under non-linear scoring rules is not constant.

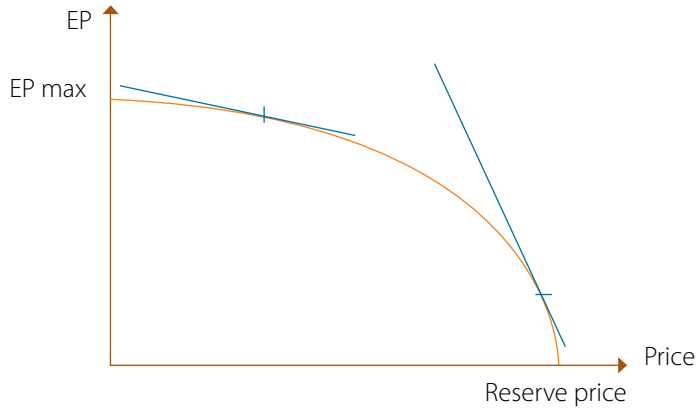
More precisely it is decreasing in the price. Economic operators need to calculate the MVP for any price level and define their tendering strategy accordingly, while in linear scoring the MVP is constant. This means that the contracting authority's price/quality preferences are not linear, in the sense that the benefit for the contracting authority increases *less than proportionally* when quality increases. In example 6, this means that 15' screens are worth to the contracting authority more than 14' but less than proportionally (*i.e.*, less than EUR 500). In other words, non-linear scoring implies that BME, for example, may be as follows: BME for 14' = EUR 500; BME for 15' = EUR 450; BME for 16' = EUR 300; BME for 17' = EUR 100. That is, getting bigger screen dimension becomes progressively less important above 15 inches.

Non-linear scoring stimulates aggressive tendering for prices close to the reserve price

Figure 5 shows that the scoring rule is rather steep in the area close to point A, that is for prices close to the reserve price; whereas it is rather flat in the area close to point B, that is for prices much below the reserve price.

Figure 5 also illustrates the differences with respect to linear scoring. Suppose we draw a linear scoring with the same reserve price and EPmax. Then the slope of the non-linear scoring is much lower around point B, whereas it is much higher around point A.

Figure 5



Policy guidelines for using non-linear scoring rules

Non-linear scoring could be used to discourage excessive price reductions. In some circumstances, say, in the case of complex projects or the acquisition of human capital (*e.g.*, consultancy services), the contracting authority may wish to soften price competition, and thus to divert competition to technical aspects. Since it is not always possible to achieve this goal by increasing the weight of technical dimensions, non-linear scoring may provide one ready-to-use solution.

4. Interdependent scoring rules

The most relevant features of interdependent scoring rules are:

- The economic score obtained by each economic operator depends not only on its tender but also on some other tender, possibly on all tenders. In some cases, this "crucial" tender is the lowest tender (LOS), or the highest and the lowest tender (HLS); in other cases, it can be the average tender. The uncertainty about the score associated to price offers complicates tendering strategies and may affect economic operators' behaviour in an unpredictable way.
- By using interdependent scoring rules the contracting authority chooses not to define the MVP, that is, it does not clarify its price/quality preferences. Economic operators are thus unable to compute a priori their score, which makes tendering strategies a more convoluted exercise.
- In some circumstances, the contracting authority may find it difficult to get good estimates of the value of the procurement contract (*e.g.*, in IT architecture or facility management services). Setting a linear scoring rule, thus facing the uncertainty about the appropriate value of the reserve price may be too a risky strategy. That is, the contracting authority may end up overestimating or underestimating the value of the contract, producing adverse consequences on the tender outcome (*e.g.*, substantial underestimation may induce suppliers to avoid tendering as the reserve price is unlikely to make them cover production costs). Consequently, the contracting authority should rather avoid fixing the reserve price, thus allowing market competition to determine the final contract price. This may be done by using the LOS, according to which each economic operator's fraction of the maximum score is proportional to the ratio between the lowest tender and that particular economic operator's tender.
- A special class of interdependent scoring rules may facilitate collusion among economic operators as explained by the following example.

Example 3. Average tender scoring rules (ABSRs) and collusion

ABSRs comprise a series of scoring rules in which economic operators' score depends upon the distance from the average score. Although almost ignored by the specialized literature, there exist sensible arguments supporting the view that ABSRs may raise the risk of collusion among economic operators. To see this in simple framework, consider a procurement contract for supplying 10,000 identical laptops, with a reserve price of EUR 1,000 each. Suppose, for the sake of simplicity, that competition takes place on the price of the laptop only, so there are no technical points related to the various quality dimensions.

N (greater than 2) economic operators participate in the competitive procedure and adopt a simple collusive mechanism: economic operator "1" wins the contract by submitting an offer of EUR 999 /laptop while all other (*N*-1) economic operators tender the reserve price. Surplus is then shared. Under the lowest-tender scoring, non-winning economic operators can break the cartel by just offering EUR 998. The cost of breaking the cartel is the same for all: by reducing the price by EUR 1 /laptop, any economic operator is effectively able to break the agreement, thus getting the contract.

Consider now a form of average scoring that awards the contract to the economic operator whose tender is closest to the average, *but* below the average. Again, the cartel selects economic operator "1" to win by submitting EUR 999. The remaining *N*-1 economic operators tender the reserve price. What is the amount a deviating economic operator should submit in order to win the contract? How much does the deviation cost him? Notice first that economic operator 1 is indeed the winner since EUR 999 is the only tender below the average which is equal to (1/*N*) EUR 999 +[(*N*-1)/N] EUR 1000. In order to be awarded the contract a defecting economic operator, say economic operator "2", needs to place a tender such that all other tenders remain above the average.

It is easy to see that EUR 998 is not low enough under the lowest-tender scoring. To see this more clearly, consider the situation where *N*=5. Should economic operator "2" submit EUR 998 the average would be (998+999+3(1000))/5= 999.4. Given this average, economic operator "1" is still the winner. As a result, EUR 998 is not sufficient for economic operator "2" to be awarded the procurement contract. In order to be the winner, economic operator "2" needs to bring the average below EUR 999. Then he needs to tender a price b_{def} such that (b_{def}+999+3(1000))/5 ≤ 999, which implies b_{def} ≤ EUR 996. More generally, when the number of colluding firms is *N*, then b_{def} ≤ (*N*-1) EUR 999 – (*N*-2) EUR 1 000.

The simple pro-collusive feature of average-tender scoring stems from the higher cost borne by a defecting economic operator to break the collusive scheme with respect to the lowest-tender scoring rule (or linear scoring rule if quality dimensions were evaluated as well). The cost of defection is higher the higher the number of colluding economic operators since the defecting economic operator must counterbalance the weight of other (*N*-2) identical tenders in order to be the only below the average economic operator.

Such a conclusion is somewhat at odds with a basic force that is at work in cartels in other markets. There, other things being equal, the greater the cartel size the higher the incentive to defect since the gains from defection typically grow with the cartel size. Here, a greater cartel size provides a lower incentive to deviate through a higher cost of a deviation.

Set out below are some of the most widely used interdependent scoring rules:

Suppose that N (greater than or equal to 2) economic operators submit tenders ($b_1,\ldots,b_N$). Define b_{min}, b_{max} and b_a as the lowest, highest and average tender respectively, where

$$b_a = \frac{b_1 + \ldots + b_N}{N}.$$

EP_{max} indicates the total number of economic points, while EPi is economic operator i's economic score obtained by submitting b_i.

Lowest-tender Scoring (LOS):

$$\mathrm{EP}_i = \mathrm{EP}_{\max} \cdot \left(\frac{b_{\min}}{b_i} \right), \; i = 1,\ldots,N.$$

Highest-tender-lowest-tender scoring (HLS):

$$\mathrm{EP}_i = \mathrm{EP}_{\max} \cdot \left(\frac{b_{\max} - b_i}{b_{\max} - b_{\min}} \right), \; i = 1,\ldots,N.$$

Average Scoring (AS):

$$\mathrm{EP}_i = \begin{cases} \mathrm{EP}_{\max} \cdot \left(\dfrac{r - b_i}{r - f(b_a)} \right), & \text{if } f(b_a) < b_i \le r, \; i = 1,\ldots N, \\ \mathrm{EP}_{\max}, & \text{if } b_i \le f(b_a), \end{cases}$$

where r is the reserve price and $f(b_a)$ is a monotonic function of b_a. In most cases, $f(b_a)$ is simply equal to βb_a , where β is a number strictly greater than zero, but less than one.

SECTION 3
EXERCISES

Check each exercise for local relevance and adapt for local use

EXERCISE 1
CASE STUDY

The Ministry of Finance is about to launch a restricted procedure for the award of a contract for the supply of an IT system (hardware and software). The contract will be awarded on the basis of the most economically advantageous tender (MEAT). When determining the individual criteria to be applied, the Ministry asks you, in your role as a Procurement Officer, to advise on the following questions.

1. The Ministry of Finance asks you to advise on the appropriate individual criteria for this purchase. Use the table below to arrive at appropriate individual criteria.

No.	Criterion	Percentage
1		
2		
3		
4		
5		
6		
Total		**100%**

2. The Ministry asks you to advise on whether or not the individual criteria to be applied to determine the most economically advantageous tender must be announced in the contract notice, or if they can be announced in the contract documents.
3. The Ministry explains that it would like to include in the individual criteria to determine the most economically advantageous tender the number of similar contracts that tenderers have carried out in the past three years, and give X number of extra points to those tenderers that have carried out four or more contracts in the past three years. You are requested to advise if this is an allowed criterion for determining the most economically advantageous tender.
4. The Ministry explains that it is not sure about the weighting to be given to each of the criteria that it will apply to determine the most economically advantageous tender, and that it prefers to indicate the criteria in descending order of importance. You are requested to advise on this issue.

EXERCISE 2
GROUP DISCUSSION

Discuss in two separate groups the main points that should be addressed when setting the overall strategy concerning the award criteria to be applied.

At the end of the discussions each group is to present its conclusions for comparison.

EXERCISE 3
CASE STUDY

The Ministry of Finance has now sent the invitations to submit tenders to the tenderers that qualify, and has announced in the contract documents the various criteria that it will apply to determine the most economically advantageous tender and their relative weighting. These criteria are as follows: price, including specific potential upgrades, with a weighting of 50%; compatibility with existing systems, with a weighting of 20%; helpdesk and start-up provision, with a weighting of 10%; training offered, with a weighting of 10%; downtime retrieval proposals, with a weighting of 5%; and financially backed warranty for system failure, with a weighting of 5%. (N.B. The criteria were not previously published in the contract notice.)

During the tender process and before the deadline for submission of tenders expires, the Ministry asks you, in your role as Procurement Officer, to advise on a number of questions.

1. One week before the deadline for submission of tenders expires, the Ministry explains that it would like to give some consideration – through a scoring system – to whether potential tenderers are able to put the IT system in place earlier than the required delivery time. (Note that the delivery time stated in the contract documents is a maximum of six calendar months and is to be assessed on the basis of a pass or fail system only.) Please advise the Ministry on how to deal with this situation at this late stage of the tender process.
2. The Ministry explains that it has been thinking of dividing the "compatibility with existing systems" criterion into sub-criteria and asks you if these sub-criteria may be introduced during the evaluation process without disclosing them to the potential tenderers. Please advise if this is possible.

SECTION 4
THE LAW

Adapt all this section using relevant local legislation, processes and terminology.

PART 1 LAW

Adapt all this section for local use – using relevant local legislation (including secondary legislation), process and terminology.

The main legal requirements relating to the award criteria are set out in Directive 2004/18/EC:

Recital 46 – explains that public contracts shall be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. Only two award criteria are allowed: "lowest price" and "most economically advantageous tender" (MEAT). It also explains the general rules on setting and disclosing the criteria used to determine the MEAT.

Recital 47 – explains that in case of public service contracts, the award criteria must not affect the application of national provisions on the remuneration of certain services, such as, for example the services performed by architects, engineers or lawyers, and, where public supply contracts are concerned, the application of national provisions setting out fixed prices for school books.

Article 53 – Contract award criteria - sets out the award criteria on the basis of which contracting authorities may award public contracts. It also lays down general rules on setting and disclosing the criteria used to determine the most economically advantageous tender (MEAT).

The following is a summary of the main issues covered by each paragraph of Article 53:

- **53(1): The permitted award criteria**

  Contracting authorities may award public contracts on the basis of the lowest price criterion only or on the basis of the most economically advantageous tender (MEAT) criterion. In case the MEAT criterion is used, contracting authorities may use different criteria which must be linked to the subject-matter of the public contract in question (paragraph 1 of Article 53 gives some examples of these criteria).

- **53(2): Rules on setting and disclosing the criteria used to determine the MEAT**

  Contracting authorities must disclose in the manners specified the relative weighting that they give to each of the criteria chosen to determine the most economically advantageous tender. Where, in the opinion of contracting authorities weighting is not possible for demonstrable reasons, they must disclose in the specified manners, the criteria in descending order of importance.

PART 2 CASES

On the next few pages you can see the judgments of the ECJ in the following cases, referred to in the Narrative:

C-315/01 **Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT)** v **Österreichische Autobahnen und Schnellstraßen AG (ÖSAG)**,

C-247/02 **Sintesi SpA** v **Autorità per la Vigilanza sui Lavori Pubblici**,

C 532/06 **Emm. G. Lianakis AE,Sima Anonymi Techniki Etairia Meleton kai Epivlepseon, Nikolaos Vlachopoulo** v **Dimos Alexandroupolis, Planitiki AE, Aikaterini Georgoula, Dimitrios Vasios, N. Loukatos kai Synergates AE Meleton, Eratosthenis Meletitiki AE, A. Pantazis – Pan. Kyriopoulos kai syn/tes OS Filon OE, Nikolaos Sideris**,

JUDGMENT OF THE COURT (Sixth Chamber)

19 June 2003 (1)

(Public contracts - Directive 89/665/EEC - Review procedures concerning the award of public contracts - Power of the body responsible for review procedures to consider infringements of its own motion - Directive 93/36/EEC- Procedures for the award of public supply contracts - Selection criteria - Award criteria)

In Case C-315/01,

REFERENCE to the Court under Article 234 EC by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that court between

Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT)

and

Österreichische Autobahnen und Schnellstraßen AG (ÖSAG),

on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), and of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1),

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen (Rapporteur), V. Skouris, F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: L.A. Geelhoed,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT), by S. Korn, Universitätsassistent,

- the Austrian Government, by M. Fruhmann, acting as Agent,

- the Commission of the European Communities, by M. Nolin, acting as Agent, assisted by R. Roniger, Rechtsanwalt,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 10 October 2002,

gives the following

Judgment

1. By order of 11 July 2001, received at the Court on 13 August 2001, the Bundesvergabeamt (Federal Procurement Office) referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) (Directive 89/665), and of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

2. Those questions were raised in proceedings between Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) and Österreichische Autobahnen und Schnellstraßen AG (ÖSAG) concerning the award of a public supply contract for which GAT had tendered.

Legal context

Community provisions

Directive 89/665

3. Article 1 of Directive 89/665 provides:

1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the provisions set out in the following articles and, in particular, Article 2(7), on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

...

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.

4.

Article 2 provides:

1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.

...

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

...

8. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article [234] of [the Treaty] and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.

Directive 93/36

5.

Article 15(1) of Directive 93/36, which forms part of Chapter 1 (Common rules on participation) of Title IV, provides:

Contracts shall be awarded on the basis of the criteria laid down in Chapter 3 of this Title, taking into account Article 16, after the suitability of the suppliers not excluded under Article 20 has been checked by the contracting authorities in accordance with the criteria of economic and financial standing and of technical capacity referred to in Articles 22, 23 and 24.

6.

Article 23, which forms part of Chapter 2 (Criteria for qualitative selection) of Title IV, provides:

1. Evidence of the supplier's technical capacity may be furnished by one or more of the following means according to the nature, quantity and purpose of the products to be supplied:

(a) a list of the principal deliveries effected in the past three years, with the sums, dates and recipients, public or private, involved:

- where effected to public authorities, evidence to be in the form of certificates issued or countersigned by the competent authority;

- where effected to private purchasers, delivery to be certified by the purchaser or, failing this, simply declared by the supplier to have been effected;

...

(d) samples, descriptions and/or photographs of the products to be supplied, the authenticity of which must be certified if the contracting authority so requests;

....

7.

Article 26, which forms part of Chapter 3 (Criteria for the award of contracts) of Title IV, states:

1. The criteria on which the contracting authority shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when award is made to the most economically advantageous tender, various criteria according to the contract in question: e.g. price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance.

....

National legislation

8. Directives 89/665 and 93/36 were transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Public Procurement Law, BGBl. I, 1997/56, the BVergG).

9. Paragraph 113 of the BVergG sets out the powers of the Bundesvergabeamt. It provides:

1. The Bundesvergabeamt is responsible on application for carrying out a review procedure in accordance with the following provisions.

2. To preclude infringements of this Federal Law and of the regulations implementing it, the Bundesvergabeamt is authorised until the time of the award:

(1) to adopt interim measures and

(2) to set aside unlawful decisions of the contracting authority.

3. After the award of the contract or the close of the contract award procedure, the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations issued under it, the contract has not been awarded to the best tenderer. ...

10. Paragraph 115(1) and (5) of the BVergG provides:

1. Where an undertaking claims to have an interest in the conclusion of a contract within the scope of this Federal Law, it may apply for the

contracting authority's decision in the contract award procedure to be reviewed on the ground of unlawfulness, provided that it has been or risks being harmed by the alleged infringement.

...

5. The application shall contain:

(1) an exact designation of the contract award procedure concerned and of the contested decision,

....

11. Under Paragraph 117(1) and (3) of the BVergG:

1. The Bundesvergabeamt shall set aside, by way of administrative decision, taking into account the opinion of the Conciliation Committee in the case, any decision of the contracting authority in an award procedure where the decision in question:

(1) is contrary to the provisions of this Federal Law or its implementing regulations and

(2) significantly affects the outcome of the award procedure.

...

3. After the award of the contract, the Bundesvergabeamt shall, in accordance with the conditions of subparagraph 1, determine only whether the alleged illegality exists or not.

12. Paragraph 122(1) of the BVergG provides that in the event of a culpable breach of the Federal Law or its implementing rules by the organs of an awarding body, an unsuccessful candidate or tenderer may bring a claim against the contracting authority to which the conduct of the organs of the awarding body is attributable for reimbursement of the costs incurred in drawing up its bid and other costs borne as a result of its participation in the tendering procedure.

13. Under Paragraph 125(2) of the BVergG a claim for damages, which must be brought before the civil courts, is admissible only if the Bundevergabeamt has made a declaration under Paragraph 113(3).

The civil court called upon to hear the claim for damages, and the parties to the proceedings before the Bundesvergabeamt, are bound by that declaration.

14. Pursuant to Paragraph 2(2)(c), point 40a, of the Einführungsgesetz zu den Verwaltungsverfahrensgesetzen 1991 (Introductory Law to the Laws on Administrative Procedure, BGBl. 1991/50), the Allgemeines Verwaltungsverfahrensgesetz 1991 (General Law on Administrative Procedure, BGBl, 1991/51, hereinafter the AVG) applies to the administrative procedure adopted by the Bundesvergabeamt.

15. Paragraph 39(1) and (2) of the AVG, in the version applicable to the main proceedings, provides:

1. The evaluation procedure shall be governed by the provisions of administrative law.

2. In so far as those provisions do not cover a matter, the authority shall proceed *ex proprio motu* and shall determine the procedure for the evaluation, subject to the provisions contained in this Part ....

The main proceedings and the questions referred for a preliminary ruling

16. On 2 March 2000 ÖSAG, represented by the Autobahnmeisterei (the Motorway Authority) for Sankt Michael/Lungau, issued an invitation to tender for the supply of a special motor vehicle: new, ready-to-use and officially approved road sweeper for the A9 Phyrn motorway, delivery to the motorway authority for Kalwang, in an open European procedure.

17. The five tenders submitted were opened on 25 April 2000. GAT had submitted a tender at a price of ATS 3 547 020 excluding VAT. The tender submitted by the firm ÖAF & Steyr Nutzfahrzeuge OHG was ATS 4 174 290 net; that of another tenderer was ATS 4 168 690, excluding VAT.

18. As regards the evaluation of the tenders, Point B.1.13 of the invitation to tender provided:

B.1.13 Tender evaluation

The determination of which tender is technically and economically the most advantageous shall be made in accordance with the best tenderer principle. It is a fundamental condition that the vehicles tendered satisfy the conditions in the invitation to tender.

The evaluation shall be carried out as follows:

Tenders shall be evaluated in each case by reference to the best tenderer and points shall be calculated relative to the best tenderer.

...

(2) Other criteria:

A maximum of 100 points shall be awarded for other criteria, and shall count for 20% of the overall evaluation.

2.1 Reference list of road sweeper vehicle customers in the geographical area comprising the part of the Alps within the European Union (references to be provided in German): weighting 20 points.

Evaluation formula

The highest number of customers divided by the next highest number and multiplied by 20 points.

19. On 16 May 2000, ÖSAG eliminated GAT's tender on the ground that that tender did not comply with the conditions in the invitation to tender inasmuch as the pavement cleaning machine tendered could be operated only down to temperatures of 0 °C, whereas the invitation to tender had required a minimum operating temperature of -5 °C. In addition, despite a request by the contracting authority, the applicant had not arranged for the machine to be available for inspection within a 300 kilometre radius of the authority issuing the invitation to tender, as required therein. Furthermore, ÖSAG doubted that the price in GAT's tender was plausible. Finally, despite requests by the ÖSAG, GAT had not provided a sufficient explanation of the technical specifications concerning cleaning of the reflectors on the machine it had tendered.

20. In accordance with the award proposal of 31 July 2000, ÖAF & Steyr Nutzfahrzeuge OHG was awarded the contract by letter of 23 August 2000. By letter of 12 July 2000, the other tenderers were notified that a decision had been taken regarding the recipient of the award. GAT had been informed by letter of 17 July 2000 that its tender had been eliminated, and by letter of 5 October 2000 it was notified of the identity of the recipient of the award and the contract price.

21. On 17 November 2000 GAT sought a review by the Bundesvergabeamt and a declaration that the award in the contract award procedure had not been made to the best tenderer, claiming that

its tender had been eliminated unlawfully. The technical description included in its tender of the reflector cleaning had been sufficient for an expert. In addition, it had invited ÖSAG to visit its supplier's factory. GAT also contended that the award condition consisting of the opportunity to inspect the subject of the invitation to tender within a 300 kilometre radius of the authority issuing the invitation to tender contravened Community law because it constituted indirect discrimination. ÖSAG should have accepted any corresponding product in Europe. In addition, GAT argued, that criterion could be used only as an award criterion and not - as the contracting authority had subsequently wrongly used it - as a selection criterion. It was true that the basic version of the road sweeper GAT had tendered could be used only at temperatures down to 0 °C. However, ÖSAG had reserved the right to purchase an additional option. The additional option tendered by GAT could operate at -5 °C, as required in the invitation to tender. Finally, the price of GAT's tender was certainly not implausible. On the contrary, GAT was able to give ÖSAG an adequate explanation as to why its price was so favourable.

22. As the Bundesvergabeamt considered that an interpretation of several provisions of Community law was required in order to enable it to give a decision in the case before it, it decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

1 (a) Is Article 2(8) of Directive 89/665, or any other provision of that directive or any other provision of Community law, to be interpreted as meaning that an authority responsible for carrying out review procedures within the meaning of Article 1(1) of that directive, including the exercise of the powers referred to in Article 2(1)(c) thereof, is precluded from taking into account, of its own motion and independently of the submissions of the parties to the review procedure, those circumstances relevant under the law governing contract award procedures which the authority responsible for carrying out review procedures considers material to its decision in a review procedure?

(b) Is Article 2(1)(c) of Directive 89/665, if necessary considered in conjunction with other principles of Community law, to be interpreted as meaning that an authority responsible for carrying out review procedures within the meaning of Article 1(1) of that directive, including the exercise of the powers referred to in Article 2(1)(c) thereof, is precluded from dismissing an application by a tenderer that is indirectly aimed at obtaining damages, where the contract award procedure is already vitiated by a substantive legal defect attributable to a decision

taken by the contracting authority, other than the decision being contested by that tenderer, on the ground that if the contested decision had not been taken the tenderer would none the less have been harmed for other reasons?

2 If Question 1(a) is answered in the negative: Is Directive 93/36, in particular Articles 15 to 26 thereof, to be interpreted as prohibiting a public contracting authority conducting contract award procedures from taking account of references relating to the products offered by tenderers not as proof of the tenderers' suitability but to satisfy an award criterion, such that the fact that those references are given a negative evaluation would not exclude the tenderer from the contract award procedure but would merely result in the tender receiving a lower evaluation, for example under a points system in which poor evaluation of references might be offset by a lower price?

3 If Questions 1(a) and 2 are answered in the negative: Is it compatible with the relevant provisions of Community law, including Article 26 of Directive 93/36, the principle of equal treatment and the obligations of the Communities under public international law for an award criterion to provide that product references are to be evaluated on the basis of the number of references alone, there being no substantive examination as to whether contracting authorities' experiences of the product have been good or bad, and, moreover, that only references from the geographical area comprising the part of the Alps within the European Union are to be taken into account?

4 Is it compatible with Community law, in particular the principle of equal treatment, for an award criterion to permit opportunities to inspect examples of the subject of the invitation to tender to receive a positive evaluation only if available within a 300 kilometre radius of the authority issuing the invitation to tender?

5 If Question 2 is answered in the affirmative, or Question 3 or 4 in the negative: Is Article 2(1)(c) of Directive 89/665, if necessary considered in conjunction with other principles of Community law, to be interpreted as meaning that if the breach committed by the contracting authority consists in imposing an unlawful award criterion, the tenderer will be entitled to damages only if he can actually prove that, but for the

unlawful award criterion, he would have submitted the best tender?

23. The national court has also asked the Court to apply an accelerated preliminary ruling procedure under Article 104a of the Rules of Procedure, claiming that the first question arises in almost half of the review procedures brought before it and that the Verfassungsgerichtshof (Constitutional Court) has already set aside several of the Bundesvergabeamt's decisions specifically on the ground that it had raised *ex proprio motu* the unlawfulness of certain aspects of the award procedures at issue.

24. However, by decision of 13 September 2001, that request was denied by the President of the Court, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, on the ground that the circumstances referred to by the national court did not establish that a ruling on the questions referred to the Court was a matter of exceptional urgency.

The jurisdiction of the Court

25. On the basis of the order for reference made by the Bundesvergabeamt on 11 July 2001 in another case concerning public procurement, registered at the Court Registry under number C-314/01 and currently pending before the Court, the Commission expresses doubts as to the judicial nature of the body making the reference on the ground that it acknowledged in the order that its decisions do not contain binding, enforceable directions addressed to the contracting authority. In those circumstances, the Commission has doubts as to the admissibility of the questions referred for a preliminary ruling by the Bundesvergabeamt in the present proceedings in the light of the case-law of the Court, in particular Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14, and Case C-178/99 *Salzmann* [2001] ECR I-4421, paragraph 14, according to which a national court or tribunal may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.

26. It should be noted in that regard, first, that after the award of the contract the Bundesvergabeamt is competent, under Paragraph 113(3) of the BVergG, to determine whether as a result of an infringement of the relevant national legislation the contract has not been awarded to the best tenderer.

27. Secondly, it is apparent from the express wording of Paragraph 125(2) of the BVergG that a declaration made by the Bundesvergabeamt under Paragraph 113(3) of that Law not only constitutes a condition for admissibility of any claim for damages brought before the civil courts by

reason of a culpable breach of that legislation but also binds the parties to the proceedings before the Bundesvergabeamt and the civil court hearing the case.

28. In those circumstances, neither the binding nature of a decision taken by the Bundevergabeamt under Paragraph 113(3) of the BVergG nor, accordingly, the judicial nature of the latter can reasonably be called into question.

29. It follows that the Court has jurisdiction to reply to the questions raised by the Bundesvergabeamt.

The admissibility of the questions referred

30. The Austrian Government claims that Question 1(a) and Question 5 are not admissible because they were raised in proceedings brought under Paragraph 113(3) of the BVergG, which is not a review procedure within the meaning of Directive 89/665 but merely an application for a declaration.

31. It states that the Austrian legislature exercised the option offered by the second subparagraph of Article 2(6) of Directive 89/665 to provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures are to be limited to awarding damages to any person harmed by an infringement. However, in Austrian law the power to award such damages, for which Article 2(1)(c) of Directive 89/665 requires the Member States to make provision, was not conferred on the Bundesvergabeamt but, as is clear from Paragraphs 122 and 125 of the BVergG, on the civil courts.

32. The Austrian Government considers that in those circumstances a reply to Question 1(a) and to Question 5 is not necessary to a solution of the main proceedings.

33. The Court observes, first, that a division of the power provided for in Article 2(1)(c) of Directive 89/665 between several courts is not contrary to the directive, since Article 2(2) expressly allows the Member States to confer the powers specified in paragraph 1 of that provision on separate bodies responsible for different aspects of the review procedure.

34. Secondly, although after the award of the contract the Bundesvergabeamt is not competent to award damages to the person harmed by the infringement of Community law on public procurement or the national rules implementing that law, but only to find that as a result of that infringement the contract has not been awarded to the best tenderer, that finding, as is clear from paragraph 27 of this judgment, not only constitutes a condition for admissibility of any claim for damages brought before the civil courts by reason of a culpable

infringement of that legislation but also binds the parties to the proceedings before the Bundesvergabeamt and the civil court hearing the case.

35. In those circumstances, it must be concluded that the Bundesvergabeamt, even if it is hearing a case brought under Paragraph 113(3) of the BVergG, conducts a review procedure as required by Directive 89/665 and, as has already been seen in paragraph 28 of this judgment, is called upon to adopt a binding decision.

36. Furthermore, as is confirmed by Paragraph 117(3) of the BVergG, in proceedings brought under Paragraph 113(3) of that Law the Bundesvergabeamt is competent to determine the existence of the alleged infringement. It is possible that, in the exercise of that competence, it may consider it necessary to refer questions to the Court for a preliminary ruling.

37. Where such questions, which the Bundesvergabeamt considers necessary to enable it to determine the existence of illegality, concern the interpretation of Community law they cannot be declared inadmissible (see to this effect, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38, and Case C-153/00 *Der Weduwe* [2002] ECR I-11319, paragraph 31).

38. On the other hand, the Bundesvergabeamt, which is not directly competent to award damages to persons harmed by unlawfulness, is not entitled to refer to the Court for a preliminary ruling questions relating to the award of damages or the conditions for awarding them.

39. It is thus clear that all the questions referred for a preliminary ruling in this case by the Bundesvergabeamt are admissible except Question 5, which specifically seeks to know under what conditions a tenderer who claims to have been harmed by the adoption of an unlawful award criterion is entitled to damages.

Questions 1(a) and 1(b)

40. In its order for reference, the Bundesvergabeamt states that it is clear from Paragraphs 113(3) and 115(1) of the BVergG that in a review procedure following the award of a contract it must examine the contested award decision as to its lawfulness, but can grant the application only if it is the contested unlawful decision that has caused the contract not to be awarded to the best tenderer within the meaning of that Law. Therefore, if the award procedure is already fundamentally unlawful because of another (possibly earlier) decision by the contracting authority, as a result of which the applicant is not in any event the best tenderer within the meaning of the Law, and the applicant has not contested that other decision of the contracting

authority in the review procedure, an application for review cannot be granted. In such a case, the applicant has not been harmed by the contested infringement within the meaning of Article 2(1)(c) of Directive 89/665 because the harm, which may take the form of wasted tender costs, was caused by another infringement by the contracting authority.

41. The Bundesvergabeamt also points out that under Paragraph 39(2) of the AVG it must determine the relevant facts *ex proprio motu* and therefore consider *ex proprio motu* whether in the main proceedings award criteria other than that of the inspection opportunity contested by the applicant are lawful. It also points out that according to a judgment of the Austrian Verfassungsgerichtshof of 8 March 2001 (B 707/00) the question as to the applicability of rules of procedure characterised by the *ex proprio motu* principle - which enable the review body to take account of facts that are material under the law relating to contract award procedures, irrespective of the submissions of the parties - is likely to raise, in the light of the principle laid down in the second subparagraph of Article 2(8) of Directive 89/665 that both parties must be heard in the review procedure, certain problems of Community law, making a reference to the Court under the third paragraph of Article 234 EC mandatory.

42. The Bundesvergabeamt states that it is that precedent of the Verfassungsgerichtshof which has induced it to refer Question 1(a) and (b), even though it is itself fully aware that the requirement that both sides be heard in the procedure - which stems not from the second subparagraph of Article 2(8) of Directive 89/665, which applies only to independent review bodies, but from the requirements imposed on a court within the meaning of Article 234 EC - is not inconsistent with the *ex proprio motu* rule applicable in administrative procedures, and that the Court has already implicitly found that the Bundesvergabeamt conducts a procedure in which both sides are heard, since it has recognised its right to refer questions for preliminary rulings.

43. It follows from the foregoing considerations, and from the legislation of which they form part, that by Questions 1(a) and (b) the national court is asking in essence whether Directive 89/665 precludes the court responsible for hearing review procedures, in an action brought by a tenderer, with the ultimate aim of obtaining damages, for a declaration that the decision to award a public contract is unlawful, from raising of its own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer. On the other hand, the directive does preclude the court from dismissing an application by a tenderer on the ground that, owing to the unlawfulness raised of its own motion, the award procedure was, in any event, unlawful and that the harm the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer.

44.

In that regard, it is appropriate to recall that, as is apparent from the first and second recitals in the preamble, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and Community levels, to ensure the effective application of Community directives relating to public procurement, in particular at a stage when infringements can still be remedied. To that effect, Article 1(1) of that directive requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible (see, in particular, Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, paragraphs 33 and 34, and Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 74).

45. However, Directive 89/665 lays down only the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of Community law concerning public contracts (see, in particular, Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 47).

46. If there is no specific provision governing the matter, it is therefore for the domestic law of each Member State to determine whether, and in what circumstances, a court responsible for review procedures may raise *ex proprio motu* unlawfulness which has not been raised by the parties to the case brought before it.

47. Neither the aims of Directive 89/665 nor the requirement it lays down that both parties be heard in review procedures precludes the introduction of that possibility in the domestic law of a Member State.

48. Firstly, it cannot be inconsistent with the objective of that directive, which is to ensure compliance with the requirements of Community law on public procurement by means of effective and swift review procedures, for the court responsible for the review procedures to raise *ex proprio motu* unlawfulness affecting an award procedure, without waiting for one of the parties to do so.

49. Secondly, the requirement that both parties be heard in review procedures does not preclude the court responsible for those procedures from being able to raise *ex proprio motu* unlawfulness which it is the first to find, but simply means that before giving its ruling the court must observe the right of the parties to be heard on the unlawfulness raised *ex proprio motu.*

50. It follows that Directive 89/665 does not preclude the court responsible for hearing review procedures, in an action brought by a tenderer, with the ultimate aim of obtaining damages, for a declaration that the decision to award a public contract is unlawful, from raising of its own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer.

51.

However, it does not necessarily follow that the court may dismiss an application by a tenderer on the ground that, by reason of the unlawfulness raised of its own motion, the award procedure was in any event unlawful and that the harm the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer.

52. Firstly, as is apparent from the case-law of the Court, Article 1(1) of Directive 89/665 applies to all decisions taken by contracting authorities which are subject to the rules of Community law on public procurement (see inter alia Case C-92/00 *HI* [2002] ECR I-5553, paragraph 37, and Case C-57/01 *Makedoniko Metro and Michaniki* [2003] ECR I-1091, paragraph 68) and makes no provision for any limitation as regards the nature and content of those decisions (see inter alia the judgments cited above in *Alcatel Austria*, paragraph 35, and *HI*, paragraph 49).

53. Secondly, among the review procedures which Directive 89/665 requires the Member States to introduce for the purposes of ensuring that the unlawful decisions of contracting authorities may be the subject of review procedures which are effective and as swift as possible is the procedure enabling damages to be granted to the person harmed by an infringement, which is expressly stated in Article 2(1)(c).

54. Therefore, a tenderer harmed by a decision to award a public contract, the lawfulness of which he is contesting, cannot be denied the right to claim damages for the harm caused by that decision on the ground that the award procedure was in any event defective owing to the unlawfulness, raised *ex proprio motu*, of another (possibly previous) decision of the contracting authority.

55. That conclusion is all the more obvious if a Member State has exercised the power conferred on Member States by the second subparagraph of Article 2(6) of Directive 89/665 to limit, after the conclusion of the contract following the award, the powers of the court responsible for the review procedures to award damages. In such cases, the unlawfulness alleged by the tenderer cannot be subject to any of the penalties provided for under Directive 89/665.

56. In the light of all the foregoing considerations, the reply to be given to Question 1 is that Directive 89/665 does not preclude the court responsible for hearing review procedures, in an action brought by a tenderer, with the ultimate aim of obtaining damages, for a declaration that the decision to award a public contract is unlawful, from raising of its own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer. However, the directive does preclude the court from dismissing an application by a tenderer on the ground that, owing to the unlawfulness raised of its own motion, the award procedure was in any event unlawful and that the harm which the tenderer may have suffered would therefore have

been caused even in the absence of the unlawfulness alleged by the tenderer.

Question 2

57. It is clear from paragraph 18 of this judgment, and from the wording of Question 3, that the call for tenders at issue in the main proceedings specified that in order to evaluate the tenders so as to determine which offer was the most economically advantageous the contracting authority had to take account of the number of references relating to the product offered by the tenderers to other customers, without considering whether the customers' experiences of the products purchased had been good or bad.

58. In those circumstances, Question 2 should be understood as seeking to ascertain whether Directive 93/36 precludes the contracting authority, in a procedure to award a public supply contract, from taking account of the number of references relating to the products offered by the tenderers to other customers not as a criterion for establishing their suitability for carrying out the contract but as a criterion for awarding the contract.

59. According to the scheme of Directive 93/36, in particular Title IV, the examination of the suitability of contractors to deliver the products which are the subject of the contract to be awarded and the awarding of the contract are two different operations in the procedure for the award of a public works contract. Article 15(1) of Directive 93/36 provides that the contract is to be awarded after the supplier's suitability has been checked (see to this effect, regarding public works contracts, Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 15).

60. Even though Directive 93/36, which, according to the fifth and sixth recitals, is intended to achieve the coordination of national procedures for the award of public supply contracts while taking into account, as far as possible, the procedures and administrative practices in force in each Member State, does not rule out the possibility that examination of the tenderer's suitability and the award of the contract may take place simultaneously, the two procedures are governed by different rules (see to this effect *Beentjes*, cited above, paragraph 16).

61. Article 15(1) of the directive provides that the suitability of tenderers is to be checked by the contracting authority in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 22, 23 and 24 of the directive. The purpose of these articles is not to delimit the power of the Member States to fix the level of financial and economic standing and technical knowledge required in order to take part in procedures for the award of public works contracts, but to determine the references or evidence which may be furnished in order to establish the suppliers' financial or

economic standing and technical knowledge or ability (see to this effect *Beentjes*, cited above, paragraph 17).

62. As far as the criteria which may be used for the award of a public contract are concerned, Article 26(1) of Directive 93/36 provides that the authorities awarding contracts must base their decision either on the lowest price only or, when the award is made to the most economically advantageous tender, on various criteria according to the contract involved, such as price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance.

63. As is apparent from the wording of that provision, in particular the use of the expression e.g., the criteria which may be accepted as criteria for the award of a public contract to what is the most economically advantageous tender are not listed exhaustively (see to this effect, regarding public works contracts, Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 35, and, regarding public service contracts, Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraph 54).

64. However, although Article 26(1) of Directive 93/36 leaves it to the contracting authority to choose the criteria on which it intends to base its award of the contract, that choice may relate only to criteria aimed at identifying the offer which is the most economically advantageous (see to this effect *Beentjes*, paragraph 19, *SIAC Construction*, paragraph 36, and *Concordia Bus Finland*, paragraph 59).

65. However, the fact remains that the submission of a list of the principal deliveries effected in the past three years, stating the sums, dates and recipients, public or private, involved is expressly included among the references or evidence which, under Article 23(1)(a) of Directive 93/36, may be required to establish the suppliers' technical capacity.

66. Furthermore, a simple list of references, such as that called for in the invitation to tender at issue in the main proceedings, which contains only the names and number of the suppliers' previous customers without other details relating to the deliveries effected to those customers cannot provide any information to identify the offer which is the most economically advantageous within the meaning of Article 26(1)(b) of Directive 93/36, and therefore cannot in any event constitute an award criterion within the meaning of that provision.

67. In the light of the foregoing considerations, the reply to be given to the second question is that Directive 93/36 precludes the contracting authority, in a procedure to award a public supply contract, from taking account of the number of references relating to the products offered by the tenderers to other customers not as a criterion for establishing their suitability for carrying out the contract but as a criterion for awarding the contract.

Question 3

68. Since this question was predicated upon a negative reply to the second question, it need not be answered.

Question 4

69. By its fourth question, the national court is asking, in essence, whether Community law, in particular the principle of equal treatment, precludes a criterion for the award of a public supply contract according to which a tenderer's offer may be favourably assessed only if the product which is the subject of the offer is available for inspection by the contracting authority within a radius of 300 km of the authority.

70. The reply must be that such a criterion cannot constitute a criterion for the award of the contract.

71. Firstly, it is apparent from Article 23(1)(d) of Directive 93/36 that for public supply contracts the contracting authorities may require the submission of samples, descriptions and/or photographs of the products to be supplied as references or evidence of the suppliers' technical capacity to carry out the contract concerned.

72. Secondly, a criterion such as that which is the subject of Question 4 cannot serve to identify the most economically advantageous offer within the meaning of Article 26(1)(b) of Directive 93/36 and therefore cannot, in any event, constitute an award criterion within the meaning of that provision.

73. In those circumstances, it is not necessary to consider whether that criterion is also contrary to the principle of equal treatment, which, as the Court has repeatedly held, underlies the directives on procedures for the award of public contracts (see, inter alia, the judgments in *HI*, paragraph 45, and *Universale-Bau*, paragraph 91).

74. In the light of the foregoing considerations, the reply to be given to Question 4 is that Directive 93/36 precludes, in a procedure to award a public supply contract, the requirement that the products which are the subject of the tenders be available for inspection by the contracting authority within a radius of 300 km of the authority as a criterion for the award of the contract.

Costs

75. The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not

recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 11 July 2001, hereby rules:

1. Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, does not preclude the court responsible for hearing review procedures, in an action brought by a tenderer, with the ultimate aim of obtaining damages, for a declaration that the decision to award a public contract is unlawful, from raising of its own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer. On the other hand, the directive does preclude the court from dismissing an application by a tenderer on the ground that, owing to the unlawfulness raised of its own motion, the award procedure was in any event unlawful and that the harm which the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer.

2. Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts precludes the contracting authority, in a procedure to award a public supply contract, from taking account of the number of references relating to the products offered by the tenderers to other customers not as a criterion for establishing their suitability for carrying out the contract but as a criterion for awarding the contract.

3. Directive 93/36/EEC precludes, in a procedure to award a public supply contract, the requirement that the products which are the subject of the tenders be available for inspection by the contracting authority within a radius of 300 km of the authority as a criterion for the award of the contract.

Puissochet
Schintgen
Skouris

Macken

Cunha Rodrígues

Delivered in open court in Luxembourg on 19 June 2003.

R. Grass

J.-P. Puissochet

Registrar

President of the Sixth Chamber

JUDGMENT OF THE COURT (First Chamber)

24 January 2008 (*)

(Directive 92/50/EEC – Public service contracts – Carrying out of a project in respect of the cadastre, town plan and implementing measure for a residential area – Criteria which may be accepted as 'criteria for qualitative selection' or 'award criteria' – Economically most advantageous tender – Compliance with the award criteria set out in the contract documents or contract notice – Subsequent determination of weighting factors and sub-criteria in respect of the award criteria referred to in the contract documents or contract notice – Principle of equal treatment of economic operators and obligation of transparency)

In Case C-532/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Simvoulio tis Epikratias (Greece), made by decision of 28 November 2006, received at the Court on 29 December 2006, in the proceedings

Emm. G. Lianakis AE,

Sima Anonymi Techniki Etairia Meleton kai Epivlepseon,

Nikolaos Vlachopoulos

v

Dimos Alexandroupolis,

Planitiki AE,

Aikaterini Georgoula,

Dimitrios Vasios,

N. Loukatos kai Synergates AE Meleton,

Eratosthenis Meletitiki AE,

A. Pantazis – Pan. Kyriopoulos kai syn/tes OS Filon OE,

Nikolaos Sideris,

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of Chamber, A. Tizzano, A. Borg Barthet, M. Ilešič and E. Levits, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

after considering the observations submitted on behalf of:

– N. Loukatos kai Synergates AE Meleton, Eratosthenis Meletitiki AE, A. Pantazis – Pan. Kyriopoulos kai syn/tes OS Filon OE and Nikolaos Sideris, by E. Konstantopoulou and P.E. Bitsaxis, dikigori,

– the Commission of the European Communities, by M. Patakia and D. Kukovec, acting as Agents,

gives the following

Judgment

1 This reference for a preliminary ruling concerns, in essence, the interpretation of Articles 23(1), 32 and 36 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) ('Directive 92/50').

2 The reference has been made in the context of two sets of proceedings brought by (1) the consortium of consultancy firms and experts comprising Emm. G. Lianakis AE (universal successor in title to Emm. Lianakis EPE), Sima Anonymi Techniki Etairia Meleton kai Epivlepseon and Nikolaos Vlachopoulos ('the Lianakis consortium') and (2) the consortium of Planitiki AE, Aikaterini Georgoula and Dimitrios Vasios ('the Planitiki consortium'), against Dimos Alexandroupolis (Municipality of Alexandroupolis) and the consortium of N. Loukatos kai Synergates AE Meleton, Eratosthenis Meletitiki AE, A. Pantazis – Pan. Kyriopoulos kai syn/tes (Filon OE) – Nikolaos Sideris ('the Loukatos consortium'), concerning the award of a contract to carry out a project in respect of the cadastre, town plan and implementing measure for part of the Municipality of Alexandroupolis.

Legal context

3 Directive 92/50 coordinates the procedures for the award of public service contracts.

4 To that end, the Directive determines which contracts must be subject to an award procedure and the procedural rules to be followed, including, in particular, the principle of equal treatment of economic operators, the criteria for the qualitative selection for operators ('qualitative selection criteria') and the criteria for the award of contracts ('award criteria').

5 Thus, Article 3(2) of Directive 92/50 provides that '[c]ontracting authorities shall ensure that there is no discrimination between different service providers'.

6 Article 23(1) of the Directive provides that '[c]ontracts shall be awarded on the basis of the criteria laid down in Chapter 3 [namely Articles 36 and 37], taking into account Article 24, after the suitability of the service providers not excluded under Article 29 has been checked by the contracting authorities in accordance with the criteria referred to in Articles 31 and 32'.

7 According to Article 32 of the Directive:

'1. The ability of service providers to perform services may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

2. Evidence of the service provider's technical capability may be furnished by one or more of the following means according to the nature, quantity and purpose of the services to be provided:

(a) the service provider's educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for providing the services;

(b) a list of the principal services provided in the past three years, with the sums, dates and recipients, public or private, of the services provided:

…

(c) an indication of the technicians or technical bodies involved, whether or not belonging directly to the service provider, especially those responsible for quality control;

(d) a statement of the service provider's average annual manpower and the number of managerial staff for the last three years;

(e) a statement of the tool, plant or technical equipment available to the service provider for carrying out the services;

(f) a description of the service provider's measures for ensuring quality and his study and research facilities;

…'

8 Article 36 of Directive 92/50 provides:

'1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting authority shall base the award of contracts may be:

(a) where the award is made to the economically most advantageous tender, various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price; or

(b) the lowest price only.

2. Where the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the contract notice the award criteria which it intends to apply, where possible in descending order of importance.'

The dispute in the main proceedings and the question referred for a preliminary ruling

9 In 2004, the Municipal Council of Alexandroupolis issued a call for tenders for a contract to carry out a project in respect of the cadastre, town plan and implementing measure for the Palagia area, a part of Alexandroupolis with fewer than 2 000 inhabitants. The budget for the project was EUR 461 737.

10 The contract notice referred to the award criteria in order of priority: (1) the proven experience of the expert on projects carried out over the last three years; (2) the firm's manpower and equipment; and (3) the ability to complete the project by the anticipated deadline, together with the firm's commitments and its professional potential.

11 Thirteen consultancies responded to the call for tenders, including in particular the Lianakis and Planitiki consortia, and the Loukatos consortium.

12 During the evaluation procedure, in order to evaluate the tenderers' bids, the project award committee of the Municipality of Alexandroupolis ('the Project Award Committee') defined the weighting factors and sub-criteria in respect of the award criteria referred to in the contract notice.

13 Accordingly, it set weightings of 60%, 20% and 20% for each of the three award criteria referred to in the contract notice.

14 In addition, it stipulated that experience (first award criterion) should be evaluated by reference to the value of completed projects. Thus, for experience on projects worth up to EUR 500 000, a tenderer would be awarded 0 points; between EUR 500 000 and EUR 1 000 000, 6 points; between EUR 1 000 000 and EUR 1 500 000, 12 points; and so on up to a maximum score of 60 points for experience on projects worth over EUR 12 000 000.

15 A firm's manpower and equipment (second award criterion) were to be assessed by reference to the size of the project team. A tenderer would therefore be awarded 2 points for a team of 1 to 5 persons, 4 points for a

team of 6 to 10 persons, and so on up to a maximum score of 20 points for a team of more than 45 persons.

16 Finally, the Project Award Committee decided that the ability to complete the project by the anticipated deadline (third award criterion) should be assessed by reference to the value of the firm's commitments. Accordingly, a tenderer would be awarded the maximum score of 20 points for work worth less than EUR 15 000; 18 points for work worth between EUR 15 000 and EUR 60 000; 16 points for work worth between EUR 60 000 and EUR 100 000; and so on down to a minimum score of 0 points for work worth more than EUR 1 500 000.

17 In application of those rules, the Project Award Committee allocated first place to the Loukatos consortium (78 points), second place to the Planitiki consortium (72 points) and third place to the Lianakis consortium (70 points). Consequently, in its report of 27 April 2005, it proposed that the project be awarded to the Loukatos consortium.

18 By decision of 10 May 2005, the Municipal Council of Alexandroupolis approved the Project Award Committee's report and awarded the project to the Loukatos consortium.

19 The Lianakis and Planitiki consortia took the view that the Loukatos consortium could only have been awarded the project as a result of the Project Award Committee's subsequent stipulation of the weighting factors and sub-criteria in respect of the award criteria referred to in the contract notice, and challenged the decision taken by the Municipal Council of Alexandroupolis, initially before the Council itself and subsequently before the Simvoulio tis Epikratias (Greek Council of State; 'Simvoulio tis Epikratias') on the basis, in particular, of allegations of infringement of Article 36(2) of Directive 92/50.

20 In those circumstances, the Simvoulio tis Epikratias decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'If the contract notice for the award of a contract for services makes provision only for the order of priority of the award criteria, without stipulating the weighting factors for each criterion, does Article 36 of Directive 92/50 allow criteria to be weighted by the evaluation committee at a later date and, if so, under what conditions?'

The question referred for a preliminary ruling

21 By its question, the referring court asks in essence whether, in a tendering procedure, Article 36(2) of Directive 92/50 precludes the contracting authority from stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or contract notice.

22 The Commission submitted in its written observations that, before replying to the question referred, it is necessary to consider whether, in a tendering procedure, Directive 92/50 precludes the contracting authority from taking into account as 'award criteria' rather than as 'qualitative selection criteria' the tenderers' experience, manpower and equipment, or their ability to perform the contract by the anticipated deadline.

23 In that regard, even if – formally – the national court has limited its question to the interpretation of Article 36(2) of Directive 92/50 in relation to a possible later change to the award criteria, that does not prevent the Court from providing the national court with all the elements of interpretation of Community law which may enable it to rule on the case before it, whether or not reference is made thereto in the question referred (see Case C-392/05 *Alevizos* [2007] ECR I-0000, paragraph 64 and the case-law cited).

24 Accordingly, it is necessary, first of all, to establish the lawfulness of the criteria chosen as 'award criteria', before considering whether it is possible for the weighting factors and sub-criteria in respect of the award criteria referred to in the contract documents or contract notice to be set at a later date.

Criteria chosen as 'award criteria' (Articles 23 and 36(1) of Directive 92/50)

25 It must be borne in mind that Article 23(1) of Directive 92/50 provides that a contract is to be awarded on the basis of the criteria laid down in Articles 36 and 37 of the Directive, taking into account Article 24, after the suitability of the service providers not excluded under Article 29 has been checked by the contracting authorities in accordance with the criteria referred to in Articles 31 and 32.

26 The case-law shows that, while Directive 92/50 does not in theory preclude the examination of the tenderers' suitability and the award of the contract from taking place simultaneously, the two procedures are nevertheless distinct and are governed by different rules (see, to that effect, in relation to works contracts, Case 31/87 *Beentjes* [1988] ECR 4635, paragraphs 15 and 16).

27 The suitability of tenderers is to be checked by the authorities awarding contracts in accordance with the criteria of economic and financial standing and of technical capability (the 'qualitative selection criteria') referred to in Articles 31 and 32 of Directive 92/50 (see, as regards works contracts, *Beentjes*, paragraph 17).

28 By contrast, the award of contracts is based on the criteria set out in Article 36(1) of Directive 92/50, namely, the lowest price or the economically most advantageous tender (see, to that effect, in relation to works contracts, *Beentjes*, paragraph 18).

29 However, although in the latter case Article 36(1) of Directive 92/50 does not set out an exhaustive list of the criteria which may be chosen by the contracting authorities, and therefore leaves it open to the authorities awarding contracts to select the criteria on which they propose to base their award of the contract, their choice is nevertheless limited to criteria aimed at identifying the tender which is economically the most advantageous (see, to that effect, in relation to public works contracts, *Beentjes*, paragraph 19; Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraphs 35 and 36; and, in relation to public service contracts, Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraphs 54 and 59, and Case C-315/01 *GAT* [2003] ECR I-6351, paragraphs 63 and 64).

30 Therefore, 'award criteria' do not include criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the tenderers' ability to perform the contract in question.

31 In the case in the main proceedings, however, the criteria selected as 'award criteria' by the contracting authority relate principally to the experience, qualifications and means of ensuring proper performance of the contract in question. Those are criteria which concern the tenderers' suitability to perform the contract and which therefore do not have the status of 'award criteria' pursuant to Article 36(1) of Directive 92/50.

32 Consequently, it must be held that, in a tendering procedure, a contracting authority is precluded by Articles 23(1), 32 and 36(1) of Directive 92/50 from taking into account as 'award criteria' rather than as 'qualitative selection criteria' the tenderers' experience, manpower and equipment, or their ability to perform the contract by the anticipated deadline.

Subsequent stipulation of weighting factors and sub-criteria in respect of the award criteria referred to in the contract documents or contract notice

33 It must be borne in mind that Article 3(2) of Directive 92/50 requires contracting authorities to ensure that there is no discrimination between different service providers.

34 The principle of equal treatment thus laid down also entails an obligation of transparency (see, to that effect, in relation to public supply contracts, Case C-275/98 *UnitronScandinaviaand 3-S* [1999] ECR 8291, paragraph 31, and, in relation to public works contracts, *SIAC Construction*, paragraph 41).

35 Furthermore, it follows from Article 36(2) of Directive 92/50 that where the contract has to be awarded to the economically most advantageous tender, the contracting authority must state in the contract documents or in the contract notice the award criteria which it intends to apply, where possible in descending order of importance.

36 According to the case-law, Article 36(2), read in the light of the principle of equal treatment of economic operators set out in Article 3(2) of Directive 92/50 and of the ensuing obligation of transparency, requires that potential tenderers should be aware of all the elements to be taken into account by the contracting authority in identifying the economically most advantageous offer, and their relative importance, when they prepare their tenders (see, to that effect, in relation to public contracts in the water, energy, transport and telecommunications industries, Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 88; in relation to public works contracts, Case C-470/99 *Universale-Bau andOthers* [2002] ECR I-11617, paragraph 98; and, in relation to public service contracts, Case C-331/04 *ATI EACand Others* [2005] ECR I-10109, paragraph 24).

37 Potential tenderers must be in a position to ascertain the existence and scope of those elements when preparing their tenders (see, to that effect, in relation to public service contracts, *Concordia Bus Finland*, paragraph 62, and *ATI EACand Others*, paragraph 23).

38 Therefore, a contracting authority cannot apply weighting rules or sub-criteria in respect of the award criteria which it has not previously brought to the tenderers' attention (see, by analogy, in relation to public works contracts, *Universale-Bau and Others*, paragraph 99).

39 That interpretation is supported by the purpose of Directive 92/50 which aims to eliminate barriers to the freedom to provide services and therefore to protect the interests of economic operators established in a Member State who wish to offer services to contracting authorities established in another Member State (see, in particular, Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 16).

40 To that end, tenderers must be placed on an equal footing throughout the procedure, which means that the criteria and conditions governing each contract must be adequately publicised by the contracting authorities (see, to that effect, in relation to public works contracts, *Beentjes*, paragraph 21, and *SIAC Construction*, paragraphs 32 and 34; also, in relation to public service contracts, *ATI EAC and Others*, paragraph 22).

41 Contrary to the doubts expressed by the referring court, those findings do not conflict with the interpretation by the Court of Justice of Article 36(2) of Directive 92/50 in *ATI EAC and Others*.

42 In the case that gave rise to that judgment, the award criteria and their weighting factors, together with the sub-criteria of those award criteria had in fact been established beforehand and published in the contract documents. The contracting authority concerned had merely stipulated subsequently, shortly before the opening of the envelopes, the weighting factors to be applied to the sub-criteria.

43 In that judgment, the Court held that Article 36(2) of Directive 92/50 does not preclude proceeding in that way, provided that three very specific conditions apply, namely that the decision to do so:

– does not alter the criteria for the award of the contract set out in the contract documents;

– does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation; and

– was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers (see, to that effect, *ATI EAC and Others*, paragraph 32).

44 It must be noted that in the case in the main proceedings, by contrast, the Project Award Committee referred only to the award criteria themselves in the contract notice, and later, after the submission of tenders and the opening of applications expressing interest, stipulated both the weighting factors and the sub-criteria to be applied to those award criteria. Clearly that does not comply with the requirement laid down in Article 36(2) of Directive 92/50 to publicise such criteria, read in the light of the principle of equal treatment of economic operators and the obligation of transparency.

45 Having regard to the foregoing, the answer to the question referred must therefore be that, read in the light of the principle of equal treatment of economic operators and the ensuing obligation of transparency, Article 36(2) of Directive 92/50 precludes the contracting authority in a tendering procedure from stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or contract notice.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Read in the light of the principle of equal treatment of economic operators and the ensuing obligation of transparency, Article 36(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, precludes the contracting authority in a tendering procedure from stipulating at a later date

the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or contract notice.

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)
7 October 2004 (1)

(Directive 93/37/EEC – Public works contracts – Award of contracts – Right of the contracting authority to choose between the criterion of the lower price and that of the more economically advantageous tender)

In Case C-247/02,
REFERENCE to the Court under Article 234 EC
from the Tribunale amministrativo regionale per la Lombardia (Italy), made by decision of 26 June 2002, received at the Court on 8 June 2002, in the proceedings
Sintesi SpA

v

Autorità per la Vigilanza sui Lavori Pubblici,

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, J.-P. Puissochet, R. Schintgen (Rapporteur), F. Macken and N. Colneric, Judges,
Advocate General: C. Stix-Hackl,
Registrar: M. Múgica Azarmendi, Principal Administrator,
having regard to the written procedure and further to the hearing on 19 May 2004,
after considering the observations submitted on behalf of:
–
Sintesi SpA, by G. Caia, V. Salvadori and N. Aicardi, avvocati,
–
Ingg. Provera e Carrassi SpA, by M. Wongher, avvocatessa,
–
the Italian Government, by I.M. Braguglia, acting as Agent, assisted by M. Fiorilli, avvocato dello Stato,
–
the Greek Government, by S. Spyropoulos, D. Kalogiros and D. Tsagkaraki, acting as Agents,
–
the Austrian Government, by M. Fruhmann, acting as Agent,
–

the Commission of the European Communities, by K. Wiedner, R. Amorosi and A. Aresu, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 July 2004,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 30(1) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54; 'the Directive').

2 The reference was made in proceedings between Sintesi SpA ('Sintesi') and the Autorità per la Vigilanza sui Lavori Pubblici (Public Works Supervisory Authority; 'the supervisory authority') concerning the award of a public works contract under the restricted tendering procedure.

Legal framework

Community rules

3 According to the second recital in the preamble to the Directive, '… the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails not only the abolition of restrictions but also the coordination of national procedures for the award of public works contracts'.

4 Article 30(1) of the Directive provides:

'1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a)

either the lowest price only;

(b)

or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.'

National legislation

5 Article 30(1) of the Directive was transposed into Italian law by Article 21 of Law No 109 of 11 February 1994 (GURI No 41 of 19 February

1994, p. 5; ‘Law No 109/1994’), which is the framework law on public works in Italy.

6 Article 21(1) and (2) of Law No 109/1994, in the version in force at the material time, is worded as follows:

‘Criteria for the award of contracts – Contracting authorities

1. The award of contracts by open or restricted tender shall be based on the criterion of lowest price, below the base price in the tender notice, and shall be determined as follows:

…

2. The award of contracts by call for competitive tenders and also the allocation of concessions by restricted calls for tender shall be made on the basis of the criterion of the most economically advantageous tender, taking into account the following factors which vary according to the work to be carried out:

…’

Main proceedings and questions referred to the Court

7 In February 1991, the City of Brescia (Italy) awarded Sintesi a concession contract for the construction and management of an underground car park.

8 Under the contract concluded between the City of Brescia and Sintesi in December 1999, Sintesi was required to submit the completion of the works to a restricted call for tenders, at European level, in accordance with the Community rules on public works.

9 By a notice published in the *Official Journal of the European Communities* on 22 April 1999, Sintesi made a restricted call for tenders based on the criterion of the most economically advantageous tender. This tender was to be assessed on the basis of price, technical merit and time necessary for completion of the works.

10 Following the preselection stage, Sintesi sent the selected undertakings a letter of invitation to tender and the file of tender documents. Ingg. Provera e Carrassi SpA (‘Provera’), one of the companies invited to submit a tender, sought and was granted an extension of the period for submitting its tender. However, it subsequently informed Sintesi that it would not take part in the tendering procedure, on the ground that it was unlawful.

11 On 29 May 2000, Sintesi awarded the contract, accepting the most economically advantageous tender.

12 Following a fresh complaint by Provera, the contracting authority, by letter of 26 July 2000, informed Sintesi that it regarded the tendering procedure in question as contrary to Law No 109/1994, and on 7 December 2000 it adopted Decision No 53/2000, which is worded as follows:

‘1. in the system governed by Framework Law No 109/1994 on public works, a contract can be awarded only on the basis of the criterion of the lowest price; the criterion of the most economically advantageous tender can be employed only in the hypotheses of competition for and the concession of the construction and management of public works;

2. the above rules are applicable to all works contracts, whatever the amount involved, including where that amount is above the Community threshold, and the system in question cannot be regarded as contrary to Article 30(1) of Directive 93/37/EEC …;

3. where, in cases where the law so allows, and therefore not in the case referred to us, assessment of the technical merit is provided for in the framework of the actual application of the criterion of the most economically advantageous tender, it is necessary, in order to allow such an assessment, that the project be capable of being altered by the candidates.’

13 Sintesi challenged that decision before the national court, claiming, in particular, that there had been a breach of Article 30(1) of the Directive.

14 It claimed that it follows from that provision that the two criteria for the award of public works contracts, namely the ‘lowest price’ criterion and the ‘most economically advantageous’ criterion, are placed on an equal footing. By excluding, on the basis of Law No 109/1994, the criterion of the most economically advantageous tender in the case of a public works contract concluded according to the restricted tendering procedure, the supervisory authority was, in Sintesi’s submission, in breach of Article 30(1) of the Directive.

15 The national court observes that Article 21(1) of Law No 109/1994 seeks to ensure transparency in the procedures for awarding public contracts, but is uncertain as to whether that provision is capable of ensuring free competition, since price does not on its own appear to constitute a factor capable of ensuring that the best tender will be accepted.

16 The national court also makes the point that the car park in question will be situated in the historical centre of the City of Brescia. Consequently, the works to be carried out would be very complex and would require an assessment of technical elements, which should be provided by the tenderers, so that the contract can be awarded to the undertaking most capable of carrying out the work.

17 In those circumstances, the Tribunale amministrativo regionale per la Lombardia decided to stay proceedings and refer the following two questions to the Court for a preliminary ruling:

‘1.

Does Article 30(1) of [the Directive], in so far as it allows individual contracting authorities to choose either the lowest price or the most economically advantageous tender as the criterion for the award of a

contract, constitute a logically consistent application of the principle of free competition which is already enshrined in Article 85 of the EC Treaty (now Article 81 EC) and requires that all tenders submitted as part of a procedure for the award of a contract announced within the single market be assessed in such a way as not to prevent, restrict or distort comparison between them?

2.

Does Article 30 of [the Directive], as a strictly logical consequence, preclude Article 21 of Law No 109 of 11 February 1994 from excluding, for the award of public works contracts under open and restricted procedures, the choice by the contracting authority of the criterion of the most economical tender, and prescribing, as a general rule, that of the lowest price only?'

Admissibility of the reference for a preliminary ruling

18 The Italian Government has doubts as to the admissibility of the reference, on the ground that the questions are purely theoretical.

19 The Commission of the European Communities questions the very applicability of Article 30 of the Directive to the main proceedings, in so far as the award procedure was undertaken by a works concessionaire.

20 It states that under Article 3(3) and (4) of the Directive, only a public works concessionaire which is itself one of the contracting authorities referred to in Article 1(b) of the Directive is required, in respect of the work to be carried out by third parties, to comply with all the provisions of the Directive. Public works concessionaires other than contracting authorities, on the other hand, are only required to observe the rules on advertising set out in Article 11(4), (6), (7) and (9) to (13) and Article 16 of the Directive.

21 In that regard, it is settled case-law that the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts (see, inter alia, Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 14, and Case C-314/01 *Siemens and ARGE Telekom* [2004] ECR I-0000, paragraph 33, and the case-law cited there).

22 In the context of that cooperation, it is for the national court or tribunal seised of the dispute, which alone has direct knowledge of the facts giving rise to the dispute and must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, inter alia, *Lourenço Dias*, cited above, paragraph 15; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 18; and *Siemens and ARGE Telekom*, cited above, paragraph 34).

23

In the present case, it is by no means clear that the interpretation of Article 30 will be of no assistance in the resolution of the main dispute since, as stated in the decision for reference, under the contract concluded between the City of Brescia and Sintesi, the latter, in its capacity as concessionaire, was required, for the purpose of the works at issue in the main proceedings, to launch a restricted tender procedure, at European level, in accordance with the Community rules on public works.

24 The reference for a preliminary ruling must therefore be held to be admissible.

The questions for the Court

25 By its questions, which should be examined together, the national court is asking essentially whether Article 30(1) of the Directive is to be interpreted as meaning that it precludes national rules under which, when awarding public works contracts, following open or restricted tendering procedures, the contracting authorities are required to employ only the lowest-price criterion. In particular, it asks whether the objective pursued by that provision, which seeks to ensure effective competition in the field of public contracts, necessarily implies that the question must be answered in the affirmative.

Observations submitted to the Court

26 According to Sintesi, Article 30(1) of the Directive, in so far as it leaves to the contracting authority the free choice between lowest price and most advantageous tender as the criterion for awarding public works contracts, implements the principle of free competition. Reducing that authority's discretion to a mere analysis of the prices submitted by the tenderers, as required by Article 21(1) of Law No 109/1994, constitutes an obstacle to the selection of the best possible tender and is therefore contrary to Article 81 EC.

27 Provera and the Italian Government claim that in adopting Law No 109/1994 the national legislature was seeking, in particular, to combat corruption in the public works contracts sector by eliminating the administration's discretion in awarding contracts and by adopting transparent procedures apt to ensure free competition.

28 In their submission, it follows from the very wording of Article 30(1) that the Directive does not ensure that the contracting authority is free to choose one criterion rather than another, nor does it require that one or other criterion be used in certain specific circumstances. Article 30(1) merely sets out the two criteria applicable to the award of contracts and does not specify the cases in which they are to be used.

29 Nor does the national legislature's choice of the 'lowest price' criterion in restricted or open tendering procedures adversely affect tenderers'

rights, since the same, pre-determined criterion is applied to each of them.

30 The Greek and Austrian Governments agree with that interpretation.

31 In particular, according to the Austrian Government, there is no indication in Article 30 of the Directive as to which of the two criteria, which are placed on an equal footing, the contracting authority must choose. The Directive thus leaves it to that authority to determine precisely what criterion it will use to obtain the best quality/price ratio in the light of its needs. However, Article 30 does not preclude the national legislature from itself directly making that choice, depending on the nature of the contracts in question, by authorising either both criteria, or only one of them, as the Directive does not confer on the contracting authority any subjective right to exercise such a choice.

32 The Commission also submits that the Directive does not express any preference for one or other of the two criteria set out in Article 30(1) of the Directive. That provision seeks only to ensure that contracting authorities do not adopt criteria for the award of public works contracts other than the two criteria which it sets out; it does not impose any choice between them. In order to preclude arbitrary conduct on the part of those authorities and to ensure healthy competition between undertakings, it is in principle immaterial whether the contract is concluded on the basis of the lowest price or the most economically advantageous tender. It is also essential that the award criteria be clearly stated in the contract notice and applied objectively and without discrimination.

33 The choice of the appropriate criterion is for the contracting authority, which examines each particular case when awarding a specific contract, or for the national legislature, which is entitled to adopt legislation applicable either to all public works contracts or only to certain types of contracts.

34 The Commission observes that, in the present case, Article 21(1) of Law No 109/1994 requires that the lowest-price criterion be used in order to ensure the greatest transparency of procedures relating to public works contracts, which is consistent with the objective pursued by the Directive, namely to ensure the development of effective competition. Such a provision is therefore not contrary to Article 30(1) of the Directive.

The Court's answer

35 According to the 10th recital thereto, the purpose of the Directive is to develop effective competition in the field of public contracts (see Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697, paragraph 26; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, paragraph 34; and Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 89).

36 That objective, moreover, is expressly stated in the second subparagraph of Article 22(2) of the Directive, which provides that where the contracting authorities award a contract by restricted procedure, the number of candidates invited to tender is in any event to be sufficient to ensure genuine competition.

37 In order to meet the objective of developing effective competition, the Directive seeks to organise the award of contracts in such a way that the contracting authority is able to compare the different tenders and to accept the most advantageous on the basis of objective criteria (*Fracasso and Leitschutz*, cited above, paragraph 31).

38 Thus Article 30(1) of the Directive sets out the criteria on which the contracting authority relies when awarding contracts, namely either the lowest price only or, when the award is made to the most economically advantageous tender, various criteria according to the contract, such as price, period for completion, running costs, profitability, technical merit.

39 A national provision, such as that at issue in the main proceedings, which restricts the contracting authorities' freedom of choice, in the context of open or restricted tendering procedures, by requiring that the lowest price be used as the sole criterion for the award of the contract, does not prevent those authorities from comparing the different tenders and from accepting the best one on the basis of an objective criterion fixed in advance and specifically included among those set out in Article 30(1) of the Directive.

40 However, the abstract and general fixing by the national legislature of a single criterion for the award of public works contracts deprives the contracting authorities of the possibility of taking into consideration the nature and specific characteristics of such contracts, taken in isolation, by choosing for each of them the criterion most likely to ensure free competition and thus to ensure that the best tender will be accepted.

41 In the main proceedings, the national court has specifically highlighted the technical complexity of the work to be carried out and, accordingly, the contracting authority could profitably have taken that complexity into account when choosing objective criteria for the award of the contract, such as those set out, by way of example, in Article 30(1)(b) of the Directive.

42 It follows from the foregoing considerations that the answer to the questions referred to the Court must be that Article 30(1) of the Directive is to be interpreted as meaning that it precludes national rules which, for the purpose of the award of public works contracts following open or restricted tendering procedures, impose a general and abstract requirement that the contracting authorities use only the criterion of the lowest price.

Costs

43 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) rules as follows:

Article 30(1) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts is to be interpreted as meaning that it precludes national rules which, for the purpose of awarding public works contracts following open or restricted tendering procedures, impose a general and abstract requirement that the contracting authorities use only the criterion of the lowest price.

Signatures.

SECTION 5
CHAPTER SUMMARY

SELF-TEST QUESTIONS

Check each question for local relevance and adapt accordingly.

1. What is the difference between the lowest price criterion and MEAT criterion?
2. Are you free to choose between the lowest price criterion and the MEAT criterion?
3. Can you take into account the ultimate price to be paid when you apply the lowest price criterion?
4. What are the limitations of the lowest price criterion?
5. Can you give an example of when the lowest price criterion is normally and typically applied?
6. What is meant by "most economically advantageous tender"?
7. What are the advantages of the MEAT criterion?
8 What are the two categories of criteria that you may take into account to determine the most economically advantageous tender?
9. What is meant by life cycle costs?
10. Are you free to choose the individual criteria that you will apply to determine the most economically advantageous tender?
11. What is the difference between selection criteria and award criteria?
12. What is meant by weighting the criteria to be applied to determine the most economically advantageous tender?
13. Are you obliged to disclose the criteria to be applied to determine the MEAT and their relative weighting as well as any more detailed evaluation methodology developed?
14. What are the main points that you should keep in mind when you determine the criteria to be applied to determine the MEAT and their relative weighting?
15. How do you award lots?

Further reading

Comba, Marion E. (2009), "Selection and Award Criteria in Italian Public Procurement Law", *Public Procurement Law Review*, Sweet & Maxwell, Issue 3.

Folliot-Lalliot, Laurence (2009), "The Separation between the Qualification Phase and the Award Phase in French Procurement Law", *Public Procurement Law Review*, Sweet & Maxwell, Issue 3.

Kotsonis, Totis (2008), "The Nature of Award Criteria and the Subsequent Stipulation of Weightings and Sub-criteria: Lianakis v Dimos Alexandroupolis (C-532/06)", *Public Procurement Law Review*, Thomson Sweet & Maxwell, Issue 4.

Rubach-Larsen, Anne (2009), "Selection and Award Criteria from a German Public Procurement Law Perspective" *Public Procurement Law Review*, Sweet & Maxwell, Issue 3.

Timmermans, William and Tim Bruyninckx (2009), "Selection and Award Criteria in Belgian Procurement Law", *Public Procurement Law Review*, Sweet & Maxwell, Issue 3.

Treumer, Steen (2009a), "The Distinction between Selection and Award Criteria in EC Public Procurement Law: A Rule without Exceptions?", *Public Procurement Law Review*, Sweet & Maxwell, Issue 3.

Treumer, Steen (2009b), "The Distinction between Selection and Award criteria in EC Public Procurement Law: The Danish Approach", *Public Procurement Law Review*, Sweet & Maxwell, Issue 3.

United Kingdom Office of Government Commerce (2009), "Requirements to Distinguish between 'Selection' and 'Award' Stages of a Public Procurement, and to Give Suppliers Complete Information about the Criteria Used in Both Stages", Action Note 04/09 29, April, www.ogc.gov.uk.

Conducting the procurement process

MODULE E

Tender evaluation and contract award

PART 5

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. The main principles that you should apply and the main stages that you should follow in the process of evaluating tenders
2. The purpose of, and when and how you may request, tender clarifications
3. How you should proceed in case a tender appears to be abnormally low
4. The importance of the evaluation report
5. When and how the contract award is made

1.2 IMPORTANT ISSUES

The most important issues in this chapter are concerned with the need to ensure that:

- The process of evaluation of tenders is carried out in accordance with the basic public procurement principles of transparency, equal treatment and non-discrimination. The process must also be confidential
- The tenders are evaluated and scored in a consistent manner
- The pre-announced award criteria are applied as they are. Under no circumstances may they be changed or waived during the process of evaluation of tenders
- A specific *inter partes* procedure is followed before rejecting an abnormally low tender
- Each stage of the evaluation process is duly recorded in writing

This means that it is critical to understand fully:

- The role and responsibilities of the members of the evaluation panel
- The rules and stages to be followed during the process of evaluating tenders
- The importance of drafting a clear and comprehensive evaluation report
- When and how the contract award takes place

If this is not properly understood, the process of evaluation of tenders may lead to misleading results – for example, to the choice of a tender that is not the best one on the basis of the pre-announced award criteria – and to legal challenges.

1.3 LINKS

There is a particularly strong link between this section and the following modules or sections:

- Module A1 on the basic principles of public procurement
- Module B4 on the role of the evaluation panel/tender committee
- Module C4 on public procurement procedures and techniques
- Module E3 on selection (qualification) of candidates
- Module E4 on setting the award criteria
- Module E6 on transparency and communication
- Module F1 on remedies, standstill period and contract conclusion

1.4 RELEVANCE

This information is of particular relevance to those procurement professionals and to all professionals that are involved in the process of evaluation of tenders. It is also important for those involved in procurement planning, in the preparation of the tender documents including specifications, and in setting the selection criteria and the award criteria. It is also of particular relevance to those persons who, within the line organisation of a contracting authority, have both the responsibility and the power, including delegation power, to make procurement decisions (e.g. to make award decisions and sign contracts).

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

Adapt for local use using the format below, including listing the relevant national legislation and the key elements of that legislation. This section may need expanding to reflect particular local requirements relating to the process of evaluation of tenders and contract award. This may include adding information relating to contracts below the EU thresholds and/or low-value contracts.

Directive 2004/18/EC sets out general rules on how and when the award of contracts shall take place. However, the Directive does not contain specific rules on how the process of evaluating tenders, which results in the contract award, should be structured. This is left to member states to regulate. A brief overview of the main provisions contained in **Directive 2004/18/EC**, which are relevant to this module E5, is given below:

- Article 24 sets out general rules on variants and on how they should be treated during the process of evaluation of tenders
- Article 42(3) establishes *inter alia* that the means of communication used shall guarantee that the content of tenders is examined only after the deadline for their submission has expired
- Article 44(1) sets out general rules on how and when the award of contracts shall

take place

- Article 53 sets out the criteria on the basis of which contracting authorities may award public contracts
- Article 55 sets out the general rules and principles concerning abnormally low tenders
- Annex VII A (on the information to be included in the contract notice), in item 13, mentions that in case of open procedures, the persons authorised to be present at the opening of tenders as well as the date, time and place of opening should be indicated in the contract notice

(For further information on the main legal requirements, see Section 5, The Law.)

The mandatory standstill period is regulated by **Directive 2007/66/EC**, and is examined in detail in module F1.

Utilities

A short note on the key similarities and differences applying to the utilities is included at the end of Section 2.

SECTION 2
NARRATIVE

Adapt all of this section using relevant local legislation, processes and terminology.

2.1 INTRODUCTION

Adapt all of this sub-section using relevant local legislation, processes and terminology.

The evaluation of tenders is the stage in the procurement process during which a contracting authority identifies which one of the tenders meeting the set requirements is the best one on the basis of the pre-announced award criteria (*i.e.* either the lowest-priced or the most economically advantageous tender). The qualified tenderer whose tender has been determined to be either the lowest-priced or the most economically advantageous, as the case may be, is awarded the contract (see module B2 for more information on the procurement cycle).

The evaluation of tenders must be carried out by a suitably competent evaluation panel (see module B4 for more information on the role of the evaluation panel/tender committee) and in accordance with the general law and Treaty principles of equal treatment, non-discrimination, and transparency (see module A1 for more information on the basic principles of public procurement). Also, the confidentiality of the information acquired by those involved in the evaluation process must be preserved.

The Directive sets out the criteria on the basis of which contracts are to be awarded, and it also specifies that the award of contracts is to take place after the selection (qualification) of economic operators has taken place. See module E4 for more information on the award criteria and module E3 for more information on the selection (qualification) of economic operators and the difference between selection and award.

However, the Directive does not contain specific rules on how the process of evaluation of tenders should be structured, and it also does not contain specific rules on the organisation and responsibilities of the evaluation panel. These issues are left to EU Member States to regulate. Broadly speaking, with regard to the process of evaluation of tenders, the Directive limits itself to referring to the opening of tenders and to the fact that tenders are to be examined only after the deadline for their submission has expired. It also sets out general rules on how variants should be treated during the process of evaluation of tenders as well as rules regarding abnormally low tenders.

This section examines in general terms the process of evaluation of tenders and the resulting contract award, mainly by referring to what is considered to represent good practice. References to the few relevant provisions of the Directive will also be made.

It is important to read this section in conjunction with module C4 in particular, which examines in detail the various procurement procedures (open procedure, restricted procedure, competitive dialogue, negotiated procedures) and techniques (framework agreements, electronic auctions, and dynamic purchasing system) that are allowed under the Directive and how the tender evaluation and contract award interlink with each procedure and technique in question.

Contracts below the EU thresholds

Adapt this sub-section for local use – using relevant local legislation, processes and terminology. Briefly set out the requirements of the local legislation for contracts below the relevant national thresholds.

The Directive does not apply to public procurement procedures relating to contracts that are below certain financial thresholds set in the Directive itself.

Generally speaking, with regard to contracts below the EU thresholds, it is left to EU Member States to introduce their own rules. Individual contracting authorities may also be permitted or required to publish and follow their own internal purchasing rules.

However, the general law and Treaty principles, including the requirements of transparency, equal treatment and non-discrimination, must also be respected in the context of the process of evaluation of tenders and contract award for contracts below the thresholds set in the Directive. The same requirement applies concerning the principle of confidentiality.

See module D5 for more information on the applicable financial thresholds and on the types of contracts covered by the Directive. See also module A1 for more information on the general law and Treaty principles relevant for public procurement.

2.2 PROCESS OF EVALUATION OF TENDERS: PRELIMINARY CONSIDERATIONS

Adapt all of this sub-section using relevant local legislation, processes and terminology.

2.2.1 Key principles governing the process of evaluation of tenders

The process of evaluation of tenders must be demonstrably based on the general law and Treaty principles of:

- non-discrimination
- equal treatment and
- transparency

and the process must also ensure confidentiality with regard to the tender information received and evaluated.

N.B. *The adherence to the above-mentioned principles ensures the preservation of effective competition during the process of evaluation of tenders.*

Non-discrimination on the grounds of nationality – This Treaty principle means that any discrimination with regard to tenderers on the basis of nationality is forbidden. During the process of evaluation of tenders, tenderers from other member states must not be discriminated against in favour of domestic tenderers.

Equal treatment (equality of treatment) – This general law principle means that all tenders submitted within the set deadline are to be treated equally. They shall be evaluated on the basis of the same terms, conditions and requirements set in the tender documents and by applying the same pre-announced award criteria.

It follows from settled case law of the European Court of Justice (ECJ) that the principle of equal treatment requires that comparable situations not be treated differently and that different situations not be treated similarly, unless such treatment can be justified objectively.

Transparency – This general law principle means that detailed written records must be kept (normally in the form of reports and minutes of the meetings held) of all actions of the evaluation panel. All decisions taken must be sufficiently justified and documented. In this way, any discriminatory behaviour can be prevented and if not prevented, then monitored.

See module A1 for a detailed analysis of the above-mentioned principles and other key principles applying to public procurement processes.

Confidentiality – Apart from any public tender opening, the process of evaluation of tenders must be conducted *in camera* and must be confidential. During the process of evaluation, the tenders should remain in the premises of the contracting authority and should be kept in a safe place under lock and key when not under review by the evaluation panel. This safeguard is recommended in order to avoid any leaking of information. Information concerning the process of evaluation of tenders and the award recommendation is not to be disclosed to the tenderers or to any other person who is not officially concerned with the process, until information on the award of the contract is communicated to all tenderers.

2.2.2 Evaluation panel, panel or tender committee

In general terms, the process of evaluation of tenders is carried out by a suitably competent evaluation panel, which may be either the relevant unit of the line organisation of the contracting authority or a specifically established evaluation panel/tender committee. For the purposes of this narrative, the term "evaluation panel" is used. (Adapt for local use by using relevant local legislation and terminology).

As a general rule and depending on national legislation, a chairperson with non-voting powers is appointed to lead, co-ordinate, give guidance and control the process of evaluation of tenders. The chairperson is responsible, *inter alia*, for ensuring that the process of evaluation of tenders is carried out in accordance with the general law and Treaty principles examined above and for the purpose of producing, amongst others, the evaluation report. A secretary to the evaluation panel, also with non-voting powers, is normally appointed for the purposes of providing support to the chairperson, carrying out all administrative tasks linked to the evaluation process, and keeping the minutes of each meeting. (Adapt for local use – using relevant local legislation and terminology.)

The members of the evaluation panel (also referred to in this text as evaluators) evaluate the tenders independently. They may also be requested to evaluate only the parts of the tenders that relate to their speciality. The way in which the members of the evaluation panel operate depends, however, on the provisions set down in national legislation. (Adapt for local use – using relevant local legislation and terminology.)

In principle, the evaluation panel normally has only the mandate to identify the best tender and to make a recommendation as to the award of the contract. It is the authorised officer of the contracting authority who normally announces the formal and final award decision. (Adapt for local use by using relevant local legislation and terminology.)

See module B4 for a detailed analysis of the composition, role and accountability of the evaluation panel.

Good practice note

It is good practice for all of the evaluation panel's members, including the chairperson and secretary, to sign a declaration of impartiality and confidentiality or a similar kind of declaration before they start to evaluate the tenders.

By signing such a declaration, each evaluation panel member:

- declares in an explicit way that he/she is not associated in any way with any of the tenderers (or their proposed sub-contractors, etc.) that have submitted a tender;
- commits himself/herself in an explicit way not to disclose any information acquired during the process of evaluation of tenders to tenderers or to other persons not officially involved in the evaluation process.

2.2.3 Preparatory and planning work

Preparatory work and advance planning are very important for a timely and proper conduct of the process of evaluation of tenders.

The evaluation panel under the leadership of the chairperson, just before the deadline for submission of tenders has expired, holds a preparatory/planning meeting. (Adapt for local use – using relevant local legislation and terminology.) The objectives of this preparatory/planning meeting normally include, but are not limited to, the following:

- Presentation by the chairperson, *inter alia*, of:
  - the rules governing the process of evaluation of tenders and the steps to be followed;
  - in the case of open procedures, the selection (qualification) criteria to be applied;
  - the award criteria to be applied;
  - when the most economically advantageous tender (MEAT) criterion is used, the individual criteria and their relative weighting, including the scoring system/rationale to be applied and any more detailed and pre-announced evaluation methodology;
  - the exact role and responsibilities of the members of the evaluation panel.

  N.B. *The evaluation panel must have a clear understanding of the above-mentioned issues. This understanding is essential for ensuring a consistent approach in the evaluation of tenders and a meaningful evaluation. Otherwise, the process of evaluation of tenders may lead to the choice of a tender that is not the best one on the basis of the pre-announced award criteria.*

- Opportunity for the evaluation panel members to ask any questions regarding the process of evaluation of tenders and their responsibilities in that process;

- Establishment of a clear work plan, with all steps to be followed within the set time frame for the completion of the process of evaluation of tenders;

  N.B. *The process of evaluation of tenders is to be completed within the tender validity period specified in the tender documents. Only in duly and objectively justified circumstances, which must be in line with the provisions contained in the tender documents, may tenderers be requested to extend the tender validity period.*
- Scheduling as far as possible of the evaluation meetings so as to ensure the availability of the members of the evaluation panel.

Good practice note

It is good practice to complete the process of evaluation of tenders as soon as possible, in accordance with the pre-established procurement plan and corresponding tender evaluation timetable, which are normally included in the tender documents.

2.2.4 Way in which the process of evaluation of tenders may be carried out: manually or by electronic means

The process of evaluation of tenders may be carried out in several ways, depending on the option chosen by the contracting authority, *i.e.*:

- manually or
- by electronic means or
- through a combination of manual and electronic means

(Adapt for local use, indicating whether the process of evaluation of tenders is carried out manually, by electronic means or through a combination of the two.)

Article 42 of the Directive sets out, *inter alia*, the rules applicable to the devices for the electronic transmission and receipt of tenders (see module E6 for more information on electronic means of communication).

2.3 PROCESS OF EVALUATION OF TENDERS: ITS MAIN STAGES

Adapt all of this sub-section using relevant local legislation, processes and terminology.

The process of evaluation of tenders is characterised by various stages. In general terms, these stages can be summarised as follows:

- receipt and opening of tenders;
- evaluation of tenders *strictu sensu*, which normally results in the recommendation of the contract award made by the evaluation panel to the contracting authority.

These stages are strictly linked to the procurement procedure used. See module C4 for more details on the various procurement procedures and techniques allowed under the Directive. See also module E3 on the difference between selection and award and on when these two stages take place depending on the procurement procedure used.

To assist in the evaluation of the tenders, the evaluation panel may, at its discretion and at any time during the process of evaluation, ask tenderers for clarifications of their tenders. The issue of clarifications is given special consideration is sub-section 2.4 below.

This sub-section now goes on to examine the various main stages in the process of evaluation of tenders and assumes that an e-procurement system is not used.

2.3.1 Receipt and opening of tenders

Adapt all of this sub-section using relevant local legislation, processes and terminology.

2.3.1.1 Receipt of tenders

On receiving the tenders, the contracting authority must register them.

Normally, a summary of tenders received is used to record the names of the tenderers as well as the exact date and time of reception of the tenders. The summary of tenders received is then annexed to the tender opening report.

(Adapt for local use by making reference to any standard template for the summary of tenders received that is in use locally. Add the summary of tenders received template or introduce the weblink from which any such template may be downloaded. Give a summary of the main elements that must be included in the summary of tenders received standard template.)

The envelopes containing the tenders must remain sealed and must be kept in a safe place under lock and key until they are opened, and afterwards they must be kept in a safe place under lock and key until the contract award.

Article 42(3) of the Directive establishes, *inter alia*, that the means of communication used must guarantee that the content of the tenders will be examined only after the deadline for their submission has expired.

N.B. *This provision intends to ensure that the integrity and confidentiality of tenders are preserved. This rule is particularly important when the electronic transmission of tenders is allowed (see module E6 for more details on this issue).*

Good practice note

It is good practice to group the tenders received as follows:

- tenders received prior to the deadline;
- modifications to tenders received prior to the deadline;
- withdrawals of tenders received prior to the deadline;
- tenders, modifications and withdrawals received after the deadline.

2.3.1.2 Opening of tenders

The purpose of the opening of tenders (as its name indicates) is to open the tenders received in order to start with their evaluation. Late tenders must be rejected. Normally, late tenders are returned to the tenderers concerned unopened, unless provided otherwise by national legislation. (Adapt for local use using relevant local legislation and terminology.)

Good practice note

It is good practice to open the tenders are opened and start the evaluation soon after the deadline for their submission has expired. This practice aims to reduce the risk that unauthorised persons have access to the tenders received.

The opening of tenders may be either public or non-public:

- **public tender opening** – Tenders are opened publicly in the presence of authorised persons and at the time and place indicated by the contracting authority. In the case of open procedures, the persons authorised to be present at the opening of tenders and the time and place for such an opening must be indicated in the contract notice (see Annex VII A, item 13, of the Directive on the information to be included in the contract notice).
- **non-public tender opening** – Tenders are opened in camera in the presence of the evaluation panel members only.

Good practice note

In principle, it is considered to be good practice to hold a public opening of tenders because it increases the transparency of the process of evaluation of tenders.

Comment: However, EU Member States have different rules and practices concerning the opening of tenders. Non-public opening of tenders at a formal meeting is, in general terms, acceptable for low-value contracts, which normally are contracts below the EU financial thresholds.

Unless national legislation states differently, it is normally left to the discretion of the contracting authority to establish which formal elements of the tenders will be checked at the opening session. (Adapt for local use – indicating which formal elements of the tenders have to be checked at the opening session in accordance with the provisions of national legislation.)

Good practice note

It is good practice not to reject tenders during the public opening session, except for tenders received after the closing date and time for their receipt.

Tender opening report – In accordance with the principle of transparency, it must be ensured that any occurrence during the opening session is duly recorded in a written report (which is referred to in this document as the tender opening report). In particular, the rejection of any late tenders must be recorded in the tender opening report. In principle, all persons present at the opening session must sign the tender opening report, unless otherwise required by national legislation. (Adapt for local use by making reference to any tender opening report standard template that is in use locally. Add the tender opening report standard template or introduce the web-link from which any such template may be downloaded. Give a summary of the main elements of the tender opening report and indicate any document that must be attached to it.)

Double-envelope system – When a double-envelope system is used (this is typically the case in the procurement of consultancy services), first the envelopes containing the technical offers are opened, and only after the evaluation of the technical offers has been finalised are the envelopes opened containing the financial offers of tenderers whose tenders are found to be technically compliant. During the evaluation of the technical offers, the envelopes containing the financial offers must remain sealed and must be kept in a safe place until they are opened.

2.3.2 Evaluation of tenders *strictu sensu*

The evaluation of tenders must begin soon after the opening of tenders has taken place.

The evaluation panel must make sure that the tenders received are complete and that they comply with all of the requirements set by the contracting authority in the tender documents. The evaluation panel can then apply the pre-announced award criteria (either the lowest-price criterion or the MEAT criterion) to evaluate the tenders.

Therefore, the evaluation panel will carry out the following activities:

- Formal compliance check
- Technical and substantive compliance check
- Choice of the best tender on the basis of the pre-announced award criteria (either the lowest-price criterion or the MEAT criterion)
- Recommendation for the award of the contract

2.3.2.1 Formal compliance check

The formal compliance check consists of establishing which tenders are compliant with the procedural requirements and formalities set by the contracting authority in the tender documents.

Some examples of procedural requirements and formalities

- Submission of tenders within the set deadline
- Submission of tenders in the language specified in the tender documents
- Submission of duly signed tenders
- Submission of the required number of tender copies
- Respect of the required tender validity period
- Submission of the required tender guarantee for the correct amount, for the correct duration, with the correct wording
- Submission of all requested documents

N.B. *Some of the above-mentioned procedural requirements and formalities may have already been checked during the tender opening session (for example, the submission of tenders within the set deadline).*

It is rare that tenders comply with all of the procedural requirements and formalities set in the tender documents. Tenders often present mistakes and omissions. Sound judgment must be used when deciding whether or not to reject a tender because it fails to comply with the set procedural requirements and formalities.

Non-compliance with non-fundamental procedural requirements and formalities – Generally speaking, non-compliance with non-fundamental procedural requirements and formalities does not constitute a justification for the rejection of a tender, but it would lead instead to a request for clarification. In general terms, the correction of non-compliant tenders in such instances would not give rise to an abuse. On the contrary, it would be wasteful for a contracting authority and against the principle of effective procurement to reject an advantageous tender only because it fails to meet some minor formal requirements.

N.B. *When a tenderer, through a request for clarification, is allowed to bring its tender into compliance with a specific, non-fundamental procedural requirement and formality, this must be done in compliance with the principle of equal treatment. Therefore, all tenderers that fail to comply with the same requirement or with other non-fundamental procedural requirements or formalities must be treated equally, and they must be allowed to bring their tenders into compliance (see point 2.4 below for more information on clarifications).*

Example of non-compliance with a non-fundamental formality

- The tender is submitted in a number of copies that is fewer than the required copies.

Non-compliance with fundamental procedural requirements and formalities – In principle, and in accordance with the principle of equal treatment, non-compliance with fundamental procedural requirements and formalities leads to the rejection of the tenders concerned. However, when making such a decision, the specific circumstances of each case must be taken into account. For example, late tenders must in principle not be accepted, unless – for instance – this is due to the fault of the contracting authority (see box below).

Some examples of non-compliance with fundamental procedural requirements and formalities

- The tender has been submitted after the date and time limit for submission (unless late submission is due to the fault of the contracting authority).
- The validity of the tender is in question, for example:
  - The tender has not been signed;
  - The tender is not accompanied by the required tender guarantee.

N.B. *The reasons for rejecting a tender for non-compliance with procedural requirements and formalities must be clearly and exhaustively explained and documented in the evaluation report.*

Good practice note

It is good practice to clearly indicate in the tender documents the procedural requirements and formalities that are mandatory and those that are not. A procedural requirement/formality compliance grid (checklist) could also be included in the tender documents, which would then have to be used by the evaluation panel during the formal compliance check.

This good practice enhances legal certainty, reduces the number of tenders that are non-compliant with the procedural requirements and formalities set in the tender documents, and facilitates the process of evaluation of tenders.

Single-stage procedures (open procedures) – REMINDER

Selection of tenderers – In the case of single-stage procedures, such as open procedures, the assessment as to whether tenderers satisfy the set selection (qualification) criteria is normally carried out soon after the formal compliance check has been performed. Depending on national legislation, the assessment of the tenderers' qualifications may be recorded in the evaluation report itself or in a separate report (referred to in this document as a qualitative selection report), which is attached to the evaluation report. (Adapt for local use by using relevant local legislation and terminology).

N.B. As explained in module E3, in the case of single-stage procedures, such as open procedures, selection and award take place one after the other as part of the same process, even though they remain two separate exercises. In the case of two-stage procedures (*i.e.* restricted procedures, negotiated procedures with prior publication of a contract notice, and competitive dialogue procedures), selection and award take place in two separate processes, and the selection of economic operators (candidates) is carried out during the first stage (referred to as the selection or pre-qualification process). See module E3 for more information on this issue and on the selection (pre-qualification) of economic operators.

2.3.2.2 Technical and substantive compliance check

The technical and substantive compliance check consists of identifying the tenders that are compliant with:

- the specifications,
- the contract conditions and other substantive requirements (for example, the currency used)

set by the contracting authority in the tender documents.

Tenders rarely comply fully with all of the specifications and with all of the other substantive requirements of the tender documents. Tenders often present mistakes, inconsistencies and omissions.

Non-compliance with non-fundamental specifications and other non-fundamental substantive requirements – Generally speaking, non-compliance with non-fundamental specifications and other non-fundamental substantive requirements would not constitute a reason for the rejection of a tender, but it would lead instead to a request for clarification. In principle, the correction of non-compliant tenders in these instances would not give rise to abuse. On the contrary, it would be wasteful for a contracting authority and against the principle of effective procurement to reject an advantageous tender only because it failed to meet some minor specifications or other minor substantive requirements.

N.B. *When a tenderer, following a request for clarification, is allowed to bring its tender into compliance with a specific non-fundamental specification or another non-fundamental substantive requirement, this correction must be made in compliance with the principle of equal treatment. Therefore, any tenderer failing to comply with the same requirement or with other non-fundamental specifications or non-fundamental substantive requirements must be treated equally and must also be allowed to bring its tender into compliance (see point 2.4 below for more information on clarifications).*

Example of non-compliance with a non-fundamental substantive requirement

- The tendered price is quoted in Danish kroner (DKK) instead of euros (EUR), as required in the tender documents.

Comment: In this case, the conversion of the quoted Danish kroner price into euros should be allowed, in principle, by applying the exchange rate on the date of the deadline for submission of tenders. However, this conversion would be possible only if it is not specifically forbidden by national law or by the tender documents themselves.

Non-compliance with fundamental specifications and other fundamental substantive requirements – Non-compliance with fundamental specifications and other fundamental substantive requirements must result in the rejection of the non-compliant tenders. It is against the principle of equal treatment to accept tenders that do not comply with such requirements. Generally speaking, if the cases of non-compliance with fundamental specifications and other fundamental substantive requirements were accepted, these tenders would not fulfil the purposes for which they had been requested. See further discussion of this issue in module G3.

Some examples of non-compliance with fundamental substantive requirements

- Failure to respond to the specifications by quoting, for example, a product that does not offer substantial equivalence in critical performance parameters or in other requirements
- Offer of a delivery date that it is later than the mandatory maximum delivery date specified in the tender documents
- Refusal to bear important responsibilities and liabilities allocated in the tender documents (for example, performance guarantees and insurance coverage)
- Making exceptions or reservations to critical requirements (for example, applicable law)
- Submission of partial tenders by offering, for example, only selected items or only partial quantities of a particular item or only part of the works or services required, where this is not allowed by the tender documents
- Deviation from the requirements that are explicitly indicated in the tender documents as leading to the rejection of tenders

N.B. *The reasons for rejecting a tender for non-compliance with specifications and other substantive requirements must be clearly and exhaustively explained and documented in the evaluation report.*

Good practice note

It is considered to be good practice to clearly indicate in the tender documents the specifications and other substantive requirements that are mandatory and those that are not.

This good practice enhances legal certainty, reduces the number of tenders that are non-compliant with the specifications, contract conditions and any other substantive requirement set in the tender documents, and facilitates the process of evaluation of tenders.

2.3.2.3 Choice of the best tender on the basis of the pre-announced award criteria (lowest price or MEAT)

2.3.2.3.1 Choice of the best tender on the basis of the lowest price

If the award criterion is the lowest price, the tenders submitted by qualified tenderers that:

- meet the set procedural requirements and formalities and
- meet the set specifications and other substantive requirements

are compared on the basis of the tendered prices.

N.B. *Compliance with the set specifications and other substantive requirements must be evaluated on the basis of a pass or fail system. No scoring system is used when the lowest-price criterion applies (see module E4 for further information on this issue).*

Some important issues to keep in mind before comparing tendered prices

- Tendered prices must include all price elements in accordance with the requirements set in the tender documents.
- Any arithmetical error must be corrected.

  Arithmetical errors are errors linked to miscalculations. The methodology for correction of arithmetical errors should have been described in the tender documents.

Example of how corrections of arithmetical errors may be made

With regard to a supply tender, the tender documents may indicate, for example, that the evaluation panel will correct errors as follows:

a) where there is a discrepancy between the unit price and the line item total amount (which is derived from the multiplication of the unit price by the line item quantities), the unit price as quoted prevails, unless in the opinion of the evaluation panel the decimal point in the unit price has obviously been misplaced. In that event, the line item total amount as quoted prevails and the unit price must be corrected;

b) if there is an error in a total corresponding to the addition of subtotals, the subtotals prevail and the total must be corrected;

c) where there is a discrepancy between the amount in figures and the amount in words, the amount in words prevails unless the amount expressed in words is related to an arithmetical error. In that event, the amount in figures prevails, subject to a) and b) above.

The correction of arithmetical errors is in practice considered to be binding on the tenderer. Therefore, if the tenderer in question does not accept the correction of arithmetical errors made by the evaluation panel, its tender will be rejected. In accordance with the principle of transparency, this provision should be made clear in the tender documents. (Adapt for local use by using national legislation and terminology.)

N.B. *For reasons of transparency, the correction of arithmetical errors must be explained in detail in the evaluation report.*

- Any discount must be applied.

The tender documents may foresee the possibility for tenderers to offer discounts. In that event, the tender documents must also specify the methodology for the application of such discounts.

When a tender is divided into several lots, the tender documents may foresee the possibility for tenderers to offer discounts, which are conditional on the simultaneous award of other lots (referred to as cross-discounts). In that case, the evaluation panel selects the optimum combination of awards on the basis of the least overall cost of the total contract package. Cross-discounts, however, should be used only and exclusively when the award criterion applied is the lowest price. (Adapt for local use by using national legislation and terminology).

Example of application of cross-discounts

The tender is divided into three lots, and the award criterion to be applied is the lowest price. Three tenders have been received: from Tenderer A, Tenderer B and Tenderer C.

Tenderer A tenders for Lot 1 and Lot 3 and offers the following prices for each lot: 80 and 40 respectively *(please note that the prices are indicated in this way for exemplification reasons only).* Tenderer A states in its tender that it offers a discount of 20% if awarded both Lot 1 and Lot 3.

Tenderer B tenders for Lot 1, Lot 2 and Lot 3 and offers the following prices for each lot: 70, 40, and 50 respectively *(please note that the prices are indicated in this way for exemplification reasons only).* Tenderer B states in its tender that it offers a discount of 10% if awarded all three lots.

Tenderer C tenders for Lot 1, Lot 2 and Lot 3 and offers the following prices for each lot: 60, 55, and 42 respectively *(please note that the prices are indicated in this way for exemplification reasons only).* Tenderer C does not offer any discount.

	Tenderer A	Tenderer B	Tenderer C	Ranking without discount
LOT 1	80	70	60	Tenderer C
LOT 2	no tender submitted	40	55	Tenderer B
LOT 3	40	50	42	Tenderer A

After application of the discounts, the prices offered by each tenderer are as follows:

	Tenderer A	Tenderer B	Tenderer C
LOT 1	64	63	60
LOT 2	no tender submitted	36	55
LOT 3	32	45	42

In this case, three combinations are possible:

1. 64 (from Tenderer A after discount) + 40 (from Tenderer B before discount) + 32 (from Tenderer A after discount) = 136
2. 63+36+45 (all three offers from Tenderer B after discount) = 144
3. 60 (from Tenderer C) + 40 (from Tenderer B before discount) + 40 (from Tenderer A before discount) = 140

As a result of the above, the first combination is the cheapest one and therefore Lot 1 and Lot 3 must be awarded to Tenderer A, while Lot 2 must be awarded to Tenderer B for the initially offered price.

N.B. *For reasons of transparency, the calculations for the application of discounts must be shown in detail in the evaluation report.*

- Tenders that appear to be abnormally low must be duly investigated. The issue of abnormally low tenders is examined in detail in point 2.5 below.

To summarise: The qualified tenderer that has offered the lowest-priced compliant tender that is not abnormally low (and after correction of arithmetical errors and application of discounts) is chosen as having submitted the best tender and is recommended for the award of the contract.

2.3.2.3.2 Choice of the best tender on the basis of the MEAT criterion

If the award criterion is the most economically advantageous tender (MEAT), tenders submitted by qualified and selected tenderers that:

– meet the set procedural requirements and formalities, and

– meet the set mandatory specifications and other set mandatory substantive requirements

will be evaluated by applying the pre-announced individual criteria and their relative weighting. If a more detailed evaluation methodology was disclosed in the tender documents, this methodology must be followed.

Some important points to keep in mind:

- The pre-announced criteria and their relative weighting, any pre-announced sub-criteria and their relative weighting, as well as any pre-announced more detailed evaluation methodology cannot be changed or waived during the process of evaluation of tenders. Any criteria and methodology must be applied as they stand.
- To obtain a meaningful evaluation, the members of the evaluation panel must take a consistent approach when scoring the tenders, and the same scoring rationale must be used.
- When evaluating and scoring the financial aspects of the tenders, the evaluation panel must beforehand:
  - make sure that all costs are included;
  - correct any arithmetical errors;

    Arithmetical errors are errors linked to miscalculations. The methodology for correction of arithmetical errors must have been described in the tender documents. (See sub-section 2.3.2.3.1 above for an example of how corrections of arithmetical errors may be made).

    N.B. *For reasons of transparency, corrections of arithmetical errors must be explained in detail in the evaluation report.*
  - apply any discount;

    The tender documents may foresee the possibility for tenderers to offer discounts. In that case, the tender documents must also specify the methodology for the application of such discounts. No cross-discounts can be applied.

    N.B. *For reasons of transparency, the calculations for the application of discounts must be shown in detail in the evaluation report.*
  - investigate any tender that appears to be abnormally low (see point 2.5 below on this issue).

Good practice note

It is good practice to evaluate the financial aspects of the tenders separately from the non-financial aspects.

- Evaluation grids/matrices should be used to score the tenders. For the purpose of transparency, these grids/matrices must then be attached to the evaluation report.

Good practice note

It is good practice to use evaluation grids/matrices to score the tenders for the following main reasons:

- Listing the elements of the tenders to be evaluated ensures that all issues under evaluation are addressed and that the process of evaluation of tenders is consistent.
- These evaluation grids/matrices constitute an important audit trail.
- The grids/matrices are very important for the debriefing of unsuccessful tenderers.

Also, it is good practice for each member of the evaluation panel to adequately justify in writing the scores given to each tender element that has been evaluated by indicating the shortcomings/weaknesses and advantages/strengths of each of these elements. For transparency reasons, these justifications/explanations must become part of the evaluation report.

Moderation meeting of the evaluation panel - A moderation meeting would normally be held once all members of the evaluation panel have completed their independent review and scoring of the tenders (with regard to the various ways of operating of the evaluation panel, see module B4). (Adapt for local use by using national legislation, processes and terminology.)

The moderation meeting would consider the scores (and comments) allocated by each member of the evaluation panel 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.

In the event of significant differences in the scores given by members of the evaluation panel, a mechanism should be agreed in advance to deal with this issue. Such a mechanism, which must be in line with national legislation, might include, for example, the request for clarifications from tenderers or the engagement of expert advice. In that case, more than one moderation meeting would have to be held. (Adapt for local use by using national legislation, processes and terminology.)

Variants – When the contract notice permits variants (this is possible only when the award is based on the MEAT criterion – see article 24 of the Directive), such variants must be scored separately.

Only variants meeting the minimum requirements set by the contracting authority are to be taken into consideration. In procedures awarding public supply or service contracts, a variant may not be rejected on the sole grounds that it would, if successful, lead to either a service contract rather that a supply contract or vice versa (see article 24(4) of the Directive and see also module E1 for more information on variants). (Adapt for local use by using national legislation, processes and terminology.)

Double-envelope system (often used for consultancy services) – For those tenders that, after technical evaluation, have obtained at least a minimum technical score, as pre-established in the tender documents, the financial offer is then opened for evaluation. The tender receiving the highest combined (technical + financial) score, on the basis of a formula pre-established in the tender documents, is to be recommended for the award of the contract. (Adapt for local use by using national legislation, processes and terminology.)

To summarise: The qualified tenderer that has offered a compliant tender that is determined to be the most economically advantageous one (i.e. the one with the highest total evaluation score on the basis of the criteria and relative weighting, as pre-established in the contract notice or tender documents) is chosen as having submitted the best tender and is recommended for the award of the contract.

Tender scoring examples

Examples of how tender scoring may be carried out in practice are provided in section 3 of this module.

For more detailed information on scoring systems, see also module C2.

2.3.2.4 Special considerations regarding the application of both the lowest-price criterion and the MEAT criterion

Equally-ranked tenders – In practice, it may happen that two or more tenders are equally ranked (for example, when the MEAT criterion applies, they each have the same total evaluation score). The Directive does not deal with this issue, which is normally regulated by national legislation.

Comment

This situation would need to be dealt with in accordance with the provisions included in the tender documents and in line with the provisions of national legislation. The methods for choosing the winning tender may differ, for example whether the splitting of the contract is technically feasible or must be done by ballot.

Only tender received or only admissible tender – In practice, it may happen that only one tender has been received or that only one tender amongst the tenders submitted is admissible. The Directive does not deal with this situation, which is normally regulated by national legislation.

Comment

In principle, there is nothing to prevent the award of a contract to the only received tender or the only admissible tender if there has been effective competition and if the winning tender offers value-for-money or a price that is realistic. This situation may be simply the natural way that the market responds to the specific call for tender. However, it may be the case that, in practice, a contracting authority may feel unsatisfied with the single tender or may feel that there has been inadequate competition, and thus it may not want to award the contract and may prefer to cancel the tender process.

Case note

The ECJ has expressly held that the contracting authority is not required to award the contract to the only tenderer judged to be suitable. On this issue, see in particular:

Metalmeccanica Fracasso

(Case C-27/98 *Metalmenccanica Fracasso v AmT* [1999] E.C.R. I-5697. This case is also available on www.curia.europa.eu.)

This case concerned a request by an Austrian national court for a preliminary ruling by the ECJ. In the first part of its question, the national court asked the ECJ whether Directive 93/37 on the award of public works (which is a predecessor to the current Directive) must be interpreted as meaning that the contracting authority that had called for tenders was required to award the contract to the only tenderer judged to be suitable. It should be noted that national legislation on the acceptance of tenders ('the BVergG') laid down, *inter alia*, the grounds on which tenders could be rejected, and it also stated that the invitation to tender could be cancelled if, following the elimination of tenders in accordance with the provisions of the law, only one tender remained.

Electronic auctions – REMINDER

As explained in module C4 on public procurement procedures and techniques, the contracting authority may use an electronic auction to award the contract if it has stated its intention to use this procurement technique in the contract notice.

"An electronic auction is a repetitive process, involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, allowing them to be ranked using automatic evaluation methods" (article 1(7) of the Directive).

Therefore, a contracting authority must make a full evaluation of tenders before proceeding with an electronic auction. The evaluation must be conducted in accordance with the pre-announced award criterion or criteria and weightings. Only tenderers that have submitted admissible tenders are to be invited to participate in the electronic auction. The tenderers must be invited simultaneously by electronic means to submit new prices and/or values. The contract is awarded following the closing of the electronic auction and on the basis of the results of that auction.

See module C4 for detailed information on the conduct of electronic auctions.

2.3.2.5 Recommendation to award the contract

The evaluation panel normally has the mandate to issue only a recommendation to the contracting authority regarding the award of the contract, and not to make the final award decision, which is to be made by the authorised officer of the contracting authority. This arrangement depends, however, on the provisions of national legislation. The recommendation to award the contract is contained in the evaluation report (see point 2.6 below). (Adapt for local use by making reference to local legislation, processes and terminology. Eliminate this sub-section if national legislation provides that the evaluation panel itself makes the final award decision).

2.4 CLARIFICATIONS: SPECIAL CONSIDERATIONS

Adapt all of this sub-section using relevant local legislation, processes and terminology.

To assist in the evaluation of tenders, the evaluation panel may, at its discretion and at any time during the process of evaluation of tenders, ask tenderers for clarifications of their tenders.

N.B. *This request for clarifications must be made in accordance with the rules set out in the tender documents, with the general law and Treaty principles of transparency, equal treatment and non-discrimination, and also with the principle of confidentiality.*

Some examples of when requests for clarifications may be needed

- When the tender contains inconsistent or contradictory information about the same specific aspect of the tender
- When the tender is not clear when describing what it is offering
- When the tender contains minor mistakes or omissions
- When the tender is non-compliant with the non-fundamental formal and/or substantive requirements set in the tender documents

N.B. *In accordance with the principle of equal treatment, no substantial alterations to tenders are to be sought or accepted through requests for clarifications. Therefore, requests for clarifications cannot, for example:*

- *allow a non-compliant tender to be brought into compliance with the set mandatory fundamental specifications;*
- *allow a change in the tendered price (except for the correction of arithmetical errors discovered in the evaluation of the tenders, if applicable).*

Some important points to keep in mind:

- Requests for clarifications do not imply negotiations.
- Any request for clarification and the corresponding response must be in writing.
- The evaluation panel must agree on any request for clarification before it is sent to the tenderer concerned.
- Any agreed request for clarification must be sent to the tenderer exclusively through the chairperson of the evaluation panel. Individual members of the evaluation panel are not to be allowed to contact the tenderers directly in order to seek clarifications of their tenders.
- The clarification correspondence exchanged must be summarised in detail in the evaluation report, with a clear indication of whether the answers received are satisfactory to the evaluation panel, and if not why not. For the purpose of transparency, the exchanged correspondence must also be annexed to the evaluation report.
- Any clarification submitted by a tenderer with regard to its tender that is not provided in response to a request by the evaluation panel is not to be considered.

Good practice note

It is good practice to give tenderers a reasonable period of time to respond to a request for clarification.

2.5 ABNORMALLY LOW TENDERS: SPECIAL CONSIDERATIONS

Adapt all of this sub-section to local legislation, processes and terminology.

The Directive does not define what is meant by an abnormally low tender. However, it is generally recognised that the concept of an abnormally low tender refers to a situation where the price offered by a tenderer appears to be unreasonably low so as to raise doubts as to whether the tenderer would be able to perform the contract for the tendered price. If this is the case, once the contract has been signed, the tenderer might, for example:

- not deliver all of the goods, works or services that form the object of the contract or not deliver them in accordance with the terms of the contract;
- interpret the contract in the narrowest possible way so as to compensate for what it has lost through pricing at such a low level and then asking for variations and extra payments.

If the evaluation panel suspects that a tender is abnormally low, it needs to consider very carefully the implications for the contract.

2.5.1 Procedure that must be followed before rejecting a tender that appears to be abnormally low

Article 55 of the Directive explicitly recognises that a contracting authority may reject a tender that appears to be abnormally low. However, it may do so only on condition that the following procedure is followed:

- **The contracting authority has previously requested in writing an explanation** of the tender or of those elements of the tender that it considers relevant or that may have resulted in an abnormally low tender (article 55(1)).

  These elements may include (but are not limited to) (see article 55(1)):

  - the economic aspects of the construction method, manufacturing process or services provided;
  - innovative technical solutions or exceptionally favourable conditions available to the tenderer for the execution of the work or for the supply of the goods or service;
  - originality of the proposal;
  - compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or goods are to be provided;
  - possibility of the tenderer obtaining state aid.

and

- **The contracting authority has duly verified those constituent elements** by consulting the tenderer, taking into account the evidence provided (article 55(2)).

Only if, following investigations, the contracting authority is satisfied that the tender in question is abnormally low, may it reject the tender.

If, however, the investigations carried out show that the price is genuine, the tender in question cannot be considered as abnormally low and it cannot be rejected.

N.B. *The justifications for accepting or rejecting a tender that appears to be abnormally low must, for the purpose of transparency, be explained in detail in the evaluation report.*

Comment

The purpose of the rules on abnormally low tenders is to allow tenderers to prove that their tenders are genuine and realistic before they are rejected. This provision avoids any abusive rejection by contracting authorities of tenders that appear to be abnormally low.

Case note: *Impresa Lombardini*

(Joined cases C-285/99 and C-286/99 *Impresa Lombardini SpA v ANAS* [2001] E.C.R. I-9233 – This case is also available on www.curia.europa.eu.)

This case concerned Italian legislation regarding public works. This legislation required tenderers to accompany their tenders, when submitted, with explanations of the most significant components of their prices. These components, indicated in the tender notices or in the letters of invitation, were required to add up to not less than 75% of the basic contract value. The explanations in question were to be examined only if the tender was considered to be abnormally low. In order to establish which tender was to be considered abnormally low, a specific mathematical formula had to be applied.

In this case, the ECJ stressed, *inter alia*, three important points:

1. ***Inter partes* procedure** – Directive 93/37/EEC on public works (a predecessor to the current Directive) required an *inter partes* procedure. On the basis of this procedure, the contracting authority had to request explanations of those parts of the tender that raised suspicion and to assess the response. As a result of this requirement, the tenderer concerned had to be given the opportunity to effectively supply all explanations *at a time* – necessarily after the opening of the envelopes – when the tenderer was aware that its tender appeared to be abnormally low and was also aware of the precise aspects of the tender that the contracting authority suspected of being abnormal. Therefore, the requirement of an *inter partes* procedure was violated if a contracting authority automatically rejected a tender as being abnormally low, basing its argument solely on the explanations submitted at the time the tender was lodged, without carrying out the required *interactive* process of explanations after the opening of the envelopes and before the final decision.

2. **Steps to be followed** – With regard to abnormally low tenders, the contracting authority therefore has the following duties:
   - firstly, to identify the suspect tenders;
   - secondly, to ask the tenderers concerned for the details that it considers to be appropriate in order to allow these tenderers to demonstrate their genuineness;
   - thirdly, to assess the merits of the explanations provided; and
   - fourthly, to take a decision as to whether to admit or reject those tenders.
3. **Methods of calculating an anomaly threshold** – The Directive does not determine the method of calculating an anomaly threshold, and this issue is in principle left to the discretion of EU Member States. In the cases in question, the method of calculating the anomaly threshold (which resulted from a calculation carried out for each contract notice and was based in general terms on the average of the tenders submitted) appeared to be objective and non-discriminatory. Community law does not in principle preclude a mathematical criterion from being used for the purposes of identifying the tenders that appear to be abnormally low, *on condition that* the result of applying that criterion is not beyond challenge, and that the requirement for *inter partes* examination of those tenders is complied with.

2.5.2 Abnormally low tenders and state aid

When a contracting authority determines that a tender is abnormally low because the tenderer has obtained state aid, the tenderer can be rejected on this ground alone and after consultation, if the tenderer is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid was legally granted (article 55(3) of the Directive).

Comment

The term 'alone' indicates that the fact of the tender being affected by illegal state aid constitutes sufficient grounds for rejecting it. In this case, the risk of non-performance of the contract does not come into consideration. The purpose of this provision is to allow the contracting authority to refuse to accept a tender that would have been successful due to illegal state aid.

N.B. *However, a contracting authority is not obliged to reject a tender that is affected by illegal state aid but it* ***can*** *decide to do so.*

When the contracting authority rejects a tender due to the receipt of unlawful state aid, it must inform the European Commission of that fact (article 55(3)).

2.6 EVALUATION REPORT

Adapt all of this sub-section to local legislation, processes and terminology.

The recommendation for the award of the contract is contained in the evaluation report, which is normally prepared by the chairperson of the evaluation panel with the support of the secretary and members of the panel. (Adapt for local use by making reference to any evaluation report standard template that is in use locally. Add the evaluation report standard template or introduce the weblink from which any such template may be downloaded.)

2.6.1 Information that should be contained in the evaluation report

(Adapt for local use by making reference to the main elements that must be included in the evaluation report.)

In broad terms, the evaluation report must:

- summarise in a clear way the activities carried out by the evaluation panel during the process of evaluation of tenders;
- provide a clear and detailed analysis of those activities and their results;
- provide a clear justification for any recommendation made.

In particular, the evaluation report normally includes, *inter alia*, the following information:

- subject and value of the contract (or framework agreement);
- name of the successful tenderer and reasons for the success of its tender;
- names of the unsuccessful tenderers and reasons for the rejection of their tenders;

N.B. *Particular attention must be paid to the rejected tenders: the reasons for their rejection must be clearly and exhaustively explained.*

Good practice note

It is good practice to also document the reasons for the rejection of tenders so that if they are challenged or when debriefing unsuccessful tenderers all of the information provided is backed up by full documentary evidence showing that the evaluation had been properly conducted.

- details of any abnormally low tender, with clear indications of the reasons why the tender concerned was accepted or rejected, as the case may be
- details of corrections of any arithmetical error;
- details of the calculations showing the application of any discount;
- details of the requests for clarifications and the corresponding replies (with indication of the dates of expedition, deadlines for reply, and dates of receipt of replies);

  N.B. *It must also be clearly indicated and explained whether the evaluation panel was satisfied with the answers received and if not, then why not.*
- names and functions of all those involved in the tender evaluation and their signatures;
- date on which the evaluation report was finalised.

2.6.2 Attachments to the evaluation report

(Adapt for local use by making reference to the documents that must be attached to the evaluation report.)

The evaluation report must have attached to it all of the documentation drawn up by the evaluation panel during the performance of its tasks, which normally includes, *inter alia*:

- tender opening report;
- qualitative selection report (if applicable);
- minutes of each meeting held by the evaluation panel;
- any request for tender clarification and the corresponding response;
- all of the evaluation grids/matrices used during the process of evaluation of tenders duly completed, dated and signed by the members of the evaluation panel.

Good practice note

It is good practice to document, through the use of evaluation grids/matrices, each stage of the evaluation process strictu sensu, including the formal compliance check of the tenders.

N.B. *Special attention must be given to the way in which the evaluation report is drafted, the information that it contains as well as its attachments. It must be kept in mind that the evaluation report is:*

- *the basis used by the authorised officer of the contracting authority for making an informed decision concerning the recommendation of the award;*
- *the basis used by the contracting authority for informing and debriefing unsuccessful tenderers;*
- *the basis used by the contracting authority for replying to any complaint received;*
- *the main document examined by the auditors or other control bodies in order to determine whether the process of evaluation of tenders was carried out in a proper way and in accordance with the general law and Treaty principles.*

Good practice note

For the purpose of transparency, it is good practice to prepare an evaluation report for each contract award procedure, regardless of its value.

Recommendation to cancel the tender process – There are a number of situations where the evaluation panel may not make a recommendation for the award of a contract. Depending on the provisions of national legislation, this is the case, for example, when:

- no tenders have been received at all;
- none of the tenders received has been found to be compliant;
- all admissible tenders exceed the budget available;
- none of the tenderers (when using the open procedure) satisfies the set selection criteria.

In this case, the evaluation panel recommends, in the evaluation report, the cancellation of the tender process. It will then be up to the contracting authority to decide, on the basis of the circumstances of the case and the applicable national legislation, how to proceed (for example, by entering into a negotiated procedure or re-advertising the tender process). (Adapt for local use by making reference to local legislation, processes and terminology. Indicate the reasons that justify the recommendation to cancel a tender on the basis of national legislation.)

The contracting authority may also cancel the tender process and not proceed with the award of the contract, for example because:

- the circumstances of the contract have been fundamentally altered;
- irregularities occurred during the process of evaluation of tenders.

(Adapt for local use by making reference to local legislation, processes and terminology.)

N.B. *The Directive limits itself to referring to the possibility of cancellation of the tender process, without indicating the grounds on which such a cancellation may be made. ECJ case law confirms that a contracting authority enjoys broad discretion as far as the cancellation of a tender process is concerned, and such a decision is not limited to exceptional cases or does not necessarily have to be based on serious grounds. However, the cancellation of a tender process must be made on the basis of objective and justifiable grounds and in accordance with the general law and Treaty principles. Therefore, and as a way of example, it is against the general law and Treaty principles to cancel a tender process simply because a specific national economic operator is not awarded the contract. Where a contracting authority decides to cancel a tender process, it must inform economic operators promptly of its decision and of the reasons for the cancellation. It must also duly inform the Official Journal of the European Union (see in particular article 41 and Annex VIII of the Directive as well as module E2).*

2.7 AWARD APPROVAL

(Adapt for local use by making reference to local legislation, processes and terminology. Eliminate this sub-section if national legislation provides that it is the evaluation panel itself that makes the final award decision).

It is the chairperson of the evaluation panel who normally issues the evaluation report to the authorised officer of the contracting authority for approval.

The authorised officer is responsible for:

- verifying that the process of evaluation of tenders was conducted properly;
- ensuring that the recommendation of the award is sound and correct; and
- making the final award decision.

It is of utmost importance for the authorised officer of the contracting authority to be knowledgeable about the rules governing the process of evaluation of tenders and more generally about the applicable public procurement rules.

The authorised officer of the contracting authority, before approving the recommendation for the award, may consider it necessary, for example:

- to ask for clarifications about any of the recommendation(s) contained in the evaluation report and about any aspect of the process of evaluation of tenders;
- to ask for evidence supporting any recommendation(s) contained in the evaluation report;
- to ask for a formal presentation of the evaluation report in order to better understand its contents;
- to ask that additional action be taken by the evaluation panel with regard to a specific recommendation made or to any other aspect of the process of evaluation of tenders.

2.7.1 Form of the award approval

The authorised officer of the contracting authority is to give the award approval in writing by indicating his/her full name and position as well as the date, followed by his/her signature. Where the award approval must be provided by a committee or elected representative, for example, rather than by an individual authorised officer, then the correct authorisation process must be followed.

The written approval is to be kept as part of the tender file.

N.B. *The written approval of the authorised officer is a very important element, which will be checked by the auditors and/or other control bodies as a necessary authorisation to proceed with the contract award.*

2.8 CONTRACT AWARD

Adapt all of this sub-section to local legislation, processes and terminology.

Once the award approval has been given, the contracting authority notifies the successful tenderer in writing that its tender has been accepted for the contract award.

2.8.1 Time limits for the contract award to the successful tenderer

Even though the Directive does not establish a specific time limit for the award of a contract to the successful tenderer, the contract award is to be made as soon as possible and in any event before the tender validity period has expired.

Two-stage procedures (restricted procedure, negotiated procedure with prior publication of a contract notice, competitive dialogue)

Confirmation of the tenderers' qualifications – Under these procedures, just before the award of the contract, the contracting authority may want to ask the successful tenderer to confirm in writing that it still meets the qualification criteria on the basis of which it was assessed in the pre-qualification process. This request for confirmation depends, however, on the provisions in this regard in national law.

2.9 CONCLUSION OF THE CONTRACT WITH THE WINNING TENDERER: GENERAL CONSIDERATIONS

Adapt all of this sub-section to local legislation, processes and terminology.

Mandatory standstill period – In accordance with the provisions of the Remedies Directive, the contracting authority must notify all tenderers and candidates (in the case of two-stage procedures) of the contract award decision before it concludes the contract with the winning tenderer (see modules E6 and F1 for more details about informing tenderers and candidates of the award). This notification is followed by the 'mandatory standstill period'. (The mandatory standstill period is examined in detail in module F1 on remedies).

As explained in module F1, the mandatory standstill period means that a minimum number of calendar days (which, in very broad terms, may be either 10 of 15) must elapse between the written communication of the contract award decision to all tenderers (and, where relevant, to candidates) and the contract conclusion.

Framework agreements – The mandatory standstill period applies at the stage of the award of the framework agreement itself. However, EU Member States may provide for a derogation from the standstill period with regard to individual call-off contracts that are based on a concluded framework agreement (see module C4 for more information on framework agreements and module F1 for more information on notification requirements for contracts).

N.B. *EU Member States may also provide for derogations from the mandatory standstill period in other circumstances, for example when the decision concerns the award of specific contracts under a dynamic purchasing system or when the Directive does not require prior publication of a contract notice in the Official Journal of the European Union (refer to module F1 for details of all cases where member states may provide for a derogation from the mandatory standstill period).*

Contract conclusion – Once the mandatory standstill period has expired and provided that no complaint has been received and depending on national legislation, the contracting authority may proceed with the conclusion of the contract, using the contract template and contract conditions that were included in the tender documents and accepted by the successful tenderer with its tender.

See module F1 for more detailed information on the mandatory standstill period and contract conclusion.

Publication of a contract award notice – REMINDER

The contracting authority must remember to publish the contract award notice (or the cancellation notice, as the case may be), in accordance with the provisions of the Directive.

See module E2 for more information on the publication of contract award notices.

2.10 EVALUATION AND AWARD OF LOTS LAUNCHED UNDER THE SAME TENDER PROCESS

Adapt all of this sub-section to local legislation, processes and terminology.

The Directive is silent on this issue.

A tender process may cover several lots, and economic operators may normally tender for one or more lots.

The way lots are evaluated and awarded depends on what has been foreseen in the tender documents.

Generally speaking, and in practice, it is very common for lots to be evaluated separately, *i.e.* lot by lot, applying the pre-announced award criteria (either lowest price or most economically advantageous tender) for each lot concerned. In this case, each lot is awarded as a separate contract.

See module E4 on how lots may be awarded and module A4 for discussion of economic issues relating to the award of contracts in lots).

UTILITIES

This short note highlights the main differences and similarities concerning the principles and requirements applying to tender evaluation and contract award in the utilities sector.

Adapt all of this sub-section for local use – using relevant local legislation, processes and terminology.

Directive 2004/17/EC (Utilities Directive), like the Public Sector Directive (the Directive), sets out general rules on how and when the award of contracts should take place but it does not contain specific rules on how the process of evaluation of tenders should be structured and on the steps to be followed. With regard to the process of evaluation of tenders, the main relevant provisions are as follows:

- **Article 36** sets out general rules on variants and how they should be treated during the process of evaluation of tenders
- **Article 48(3)** establishes, *inter alia*, that the means of communication used must guarantee that the content of tenders is examined only after the deadline for their submission has expired
- **Article 51(3)** sets out the general principles with regard to how and when the award of contracts is to take place
- **Article 55** sets out the criteria on the basis of which contracting entities operating in the utilities sector may award contracts
- **Article 57** sets out the general rules and principles concerning abnormally low tenders
- **Annex XIII** (information to be included in the contract notices), in item 11, indicates that in the case of open procedures, the names of the persons authorised to be present at the opening of tenders as well as the date, time and place of the opening should be provided in the contract notice.

The above-mentioned articles of the Utilities Directive are substantially the same as the corresponding articles contained in the Directive.

N.B. *The Remedies Directive 2007/66/EC sets out the rules on the mandatory standstill period for the utilities sector.*

SECTION 3
EXERCISES

Check each exercise and question for local relevance

EXERCISE 1
CASE STUDY

The contract to be awarded concerns the supply of printers, and the award criterion to be applied is the MEAT. The tender has been launched under an open procedure.

The deadline for submission of tenders is now about to expire. In your role as a chairperson of the evaluation panel, you organise a preliminary/planning meeting during which you present to the evaluation panel, *inter alia*, the rules that govern the process of evaluation of tenders, the individual award criteria to be applied and their relative weighting, and the evaluation grids/matrices to be used during the process of evaluating tenders.

During the preliminary/planning meeting, you want also to set – with the agreement of the evaluation panel – a clear work plan in order to ensure a proper and timely conduct of the process of evaluation of tenders. During the preliminary/planning meeting, the members of the evaluation panel ask you a number of questions.

1. A member of the evaluation panel mentions to you that he would like to carry out the evaluation of tenders at home and that he therefore would like to take copies of the tenders to be evaluated with him. He adds that he would then meet with the other members of the evaluation panel as and when required. Please advise if this is possible.
2. An evaluation panel member explains to you that his direct superior has asked him to report to him on a regular basis on the developments of the process of evaluation of tenders, and to ask for his approval on the scores that he gives to the tenders under evaluation. Please give advice on this issue.
3. An evaluation panel member mentions to you that the work plan set is too tight for him because he has a lot of other commitments to comply with. He asks you to set a work plan that goes beyond the tender validity period. Please advise if this is possible.

EXERCISE 2
CASE STUDY

The deadline for submission of tenders has now expired. Ten (10) tenders have been submitted on time and two (2) tenders have been received after the deadline for submission of tenders has expired.

A public opening of the tenders is held on the date, time, and place indicated in the contract notice, and in the presence of the authorised persons also indicated in the notice. During the tender opening session, the two (2) late tenders are rejected and they are returned unopened to the tenderers' representatives present at the public opening. Soon after the opening of tenders has taken place, the evaluation panel starts evaluating the tenders that were received on time.

During the process of evaluation of tenders, you – as chairperson of the evaluation panel – are asked a number of questions by the panel members.

1. A member of the evaluation panel explains to you that he would like to ask a tenderer to clarify contradictory information presented in its tender. He asks you if he can contact the tenderer in question directly by telephone in order to seek this clarification. Please advise the evaluation panel member on whether or not this is possible.
2. A member of the evaluation panel explains to you that he believes that the relative weighting given to the pre-announced individual criteria for the award of the contract should be slightly changed. Please advise on this issue.
3. The evaluation panel has identified a tender that appears to be abnormally low. The panel members explain to you that it is obvious that the tenderer in question cannot deliver the items to be supplied for such a low price, and that therefore the panel would like to reject the tender without asking for any explanation to the tenderer concerned. Please advise on this issue.

EXERCISE 3
GROUP DISCUSSION

Discuss in two separate groups:

- The purpose of the evaluation report
- The main information and attachments that the evaluation report should contain
- Why it is important to have a clearly drafted and comprehensive evaluation report

At the end of the discussions each group is to present its conclusions for comparison.

SECTION 4
THE LAW

Adapt all this section for local use – using relevant local legislation (including secondary legislation), processes and terminology.

This section is divided into two parts:

- **Part 1 – Law** - lists and summarises the main legal provisions relating to tender evaluation and contract award set out in Directive 2004/18/EC.
- **Part 2 – Cases** - contains copies of two key ECJ judgments:

  Joined Cases C-285/99 and C-286/99 *Impresa Lombardini SpA - Impresa Generale di Costruzioni v ANAS - Ente nazionale per le strade, Società Italiana per Condotte d'Acqua SpA* (C-285/99), and between *Impresa Ing. Mantovani SpA* and *ANAS - Ente nazionale per le strade*

  C-27/98 *Metalmeccanica Fracasso SpA, Leitschutz Handels- und Montage GmbH v Amt der Salzburger Landesregierung für den Bundesminister für wirtschaftliche Angelegenheiten*,

PART 1
LAW

Adapt all this section for local use – using relevant local legislation (including secondary legislation), processes and terminology.

Directive 2004/18/EC sets out the following legal requirements concerning tender evaluation and contract award:

Article 24 – Variants - sets out general rules on variants and on how they should be treated during the process of evaluation of tenders. It specifies that contracting authorities may authorise tenderers to submit variants only if the MEAT criterion is used.

The following is a summary of the main issues covered by paragraph 4 of Article 24 which is relevant to this Module:

- **24 (4) Which variants may be taken into consideration**

  Only those variants meeting the minimum requirements laid down by the contracting authority may be taken into consideration.

Article 42 – Rules applicable to communication – sets out general rules on how communication and information exchange may take place and stresses the need to ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved.

The following is a summary of the main issues covered by paragraph 3 of Article 42 which is relevant to this Module:

- **42(3)** establishes inter-alia that the means of communication used shall guarantee that the content of tenders is examined only after the deadline for their submission has expired.

Article 44 – Verification of the suitability and choice of participants and award of contracts - sets out inter-alia the general principles on how and when the award of contracts should take place.

The following is a summary of the main issues covered by paragraph 1 of Article 44 which is relevant to this Module:

- **44(1): How and when the award of contracts should take place**

  Contracts shall be awarded on the basis of the award criteria allowed by the Directive after the process of selection of economic operators has taken place.

Article 53 - sets out the award criteria on the basis of which contracting authorities may award public contracts (Article 53(1)). It also lays down general rules on setting and disclosing the criteria used to determine the most economically advantageous tender (MEAT) (Article 53(2)).

N.B. *This Article is examined in detail in Module E4 on setting the award criteria.*

Article 55 – Abnormally low tenders sets out the general rules and principles concerning abnormally low tenders.

The following is a summary of the main issues covered by the each paragraph of Article 55:

- **55(1): Obligation to request explanations**

  A contracting authority shall, before rejecting those tenders that appear abnormally low, request explanations in writing about the constituent elements of the tenders that it considers relevant.

- **55(2): Obligation to verify the constituent elements of the tender**

  A contracting authority shall verify the constituent elements of the tender that it considers relevant by consulting the tenderer in question, taking into account the evidence supplied.

- **55(3): Abnormally low tenders and State aid**

  Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender my be rejected on that ground alone, only after having consulted with the tenderer and where the latter is unable to prove that the aid in question was granted legally.

Annex VII A (on the information to be included in the contract notice), in item 13, mentions that in case of open procedures, the persons authorised to be present at the opening of tenders as well as the date, time and place of opening should be indicated in the contract notice.

N.B. Directive 2007/66/EC sets out the rules on the mandatory standstill period – This Directive is examined in Module F1.

JUDGMENT OF THE COURT (Sixth Chamber)

27 November 2001 (1)

(Directive 93/37/EEC - Public works contracts - Award of contracts - Abnormally low tenders - Detailed rules for explanation and rejection applied in a Member State - Obligations of the awarding authority under Community law)

In Joined Cases C-285/99 and C-286/99,

REFERENCE to the Court under Article 234 EC by the Consiglio di Stato (Italy) for a preliminary ruling in the proceedings pending before that court between

Impresa Lombardini SpA - Impresa Generale di Costruzioni

and

ANAS - Ente nazionale per le strade,

Società Italiana per Condotte d'Acqua SpA (C-285/99),

and between

Impresa Ing. Mantovani SpA

and

ANAS - Ente nazionale per le strade,

Ditta Paolo Bregoli (C-286/99),

intervener:

Coopsette Soc. coop. arl (C-286/99),

on the interpretation of Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54),

THE COURT (Sixth Chamber),

composed of: N. Colneric, President of the Second Chamber, acting as President of the Sixth Chamber, C. Gulmann, J.-P. Puissochet, R. Schintgen (Rapporteur) and V. Skouris, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Impresa Lombardini SpA - Impresa Generale di Costruzioni, by A. Cinti, R. Ferola and L. Manzi, avvocati,

- Impresa Ing. Mantovani SpA, by A. Cancrini, avvocato,

- Coopsette Soc. coop. arl, by S. Panunzio, avvocato,

- the Italian Government, by U. Leanza, acting as Agent, assisted by P.G. Ferri, Avvocato dello Stato,

- the Austrian Government, by W. Okresek, acting as Agent,

- the Commission of the European Communities, by M. Nolin, acting as Agent, assisted by M. Moretto, avvocato,

having regard to the Report for the Hearing,

after hearing the oral observations of Impresa Lombardini SpA - Impresa Generale di Costruzioni, represented by R. Ferola, of Impresa Ing. Mantovani SpA, represented by C. De Portu, avvocato, of Coopsette Soc. coop. arl, represented by S. Panunzio, of the Italian Government, represented by D. Del Gaizo, Avvocato dello Stato, and of the Commission, represented by M. Nolin, assisted by M. Moretto, at the hearing on 3 May 2001,

after hearing the Opinion of the Advocate General at the sitting on 5 June 2001,

gives the following

Judgment

1. By two orders of 26 May 1999, received at the Court Registry on 30 July 1999, the Consiglio di Stato referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54; the Directive).

2. The questions have been raised in two cases between the Italian companies Impresa Lombardini SpA - Impresa Generale di Costruzioni (Lombardini) (C-285/99) and Impresa Ing. Mantovani SpA (Mantovani) (C-286/99) and ANAS - Ente nazionale per le strade (National Road Agency; ANAS), the contracting authority under public law in Italy, concerning the rejection of tenders submitted by Lombardini and Mantovani in two restricted public works tendering procedures on the ground that those tenders were abnormally low.

Legal background

3. The directive was adopted on the basis of Article 57(2) of the EC Treaty (now, after amendment, Article 47(2) EC), Article 66 of the EC Treaty (now Article 55 EC) and Article 100A of the EC Treaty (now, after amendment, Article 95 EC).

4. According to the second recital in its preamble, the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails not only the abolition of restrictions but also the coordination of national procedures for the award of public works contracts.

5. Article 30 of the Directive, which appears in Chapter 3, headed Criteria for the award of contracts, of Title IV, headed Common rules on participation, provides:

1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

...

4. If, for a given contract, tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.

The contracting authority may take into consideration explanations which are justified on objective grounds including the economy of the construction method, or the technical solution chosen, or the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed by the tenderer.

If the documents relating to the contract provide for its award at the lowest price tendered, the contracting authority must communicate to the Commission the rejection of tenders which it considers to be too low.

However, until the end of 1992, if current national law so permits, the contracting authority may exceptionally, without any discrimination on grounds of nationality, reject tenders which are abnormally low in relation to the works, without being obliged to comply with the procedure provided for in the first subparagraph if the number of such tenders for a particular contract is so high that implementation of this procedure would lead to a considerable delay and jeopardise the public interest attaching to the execution of the contract in question. ...

National legislation

6. Article 30(4) of the directive was transposed into Italian law by Article 21(1a) of Law No 109 of 11 February 1994 (GURI No 41 of 19 February 1994, p. 5), the framework law on public works.

7. In the version as amended by Article 7 of Decree-Law No 101 of 3 April 1995 (GURI No 78 of 3 April 1995, p. 8), ratified by Law No 216 of 2 June 1995 (GURI No 127 of 2 June 1995, p. 3), that provision reads as follows:

In cases of awards of contracts for works worth ECU 5 million or more on the basis of the lowest-bid criterion mentioned in paragraph 1, the authority concerned must assess the irregularity, for the purposes of Article 30 of Council Directive 93/37 of 14 June 1993, of any tender which offers a higher discount than the percentage fixed before 1 January of each year by decree of the Minister of Public Works, after hearing the views of the Osservatorio (Monitoring Authority) for public works, having regard to the tenders admitted in the procedures held in the previous year.

To that end, the public administration may take account only of explanations based on the economy of the construction method or the technical solutions chosen, or the exceptionally favourable conditions available to the tenderer, but not of explanations relating to all those elements for which minimum values are laid down by legislation, regulations or administrative provisions or for which minimum values can be ascertained from official data. Tenders must be accompanied, when submitted, by explanations concerning the most significant price components, indicated in the tender notices or the letters of invitation, which together add up to not less than 75% of the basic contract value.

8. By ministerial decrees of 28 April 1997 (GURI No 105 of 8 May 1997, p. 28) and 18 December 1997 (GURI No 1 of 2 January 1998, p. 26), both issued under the first subparagraph of Article 21(1a) of Law No 109/94, as amended, and determining the threshold at which tenders in tender notices were to be regarded as abnormal, the Minister of Public Works, having recognised the impossibility of setting a single threshold for the whole country and in view of the fact that the *Osservatorio* had not been established, decided that the percentage discount

giving rise to the obligation on the contracting authority to undertake an examination of abnormal tenders would be fixed for 1997 and 1998 at a measure equal to the arithmetic mean of the discounts, in percentage terms, in the case of all tenders admitted, increased by the average arithmetic divergence of the discounts, in percentage terms, which exceed the said mean.

The main proceedings and the questions referred for a preliminary ruling

Case C-285/99

9. In 1997, Lombardini took part in a restricted procedure for the award of a public works contract issued by the ANAS, with a view to carrying out works widening a section of motorway to three lanes, with a basic contract value of ITL 122 250 216 000.

10. Both the contract notice and the letter of invitation to submit tenders stated that the contract would be awarded in accordance with Article 21 of Law No 109/94, amended by Law No 216/95, the criterion to be applied being the maximum discount on the price schedule and on the cost of the rough work contracted for, and that the contracting authority would determine which tenders were to be considered as being abnormally low by applying the criterion laid down by the ministerial decree of 28 April 1997.

11. In accordance with Article 21(1a), the letter of invitation required tenderers to include with their bids explanations concerning the most significant price components equivalent to 75% of the basic contract value mentioned in the tender notice. The tender and the explanations as to its composition were, under threat of exclusion, to be drafted in accordance with the rules attached to that invitation and included in the envelope containing the administrative documentation. It was also stipulated, again under threat of exclusion, that the explanatory documentation necessary to check the soundness of the prices bid for the significant components of the contract was to be inserted into a separate sealed envelope, which was to be opened and its contents examined only in respect of tenders offering a discount higher than the arithmetical anomaly threshold. In the event that the contract was awarded to a tenderer whose bid offered such a discount, it was further provided that the price analyses and explanations produced in support of the tender were to form an integral part of the latter and were to be attached to the contract with contractual force.

12. Having fixed the anomaly threshold for the contract in question at 28.004%, in accordance with the detailed rules set out in the ministerial decree of 28 April 1997, the competent authority opened only envelopes containing the explanatory documentation in respect of those tenders offering a discount shown to be above that threshold, which included the tender by Lombardini.

13. Following the examination of that documentation, the authority declared all tenders offering a discount above that threshold inadmissible, without however giving the undertakings concerned the opportunity to submit other explanations

after their tenders had been judged to be abnormally low and before the final awarding of the contract.

14. Lombardini's tender, which offered a discount of 29.88%, was thus excluded and the contract was awarded to Società Italiana per Condotte d'Acqua SpA, whose tender, offering a discount of 27.70%, was the lowest of the bids not regarded as being abnormally low.

15. Lombardini then brought an action before the Tribunale Amministrativo Regionale del Lazio (Regional Administrative Court, Lazio, Italy), arguing that the Italian legislation did not comply with the requirements of the Directive inasmuch as, in order to remove any suspicion of abnormality, it was not sufficient to assess the explanations supplied on the submission of the tender, which might, moreover, concern only 75% of the basic contract price, but that, in the light of the directive, it was essential for the contracting authority then to ask the undertaking in question for details and clarifications in the context of a genuine exchange of information and argument.

16. The Administrative Court having dismissed its action by a decision of 1 July 1998, Lombardini brought the dispute before the Consiglio di Stato.

17. The Consiglio makes the point that Italian legislation and administrative practice require undertakings participating in a tender procedure, on the submission of their tenders, to provide explanations, on forms prepared for the purpose, and corresponding to at least 75% of the basic contract value, under threat of automatic exclusion from the tender, even though those operators are not able to know, at the time they submit their file and before the examination of all the tenders admitted to the procedure, the level of discount which the contracting authority will regard as abnormal. The Consiglio di Stato takes the view that resolution of the dispute requires it to be determined whether that legal situation complies with the Directive or whether, on the contrary, the Directive requires the contracting authority to exchange information and argument after the submission of the tenders, by means of an individual review in discussion with the operator concerned, without any time-limit for the provision by the latter of evidence capable of corroborating the credibility of his tender.

18. The Consiglio di Stato further questions the compatibility of the Italian legislation with Community law in so far as that legislation excludes any explanation relating to those elements for which minimum values are laid down by law, regulation or administrative provision or for which minimum values can be ascertained from official data. The provision in question might prove incompatible with Community law in so far as it risked hindering the operation of free competition and infringing the principle of finding the undertakings which submit the best tender, a principle which should be regarded as fundamental in Community law.

19. Considering that resolution of the case thus required interpretation of Community law, the Consiglio di Stato decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1. Are clauses in calls for tenders for public works contracts which prevent the participation of undertakings which have not submitted with their tenders

explanations in respect of the price indicated, being equal to at least 75% of the basic contract value, incompatible with Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts?

2. Is a mechanism for automatically calculating the anomaly threshold of tenders to be subjected to a check on their authenticity, based on a statistical criterion and an arithmetical mean, such that undertakings are unable to ascertain that threshold in advance, incompatible with Article 30(4) of Directive 93/37?

3. Is provision for a prior exchange of views, without the undertaking which has allegedly submitted an abnormal tender having the opportunity to state its reasons after the opening of the envelopes and before the adoption of the decision excluding that tender, incompatible with Article 30(4) of Directive 93/37?

4. Is a provision whereby the contracting authority may take account only of explanations relating to the economy of the construction method or the technical solutions adopted or the exceptionally favourable conditions available to the tenderer incompatible with Article 30(4) of Directive 93/37?

5. Is the exclusion of explanations relating to items for which minimum figures can be ascertained from official lists incompatible with Article 30(4) of Directive 93/37?

Case C-286/99

20. In 1997, Mantovani took part in a restricted tendering procedure initiated by the ANAS for construction work on a stretch of country road. That contract notice indicated that the contract would be awarded to the tendering undertaking which allowed the largest discount in relation to the basic contract value, amounting to ITL 15 720 000 000.

21. The anomaly threshold having been fixed at 40.865%, Mantovani's tender, which involved a discount of 41.460%, above that threshold, was excluded for reasons similar to those which led to the exclusion of Lombardini's tender in Case C-285/99.

22. The works were awarded to the undertaking Paolo Bregoli, whose tender was the lowest amongst those not regarded as abnormally low.

23. Mantovani's action before the Tribunale Amministrativo Regionale del Lazio was dismissed by a decision of 26 June 1998.

24. Mantovani having brought the dispute before the Consiglio di Stato, the latter, basing its argument on considerations similar to those set out in connection with Case C-285/99, decided to stay proceedings and refer five questions to the Court of Justice for a preliminary ruling, worded identically with those in Case C-285/99.

25.

Coopsette Soc. coop. arl has been given leave to intervene in the main proceedings in support of Mantovani.

26. By Order of the President of the Court of Justice of 14 September 1999, Cases C-285/99 and C-286/99 were joined for the purposes of the written and oral procedure and the judgment.

The questions referred for a preliminary ruling

27. It must be borne in mind at the outset that, although the Court may not, under Article 234 EC, rule upon the compatibility of a provision of domestic law with Community law or interpret domestic legislation or regulations, it may nevertheless provide the national court with an interpretation of Community law on all such points as may enable that court to determine the issue of compatibility for the purposes of the case before it (see, for example, Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, paragraph 8; Case C-28/99 *Verdonck and Others* [2001] ECR I-3399, paragraph 28; Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 48).

28. In those circumstances, the questions referred, which it will be convenient to examine together, should be understood as asking essentially whether Article 30(4) of the Directive is to be interpreted as precluding legislation and administrative practice of a Member State which:

- first, allow the contracting authority to reject as abnormally low tenders offering a discount exceeding the anomaly threshold - calculated in accordance with a mathematical formula by reference to the whole of the tenders received for the procedure in question, so that tenderers are not in a position to know that threshold at the time they lodge their file -, where that authority makes its decision taking account only of explanations of the proposed prices, relating to at least 75% of the basic contract value referred to in the contract notice, which the tenderers were required, under threat of being excluded from participation, to attach to their tender, without giving them the opportunity to express their point of view, after the opening of the envelopes, concerning the elements of the prices proposed which gave rise to suspicions, and

- second, require the contracting authority to take into consideration, for the purposes of checking abnormally low tenders, only explanations based on the economy of the construction method, technical solutions chosen, or exceptionally favourable conditions available to the tenderer, but not explanations relating to all those elements for which minimum values are laid down by law, regulation or administrative provision or can be ascertained from official data.

29. The orders for reference and the documents before the court show that, under the legislation and administrative practice applicable in the main proceedings in the two cases, every tender had to be accompanied, at the time of submission, by explanations of the most significant price components representing at least 75% of the basic value of the contract in question. That information had to be

submitted in a separate sealed envelope, the contents of which were to be examined only if the tender of the undertaking concerned offered a discount exceeding the anomaly threshold, which is fixed for each contract by reference to all the bids made by the tenderers, so that the latter do not know that threshold at the time they submit their file.

30. The facts show that the contracting authority sets aside as abnormally low those tenders offering a discount greater than the anomaly threshold so calculated, and systematically awards the contract to the undertaking whose tender is the lowest amongst the other tenders. The exclusion of abnormally low tenders and the award of the contract take place solely on the basis of an assessment by the competent authority of the explanations submitted at the same time as the tenders themselves and relating to only 75% of the basic contract value, without that authority asking the undertakings concerned for further details and without the latter having the possibility of supplying other explanations after their tender has been suspected of being abnormal.

31. The relevant national legislation further provides, first, that the contracting authority may take into account only explanations based on the economy of the construction method, technical solutions chosen, or exceptionally favourable conditions available to the tenderer, while, secondly, precluding the contracting authority from basing its decision on explanations relating to any element for which a minimum values is laid down by law, regulation or administrative provision or which can be ascertained from official data.

32. It is in the light of those legal and factual characteristics that the Court must answer the questions referred for a preliminary ruling, as reformulated in paragraph 28 of this judgment.

The detailed rules for identifying, verifying and excluding abnormally low tenders

33. As regards this first aspect of the questions referred, the title of the Directive and the second recital in its preamble show that its aim is simply to coordinate national procedures for the award of public works contracts, although it does not lay down a complete system of Community rules on the matter.

34. The Directive nevertheless aims, as is clear from its preamble and second and tenth recitals, to abolish restrictions on the freedom of establishment and on the freedom to provide services in respect of public works contracts in order to open up such contracts to genuine competition between entrepreneurs in the Member States (*Ordine degli Architetti*, paragraph 52).

35. The primary aim of the Directive is thus to open up public works contracts to competition. It is exposure to Community competition in accordance with the procedures provided for by the Directive which avoids the risk of the public authorities indulging in favouritism (*Ordine degli Architetti*, paragraph 75).

36. The coordination at Community level of procedures for the award of public works contracts is thus essentially aimed at protecting the interests of traders established in a Member State who wish to offer goods or services to contracting

authorities established in another Member State and, to that end, to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body governed by public law may choose to be guided by considerations other than economic ones (see, to that effect Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraphs 16 and 17; Case C-237/99 *Commission* v *France* [2001] ECR I-939, paragraphs 41 and 42).

37. The contracting authority is therefore required to comply with the principle that tenderers should be treated equally, as indeed is expressly shown by Article 22(4), the fourth subparagraph of Article 30(4) and Article 31(1) of the Directive.

38. In addition, the principle of non-discrimination on grounds of nationality implies, in particular, an obligation of transparency in order to allow the contracting authority to ensure that it has been complied with [see, by analogy, in relation to Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, paragraph 31].

39. It is in that perspective that, as the twelfth recital in its preamble shows, the Directive provides common rules for participation in public works contracts, including both qualitative selection criteria and criteria for the award of the contract.

40. More particularly concerning those criteria for the award of the contract, these are defined in particular in Article 30 of the Directive.

41. As the first recital in its preamble shows, the Directive constitutes a consolidation of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971(II), p. 682) and subsequent amendments thereto. As the Court has already held in paragraph 13 of its judgment in Case C-304/96 *Hera* [1997] ECR I-5685), Article 30(4) of the Directive corresponds to Article 29(5) of Directive 71/305, as amended by Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1).

42. In its initial version, Article 29(5) of Directive 71/305 was worded as follows:

> If, for a given contract, tenders are obviously abnormally low in relation to the transaction, the authority awarding contracts shall examine the details of the tenders before deciding to whom it will award the contract. The result of this examination shall be taken into account.
>
> For this purpose it shall request the tenderer to furnish the necessary explanations and, where appropriate, it shall indicate which parts it finds unacceptable.
>
> ...

43.

The Court has already held that when, in the opinion of the authority awarding a public works contract, a tenderer's offer is obviously abnormally low in relation to the transaction, Article 29(5) of Directive 71/305 requires the authority to seek from the tenderer, before coming to a decision as to the award of the contract, an explanation of his prices or to inform the tenderer which of his tenders appear to be abnormal and to allow him a reasonable time within which to submit further details (Case 76/81 *Transporoute* [1982] ECR 417, paragraph 18).

44. In paragraph 17 of that judgment, the Court held that the contracting authority may not in any circumstances reject an abnormally low tender without even seeking an explanation from the tenderer, since the aim of Article 29(5) of Directive 71/305, which is to protect tenderers against arbitrariness on the part of the authority awarding contracts, could not be achieved if it were left to that authority to judge whether or not it was appropriate to seek explanations.

45. Similarly, the Court has consistently held that Article 29(5) of Directive 71/305 prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the Directive (Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraphs 19 and 21; Case C-295/89 *Donà Alfonso* [1991] ECR I-2967 (Summary publication), paragraphs 1 and 2 of the operative part).

46. The Court thus held that Article 29(5) of Directive 71/305 requires the awarding authority to examine the details of tenders which are obviously abnormally low, and for that purpose obliges it to request the tenderer to furnish the necessary explanations (*Fratelli Costanzo*, paragraph 16).

47. According to the Court, a mathematical criterion in accordance with which tenders which exceeded the basic value fixed for the price of the work by a percentage more than 10 points below the average percentage by which the tenders admitted exceeded that amount would be considered anomalous and consequently eliminated, deprives tenderers who have submitted particularly low tenders of the opportunity to demonstrate that those tenders are genuine ones, so that application of such a criterion is contrary to the aim of Directive 71/305, namely to promote the development of effective competition in the field of public contracts (*Fratelli Costanzo*, paragraph 18).

48. The Court also observed that it was in order to enable tenderers submitting exceptionally low tenders to demonstrate that those tenders were genuine ones, and thus to ensure the opening up of public works contracts, that the Council, in Article 29(5) of Directive 71/305, laid down a precise, detailed procedure for the examination of tenders which appear to be abnormally low, and that that aim would be jeopardised if Member States were able, when implementing that provision, to depart from it to any material extent (*Fratelli Costanzo*, paragraph 20).

49. It added, finally, that the examination procedure under Article 29(5) of Directive 71/305 had to be applied whenever the awarding authority was contemplating the elimination of tenders because they were abnormally low in relation to the

transaction, so that tenderers could be sure that they would not be disqualified from the award of the contract without first having the opportunity of furnishing explanations regarding the genuine nature of their tenders (*Fratelli Costanzo*, paragraph 26).

50. Since the requirements laid down by both the initial and the amended version of Article 29(5) of Directive 71/305 are in substance identical to those imposed by Article 30(4) of the Directive, the foregoing considerations apply equally in relation to the interpretation of the latter provision.

51. In consequence, Article 30(4) of the Directive necessarily presupposes the application of an *inter partes* a procedure for examining tenders regarded by the contracting authority as abnormally low, placing the latter under an obligation, after it has inspected all the tenders and before awarding the contract, first to ask in writing for details of the elements in the tender suspected of anomaly which gave rise to doubts on its part in the particular case and then to assess that tender in the light of the explanations provided by the tenderer concerned in response to that request.

52. Apart from the fact that, under the legislation and administrative practice applicable in the main proceedings, the tendering undertakings are required at the time they submit their file to provide explanations in respect of only 75% of the value of the contract, whereas it is necessary for them to be able to prove the genuine nature of their tender in respect of all its constituent elements, such prior explanations are not in any event in accordance with the spirit of the *inter partes* examination procedure established by Article 30(4) of the Directive.

53. It is essential that each tenderer suspected of submitting an abnormally low tender should have the opportunity effectively to state his point of view in that respect, giving him the opportunity to supply all explanations as to the various elements of his tender at a time - necessarily after the opening of all the envelopes - when he is aware not only of the anomaly threshold applicable to the contract in question and of the fact that his tender has appeared abnormally low, but also of the precise points which have raised questions on the part of the contracting authority.

54. The above interpretation is, moreover, the only one which complies with both the wording and the purpose of Article 30(4) of the Directive.

55. It is apparent from the very wording of that provision, drafted in imperative terms, that the contracting authority is under a duty, first, to identify suspect tenders, secondly to allow the undertakings concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate, thirdly to assess the merits of the explanations provided by the persons concerned, and, fourthly, to take a decision as to whether to admit or reject those tenders. It is therefore not possible to regard the requirements inherent in the *inter partes* nature of the procedure for examining abnormally low tenders, within the meaning of Article 30(4) of the Directive, as having been complied with unless all the steps thus described have been successively accomplished.

56.

Moreover, it is only subject to strict conditions laid down in the fourth subparagraph of Article 30(4) that the Directive allows the contracting authority to dispense with that *inter partes* procedure for examining abnormally low offers. Here there is no dispute that, in both sets of main proceedings, that derogatory provision is inapplicable *ratione temporis*.

57. Furthermore, the existence of a proper exchange of views, at an appropriate time in the procedure for examining tenders, between the contracting authority and the tenderer constitutes a fundamental requirement of the Directive, in order to prevent the contracting authority from acting in an arbitrary manner and to ensure healthy competition between undertakings.

58. Having regard to the foregoing considerations, it must be held that Article 30(4) of the Directive precludes legislation and administrative practice, such as that applicable in the cases referred, which allow the contracting authority to exclude a tender as abnormally low solely on the basis of explanations of the most significant price components, produced at the same time as the tender itself, without carrying out any *inter partes* examination of the suspect tenders by requesting clarification on points of doubt emerging on first examination and giving the undertakings concerned the opportunity to put forward their arguments in that regard before the final decision is taken.

59. In the tendering procedures at issue in the main proceedings, at the time when the tenderer submits his tender, which must be accompanied by explanations covering 75% of the basic contract value mentioned in the contract notice, he is not aware of the precise aspects of his tender which will be suspected of being abnormal, so that, at that stage of the procedure, he is not in a position to supply useful and complete explanations in support of the various elements constituting his tender.

60. The national court also asks whether Article 30(4) of the Directive similarly precludes legislative provisions and administrative practice of a Member State, such as those at issue in the main proceedings, whereby, first, tenderers are required, under threat of being excluded from participation in the contract, to accompany their tender with price explanations, covering at least 75% of the basic value of that contract, using forms designed for the purpose and, second, the anomaly threshold for tenders is calculated, in respect of each contract, on the basis of a mathematical formula which is a function of all the tenders actually lodged in the tendering procedure in question.

61. It should be noted that the Directive does not contain specific requirements in the matter.

62. More particularly concerning the first of the rules on matters of detail referred to in paragraph 60 of this judgment, this appears to be a requirement which affects all tenderers without distinction and appears to be intended to ensure a certain uniformity in the presentation of tenders, likely to facilitate an initial examination by the contracting authority and to allow a *prima facie* assessment to be made of the seriousness of the tender. It may indeed happen that, on the basis of those explanations alone, the contracting authority becomes convinced that, although the tender appears abnormally low, it is serious and the authority therefore

accepts it. In that way, this rule contributes to accelerating the procedure for verifying tenders.

63. It is true that, as the Commission has rightly pointed out, a national procedure for awarding public works contracts would be incompatible with the requirements of Article 30(4) of the Directive if it did not ensure that the *inter partes* examination of abnormally low tenders required by that provision took place.

64. That would in particular be the case, as has already been held in paragraphs 58 and 59 of this judgment, if the contracting authority rejected a tender as abnormally low basing its argument solely on the explanations submitted at the time the tender was lodged, without carrying out *inter partes* examination required by the Directive, after the opening of the envelopes and before the final decision.

65. However, such a defect would originate not in the obligation itself to submit certain explanations together with the lodging of the tender, but rather in the disregard of the requirements of the Directive at a subsequent stage of the procedure for examining abnormally low tenders.

66. Article 30(4) of the Directive does not therefore preclude a requirement to provide explanation in advance, such as that at issue in the main proceedings, taken in isolation, provided that all the requirements arising from that provision are otherwise complied with by the contracting authorities.

67. As regards the second rule referred to in paragraph 60 of this judgment, it is undisputed that the Directive does not define the concept of an abnormally low tender and, *a fortiori*, does not determine the method of calculating an anomaly threshold. That is therefore a task for the individual Member States.

68. As for the anomaly threshold applied in the cases in the main proceedings, this results from a calculation carried out for each contract notice and is based essentially on the average of the tenders submitted for that contract.

69. Such a method of calculation appears at first sight to be objective and non-discriminatory.

70. The mere fact, cited by some of the tenderers involved in the main proceedings, that the anomaly threshold is not known to the undertakings at the time when they make their tender - since it is not determined until all the tenders have been submitted - is in any event not capable of affecting its compatibility with the Directive. At that stage of the procedure, all the tenderers, like the contracting authority itself, are unaware of what that threshold will be.

71. Some of the tenderers involved in the main proceedings have, however, argued that a method for calculating the anomaly threshold based on the average of the tenders for a given contract risks being falsified by tenders not corresponding to a genuine wish to contract but merely seeking to influence the result of that calculation. Competition might also be distorted, with tenderers seeking to submit not the best tender possible but that which, particularly on the basis of statistical

criteria, stood the best probability of being the first amongst the non-suspect tenders, to which the contract is automatically awarded.

72. It is true that the result reached by a method for calculating the anomaly threshold based on the average of tenders may be significantly influenced by practices such as those described in the previous paragraph, which would be contrary to the aims of the Directive, as defined in paragraphs 34 to 36 of this judgment. That is why, for the effectiveness of the Directive to be fully preserved, that result must not be beyond challenge and must be capable of being reconsidered by the contracting authority should that prove necessary having regard in particular to the level of the anomaly threshold for tenders applied in comparable contracts and to the lessons derived from common experience.

73. It follows that, although, as stated in paragraphs 45 and 47 of this judgment, it is settled case-law that Community law precludes the automatic exclusion from public works contracts of certain tenders determined in accordance with a mathematical criterion, Community law does not in principle preclude a mathematical criterion, such as the anomaly threshold applied in the cases referred, from being used for the purposes of determining which tenders appear to be abnormally low, so long as the result to which application of that criterion leads is not beyond challenge, and the requirement for *inter partes* examination of those tenders in accordance with Article 30(4) of the Directive is complied with.

74. Some of the tenderers involved in the main proceedings have also argued, without having their allegations credibly refuted by the Italian government, that the two rules of Italian tendering procedure referred to in paragraph 60 of this judgment cannot be examined in isolation, given that the various aspects of that procedure are indissolubly interlinked.

75. They have argued in particular that the condition concerning the provision of explanations at the time of submission of the tender itself finds its justification only in the fact that the contracting authority takes its decision on the acceptance or rejection of the tender on the basis of those explanations alone, without allowing the undertakings to provide fuller explanations later. Moreover, they argue that that condition does not apply to the tenderers without distinction, in that only the envelopes of undertakings whose tenders appear abnormally low are opened, so that a tenderer not suspected of making an anomalous bid could be awarded the contract even if he submitted, as explanations, an envelope containing nothing at all. Finally, a distortion of competition between undertakings might result, because the obligation to accompany the tender with voluminous explanatory documentation entails for tenderers offering a particularly advantageous price not only a heavier administrative burden but also the inconvenience of having first to reveal information which might be confidential, and because it places undertakings from other Member States at a disadvantage in any event.

76. As regards those assertions, it is sufficient to observe that, whilst all the requirements imposed by Community law must unquestionably be complied with in the context of the various aspects of the national procedures for awarding public works contracts, which must moreover be applied in such a manner as to ensure compliance with the principles of free competition and equal treatment of

tenderers and the obligation of transparency, the fact remains that the Court of Justice is not in a position to rule on those assertions.

77. To determine whether they are well founded requires findings and assessments of fact and an interpretation of domestic law which falls within the sole jurisdiction of the national court. The principles of interpretation concerning the scope of Article 30(4) of the Directive and the spirit and purpose of the latter, set out in paragraphs 34 to 40 of this judgment, provide that court with all the guidance necessary to enable it to assess the compatibility of the national provisions in question with Community law for the purposes of judging the cases before it.

The taking into account of explanations for abnormally low tenders

78. In relation to the second aspect of the questions referred, as reformulated in paragraph 28 of this judgment, it should be pointed out that, in the words of the second subparagraph of Article 30(4) of the Directive, the contracting authority may take into consideration explanations relating to the economy of the construction method, the technical solutions chosen, the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed by the tenderer.

79. As is apparent from its very wording, that provision simply gives the contracting authority the possibility of basing its decision on certain types of objective explanation of the price proposed by a given tenderer, and does not impose upon it any obligation to do so.

80. Put back into its context, that provision is designed only to add further precision to the rule set out in the first subparagraph of Article 30(4) of the Directive, whereby the contracting authority is to request from the tenderer concerned details of the constituent elements of the tender which it considers relevant and verify those constituent elements taking account of the explanations received.

81. In that respect, the Court has already underlined, in paragraphs 51 to 59 of this judgment, the importance of the principle whereby, before the contracting authority can reject a tender as abnormally low, the tenderer must have a proper opportunity, in an *inter partes* procedure, to put forward his point of view on each of the various price components proposed.

82. Since, with a view to the development of effective competition in the area of public contracts, it is essential for that opportunity to be as full and as wide as possible, the tenderer must be able to submit in support of his tender all the explanations, and in particular those set out in the second subparagraph of Article 30(4) of the Directive, which, bearing in mind the nature and characteristics of the contract in question, he considers appropriate, without any limitation in that respect. The contracting authority is required to take into consideration all the explanations put forward by the undertaking before adopting its decision whether to accept or reject the tender in question.

83. It follows that, having regard to both its wording and its purpose, the second subparagraph of Article 30(4) of the Directive does not establish an exhaustive

catalogue of explanations that are capable of being submitted, but merely gives examples of explanations which the tenderer may provide in order to demonstrate the genuineness of the various price elements proposed. *A fortiori*, the provision in question does not authorise the exclusion of certain types of explanation.

84. As the Austrian Government and the Commission have argued in their observations, and the Advocate General has emphasised in paragraphs 50 and 51 of his Opinion, any limitation in that regard would clearly contradict the Directive's aim of facilitating the operation of free competition between the tenderers as a whole. Such a limitation would involve the outright exclusion of tenders explained by considerations other than those allowed by the applicable national legislation, despite a price which may be more advantageous.

85. It follows that Article 30(4) of the Directive precludes national legislation, such as that applicable in the main proceedings, which, first, requires the contracting authority, for the purposes of verifying abnormally low tenders, to take into account only certain explanations exhaustively listed, that listing omitting moreover explanations relating to the originality of the tenderer's proposed works, even though such explanations are expressly referred to in the second subparagraph of the above provision, and, second, expressly excludes certain types of explanation, such as those relating to any elements for which minimum values are laid down by law, regulation or administrative provision or for which minimum values can be ascertained from official data.

86. In view of all the foregoing considerations, the answer to the questions referred must be that Article 30(4) of the Directive is to be interpreted as follows:

- it precludes a Member State's legislation and administrative practice which allow the contracting authority to reject tenders offering a greater discount than the anomaly threshold as abnormally low, taking into account only those explanations of the prices proposed, covering at least 75% of the basic contract value mentioned in the contract notice, which tenderers were required to attach to their tender, without giving the tenderers the opportunity to argue their point of view, after the opening of the envelopes, on those elements of the prices proposed which gave rise to suspicions;

- it precludes a Member State's legislation and administrative practice which require the contracting authority to take into consideration, for the purposes of examining abnormally low tenders, only explanations based on the economy of the construction method, technical solutions chosen, or exceptionally favourable conditions available to the tenderer, but not explanations relating to all those elements for which minimum values are laid down by law, regulation or administrative provision or can be ascertained from official data;

- however, provided all the requirements it imposes are otherwise complied with and the aims pursued by the Directive are not defeated, it does not in principle preclude a Member State's legislation and administrative practice which, in the matter of identifying and examining abnormally low tenders, first, require all tenderers, under threat of exclusion from participation in the contract, to

accompany their tender with explanations of the prices proposed, covering at least 75% of the basic value of that contract, and, second, apply a method of calculating the anomaly threshold based on the average of all the tenders received for the tender procedure in question, so that tenderers are not in a position to know that threshold at the time they lodge their file; the result produced by applying that calculation method must, however, be capable of being reconsidered by the contracting authority.

Costs

87. The costs incurred by the Italian and Austrian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Consiglio di Stato by orders of 26 May 1999, hereby rules:

Article 30(4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts must be interpreted as follows:

- it precludes a Member State's legislation and administrative practice which allow the contracting authority to reject tenders offering a greater discount than the anomaly threshold as abnormally low, taking into account only those explanations of the prices proposed, covering at least 75% of the basic contract value mentioned in the contract notice, which tenderers were required to attach to their tender, without giving the tenderers the opportunity to argue their point of view, after the opening of the envelopes, on those elements of the prices proposed which gave rise to suspicions;

- it also precludes a Member State's legislation and administrative practice which require the contracting authority to take into consideration, for the purposes of examining abnormally low tenders, only explanations based on the economy of the construction method, technical solutions chosen, or exceptionally favourable conditions available to the tenderer, but not explanations relating to all those elements for which minimum values are laid down by law, regulation or administrative provision or can be ascertained from official data;

- however, provided all the requirements it imposes are otherwise complied with and the aims pursued by Directive 93/37 are not defeated, it does not in principle preclude a Member State's legislation and administrative practice which, in the matter of identifying and examining abnormally low tenders, first, require all tenderers, under threat of exclusion from participation in the contract, to accompany their tender with explanations of the prices proposed, covering at least 75% of the basic value of that contract, and, second, apply a method of calculating the anomaly threshold based on the average of all the tenders received for the tender procedure in question, so that tenderers are not in a position to know that threshold at the time they lodge their file; the result produced by applying that calculation method must, however, be capable of being reconsidered by the contracting authority.

Colneric

Gulmann
Puissochet

Schintgen Skouris

Delivered in open court in Luxembourg on 27 November 2001.

R. Grass

F. Macken

Registrar

President of the Sixth Chamber

1: Language of the case: Italian. </HTML

JUDGMENT OF THE COURT (Fourth Chamber)

16 September 1999 (1)

(Public works contract — Contract awarded to sole tenderer judged to be suitable)

In Case C-27/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Bundesvergabeamt, Austria, for a preliminary ruling in the proceedings pending before that court between

Metalmeccanica Fracasso SpA,

Leitschutz Handels- und Montage GmbH

and

Amt der Salzburger Landesregierung für den Bundesminister für wirtschaftliche Angelegenheiten,

on the interpretation of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1),

THE COURT (Fourth Chamber),

composed of: P.J.G. Kapteyn (Rapporteur), President of the Chamber, J.L. Murray and H. Ragnemalm, Judges,

Advocate General: A. Saggio,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Metalmeccanica Fracasso SpA and Leitschutz Handels- und Montage GmbH, by Andreas Schmid, Rechtsanwalt, Vienna,

— Amt der Salzburger Landesregierung für den Bundesminister für wirtschaftliche Angelegenheiten, by Kurt Klima, adviser to Finanzprokuratur Wien, acting as Agent,

— the Austrian Government, by Wolf Okresek, Sektionschef in the Federal Chancellor's Office, acting as Agent,

— the Commission of the European Communities, by Hendrik van Lier, Legal Adviser, acting as Agent, assisted by Bertrand Wägenbaur, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Amt der Salzburger Landesregierung für den Bundesminister für wirtschaftliche Angelegenheiten, represented by Kurt Klima; of the Austrian Government, represented by Michael Fruhmann, of the Federal Chancellor's Office, acting as Agent; of the French Government, represented by Anne Bréville-Viéville, Chargé de Mission in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; and of the Commission, represented by Hendrik van Lier, assisted by Bertrand Wägenbaur, at the hearing on 28 January 1999,

after hearing the Opinion of the Advocate General at the sitting on 25 March 1999,

gives the following

Judgment

1. By order of 27 January 1998, the Bundesvergabeamt referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 18(1) of Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1).

2. This question was raised in proceedings between Metalmeccanica Fracasso SpA and Leitschutz Handels- und Montage GmbH (hereinafter 'Fracasso and Leitschutz') and Amt der Salzburger Landesregierung für den Bundesminister für wirtschaftliche Angelegenheiten (hereinafter 'the Amt') concerning the latter's cancellation of an invitation to tender for a public works contract for which Fracasso and Leitschutz had submitted a tender.

Legal background

3. Directive 93/37 codified Council Directive 71/305/EEC of 26 July 1971 concerning coordination of procedures for the award of public works contracts (OJ 1971 L 185, p. 5). Under Article 18(1) of Directive 93/37, as amended by Directive 97/52 (hereinafter 'Directive 93/37'):

'Contracts shall be awarded on the basis of the criteria laid down in Chapter 3 of this Title, taking into account Article 19, after the suitability of the contractors not excluded under Article 24 has been checked by contracting authorities in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 26 to 29.‘

4. Under Paragraph 56(1) of the Bundesvergabegesetz (Federal law on the acceptance of tenders — 'the BVergG‘) the procedure for the award of a contract is terminated by the conclusion of a contract (the acceptance of a tender) or with the cancellation of the invitation to tender. The BVergG does not provide for another way of terminating the tendering procedure.

5. Paragraph 52(1) of the BVergG provides:

'(1) Before selecting the tender on the basis of which the contract is to be awarded, the contracting authority, in the light of the results of its examination, shall forthwith eliminate the following tenders:

1. tenders by bidders who do not have the necessary authorisation or economic and financial standing and technical knowledge or ability, or credibility;

2. tenders by bidders who are excluded from the procedure under Paragraph 16(3) or 16(4);

3. tenders the total price of which is not plausibly established;

...‘

6. Paragraph 55(2) of the BVergG provides:

'The invitation to tender may be cancelled if, following the elimination of tenders in accordance with Paragraph 52, only one tender remains.‘

7. Paragraph 16(5) of the BVergG provides:

'Tendering procedures shall be carried out only where it is intended actually to award a contract in respect of the obligations to be performed.‘

The dispute in the main proceedings

8. In the spring of 1996 the Amt issued an invitation to tender for surface works, including the erection of concrete barriers for the central reservation on a stretch of the A1 *Westautobahn*. The contract was awarded to ARGE Betondecke-Salzburg West.

9.

In November 1996 the Amt decided, for technical reasons, that the central reservation on the stretch of motorway in question was to be fitted with protective barriers made of steel rather than concrete as stipulated in the invitation to tender. It then issued a further invitation to tender under an open procedure for the erection of steel safety rails for the central reservation. The tendering procedure began in April 1997.

10. Four undertakings, or groupings of undertakings, submitted tenders, including the grouping comprising Fracasso and Leitschutz.

11. After the Amt had examined all the tenders and eliminated those of the other three tenderers on the basis of Paragraph 52(1) of the BVergG, only the tender submitted by Fracasso and Leitschutz remained.

12. In the end the Amt decided to use concrete instead of steel for the construction of the central reservation barrier and to cancel the relevant invitation to tender pursuant to Paragraph 55(2) of the BVergG. It informed Fracasso and Leitschutz of those two decisions by letter.

13. Those companies then asked the BundesVergabekontrollkommission (Federal Procurement Review Commission) to conduct a conciliation procedure pursuant to Paragraph 109(1)(1) of the BVergG concerning the question whether the decision

by the Amt to cancel the invitation to tender and its intention to issue a fresh invitation to tender for safety rails were in conformity with the provisions of the BVergG.

14. On 19 August 1997 the parties reached an amicable agreement on the new invitation to tender proposed by the conciliator, concerning the construction of steel safety rails for the sides of the motorway. This contract was to be awarded under a restricted procedure admitting in principle all the tenderers who had taken part in the cancelled tendering procedure.

15. Fracasso and Leitschutz then asked the BundesVergabekontrollkommission to complete the conciliation procedure, arguing that the dispute concerning the legality of the cancellation of the invitation to tender for safety rails for the central reservation had not been settled.

16. As the BundesVergabekontrollkommission declared that it had no authority in that regard, Fracasso and Leitschutz submitted to the Bundesvergabeamt an application for annulment of the decision by the Amt to cancel the invitation to tender.

17. Being in some doubt as to whether Paragraph 55(2) of the BVergG was compatible with Article 18(1) of Directive 93/37, the Bundesvergabeamt decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Is Article 18(1) of Directive 93/37/EEC, according to which contracts are to be awarded on the basis of the criteria laid down in Chapter 3 of Title IV, taking into account Article 19, after the suitability of the contractors not excluded under Article 24 has been checked by contracting authorities in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 26 to 29, to be interpreted as requiring contracting authorities to accept a tender even if it is the only tender still remaining in the tendering procedure? Is Article 18 sufficiently specific and precise for it to be relied on by individuals in proceedings under national law and, as part of Community law, to be used to oppose provisions of national law?'

The first part of the question

18. By the first part of the question the national court is asking whether Directive 93/37 must be interpreted as meaning that the contracting authority which has called for tenders is required to award the contract to the only tenderer judged to be suitable.

19. According to Fracasso and Leitschutz, the effect of Articles 7, 8, 18 and 30 of Directive 93/37, as interpreted by the Court, is that the contracting authority's option to refuse to award a public works contract or to reopen the procedure must be limited to exceptional cases and may be exercised only on serious grounds.

20. On the other hand, the Amt, the Austrian and French Governments and the Commission argue, essentially, that Directive 93/37 does not prohibit a contracting authority from taking no further action in a tendering procedure.

21. It is common ground that Directive 93/37 contains no provision expressly requiring a contracting authority which has put out an invitation to tender to award the contract to the only tenderer judged to be suitable.

22. Despite the fact that there is no such provision, it must be considered whether, under Directive 93/37, the contracting authority is required to complete a procedure for the award of a public works contract.

23. In the first place, as regards the provisions of Directive 93/37 cited by Fracasso and Leitschutz, it must be observed that Article 8(2) of Directive 93/37, which requires a contracting authority to inform candidates or tenderers as soon as possible of the grounds on which it decided not to award a contract in respect of which a prior call for competition was made, or to recommence the procedure, does not provide that such a decision is to be limited to exceptional cases or has necessarily to be based on serious grounds.

24. Similarly, as regards Articles 7, 18 and 30 of Directive 93/37, governing the procedures to be followed for the award of public works contracts and determining the applicable criteria for awarding them, it need merely be observed that no obligation to award the contract in the event that only one undertaking proves to be suitable can be inferred from those provisions.

25.

It follows that the contracting authority's option, implicitly recognised by Directive 93/37, to decide not to award a contract put out to tender or to recommence the tendering procedure is not made subject by that directive to the requirement that there must be serious or exceptional circumstances.

26. Second, it should be observed that, according to the 10th recital in the preamble to Directive 93/37, the aim of that directive is to ensure the development of effective competition in the award of public works contracts (see also, on the subject of Directive 71/305, Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 21).

27. In that connection, as the Commission has rightly pointed out, Article 22(2) of Directive 93/37 expressly pursues that objective in providing that, where the contracting authorities award a contract by restricted procedure, the number of candidates invited to tender must in any event be sufficient to ensure genuine competition.

28. Furthermore, Article 22(3) of Directive 93/37 provides that where the contracting authorities award a contract by negotiated procedure as referred to in Article 7(2), the number of candidates admitted to negotiate may not be less than threeprovided that there is a sufficient number of suitable candidates.

29. It must also be observed that Article 18(1) of Directive 93/37 provides that contracts are to be awarded on the basis of the criteria laid down in Chapter 3 of Title IV thereof.

30. The provisions in Chapter 3 include Article 30, paragraph 1 of which lays down the criteria on which the contracting authorities are to base the award of contracts, that is to say, either the lowest price only or, when the award is made to the most economically advantageous tender, various criteria according to the contract, such as price, period for completion, running costs, profitability or technical merit.

31. It follows that, to meet the objective of developing effective competition in the area of public contracts, Directive 93/37 seeks to organise the award of contracts in such a way that the contracting authority is able to compare the different tenders and to accept the most advantageous on the basis of objective criteria such as those listed by way of example in Article 30(1) (see, to that effect, on the subject of Directive 71/305, *Beentjes*, cited above, paragraph 27).

32. Where, on conclusion of one of the procedures for the award of public works contracts laid down by Directive 93/37, there is only one tender remaining, the contracting authority is not in a position to compare prices or other characteristics of various tenders in order to award the contract in accordance with the criteria set out in Chapter 3 of Title IV of Directive 93/37.

33. It follows from the foregoing that the contracting authority is not required to award the contract to the only tenderer judged to be suitable.

34.

The answer to the first part of the question is, therefore, that Article 18(1) of Directive 93/37 must be interpreted as meaning that the contracting authority is not required to award the contract to the only tenderer judged to be suitable.

The second part of the question

35. By the second part of the question, the national court is asking whether Article 18(1) of Directive 93/37 can be relied on before the national courts.

36. In that connection, it need merely be observed that, since no specific implementing measure is necessary for compliance with the requirements listed in Article 18(1) of Directive 93/37, the resulting obligations for the Member States are therefore unconditional and sufficiently precise (see, to that effect, on the subject of Article 20 of Directive 71/305, essentially reproduced in Article 18(1) of Directive 93/37, *Beentjes*, cited above, paragraph 43).

37. The answer to the second part of the question is, therefore, that Article 18(1) of Directive 93/37 can be relied on by an individual before the national courts.

Costs

38. The costs incurred by the Austrian and French Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the question referred to it by the Bundesvergabeamt by order of 27 January 1998, hereby rules:

1. Article 18(1) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively must be interpreted as meaning that the contracting authority is not required to award the contract to the only tenderer judged to be suitable.

2. Article 18(1) of Directive 93/37, as amended by Directive 97/52, can be relied on by an individual before the national courts.

Kapteyn
Murray
Ragnemalm

Delivered in open court in Luxembourg on 16 September 1999.

R. Grass

P.J.G. Kapteyn

Registrar

President of the Fourth Chamber

1: Language of the case: German.

SECTION 5
CHAPTER SUMMARY

SELF-TEST QUESTIONS

Check each question for local relevance and adapt accordingly.

1. What are the main principles that apply during the process of evaluation of tenders?
2. Who carries out the process of evaluation of tenders within the contracting authority?
3. Is there a time limit for completing the process of evaluation of tenders and for awarding the contract?
4. What are the main stages of the process of evaluation of tenders?
5. Can you reject tenders at the tender opening?
6. Can you give an example of a formal non-fundamental procedural requirement or formality?
7. Can you give an example of a formal fundamental procedural requirement or formality?
8. Can you accept a tender that does not meet a formal non-fundamental requirement set in the tender documents?
9. Can you give an example of a substantive non-fundamental requirement?
10. Can you give an example of a substantive fundamental requirement?
11. Can you accept a tender that does not meet a substantive fundamental requirement?
12. Are you allowed to correct arithmetical errors, and how?
13. What is meant by cross-discounts and when do they apply?
14. When the lowest price criterion applies, how do you choose the best tender?
15. When the MEAT criterion applies, how do you choose the best tender?
16. When the MEAT criterion applies and there are significant differences in the scores given by some of the members of the evaluation panel, how should such a situation be dealt with?
17. Is a contracting authority obliged to award a contract in the case of only one received or admissible tender?
18. In which circumstances may requests for clarifications be needed?
19. Can a mathematical formula be used to determine which tenders to exclude because abnormally low, without asking for written explanations concerning the tenders concerned?
20. In which form should the approval of the award be given? And why?
21. On what grounds might a tender process be cancelled?
22. Can you proceed with the conclusion of the contract with the winning tenderer soon after the contract award has been made?
23. How are lots awarded?

Further reading

On tender evaluation and contract award in general:

Arrowsmith, Sue, John Linarelli and Don Wallace Jr. (2000), *Regulating Public Procurement, National and International Perspectives*, Kluwer Law International.

On abnormally low tenders for contracts below the EU thresholds

Kotsonis, Totis (2008), "Italian Law on the Automatic Exclusion of Abnormally Low Tenders: SECAP *SpA v Comune di Torino* (C-147/06)", 17 Public Procurement Law Review, Thomson Reuters (Legal) Limited and Contributors, Issue 6.

Conducting the procurement process

Transparency, reporting, informing tenderers

MODULE E

PART 6

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. How and when the legal requirements for transparency and communication impact on the conduct of the tender process
2. What those requirements mean in practice

1.2 IMPORTANT ISSUES

The most important issuesin this chapter are understanding:

- When and what transparency and communication requirements are specifically provided for in the Directive
- How the Treaty principles and general law principles apply

This means that it is critical to understand fully:

- How the requirements apply to each of the stages in the procurement process, including the planning phase

If this is not properly understood, the requirements may be applied inappropriately or at the wrong stage and so risk being in breach of Treaty principles, the Directive or general law principles.

1.3 LINKS

There is a particularly strong link between this chapter and the following modules or sections:

- Module A1 on legislative framework and basic principles of public procurement
- Module B4 on the role of the procurement officer
- Module B5 on the role of the evaluation panel/tender committee
- Module C1 on procurement planning
- Module E1 on preparing tender documents
- Module E2 on advertisement of contract notices
- Module E3 on selection (qualification) of candidates
- Module E4 on setting contract award criteria
- Module E5 on contract evaluation and contract award
- Module G1 on contract management

1.4 RELEVANCE

This information will be of particular relevance to those procurement professionals who are responsible for procurement planning, those involved in preparing contract notices and selection and award criteria, and those involved in the selection process and tender evaluation process.

It will also be of particular relevance to those persons that, within the line management of a contracting authority, have both the responsibility and the power, including delegation power, to make procurement decisions.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

Adapt for local use

The legal requirements relating to the type of procedures are set out in **Directive 2004/18/EC**. In this context it is helpful to look at both the recitals to the Directive and the relevant articles:

- Recital 8 Technical dialogue
- Article 6 General obligation to maintain confidentiality

- Articles 35 to 43 generally, on transparency and communication, and in particular:
- Article 35 Advertising the contract award
- Article 36 The form and manner of publication of notices, including provisions relating to use of electronic means of publication
- Article 41 General requirements to inform candidates and tenderers of decisions and provide information, plus the right to withhold information
- Article 42 General rules applicable to communication
- Article 43 Reporting obligations

- Articles 44 to 53 generally, in relation to the selection of candidates and evaluation of tenders, and in particular:
- Article 53 Award criteria and disclosure of those criteria

Directive 89/665/EEC as amended for notification obligations, remedies, the standstill period and voluntary *ex ante* transparency notices.

Utilities

A short note on the key similarities and differences applying to utilities is set out at the end of Section 2.

SECTION 2
NARRATIVE

Note: Except where specified otherwise, the narrative in this module E6 discusses the rules applying to contracts that are of a certain type and value, which means that they are subject to the full application of Directive 2004/18/EC ('the Directive'), and the term 'contract' should be interpreted accordingly. For commentary on contracts falling outside the application of the Directive or only partially covered by the Directive, see module D3. For low-value contracts (under the EU financial thresholds), see below.

2.1 INTRODUCTION

Adapt all of this section for local use – using relevant local legislation, processes and terminology.

As explained in module A1, in addition to fundamental principles in the Treaty, some general principles of law have emerged from the case law of the European courts. These general principles are applied in the context of public procurement, and the most important in the context of this module are equality of treatment, transparency and proportionality.

The general principle of transparency imposes an obligation on the contracting authority that includes ensuring, for the benefit of any potential tenderer, a degree of advertising that is sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures. The principles of transparency and equal treatment mean that during the conduct of a procurement process, contracting authorities must communicate in a clear manner with all potential and actual participants so that they understand how the process is conducted and how decisions are made.

The requirement of transparency and clear communication in the conduct of procurement processes is a recurring theme. It is one of the main foundation stones upon which the Directive is built.

There are specific requirements in the Directive that regulate the manner of communication between contracting authorities and economic operators in some circumstances. For example, some communications must be in writing, there are obligations to communicate using the most rapid means possible, and there are provisions covering how electronic communication is to be conducted and how information is to be stored. In addition, there are specific requirements relating to maintaining the confidentiality of tenderers' information.

Many of these issues are covered in other modules. The purposes of this module are (1) to provide a link to issues covered in other modules, and (2) to address those issues that are not dealt with in detail in the other modules.

Sub-threshold contracts

The detailed provisions of the Directive do not apply to contracts below the EU financial thresholds. However, the general law principles and Treaty principles do apply to the procurement process that the contracting authority follows in procuring those contracts. This means that the discussions in this module on general principles and good practice are also applicable to contracts below the EU financial thresholds.

Adapt all of this section for local use – using relevant local legislation, processes and terminology. Briefly set out the transparency and communication requirements of the local legislation for sub-threshold contracts.

2.2 OVERVIEW

The flow chart below highlights the stages in the procurement process where transparency and communication are specifically addressed and provides cross-references to the relevant module.

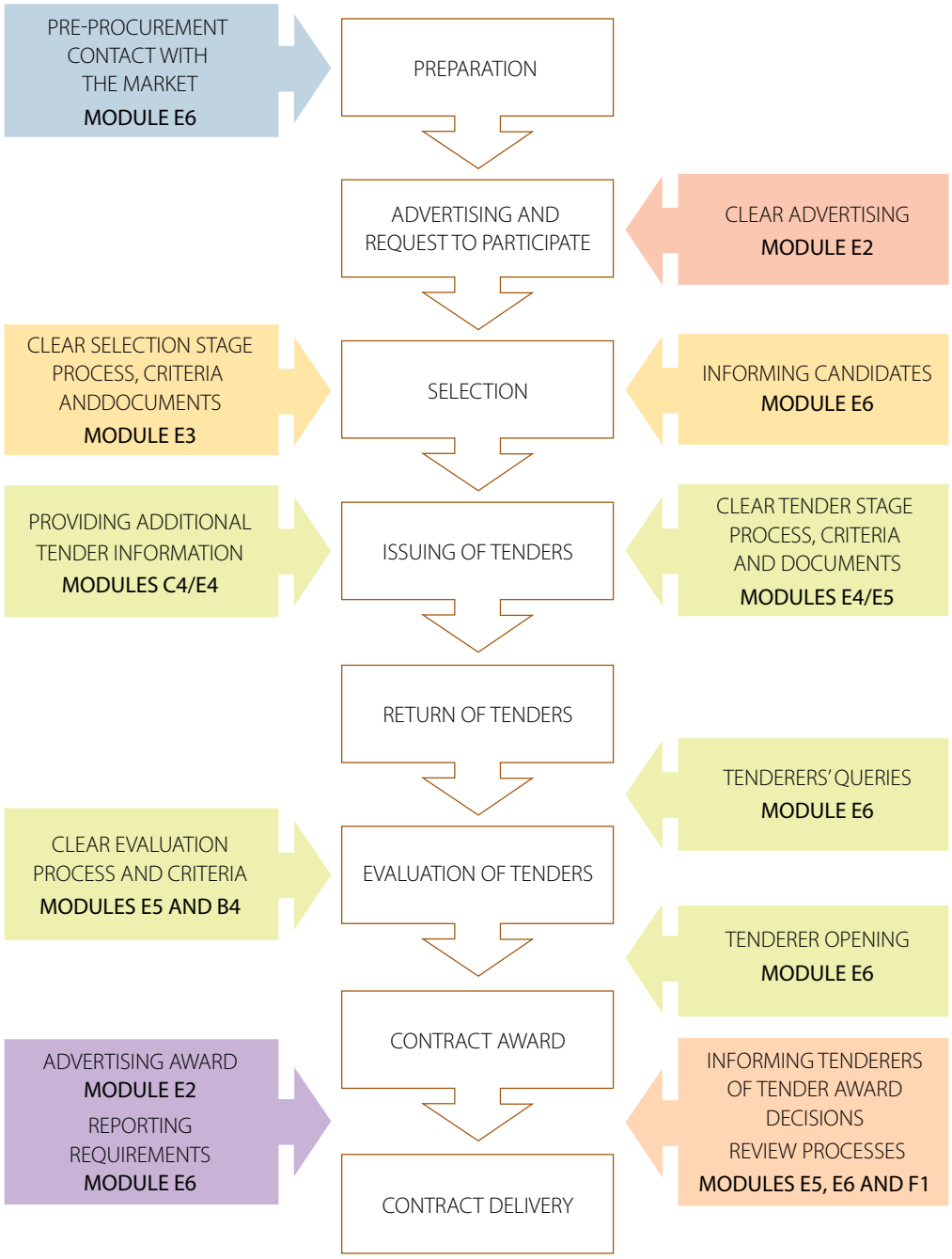
The following areas are dealt with in detail in this module E6:

- General rules applicable to communication
- Pre-procurement contact with the market
- Managing candidates' queries at the selection stage
- Informing candidates of the selection stage decision
- Managing tenderers' queries at the tendering stage
- Tender opening
- Informing tenderers of the award decision
- Reporting requirements

The flow chart shows a restricted procedure process and illustrates when and how transparency and communication opportunities or requirements arise. The restricted procedure has been used, as it illustrates separately the selection and evaluation processes.

It is important to remember that even where there is no specific provision of the Directive referred to, the requirement of transparency underlies the entire procurement process.

2.2.1 Requirements and opportunities for transparency and communication in procurement processes (restricted procedure used as an example)



2.3. GENERAL RULES AND PRINCIPLES

2.3.1 General rules applicable to communication (Article 42)

Article 42 of the Directive sets out some general rules that are applicable to written and telephone communication and information exchange. The article sets out some general principles and contains some specific rules relating to electronic communication and the transmission of requests to participate.

- **Methods of communication:** Article 42(1) refers to the various methods of written communication – post, fax or electronic means – and confirms that telephone communication may also be appropriate in specified cases. Communication may involve a mix of these methods of communication, depending upon the circumstances.
- **Means of communication must be generally available:** Article 42(2) sets out the important principle that the means of communication chosen (where there is a choice) must be generally available and therefore must not restrict economic operators' access to the procurement procedure.

2.3.2 Obligation to keep economic operators informed of the progress of an award procedure

In the *Embassy Limousine* case, the Court of First Instance held that the general transparency principle imposed on the contracting authority an obligation to provide economic operators participating in a tender process with prompt and precise information about the conduct of the award procedure.

Case Note

Case T-203/96, *Embassy Limousine Services v European Parliament* (Court of First Instance) [1998] II-ECR 4239

The European Parliament ran a tender process for a framework contract for chauffeur-driven car services for the European Parliament in Brussels.

Embassy Limousine Services was informed that the relevant committee had recommended that it be awarded the contract. Relying on this information (before the contract was formally awarded) and on the understanding that there was an urgent need to start the contract, Embassy Limousines took various steps to prepare for the contract, such as arranging for drivers and insurance.

In the meantime, doubts were raised about the alleged lack of good character of the executives and/or shareholders of this company, and questions were raised about service quality. Two directors of the company attended a meeting to respond to the concerns raised. The committee was not satisfied and decided to award a short-term contract to the second lowest tenderer and to re-open the procedure. This decision-making took some months, and the European Parliament did not keep Embassy Limousines informed of the developments, despite receiving requests for information from the company.

This failure to keep Embassy Limousines informed of the subsequent doubts was held by the Court of First Instance to be a breach of the principle of transparency.

Embassy Limousine Services was awarded financial compensation for the set-up expenses that they had incurred, including recruitment costs, rental of vehicles, and a telephone contract.

2.3.3 General obligation to maintain confidentiality

Article 6 contains a general obligation of confidentiality upon contracting authorities:

"…the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential; such information includes, in particular, technical and trade secrets and the confidential aspects of tenders."

This general obligation is subject to the provisions of national law.

2.3.4 Communication to ensure integrity and confidentiality

Article 42(3) requires that the exchange and storage of information be carried out in such a way as to ensure that:

- the integrity of data and the confidentiality of requests to participate and of tenders are preserved; and
- contracting authorities examine the contents of requests to participate and of tenders only after the time limit set for submitting them has expired.

Comment

This requirement is particularly important in the context of electronic procurement. For more traditional procurement, requests to participate and tenders should be submitted in sealed envelopes and retained as confidential and unopened in a secure location until the time and date set for opening them.

The same principles need to be applied in electronic procurement systems to ensure that there is no opportunity for requests to participate or tenders to be accessed in advance of the date for submission.

There are specific provisions covering this requirement in Annex 10 of the Directive – see below.

2.3.5 Electronic communication tools

Article 42(4) provides that the tools used for communicating by electronic means must be:

- non-discriminatory;
- generally available;
- interoperable with the information and communication technology products generally available.

Article 42(5) applies to the devices that are used for the electronic receipt of requests to participate and to the electronic transmission and receipt of tenders.

- Information regarding the specifications necessary for electronic transmission and receipt, including encryption, must be available to interested parties.
- The devices used for electronic transmission and receipt must conform to the requirements of Annex 10 (see below).
- EU Member States may require that electronic tenders be accompanied by an advanced electronic signature, in conformity with the Directive concerning the Community framework on electronic signatures (Directive 1999/93/EC).
- EU Member States may introduce or maintain voluntary accreditation schemes aimed at enhancing the levels of certification service provision for electronic devices.
- Tenderers or candidates must submit, before expiry of the time limit laid down for the submission of tenders or requests to participate, the documents, certificates and declarations required if they do not exist in electronic format.

Annex 10 requirements

Annex 10 of the Directive requires that devices used for the electronic receipt of tenders, requests for participation, and plans and projects in a contest must at the least guarantee, through technical means and appropriate procedures, that:

- electronic signatures can be used, where this option is available, when they comply with national provisions adopted pursuant to Directive 1999/93/EC concerning the Community framework on electronic signatures;
- the exact time and date for receipt of tenders, requests to participate and submission of plans and projects can be determined precisely;
- it can be reasonably ensured that no one can have access to data transmitted before the expiry of the specified time limits;
- if the access prohibition is infringed, it may be reasonably ensured that the access infringement will be clearly detectable;
- only authorised persons may set or change the dates for opening the data received;
- throughout the award process, access to data submitted is only possible through simultaneous action by authorised persons;
- simultaneous action by authorised persons must provide access to data transmitted only after the prescribed date;
- data received and opened in accordance with these requirements must remain accessible only to persons who are authorised to acquaint themselves with that data.

2.3.6 Rules applying to the transmission of requests to participate

Article 42(6) sets out rules relating to the transmission of requests to participate in procedures for the award of public contracts. These rules ensure that there are clear methods of communication:

- Requests to participate may be made by telephone or in writing.
- Where requests to participate are made by telephone, a written confirmation must be sent before the expiry of the time limit set for their receipt.

Contract authorities may require that requests to participate made by fax be confirmed by post or by electronic means, where this is necessary for the purposes of legal proof. Any such requirement, together with the time limit, must be stated in the contract notice.

2.4 PREPARATION

2.4.1 Consultation and discussions before the start of a tender process

There may be good and legitimate reasons why a contracting authority wishes to consult with potential tenderers or others prior to the start of a tender process. For example:

- Where a contracting authority has a requirement for an IT solution but is not certain about the sorts of technology that are available, it may wish to consult the market in order to determine the range of technology meeting its needs prior to finalising its technical specification. The aim is to produce a specification that can be delivered by as many economic operators as possible and thus to encourage competition so that the best solution is delivered.
- Where a contracting authority proposes a complex construction project that is to be partially financed privately, it would be sensible to explore whether the proposed project structure is fundable. There is no point in going out to tender for a project that is not deliverable because it is not structured in a way that can be funded from private sources.
- Where a contracting authority wishes to encourage the use of green technology in the construction of a new school, it might wish to explore in advance the range of green solutions available. As this is a rapidly developing marketplace with solutions often developed by small and medium-sized enterprises, the contracting authority might benefit from exploring the range of available solutions in advance so that it could structure the specifications to allow for a wide range of delivery options.

See module C1 for further discussion under the heading “Researching the supply market”.

2.4.2 What is permitted under the Directive?

Technical dialogue: In the specific context of the preparation of specifications, recital 8 of the Directive states that:

"Before launching a procedure for the award of a contract, contracting authorities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications provided, however that such advice does not have the effect of precluding competition."

The recital is not a legal provision, and there is no article in the Directive that deals with this issue, as the Directive is primarily concerned with the conduct of the tender process rather than the preparatory stages. Recital 8 does provides a clear statement of intention to the effect that, subject to the requirement to ensure that competition not be precluded (and subject always to compliance with the Treaty principles), preliminary discussions for the purposes of preparation of specifications are permitted.

Comment

Contracting authorities must take care to ensure that the Treaty principles are not breached, both in the way in which the technical dialogue process is conducted (see comments below) and in the outcome of the technical dialogue.

In terms of the outcome of the technical dialogue, contracting authorities need to be particularly careful to ensure that the specification prepared does not, for example, favour a particular provider.

2.4.3 Other forms of consultation

The Directive does not expressly prohibit a contracting authority from engaging in consultation with potential tenderers, or others, in advance of a tender process. However, contracting authorities that are considering engaging in any pre-tender consultations must bear in mind:

- the obligation to comply with the basic principles of non-discrimination, equal treatment and transparency that apply under the Directive;
- that the process and outcome must not have the effect of favouring particular providers or precluding competition;
- the public perception of their actions which, if the contracting authority is not very careful, may result in a belief that a particular contractor or contractors are being favoured;
- that consultation should not be used as a substitute for proper research and preparation by the contracting authority and its advisers.

2.4.4 Who should be consulted?

Widely advertised consultation involving all interested parties: A consultation process advertised at EU level, which provides all interested parties with the opportunity to participate and is conducted in a transparent manner ensuring equal treatment, is a process that is unlikely to breach Treaty principles.

Example

A contracting authority is proposing a complex construction project that is to be partially financed privately, and it would be sensible to explore whether the proposed project structure is fundable.

The contracting authority could advertise the project in the *Official Journal of the European Union (OJEU)* by using a Prior Information Notice (PIN). The PIN includes an invitation to all interested parties to attend a public meeting to be held at a specified time and place and explains that issues relating to the delivery of the project, including funding, will be discussed.

Care still needs to be taken to ensure that the outcome of such a process does not preclude competition. This means that the resulting specification and project approach should not favour a particular provider or be structured in such a way as to limit the competition.

In order to ensure as much transparency as possible as well as equal treatment, it would be advisable to make a summary available publicly of all of the questions raised and of the answers and information provided in response. In the context of this major project, the contracting authority could, for example, use a project-specific website to make this information available.

Comment

Limiting participation in the consultation process: In practice a contracting authority may have good reasons for believing that a consultation process involving all interested parties is not appropriate. For example, it may be of the view that a wide and open consultation will not permit the contracting authority to establish whether a project is deliverable because economic operators will be unwilling to discuss commercially confidential issues in a public forum.

Talking to a limited number of tenderers raises legal risks, particularly if the opportunity to take part in the consultation is not given to all economic operators that might be interested in the consultation.

It can be argued that it would violate the principle of equal treatment to consult only with some of the economic operators that would wish to be consulted, and then to allow the consultees also to participate in the later tender process.

This might not respect the principle of equal treatment because, for example:

- consultees might have been given advance notice of the project and thus have had more time than others to prepare;
- consultees may have obtained additional information that was not available to all (see information on the Evropaïki Dynamiki case below);
- there is a risk that consultees would distort the scope or nature of the project in their own favour.

2.4.5 Consultation methods

Good practice note

Consultation can be undertaken in a variety of ways, and the method used will depend on the outcome that the contracting authority aims to achieve.

Purpose of the consultation process: The contracting authority needs to be clear about the purpose of the consultation. Using the example above of a contracting authority proposing a complex construction project that is to be partially financed privately, the purpose of a consultation exercise could be:

- to explore the general structure of the project in order to establish whether the project is deliverable in practice;
- to seek views on whether the project is fundable;
- to explore how the project could be delivered in an environmentally sensitive way.

Form of the consultation process: There is no specified form for a consultation process. It could be, for example:

- a 'paper-based' approach – with the contracting authority issuing outline documents and asking for written comments;
- an electronic consultation, with all outline documents, draft specifications and other project details available on a project website, with an online notice board for contributions from interested parties;
- an open day for interested parties, with an opportunity to visit the site, attend a presentation from the contracting authority, ask questions and be given answers in a public forum, with full minutes being taken and made available to all participants and disclosed to all participants in any subsequent tender process.

For each of these approaches it is very important for the contracting authority to ensure that it maintains a clear audit trail of all information provided during this process so that this information can also be made available to all tenderers in the subsequent tender process.

2.4.6 Exclusion of providers that assist with preparatory work

A general consultation process can be distinguished from the situation where a provider has participated in the preparatory work leading up to a tender process. An example is the appointment by the contracting authority of an expert IT consultant to assist in the preparation of the technical specifications for an IT contract. The question arises as to whether the expert IT consultant should then be prohibited from tendering for the IT contract.

This issue was addressed by the European Court of Justice (ECJ) in the *Fabricom* case.

Case note

Joined cases C-21/03 and C-34/03, *Fabricom v Etat Belge* [2005] ECR I-1559

This case relates to the lawfulness of provisions in Belgian law. These provisions prohibited persons who had carried out research, experiments, studies or development in connection with a contract from then applying to participate in or to submit a tender for that contract.

The ECJ ruled that these Belgian laws, which applied a strict prohibition even if participants could show that there was no risk to competition, were contrary to the Directives.

The ECJ held that the prohibition was not proportionate to the objective that it was aimed to achieve, *i.e.* to ensure the equal treatment of all those participating.

The judgment of the ECJ was that this objective could be achieved by a less restrictive method, namely by prohibiting participation only by those economic operators that were unable to prove that there was no risk to competition resulting from their participation.

Comment

The practical impact of this decision is that there cannot be a blanket ban on participation in a tender process of economic operators that have participated in the preparatory stages. However, it appears that the onus is on the economic operators to demonstrate that their participation will not prejudice the procurement process.

2.4.7 Use of Prior Information Notices (PINs) and Buyer Profiles

The example in 4.3 above suggests that a contracting authority could use a Prior Information Notice (PIN) as a means of communicating with potential tenderers and inviting them to participate in pre-tender discussions.

PINs and online Buyer Profiles do provide good methods of giving advance warning to the market of forthcoming opportunities. If sufficient information is provided in a PIN, it can assist economic operators by providing advance warning of a tender. This warning gives economic operators more time to prepare for the tender opportunity and also assists them in planning future activity and in managing the demands on their time and resources.

See module E2 for further information on PINs and Buyer Profiles.

2.5 ADVERTISING AT THE START OF A PROCUREMENT PROCESS

Advertising at the start of a procurement process is the main way of informing economic operators about a contract opportunity.

Advertising – in the manner prescribed in the Directive and in local legislation – raises the awareness of as many potential economic operators as possible to contract opportunities and thus promotes competition. The advertisement is often the first communication that the contracting authority has with economic operators, and it should be the first stage of an open and transparent tendering process.

Contracting authorities are required to use a standard form contract notice and to comply with statutory time scales. These measures ensure consistent communication with economic operators.

See module E2 for detailed information on advertising.

2.6 SELECTION STAGE

2.6.1 Transparency requirements

Specifying the evidence required for selection and disclosing the selection stage criteria

There are provisions in the Directive that require a contracting authority to act in a clear, consistent and transparent manner in its communications with economic operators during the selection stage.

- The Directive explicitly obliges contracting authorities to specify in the contract notice or in the invitation to tender the evidence that economic operators must submit to prove that they satisfy the selection stage requirements (see module E2).
- In addition, if the contracting authority has fixed minimum levels, it must announce these levels in the contract notice, together with details of the information and any formalities required in order to assess whether those minimum levels are met (see modules E2 and E3).

The Directive does not contain explicit provisions requiring the contracting authority to disclose the weightings and/or scoring methodology to be used for the selection stage criteria. However, the principle of transparency and case law, including the *Universale-Bau* case, would indicate that such a disclosure is probably necessary (see module E3 for discussion of this issue and for details of the *Universale-Bau* case).

See module E3 for detailed information on the selection process and selection criteria.

2.6.2 Communication with candidates during the selection stage

Good practice note

It is common for candidates to have queries for which they need answers in order to (1) fully understand the process that is being followed; and (2) know what information they need to submit at this stage. For many candidates a formal tendering process may well be unfamiliar and quite daunting. They may find the documents and process confusing and burdensome.

There are many ways in which a contracting authority can assist candidates so that they understand what is required of them. Open and clear communication is the key.

Main tips include:

- Keep documents as simple as possible.
- Use standard documents so that candidates get used to completing them.
- Use plain language to communicate requirements.
- Be very clear about exactly which documents must be submitted.
- Be very clear about exactly how and by what date documents must be submitted.
- Explain in simple terms the importance of fully completing all forms and providing all information requested.
- Encourage candidates to ask questions if they are unsure of your requirements.
- Provide candidate-friendly assistance – a telephone or e-mail help-line for questions (where a telephone service is provided, then clear records of all discussions must be maintained).

Electronic procurement (e-procurement) is increasingly used as a method of simplifying communications and procurement processes.

Adapt for local use, refer to standard documents that contracting authorities may be required to use, refer to e-procurement systems.

When dealing with queries from candidates, it is very important to ensure that equal treatment is maintained. It is therefore good practice to record all questions and answers and to circulate all of this information (except where it is genuinely commercially confidential) to all candidates. E-procurement systems often include this facility.

It is also important to maintain a record for audit trail purposes.

2.6.3 Informing candidates of the selection stage decision

Contracting authorities are required to communicate their decisions openly to economic operators. See the information below in section 10 in relation to the obligation to inform candidates and tenderers of decisions.

2.7 TENDER STAGE

2.7.1 Transparency requirements

Advance disclosure of award criteria and evaluation processes

There are provisions in the Directive that require a contracting authority to act in a clear, consistent and transparent manner in its communications with economic operators during the tender stage. The Directive:

- obliges the contracting authority to identify in the contract notice whether the contract will be awarded on the basis of the lowest price or the most economically advantageous tender (see module E2);
- requires the contracting authority to specify in the contract notice or in the tender documents the criteria used to assess the most economically advantageous tender and their relative weighting or order of importance (see modules E2 and E4);
- specifies the information that must be included in the tender documents.

The Directive does not contain explicit provisions requiring the contracting authority to disclose the scoring methodology, but the principle of transparency and case law would indicate that this disclosure is probably necessary (see module E4 for discussion on this issue).

See module E4 for detailed information on setting and disclosing evaluation criteria.

Note: All tenderers must have access to the same information if it is relevant to the bid

The *Evropaïki Dynamiki* case concerned a call for tender by the European Commission for the development of IT services. Evropaïki Dynamiki (ED) claimed that the Commission had violated the equal treatment principle by:

- requiring a three-month 'run-in' phase for which the successful provider would not be paid. The idea was to allow the new contractor to become familiar with the IT system before taking on responsibility for the full service provision. ED claimed that this requirement favoured another tenderer that had been using the incumbent service provider as a sub-contractor (so the actual cost of providing this free run-in phase would be much lower for that other tenderer);
- failing to provide all tenderers with certain technical information that was already available to the incumbent provider.

The Court of First Instance concluded that:

- the requirement for a run-in phase was not in itself discriminatory;
- the failure to provide all tenderers with the technical information was in violation of the equal treatment principle.

(T-345/03, *Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission*)

2.7.2 Communication with candidates during the tender stage

The Directive includes rules relating to the provision of information to economic operators:

- Economic operators that wish to participate in the process may request the tender documents directly from the contracting authority or may access them from a website specified in the contract notice if a form of electronic procurement is being used.
- Tender documents issued to economic operators generally include: instructions to tenderers, the specification and supporting documents, together with contract documents, a request for selection stage information and the request to submit a tender (where the open procedure is being used)
- In order to maintain consistent treatment when dealing with economic operators, there are specific rules in the Directive relating to the time limits within which specification and supporting documents that are not available by electronic means on the date of publication of the contract notice must be sent to economic operators, as well as rules for extending the time limits where tenders can only be made after a visit to the site or after on-the-spot inspection.

See module C4 for more information on these issues.

2.7.3 Communication with economic operators during the tender stage/dealing with tenderers' queries

All communication with economic operators during the tender process must be conducted in a transparent manner so as to ensure that the principle of equal treatment is maintained.

Under the open and restricted procedures, communication with economic operators must be limited to explaining the process and providing clarifications. A contracting authority must not enter into discussions or negotiations with economic operators. See module E5 for further discussion on the nature and extent of permissible clarification.

Where a contracting authority is using the competitive dialogue procedure or the negotiated procedure, it is permitted to discuss and negotiate with economic operators, but this communication is always subject to the specific provisions of the Directive covering the conduct of these processes, and it must be in compliance with the basic principles derived from the Treaty, in particular transparency and equal treatment.

See modules C4, E3 and E5 for further information on procurement processes.

Good practice note – Communication with economic operators during the tender stage – dealing with tenderers' queries

All communication with economic operators during the tender process must be conducted in a transparent manner so as to ensure that the principle of equal treatment is maintained.

Under open and restricted procedures, it is common for economic operators to have queries, which they need to have answered in order to fully understand the process that is being followed and the information that they need to submit at this stage. Economic operators often have questions about the specification and contract documents.

For many economic operators, a formal tendering process may well be unfamiliar and quite daunting. They may find the documents and process confusing and burdensome.

There are many ways in which a contracting authority can assist tenderers so that they understand what is required of them, but this assistance should not entail discussion or negotiation (unless the contracting authority is conducting a process where these are specifically permitted). As with the selection stage of the process, open and clear communication is the key during the tender stage.

Main tips include:

- Keep documents as simple as possible.
- Use standard documents so that candidates get used to completing them.
- Use plain language to communicate requirements.
- Be very clear about exactly which documents must be submitted.
- Be very clear about exactly how and by what date documents must be submitted.
- Explain in simple terms the importance of fully completing all forms and providing all information requested.

- Encourage economic operators to ask questions if they are unsure of your requirements.
- Make it clear how economic operators can ask questions.
- Provide friendly assistance – a telephone or e-mail help-line for questions is a good idea (where a telephone service is provided, then clear records of all discussions must be maintained).
- Have relevant assistance available, such as technical experts who can help to explain the technical specification – for technically complex tenders, consider organising a technical open day, site visits or an online message board.
- For complex procurement, consider extending the usual time limits for tender submission.
- Clearly specify the required length of the responses made by economic operators in their tenders, *i.e.* impose a word limit.

Note: Electronic procurement (e-procurement) is increasingly used as a method of simplifying communications and procurement processes.

Adapt for local use, refer to standard documents that contracting authorities may be required to use, refer to e-procurement systems.

Equal treatment: When dealing with queries from economic operators, it is very important to ensure that equal treatment is maintained. It is therefore good practice to record all questions and answers and to circulate all of this information (except where it is genuinely commercially confidential – see note above on confidentiality) to all economic operators. E-procurement systems often include this facility.

It is also important to maintain a record for audit trail purposes.

See module E5 for further discussion of these issues.

2.8 OPENING OF TENDERS

The Directive does not specify the manner in which tenders are to be opened. There is no obligation under the Directive to conduct the tender opening in public.

Section IV.3.8 is the section of the standard form Contract Notice where contracting authorities can set out the 'conditions for opening tenders'. This section allows contracting authorities to indicate the date and time of opening of tenders. It also allows them to include information on the place of opening 'if applicable' and on the 'Persons authorised to be present at the opening of tenders, if applicable'.

In Annex VIIA to the Directive, which sets out the information that must be included in the Contract Notice, the requirement to specify the date, time and place of opening of tenders and persons who may be present applies only to the open procedure.

Comment

There is no obligation under the Directive to conduct the tender opening in public. The standard form contract notice allows for information to be provided on the place of opening and on persons who are authorised to be present, 'if applicable'.

The *Embassy Limousines* case confirmed that the principle of transparency requires contracting authorities to keep economic operators informed about the conduct of the process.

If tenders are to be opened in public, then this principle means that all economic operators should be given details of the public opening.

Please see module E5 for information regarding good practice on the receipt and opening of tenders. This module includes a discussion on issues such as how to store tenders, registration and record-keeping, and preparation of a tender opening report. These are all important factors in maintaining transparency in the process.

2.9 EVALUATION OF TENDERS

The next stage of the process will be the evaluation of the tenders received, and if an open procedure is used, evaluation of the pre-qualification (selection) information will also take place at this stage. The evaluation process must be conducted in a manner that is compliant with the general law and Treaty principles of:

- non-discrimination,
- equal treatment, and
- transparency.

The tender evaluation process (and pre-qualification/selection process) is covered in detail in other modules. Key areas to bear in mind in the context of ensuring clear communication and transparency of process and decision-making are:

- Advance disclosure of pre-qualification/selection criteria and marking schemes – see module E3
- Advance disclosure of the tender evaluation criteria, weighting and marking schemes – see modules E4 and E5
- Membership, role and conduct of the tender evaluation panel or tender committee – see modules B4 and E5
- Compliance checks – see module E5
- How to evaluate tenders, including correction of errors, clarification process and issues relating to abnormally low tenders – see module E5
- Preparation of the tender evaluation report – see module E5
- Award approval processes – see module E5

2.10 INFORMING CANDIDATES AND TENDERERS OF DECISIONS

2.10.1 General requirement to inform candidates and tenderers of decisions (Article 41(1))

Contracting authorities must inform candidates and tenderers as soon as possible of decisions reached concerning the conclusion of a framework agreement, the award of a contract, or admittance to a dynamic purchasing system. The information must be given by the contracting authority in writing, upon request.

Where a contracting authority decides not to conclude a framework agreement, award a contract or implement a dynamic purchasing system or where it decides to recommence a procedure, then it must inform candidates and tenderers of the reason(s) for this decision. The contracting authority must provide this information in writing, upon request.

See module F1 for further information on this requirement.

2.10.2 General requirement to provide information upon receipt of a request (Article 41(2))

Where a contracting authority receives a request for information on decisions that it has made, it must, as quickly as possible:

- inform any unsuccessful candidate of the reasons for the rejection of its tender application;
- inform any tenderer that has submitted an admissible tender of:
  - the characteristics and relative advantages of the tender selected; and
  - the name of the successful tenderer or the parties to the framework agreement.

Where a tender is rejected on the grounds of failure to meet technical specification requirements or technical standards, then the information provided to an unsuccessful tenderer must include the reasons why the tender failed to meet those requirements.

The amended Remedies Directive requires the communication of all contract decisions to be accompanied by a summary of relevant reasons (see section 4, 'The Law', for further information).

The time taken to respond must be as limited as possible and may in no circumstances exceed 15 days from receipt by the contracting authority of a written request from the unsuccessful candidate.

The main purpose of the requirements to provide information is to permit economic operators to monitor the procurement process, which includes providing them with information that will enable them to decide whether or not to legally challenge a decision by the contracting authority.

See module F1 for further information on this issue.

2.10.3 Specific requirement to inform candidates and tenderers of the contract award decision

In addition to the information requirements referred to above, there are specific requirements relating to the provision of information to tenderers when the contracting authority makes a tender award decision and the standstill period applies.

See module F1 for information requirements in relation to the contract award decision and the standstill period.

2.10.4 Right to withhold certain information (Article 41(3))

Contracting authorities may decide to withhold certain information relating to these decisions in cases where the release of such information:

- would impede law enforcement;
- would otherwise be contrary to the public interest;
- might prejudice the legitimate commercial interests of economic operators;
- might prejudice fair competition between economic operators.

2.10.5 Debriefing

Good practice note – Debriefing

The above section set out the requirements under the Directive in respect of the provision of information relating to the contract award decision. Certain information must be provided in writing, but this does not prohibit other, additional forms of communication, such as providing information in a meeting or over the telephone.

For larger, more complex or high-profile contracts, a contracting authority may decide that it is appropriate to offer a detailed debriefing process, including a debriefing meeting, to each economic operator that had submitted a bid.

Economic operators often find that detailed debriefing processes and meetings help them to fully understand the strengths and weaknesses of their own bids. The information received should allow them to learn from the process so that they can improve on future bids.

How should a contracting authority conduct a detailed debriefing process?

The starting point is that the debriefing should be open and transparent about the procurement process. The contracting authority should provide enough relevant and helpful information so that a well-informed and diligent tenderer will be able to understand the relative advantages and disadvantages of its bid and the winning tenderer's bid.

Contracting authorities will need to be careful in the conduct of such debriefings not to disclose commercially sensitive or confidential information of other tenderers.

In practice – issues to consider and bear in mind

- Face to face? Over the telephone? In writing? – How will you keep records?

  There is no prescribed format for a debriefing. Tenderers may have invested considerable funds and time in preparing their bid, and therefore a face-to-face meeting may be the most effective way of debriefing a disappointed tenderer. If so, an agenda will help to guide the conversation and a detailed written note should be kept.
- **Be as open, accurate and transparent as possible.**
- **Focus on the relative strengths and weaknesses of the bid in question.**
- **Give as complete reasons as possible.**
- **There is no obligation to talk about the merits of a decision.** Contracting authorities should allow discussion on the process used, but should not allow debate as to whether the decision was made correctly, as that issue concerns the contracting authority's decision-making process.
- **Allow the debriefing to be a two-way process if possible**. A debriefing can be a useful opportunity to obtain feedback on how easy or inviting a tenderer found it to participate in the procurement process. Such feedback can help to improve the process by promoting the image of the contracting authority as an attractive partner, encouraging other future tenderers, and leading to better value-for-money. An open and transparent debriefing will allow an authority to learn more about any perceived flaws in the process.

2.11. ADVERTISING AND REPORTING AT THE CONCLUSION OF THE PROCESS

2.11.1 Advertising the award of the contract (Article 35)

See module E2 for full information on advertising requirements.

For contracts or framework agreements above the EU financial thresholds, contracting authorities must send a contract award notice in the standard format to the *Official Journal of the European Union (OJEU)* no later than 48 days following the award of the contract or the conclusion of the framework agreement. There are special rules for contracts awarded under a dynamic purchasing system.

Where a contract is not awarded, for example because there are no suitable tenders or the procurement process has been abandoned, then the contracting authority must publish a contract notice in the *OJEU* using standard form notice 14.

The obligation to advertise a Contract Award Notice applies to all contracts where a Contract Notice has been advertised and also to some other contracts where a Contract Notice has not been advertised, for example to non-priority service contracts or contracts awarded as a result of a negotiated procedure without prior publication of a contract notice.

This final notice is important because it ensures the transparency of the process, as contractors and others are informed that the procurement process has been concluded and on what basis. The European Commission also uses this information to prepare statistical data on the level and nature of procurement activity and to monitor procurement processes.

2.11.2 Reporting obligations (Article 43)

A contracting authority is required to draw up a written report for every contract, framework agreement, and establishment of a dynamic purchasing system. The contracting authority must send the written report to the European Commission if requested to do so. The written report must contain (as a minimum):

- Name and address of the contracting authority
- Subject matter of the contract, framework or dynamic purchasing system
- Value of the contract, framework or dynamic purchasing system
- Names of the successful candidates or tenderers and the reasons for their selection
- Names of the rejected candidates or tenderers and the reasons for their rejection
- Reasons for the rejection of tenders found to be abnormally low
- Name of the successful tenderer and reasons why that tenderer was selected; if known, share of the contract or framework agreement that the successful tenderer intends to sub-contract to third parties
- For negotiated and competitive dialogue procedures, circumstances specified in the Directive justifying the use of those procedures
- Where a contracting authority has decided not to award a contract or framework agreement or to establish a dynamic purchasing system, reasons for this decision

2.12 COMPLAINTS, REVIEW AND CHALLENGES

Where economic operators and other parties (where relevant) are able to make a complaint, request a formal review, or bring a legal challenge to a procurement procedure with relative ease, this should mean that the contracting authority's processes are clearer and more transparent than processes where no method of challenge is available. The existence of an effective review system should encourage contracting authorities to ensure that the way in which they plan and run procurement processes can be subject to scrutiny and therefore encourage them to demonstrate the transparency of the process. See module F1 for further information on review and remedies.

It is worth noting that the amendments to the Remedies Directive, as well as establishing a consistent regime for available remedies also ensures even greater transparency at the contract award stage. A notable new introduction in the context of notification of contract awards relates to the situation where a contracting authority has made a direct award of a contract without prior publication of a contract notice:

Direct awards: When a contracting authority considers that it has the right to directly award a contract without publication of a contract notice, then under article 2d(4) of Directive 89/665/EEC, it may publish a simplified notice in the *Official Journal of the European Union (OJEU)* of its intention to award the contract and may also observe a standstill period of at least 10 days starting from the day following the date of publication of the notice before concluding the contract. If this procedure is followed, then the contract may be concluded without any risk of ineffectiveness. There is a new standard form Notice for this voluntary publication which can be accessed from the simap website. This notice is known as a "voluntary ex ante transparency notice".

See module F1 for further information.

UTILITIES

This short note highlights some of the major differences and similarities in the requirements applying to utilities. The general law principles and Treaty principles as well as case law apply equally to utilities.

Adapt all of this section for local use – using relevant local legislation, process and terminology.

General communication and information requirements: The main legal requirements relating to communication and information are set out in articles 48 to 50 of Directive 2004/17/EC (Utilities Directive):

Article 48 refers to the various means of communication available and confirms that the means of communication are to be generally available and that tools used for electronic communication are to be non-discriminatory.

The provisions related to maintaining integrity of data and confidentiality, the rules applicable to devices used for electronic tendering processes, and the rules of transmission of requests to participate are also set out in article 48 of the Utilities Directive and mirror the provisions in article 42 of Directive 2004/18/EC (the Directive).

Article 49 of the Utilities Directive sets out the provisions related to informing candidates and tenderers of decisions concerning the tender process. The same principles and time limits apply as in the Directive (2004/18/EC).

Article 50 covers the information to be stored concerning contract awards. Utilities are required to keep appropriate information on each contract, which is to be sufficient to permit the utilities at a later date to justify qualification and selection decisions, decisions to award contracts without a prior call for competition, and the non-application of the procurement process by virtue of the derogations provided for in the directive. Information relating to the award of a contract must be kept for at least four years from the date of the award.

Article 67 sets out the reporting obligations in relation to contracts awarded, which are less stringent than the reporting obligations under the Directive.

Consultation and discussions before the start of a tender process: Recital 15 of the Utilities Directive mirrors Recital 8 of the Directive (2004/18/EC) and points to the use of technical dialogue before launching a procedure. The same principles apply in relation to the conduct of technical discussions and other forms of consultation, as discussed above.

Buyer profiles and periodic indicative notices: Utilities may use buyer profiles as a means of communicating information to economic operators. Unlike contracting authorities covered by the Directive, utilities may also use periodic indicative notices, which provide a more flexible means of advertising contract opportunities and setting up and operating qualification systems – see module E2 for further details.

Specifying information required for selection and disclosure of selection stage criteria: Utilities have more flexibility in terms of the choice of selection criteria that they may apply, but they must still be clear about the information that they require at the selection stage and they must disclose the criteria to be applied as well as any weighting or scoring methodology to be applied – see module E3.

Advance disclosure of award criteria and tender evaluation processes: The rules and principles governing the award criteria and processes are substantially the same as the rules under the Directive, and the case law is also valid. See modules E4 and E5.

Communication with candidates and tenderers during the procurement process: The same principles and good practice that apply to contracting authorities subject to the Directive (2004/18/EC), discussed in this module E6 and in modules E3, E4 and E5, also apply to utilities.

Evaluation process: There are general rules in the Utilities Directive (2004/17/EC) concerning how and when the award of contracts should take place, but there are no specific rules on how the process of evaluation of tenders should be structured and on the steps to be followed. Basic general law and Treaty principles will apply, however. See module E5.

Advertising on the conclusion of the process: Utilities are required to dispatch a contract award notice in a standard format to the Office of the *OJEU* within two months of the award. There are also provisions allowing utilities to group contract award notices for dynamic purchasing systems, which can then be sent to the Office of the *OJEU* on a quarterly basis.

SECTION 3
EXERCISES

EXERCISE 1
CASE STUDY

You are a procurement officer at X Town Council and you are advising on the procurement process for the purchase of new photocopiers. The value of the contract is well above the EU threshold for supplies contracts.

You have been speaking to the technical team about the technical specifications and you have also discussed how the process will be conducted. When you told the technical team that the Council's standard approach is to use the post and fax machines for communication, they said that many of the companies they expect to participate in the tender process no longer use or have fax machines. All communication is now by email.

Can the Council insist on using only post and fax machines for communication with the economic operators participating in the process? Why?

EXERCISE 2
GROUP DISCUSSION

Please use the facts in Exercise 1.

One of the technical team on the photocopier procurement explains that there have been a lot of technical developments in photocopier technology recently. These developments mean that photocopiers manufactured by some, but not all, suppliers can print out much faster than before and that colour quality is very high. The members of the technical team do not understand how this technology works. They would like tenderers who use that new technology in their photocopiers to submit, as part of their tenders, the technical details explaining how that technology works.

They ask you to draft the Invitation to tender so that it is clear to tenderers that this information is required.

Please discuss this request and answer the following questions:

1. Is it permitted to ask tenderers to submit this information? Why?
2. If it is permitted, then what general obligations apply to the provision of this sort of information by tenderers?
3. What practical measures should you put into place to handle genuinely confidential information?

EXERCISE 3
COMPLEX PROCUREMENT OF IT SUPPLIES, SUPPORT AND DEVELOPMENT SERVICES

The Ministry of Finance is proposing to go out to tender to seek a contractor to provide IT supplies, support and development services. The value of the contract is estimated to be EUR 30 million.

The proposal is to set up a long-term contract with an IT contractor, perhaps for up to 15 years. During the course of that contract the IT contractor will manage and deliver all of the Ministry of Finance's IT service. This will include undertaking ongoing reviews of IT needs, providing upgrades, and replacement and new hardware and software as required. The contractor will also run the Ministry's IT helpdesk, to deal with staff queries. The IT contractor will provide the staff who deliver the on-site IT support. The Minister of Finance has made it clear that he wants the contractor appointed as quickly as possible.

The Ministry of Finance has set up a project team to run the project, and a project manager has been appointed. The project manager has extensive experience of working in the private sector on technical delivery issues and project management. He does not have any experience working for a contracting authority, and he is not a public procurement expert.

At the first project board meeting the project manager explains that he is concerned that the project has not been thoroughly assessed. He is worried that it will not be deliverable on time and within budget.

The project manager thinks that it would be good to have discussions, in advance of the tender process, with companies that have experience with these sorts of projects. The aim of the proposed discussions is to allow the Ministry to test its ideas for the project to see whether they are of interest to the market and whether the project will be deliverable commercially.

There are no annual budget or other constraints obliging the Ministry to advertise immediately and so a delay is technically feasible. There are no local laws covering this issue.

You are a procurement officer and you are a member of the project board. The project manager asks you the following questions.

1. Do you think that this sort of discussion is permitted in principle?
2. Do you think that there are legal problems if the Ministry decides to talk to a limited number of potential tenderers? What are the problems?
3. How and with whom would you undertake this type of discussion process?

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

Check each question for local relevance and adapt accordingly.

1. In which court case was it established that the general transparency principle means that there is an obligation on a contracting authority to provide economic operators participating in a tender process with prompt and precise information about the conduct of the award procedure?
2. Where in the Directive is the general obligation not to disclose information designated as confidential by economic operators?
3. "A tender evaluation panel is permitted to examine the content of tenders before the time limit set for submission of tenders has expired." True or false?
4. Where in the Directive are the detailed provisions covering the use of electronic communication tools?
5. What is technical dialogue?
6. In which cases did the European Court of Justice look at the issue of whether provisions in local law that prohibited persons who had carried out research, experiments, studies or development in connection with a contract from then applying to participate in or to submit a tender for that contract were permissible under EU law? What did the ECJ decide?
7. Where are the provisions in the Directive obliging contracting authorities to disclose to tenderers, in advance, the weightings to be applied to the selection stage criteria?
8. Where are the provisions in the Directive obliging contracting authorities to disclose to tenderers, in advance, the weightings to be applied to award criteria?
9. "The Directive requires contracting authorities to open all tenders in public." True or false?
10. When an unsuccessful candidate requests information from the contracting authority asking why it was not selected, within what time period must the contracting authority respond?
11. What information must an authority include in the written report that it is obliged to prepare in accordance with article 43?

MODULE

F

PUBLIC PROCUREMENT TRAINING FOR IPA BENEFICIARIES

Review and remedies; Combating corruption

Review and remedies; Combating corruption

Remedies

MODULE F

PART 1

SECTION 1
INTRODUCTION

Localisation: The structure and much of the commentary is generic and there will need to be adaptations for local use. The notes in green highlight areas where particular attention will need to be paid to local requirements. The notes in green are intended only as an aid to localisation and are not intended to be an exhaustive list of procedures to be followed and issues to be provided for.

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. The remedies available under EU law
2. Methods and principles of dealing with pre-trial complaints and legal action by economic operators at contracting authority level
3. Legal principles and obligations
4. Progress of award procedures during pre-trial complaints as well as during litigation
5. How economic operators view remedies
6. How problems can be avoided

1.2 IMPORTANT ISSUES

The most important issues in this chapter are concerned with the need to ensure that:

- Pre-trial complaints as well as legal action-related requests are dealt with efficiently and quickly by the contracting authorities
- Sufficient time is allowed for remedies-related delays when planning the procurement process
- The existence, conditions and deadlines of pre-trial complaint procedures as well as of legal actions are fully disclosed to economic operators, so that they know their rights in advance and may make use of them at the appropriate times, within the deadlines and before the designated review bodies

This means that it is critical to understand fully:

- What remedies are available to economic operators
- The implications of remedies sought in the course of an award procedure, including delays and interference with contracting decisions
- The approach of economic operators to remedies

If the above are not properly understood, the procurement process may be unduly delayed or even cancelled.

1.3 LINKS

There is a particularly strong link between this section and the following modules or sections

- Module B on organisation at the level of contracting authorities
- Module E2 on advertisement of contract notices
- Module E3 on selection (qualification) of economic operators
- Module E5 on contract evaluation and contract award
- Module E6 on transparency, reporting, informing tenderers, communication with participants of the procedure.

1.4 RELEVANCE

This information will be of particular relevance to those procurement professionals involved in the procurement planning, as they need to calculate delays related to remedies in their expected date of completion of the award procedure. It will also be of particular relevance to procurement officers who are responsible for receiving and deciding on complaints at any point during the award procedure, as well as officers with the power to make procurement decisions and sign contracts.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

Adapt for local use using the format below, including listing the relevant national legislation and the key elements of that legislation. This section may need expanding to reflect particular local requirements relating to setting award criteria. That may include adding information relating to sub-threshold and/or low-value contracts.

Rules on remedies available to economic operators in the course of public sector contract award procedures are found in **Directive 89/665/EEC** as amended by **Directive 2007/66/EC**.

Utilities

Rules on remedies available to economic operators in the course of utilities contract award procedures are found in **Directive 92/13/EEC** as amended by **Directive 2007/66/EC**.

SECTION 2
NARRATIVE

Adapt all of this section using relevant local legislation, processes and terminology.

2.1 INTRODUCTION

Remedies are legal actions available to economic operators participating in contract award procedures, which allow them to request the enforcement of public procurement regulations and their rights under those regulations in cases where contracting authorities, either intentionally or unintentionally, fail to comply with the legal framework for public procurement.

The legal framework on remedies is found in the following directives:

Directive 89/665/EEC regulates remedies available to economic operators during public sector contract award procedures.

Directive 92/13/EEC regulates remedies available to economic operators during utilities contract award procedures.

Both directives were amended by Directive 2007/66/EC. Thus, any reference in this module to Directive 89/665/EEC (or to Directive 92/13/EEC concerning utilities) means as amended by Directive 2007/66/EC.

All directives must be implemented in national law, which provides for the specific procedural rules applying to remedies. Certain procedural rules are provided by the directives themselves, and these rules will be referred to in relevant sections of this module F1.

The aim of the directives on remedies is to allow irregularities occurring in contract award procedures to be challenged and corrected as soon as they occur, and to thereby increase the lawfulness and transparency of such procedures, build confidence among businesses, and facilitate the opening of local public contract markets to foreign competition. The achievement of these objectives is sought by involving economic operators, as prime beneficiaries, in the enforcement of procurement rules and enabling them to demand the observance of their rights to lawful participation in award procedures.

It is important for economic operators to have mechanisms available to them to enforce procurement rules. These mechanisms encourage them to monitor contract award procedures and, eventually, to require that procurement rules be followed so that their chances of being awarded a contract are not unlawfully diminished. Thus these mechanisms both enhance the lawfulness of procedures and encourage competition.

It follows that all national remedies, so as to ensure the enforcement of procurement rules, must be:

- clear and straightforward, *i.e.* understandable and easy to use by economic operators;
- available to all economic operators wishing to participate in a specific contract award procedure without discrimination, in particular on the grounds of nationality;
- effective in preventing or correcting instances of unlawfulness on the part of economic operators and/or contracting authorities.

It also follows, and is of particular relevance for procurement officers, that contracting authorities should not only allow some time, when planning their procurement procedures, for delays and disruptions resulting from remedies filed by economic operators, but should also assist in the rapid and effective resolution of all possible disputes, both:

- before these disputes reach local review bodies (for example, by correcting the irregularity themselves); and
- during litigation (for example, by providing all requested documents and information in good time, to ensure the effectiveness of the review process).

This section will examine the remedies available, who may use them, what are the types of review bodies before which remedies are sought and, most importantly, what is required of contracting authorities and their procurement officers with regard to remedies. As this issue largely concerns local laws, the focus will be on good practice requirements as well as on interaction between contracting authorities and economic operators.

Sub-threshold / excluded contracts

Adapt all of this section for local use – using relevant local legislation, processes and terminology. Briefly set out the requirements of the local legislation for sub-threshold contracts.

Directive 89/665/EEC does not apply to public procurement procedures relating to contracts that are below certain set financial thresholds ('sub-threshold contracts').

Generally speaking, with regard to all contracts that fall outside Directive 2004/18/EC (the Public Sector Directive), including but not limited to sub-threshold contracts, EU Member States are free to introduce their own rules, and thus, if they wish, to make the remedies provided in Directive 89/665/EEC available for all public procurement awards.

In any event, cross-border contracts falling outside the Directive 2004/18/EC are covered by general EU law, such as the EC Treaty rules and principles. Therefore, for all legal action in relation to procurement procedures for such contracts, the basic principles of all remedies to enforce EU rules, *i.e.* the principles of equal treatment, non-discrimination, and effective legal protection of all economic operators, must be respected in all cross-border contracts.

See also module D4 on excluded contracts and module D5 on applicable financial thresholds.

2.2 RIGHT TO USE THE REMEDIES

Adapt this section for local use – using relevant local legislation, case law and terminology.

The remedies are available to any economic operator that has or has had an interest in obtaining a particular contract and that risks or has risked being harmed by an alleged violation of the applicable procurement rules.

This means that all economic operators that have expressed an interest in participating in a contract award procedure – or might have done so if the contract had been advertised – have the right to benefit from the available remedies.

Only an interest in obtaining a particular contract is required of the economic operator (and not a possibility, probability or likelihood of winning the contract) in order to have the right to use the remedies.

Who may be denied the standing to file for remedies (as applicable under local law)?

The standing required to file for remedies may be denied to any economic operator that cannot establish harm as a result of the breach, *i.e.*:

(a) Economic operators that could not possibly have been awarded the contract, for example because they lack the critical technical qualifications, may be denied the right to challenge the contract award.

(b) Economic operators that have not participated in the contract award procedure may not be allowed to challenge contract award decisions. Such decisions cannot possibly affect outsiders to the contract award procedure.

(c) Economic operators that have been excluded at earlier stages of the award procedure (for example at the selection stage) may not have the standing required to challenge decisions taken at later stages of the procedure (for example, the award decision). In particular with regard to the right to challenge the contract award decision, according to article 2a(2) of Directive 89/665/EEC the right to remedies may be denied to those tenderers that have been informed by the contracting authority of the (prior) decision concerning their exclusion and that decision has either been challenged and found lawful or the time limit for challenging the decision has passed. The right to challenge the award decision may also be denied to those candidates that were informed by the contracting authority of the rejection of their applications prior to the notification of the contract award decision. The contract award decision cannot affect economic operators that have been previously and definitively excluded from the procurement process.

(d) Economic operators that remain in the award procedure may not be allowed to challenge at later stages of the procedure any defective decisions that may have been taken at earlier stages of the procedure (for example, at the selection stage), for example by alleging that defects in selection tainted the award decision since the winning tenderer did not actually meet the selection criteria.

(e) Community groups, contractors' trade associations, subcontractors, environmental associations or other interested bodies may not have access to public procurement remedies.

(f) Members of consortia may not be allowed to act individually, *i.e.* local law may provide that only all of the members of a tendering consortium acting together may bring an action and not each member acting on its own. The action can also be dismissed if all members of a tendering consortium act together but the application of one of them is held to be inadmissible. This provision was accepted by the European Court of Justice (ECJ) in case C-129/04 [*Espace Trianon SA and Société wallone de location - financement SA (Sofibail) vs Office communautaire et régional de la formation professionnelle et de l'emploi (FOREM)*, available at http://eur-lex.europa.eu.int/].

Generally, local laws on standing and on representation in legal proceedings are applicable to the extent that they do not interfere with the rule that all economic operators with an interest in obtaining a particular contract and that risk being harmed as a result of a breach of the rules must have access to effective legal remedies.

2.3 TYPES OF REVIEW BODIES

Adapt all of this section for local use – using relevant local legislation, processes and terminology.

Procurement cases are brought before a body that may be either a specialised procurement tribunal or a regular court. EU Member States are free to choose between the two. Such a choice is important, since the speed, cost, outcome and frequency of the use of remedies will depend on it. Briefly, the pros and cons of choosing either (a) the courts or (b) a specialised procurement tribunal are as follows:

(a) Courts

Pros: Courts may have a better knowledge of general law. Also, they are usually better acquainted with methods of interpretation and legal principles and are better able to employ them.

Cons: The procedure before the courts tends to take longer, as they also hear other cases and may lack specialized public procurement knowledge. For this reason, they may possibly be more expensive than specialised tribunals.

(b) Specialised procurement tribunals

Pros: The procedure in specialised procurement tribunals is usually simpler as well as quicker, since they have to deal exclusively with procurement cases. They tend to be more aware of the realities of procurement and more familiar with contract award procedures and related issues.

Cons: The specialised tribunals may not be very familiar with general law or legal principles.

If a specialised procurement review body is chosen, then there should be a right to appeal its decisions to a different independent body, with properly qualified members and at least some procedural rules. Article 2(9) of Directive 89/665/EEC sets out the requirements that such an independent body must meet (refer to 'The Law' section).

Article 2(2) of Directive 89/665/EEC allows for different review bodies to be responsible for different aspects of review. If this is indeed the local choice, usually it is the case that a specialised procurement tribunal hears applications for interim relief and set-asides, and the regular courts hear actions on damages.

2.4 TYPES OF REMEDIES

Adapt this section for local use – using relevant local legislation, remedies and terminology.

In this section we will look at the available remedies. What contracting authorities (and their procurement officers) should do with regard to remedies is dealt with separately in section 2.6 below. In all of the sub-sections to this section, we will examine each type of remedy, addressing the following points:

(a) What does the remedy consist of?;

(b) Where is the remedy brought?;

(c) Procedure;

(d) Measures that can be ordered;

(e) Aim;

(f) Use (from the point of view of the contracting authority and of the procurement procedure).

2.4.1 Complaints before the contracting authority or an authority supervising the contracting authority

To encourage the settlement of disputes without recourse to legal action, local law may require or allow the economic operator concerned, before filing a legal action with the competent review body, to first seek review by lodging an 'application for review' (*i.e.* complaint) with the contracting authority against an alleged infringement in a contract award procedure. Complaints are not legal courses of action as such, as they are submitted prior to the proceedings before review bodies. Depending on the specific facts and circumstances, complaints can lead to enforcement of the law and to quick and early resolution of disputes.

(a) What does the complaint consist of?

A complaint is an application addressed to the contracting authority, containing the economic operator's allegation of an infringement occurring in the course of the contract award procedure and a request for the situation to be reviewed and corrected. Complaints are lodged prior to legal proceedings before local review bodies. The complaint may also refer to the economic operator's right or intention to seek review before the competent review bodies.

Depending on local legislation, complaints may be:

- **optional**, *i.e.* the economic operator may file a complaint, if it wishes, but no consequences are attached to not filing; or
- **compulsory,** *i.e.* the economic operator must file a complaint if it wishes to then proceed with legal action before local review bodies. In such cases, legal action will be dismissed if a complaint has not been filed first, and the procedure and deadlines for such filing are provided for in local law.

According to article 1(5) of Directive 89/665/EEC, if the complaint is compulsory, then its submission results in immediate suspension of the possibility to conclude the contract. Local law may provide that this suspensive effect also applies to optional complaints. The suspension allows the award procedure to go ahead, although the contract cannot be concluded. It is up to the contracting authority to assess whether it is safe to go ahead with the procedure pending review of a complaint or, inversely, whether this may cause future actions or decisions of the contracting authority to be tainted by the unlawfulness of the challenged contracting decision, if it is found to be unlawful. This would also be a matter of local law. It is suggested that it is best, if possible, to wait – see also section 2.6.7 below.

The suspension of the procedure cannot end until 10 calendar days have passed from the day following the date of the contracting authority's reply concerning the complaint, if fax or e-mail was used for this purpose by the contracting authority. If other means of communication were used, the suspension cannot end until 15 calendar days have passed from the day following the date of the contracting authority's reply concerning the complaint or at least 10 calendar days from the day following the date of receipt by the complainant of the contracting authority's reply with regard to the complaint. The same deadlines apply if the contracting authority did not reply to the complaint, and the period of suspension begins on the day following the deadline date by which the contracting authority should have replied but did not.

(b) Where is the complaint brought?

This depends on local legislation. Complaints are generally submitted to the contracting authority, and possibly to a special review panel within the contracting authority that has been designated for this purpose.

(c) Procedure

The complaints procedure depends on local legislation. It can have an informal or formal character (with specific rules applying). If the complaint is a compulsory prerequisite for legal action, then local law will provide for at least some filing requirements and deadlines.

(d) Measures that can be ordered

If the complaint is accepted, the contracting authority will try to correct the breach by undertaking all due actions, for example by allowing an economic operator that fulfils the set selection criteria to remain in the procedure (and thereby correcting an unlawful exclusion decision).

(e) Aim

The aim of pre-trial complaints is to give the economic operator the opportunity to explain its case and to allow the contracting authority the possibility – if it has accepted the complaint – of either convincing the economic operator that no breach has occurred or, alternatively, correcting the breach before the matter reaches the courts.

(f) Use

Complaints can prove to be very useful because they can lead to quick and inexpensive resolution of disputes. In particular where breaches are caused by negligence, the contracting authority usually tries to correct the breach, and thus disputes are resolved quickly and inexpensively for both sides. Alternatively, if no breach has occurred, the contracting authority is given the opportunity to explain this situation to the affected economic operator, presenting the arguments for its position. An adequate explanation may convince the economic operator and prevent further legal action.

There may also be drawbacks to the availability of complaint procedures which in some member states can be time-consuming and not very effective.

2.4.2 Interim measures

(a) What do the interim measures consist of?

Interim measures are provisional measures taken against the contract notice and any contracting decision, including the contract award decision.

Article 2(3) of Directive 89/665/EEC provides that while an application for interim measures is pending against the contract award decision, the contract cannot be concluded until the review body has decided either to authorise or not the application of interim measures (including the further suspension of the conclusion of the contract) or to judge the merits of the case (*i.e.* whether or not to set aside the contract award decision). The suspension is to last at least until the expiry of the standstill period applicable to contract award decisions, examined below under 2.4.4. Applications for interim measures against other contracting decisions do not necessarily, in themselves, have an automatic suspensive effect.

(b) Where are the interim measures brought?

An application for interim measures is brought before the competent local court or procurement tribunal.

(c) Procedure

The procedure for interim measures depends on local legislation, which sets out the filing rules, deadlines, and notifications to other candidates or tenderers. Since the aim of interim measures is to provide a quick provisional resolution to a dispute, the time limits are usually tight. For the same reason, procedural rules (for example, concerning evidence) should be light. Local law must allow for the application for interim relief to be made without requiring a prior application to set aside the contracting decision (C-236/95 *Commission v Greece* available at http://eur-lex.europa.eu.int).

According to article 2c of Directive 89/665/EEC, the deadline for submitting an application for review (therefore also for interim measures) must be at least 10 days from the day following the date on which the contracting authority sent the contracting decision to tenderers or candidates, if fax or e-mail was used. If the contracting authority used other means of communication (such as post) to transmit the contracting decision, the deadline date must be at least 15 days from the day following the date of dispatch of this decision or at least 10 days from the day following the date of receipt of this decision by the tenderers or candidates. If no notification is required (for example, if the dispute concerned specifications set in the contract notice), then the deadline is at least 10 days from the date of publication of the contract notice.

Days are calendar days, not working (business) days. Local law may allow for longer deadline periods.

(d) Measures that can be ordered

The following interim measures can be ordered:

- Suspension of the implementation of any decision taken by the ontracting authority
- Suspension of the whole contract award procedure
- Provisional correction of the breach (this depends on local law and is rather unusual)

(e) Aim

Interim measures aim to prevent the creation of unalterable situations and, before a final decision is reached on whether a contracting decision is unlawful and must be set aside, to avoid the continuation of the contract award procedure without an economic operator that would otherwise have been able to participate and possibly be awarded the contract. (The amending Directive 2007/66/EC provides for automatic suspension of the contract award where legal proceedings are brought.) These aims may only be achieved if the local legal system provides an effective possibility of obtaining interim relief (therefore relevant procedures are neither too complex nor too slow) and if the competent review body is not reluctant to grant interim relief as a matter of principle.

(f) Use

The fact that legal action has been instituted means that the matter is out of the hands of the contracting authority, which can only try to argue its case. It is therefore best that matters are resolved, to the extent that they can be, during pre-trial complaints brought by economic operators. However, applications for interim measures are by far the most useful legal remedy because decisions on such measures are taken rapidly, and therefore economic operators as well as procurement officers may continue relatively quickly with the award procedure.

2.4.3 Setting aside of contracting decisions

(a) What does the set-aside remedy consist of?

The application for the set-aside remedy cancels or renders ineffective a contracting decision taken unlawfully or otherwise corrects an unlawful situation. In particular with regard to the award decision, see below section 2.4.4.

Article 2(3) of Directive 89/665/EEC provides that, while the application for a set-aside remedy is pending against the *contract award decision,* the contract cannot be concluded until either the review body has taken a decision on interim measures or on the merits of the case (*i.e.* on whether or not to set aside the contract award decision). The suspension is to last at least until the expiry of the standstill period applicable to award decisions, examined under 2.4.4 below. Applications for the setting aside of other contracting decisions may not necessarily, in themselves, have an automatic suspensive effect (although interim measures may of course always be applied for and granted).

(b) Where is the application for a set-aside remedy brought?

An application for a set-aside remedy is brought before the competent local court or procurement tribunal.

(c) Procedure

The procedure for a set-aside remedy depends on local legislation, which sets the filing rules, deadlines, and notifications to other candidates or tenderers.

According to article 2c of Directive 89/665/EEC, deadlines to apply for a set-aside must be at least 10 days from the day following the date on which the contracting authority sent the contracting decision to tenderers or candidates, if fax or electronic means was used. If the contracting authority used other means of communication (such as post) to transmit the contracting decision, the deadline date must be at least 15 days from the day following the date of dispatch of this decision, or at least 10 days from the day following the date of receipt of this decision by the tenderers or candidates. If no notification is required (for example, if the dispute concerns specifications set in the contract notice), then the deadline date must be at least 10 days from the date of publication of the contract notice.

Days are calendar, not working (business), days. Local law may allow for longer deadline periods.

(d) Measures that can be ordered

For a set-aside remedy, the following measures can be ordered:

- Removal of discriminatory technical, economic or financial specifications in the contract notice, tender documents or any other document relating to the contract award procedure;
- Annulment of an unlawful contracting decision
- Positive correction of any unlawful document or contracting decision, for example an order of the contracting authority to amend or delete an unlawful clause in the tender documents or to reinstate an economic operator that had been unlawfully excluded.

Local review bodies usually do not review the soundness of the contracting authority's decisions or the way in which the contracting authority reached such decisions. They only examine whether the contracting decision was reasonable or whether the contracting authority committed a serious error (especially whether it obviously misused its discretion in setting a specification, selecting a candidate or awarding a contract). This role is consistent with the aim of Directive 89/665/EEC, which is to allow review bodies to check whether contracting decisions are well-founded and supported by evidence, but not to 're-decide' a contracting decision, which is within the scope of the contracting authority's discretion. Review of reasonableness is particularly important in the context of procedures where the contract is awarded to the most economically advantageous offer, as in that case the discretion of the contracting authority is wide, since it decides and applies the criteria constituting an advantageous offer, and there is therefore a probability of abuse of discretion. However, such a review must be limited to a 'reasonableness' test, as otherwise it might lead to speculative litigation aimed at convincing the review body to second-guess the decision of the contracting authority. Localisation required.

(e) Aim

The aim of set-asides is to correct proven irregularities. It goes without saying that this aim is only achieved if the local legal system provides an effective possibility of cancelling an unlawful specification or contracting decision and if the competent review body reviews the reasonableness of (but not the choices made by) contracting decisions.

(f) Use

For set-asides, as for interim measures, the fact that legal action has been instituted means that the matter is out of the hands of the contracting authority, which can only try to argue its case. The whole procedure, up to and including a decision to set (or not to) aside a contracting decision, can be time-consuming. From the point of view of contracting authorities, therefore, this remedy can cause long delays in their award procedures, which is why it is best if matters can be resolved, to the extent that they can, during the review of pre-trial complaints brought by economic operators. From the point of view of the lawfulness of the award procedure, the set-aside is a useful remedy, as it can correct an infringement, provided that review bodies use their powers reasonably.

Directive 89/665/EEC allows local legislation to stipulate that public procurement contracts that have been concluded may not be set aside in certain cases where an alternative sanction is applied. In that case, the rights of economic operators and the powers of the local review body are limited to asking for, and awarding, compensation to economic operators for any harm caused to them by infringements of the public procurement rules. This provision makes sure that concluded contracts are not affected and that performance can take place immediately following conclusion, notwithstanding any defects of the procedure leading up to the conclusion. However, there have been many instances of abuse of this option by contracting authorities. In particular, contracting authorities have been quick to conclude contracts, knowing that, as soon as they were concluded, such contracts would be allowed to stand, even if the award procedure was unlawful. It was therefore important to provide for the challenging of contract award decisions, so as to ensure that contracts would ultimately be awarded to the tenderer that had made the best offer.

Alcatel case - Judgment of the ECJ on the distinction between award decision and conclusion of contract and on challenging an award decision

(C-81/98, *Alcatel Austria AG and Others, Siemens AG Österreich, Sag-Schrack Anlagen Technik AG v. Bundesministerium für Wissenshaft und Verkehr*, available at http://curia.europa.eu/jcms/jcms/)

Facts

In 1996 the Austrian Federal Ministry of Science and Transport ran an open procedure for the supply, installation and demonstration of hardware and software components of an electronic system for automatic data transmission on Austrian motorways.

Under Austrian law, the contract between the contracting authority and the tenderer was concluded when the tenderer received notification by the contracting authority of the acceptance of its offer. The contracting authority did not have the obligation to notify the other tenderers of its intention to award the contract before it notified the successful tenderer. Therefore other tenderers did not have the opportunity to challenge the award decision before the contract was concluded. Also, in Austria concluded procurement contracts could not be reversed. Unsuccessful tenderers in award procedures in which the award decision was taken unlawfully could only seek compensation.

On 5 September 1996 the contract in question was awarded to one of the tenderers and was signed on the same day. The other tenderers learned of the contract through the press. They then applied to the Austrian Bundesvergabeamt (the Austrian Federal Procurement Office, competent for hearing applications for set-aside and interim measures) to review the award. The Federal Procurement Office requested the ECJ to give a preliminary ruling on several issues concerning the interpretation of Directive 89/665/EC.

The first preliminary question was whether EU Member States were obliged, under Directive 89/665/EC, to provide for the remedies of set-aside and interim measures against the award decision, notwithstanding the possibility provided for in the Directive of limiting the available remedies to compensation for damages after a contract was concluded.

Decision:

The ECJ ruled that Directive 89/665/EC should be interpreted to mean that EU Member States had to ensure that the remedies of set-aside and interim relief could be used against an award decision. According to the ECJ, Directive 89/665/EC sought to reinforce the effective enforcement of the procurement rules, in particular at a stage where infringements could still be rectified. The award decision was the most important contracting decision, and it had to be possible to have it suspended or set aside. Therefore, the award decision and the conclusion of contract had to be distrinct, and the award decision had to be open to challenge, notwithstanding any local rules to the effect that concluded contracts could not be reversed.

The ECJ was silent on the way in which EU Member States should fulfil this obligation and whether there should be a delay between the award decision and the conclusion of the contract or the length of such a delay. Instances of contracts being concluded without any possibility of challenging the award decision beforehand, continued to occur. For this reason, in late 2007, Directive 2007/66/EC was adopted to amend Directive 89/665/EEC (as well as Directive 92/13/EEC on remedies in utilities award procedures). Among other provisions, the new Directive 2007/66/EC set out the requirement for a standstill period between the contract award decision and the conclusion of the contract with the successful tenderer and established the right to challenge the award decision.

2.4.4 Directive 2007/66/EC and the standstill period

Adapt all of this section for local use – using relevant local legislation, processes and terminology.

Directive 2007/66/EC requires public authorities to wait for a certain number of days between the contract award decision and the conclusion of the contract with the successful tenderer. This standstill period allows rejected tenderers to challenge the contracting authority's decision not to award the contract to them, if they think that such a decision was unlawful, and therefore to prevent the contract from being concluded on the basis of an improper award decision.

Not only during the standstill period but also *during legal proceedings*, instituted by means of either an application for interim measures or an application to set aside the contract award decision, *and until the review body* has issued a decision, the contracting authority may not conclude the contract, according to article 2(3) of Directive 89/665/EEC.

Concluded vs signed contracts

It is important for contracting authorities to remember that what is required is to allow for a standstill period before the contract is concluded, *i.e.* before the contract is performed. Signature of the contract is immaterial, especially taking into account that under several legal systems a contract is concluded before it is actually signed, for example when the award decision is notified to the successful tenderer.

According to article 2a(2) of Directive 89/665/EEC, local law may provide that **contracting authorities do not have to observe the standstill period (or notify the award decision) where:**

- the decision is for the award of specific contracts under a framework agreement or a dynamic purchasing system;
- there is no obligation under Directive 2004/18/EC to publish a contract notice;
- there is only one tenderer/candidate left at the award stage of the procedure; in that case, there are no other persons remaining in the award procedure with an interest or right to challenge the contract award decision and to benefit from the standstill period.

If subsequently the derogation from the standstill period is found to be faulty, because either the specific contracts under a framework agreement or dynamic purchasing system have been awarded in violation of the applicable rules or a contract notice should have been published (but was not), the concluded contract is not protected, and review bodies are required to render it ineffective – see below under (d).

(a) Notification requirement

As soon as contracting authorities have made an award decision, they must notify all tenderers or candidates, including unsuccessful ones, of this decision and then allow a certain number of days to pass before they actually conclude the contract. The notification must include a summary of the reasons for this decision, as set out in article 41(2) of Directive 2004/18/EC, and in particular the name of the successful tenderer and the characteristics and relative advantages of the tender selected; certain information may be withheld. For the applicable information requirements under article 41 of Directive 2004/18/EC, see below in section 2.6.3. The exact duration of the standstill period must also be mentioned in the notification, so that tenderers/candidates know how much time they have to challenge the award decision, if they wish to do so.

Tenderers or candidates that were duly excluded or rejected previously do not have legal standing to challenge the award decision, and there is no requirement to notify them of the award decision. On this issue, see section 2.2. above.

(b) Length of standstill period

According to article 2a(2) of Directive 89/665/EEC, the standstill period must last at least 10 days, starting from the day following the date on which the contracting authority sends the notification of the contract award decision to tenderers or candidates, if fax or electronic means is used. If the contracting authority uses other means of communication (such as post) to send the notification of the contract award decision, then the standstill period must last at least 15 days, starting from the day following the date of dispatch of the notification of the contract award decision, or at least 10 calendar days starting from the day following the date of receipt by tenderers or candidates of the notification of the contract award decision.

These standstill periods are only the minimum requirements: local law may provide for longer (but not shorter) periods.

The shorter the standstill period, the more quickly the contract will be concluded, and so contracting authorities may opt to use fax or electronic means such as e-mail to take advantage of the shorter standstill period.

Days are calendar days, not business (working) days.

During this standstill period, rejected tenderers can apply for the review of the award decision, either first by the contracting authority (*i.e.* using a complaints procedure) and/or directly before the review body, asking for interim measures or for the setting aside of the award decision. This choice depends on whether there are pre-trial complaints under local law and whether these complaints are optional or compulsory prior to the use of other remedies.

Good practice note

It is useful to include in the notification material all documents supporting the award decision, such as opinions or recommendations by the tender evaluation panel. Requests for disclosure of supporting documents, as applicable under local law, may lead to an extension of the standstill period.

(c) Direct awards

When a contracting authority considers that it has the right to directly award a contract without publication of a contract notice, then under article 2d(4) of Directive 89/665/EEC, it may publish a simplified notice in the *Official Journal of the European Union (OJEU)* of its intention to award the contract and may also observe a standstill period of at least 10 days starting from the day following the date of publication of the notice before concluding the contract. If this procedure is followed, then the contract may be concluded without any risk of ineffectiveness. There is a new standard form Notice for this voluntary publication which can be accessed from the simap website.

(d) Ineffectiveness of concluded contracts

Article 2d(1) of Directive 89/665/EEC provides that local review bodies are to set aside or otherwise render ineffective a concluded contract when that contract has been concluded:

- **without the contracting authority publishing a contract notice and without running an award procedure**, despite an obligation to do so under Directive 2004/18/EC;
- **without the observation of a standstill period** for the award of specific contracts under a framework agreement or dynamic purchasing system and this award therefore breaches the relevant applicable rules under Directive 2004/18/EC;
- **during the automatic suspension period** when a pre-trial complaint is s ought against any contracting decision or **during the standstill or suspension period throughout legal proceedings against contract award decisions**, if the tenderer claiming to have been harmed is deprived of asking for interim measures or for the setting aside of the concerned contracting or award decision *and* the rules of Directive 2004/18/EC have been breached *and* the concerned tenderer's chances of obtaining the contract have been affected as a result.

The ineffectiveness sanction was adopted to prevent contracting authorities from hastening to conclude contracts, even in violation of the standstill or suspension periods or of basic procurement rules, assuming that they would be immune to any sanctions following conclusion of these contracts. It was intended to incite procurement officials to be very careful when applying the procurement rules. The risk of termination of unlawfully concluded contracts is a serious one. There is also a serious risk that the successful tenderer, for which the contract has been terminated in this way, would seek damages under local contracts law.

The legal action to set aside a signed contract (in the case described above) would be instituted by a tenderer claiming to be harmed as a consequence. Deadlines and procedures for such a request are governed by local law. However, minimum deadlines are 30 calendar days, starting from the day following the date of publication of the contract award notice (this notice must include a justification of the award of the contract without prior publication of a contract notice, if that was the case) or of the notification to tenderers/candidates by the contracting authority of the conclusion of the contract, provided that a summary of the reasons for the award decision were mentioned in the notification (see below in section 2.6.3. the relevant information requirements of Directive 2004/18/EC). Otherwise, deadlines may be extended. If no contract award notice was published or if there was no notification transmitted to tenderers/ candidates, the minimum deadline for legal action against a concluded contract is six months from the day following the date of conclusion of the contract.

These deadlines are only the minimum requirements; local law may provide for longer (but not shorter) periods.

Depending on local law, the setting aside of a signed contract may be retroactive (*i.e.* all contractual obligations, including those already performed, are to be cancelled, and the tenderer and contracting authority must settle their relationship under local rules) or prospective (*i.e.* only future and unperformed contractual obligations may be annulled). In the case of prospective cancellation, there must also be other penalties, such as fines imposed on the contracting authority, in accordance with article 2d(2) of Directive 89/665/EEC.

Unlawfully concluded contracts may be maintained, if the cumulative conditions are not met, *i.e.* breach of the standstill or suspension periods and breach of the rules of Directive 2004/18/EC, *and* possible harm of chances of obtaining the contract. Then, depending on local law, review bodies may have the discretion of deciding not to render ineffective an unlawfully concluded contract.

According to article 2d(3) of Directive 89/665/EEC, discretion may be granted to review bodies if they find that there are overriding reasons related to a general interest in maintaining the contract. This discretion must be used with care, as it is provided as an exception to the general rule that unlawfully concluded contracts must not be maintained.

Economic reasons – such as costs arising from delays in carrying out the project, restarting of the award procedure, changing of the contractor, or damages that may be sought by the successful tenderer of the cancelled contract – cannot be taken into account by review bodies, and contracting authorities therefore should not, and cannot, rely on them.

In cases such as those cited above, where unlawfully concluded contracts are allowed to stand, or in cases where the cancellation of an unlawfully concluded contract applies only for the future, *i.e.* not retroactively, the following alternative penalties must be imposed, in accordance with article 2e(2) of Directive 89/665/EEC:

- **Fines imposed on the contracting authority:** Such fines must be adequately high in order to punish the unlawfulness. Their amount should take into account both the seriousness of the breach as well as the contracting authority's conduct. The harmed tenderer is entitled to ask for compensation in any case.

or

- **Shortening of the duration of the contract.**

2.4.5 Damages

(a) What do damages consist of?

The compensation of economic operators harmed by an infringement of the public procurement rules should be available.

(b) Where is the remedy brought?

Claims for damages are brought before the local review body. Often, even if there is a procurement tribunal, the local review body will hear applications for interim measures and/or set-asides, while the regular courts will hear claims for damages.

(c) Procedure

The procedure for bringing claims for damages depends on local legislation, which sets the filing rules, deadlines, requirements of proof, and extent of compensation (for example, the conditions under which tendering costs can be recovered).

(d) Measures that can be ordered

The measures that are ordered if a claim for damages is successful is the compensation of all harms suffered by the economic operator, which usually includes actual costs incurred and, exceptionally, lost profits. The compensation must be full –however, it is very difficult to establish the extent of the damage suffered in a competitive process.

(e) Aim

This remedy aims to compensate harmed economic operators.

(f) Use

This remedy does not interfere with the contract award procedure, its progress or conclusion. It is of use to economic operators but is not used very often because it is difficult to prove actual harm and therefore difficult to be granted compensation. The award of damages as a result of an irregularity occurring in a contract award procedure would be relevant for the audit of award procedures by local audit bodies.

2.5 GENERAL PRINCIPLES TO BE OBSERVED BY REVIEW BODIES AND CONTRACTING AUTHORITIES WITH REGARD TO REMEDIES

Adapt all of this section for local use – using relevant local legislation, processes and terminology.

The general principles below must be observed by local review bodies as well as by contracting authorities, which are obliged to follow the law (including legal principles) in their procedures.

2.5.1 Non-discrimination

Access to remedies should be open to all economic operators without discrimination, especially on grounds of nationality. Also, remedies to enforce EU public procurement rules and their conditions (procedural rules, such as deadlines and filing requirements) should be at least as favourable as those available to enforce domestic procurement rules. This principle is expressly stated in article 1(2) of Directive 89/665/EC.

The procedural rules themselves are a matter for local law to decide, on condition that the rules of Directive 89/665/EC as well as the legal principle of non-discrimination (and that of effectiveness, examined below) are complied with. If there are no remedies to enforce domestic procurement rules, then remedies for the enforcement of EU public procurement rules only have to comply with the rules of Directive 89/665/EC, as well as with the legal principle of effectiveness, since there is no scope for the application of the principle of non-discrimination.

From the point of view of contracting authorities, the principle of non-discrimination mainly means that they should treat all economic operators in the same manner, in particular with regard to their actions and duties, as set forth in section 2.6. below.

2.5.2 Effectiveness

Remedies must have sufficient power to ensure observance of EU public procurement rules, *i.e.* they must be effective.

This means that contracting authorities should try to facilitate the proper conduct of all legal procedures and should always comply with decisions concerning remedies.

One aspect of remedies that is extremely important in procurement is speed. The importance of speed is stressed in article 1(1) of Directive 89/665/EEC, which states that "decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible...".

In practice, for contracting authorities this means that even if there are no maximum deadlines within which they must respond to requests for information, complaints, etc., they must nevertheless in practice try to ensure speed by giving priority to dealing with such requests and to responding quickly.

More detailed information on the duties of contracting authorities is set forth in section 2.6. below.

2.5.3 Transparency

Transparency in the context of remedies and review procedures means, as far as the contracting authority is concerned, that through the tender documents themselves as well as in the notifications of contracting decisions, maximum information is provided to economic operators on:

- rights to remedies under the law, in particular remedies having to do with the conduct of the award procedure, *i.e.* interim measures and set-aside applications;
- relevant procedural rules, in particular deadlines and names of persons/committees receiving pre-trial complaints within the contracting authority; and
- all information on how contracting decisions were reached, to the extent that this information is relevant to economic operators.

More detailed information on the duties of contracting authorities is set out in section 2.6. below.

2.6 WHAT IS REQUIRED BY CONTRACTING AUTHORITIES WITH REGARD TO REMEDIES?

Adapt all of this section for local use – using relevant local legislation, processes and terminology.

Some of the directions to contracting authorities that follow are legal duties arising from EU Directives or from the case law of the ECJ or the Court of First Instance. However, many of the directions are good practice rules. Where relevant, the applicable EU legal rules will be mentioned.

In many of the areas examined below, there will be local rules applicable to public authorities, defining the due manner of exercising their duties and specifying their powers and obligations in communicating with their counterparts (economic operators, tenderers and contractors), as well as relevant response, disclosure and co-operation rules. All such local rules should be observed.

2.6.1 Notification of available remedies in tender documents

It is very helpful if the tender documents clearly explain the remedies available to economic operators (both pre-trial complaints, if any, and legal actions), by summarising local law and including a reference to the applicable rules.

In particular with regard to pre-trial complaints, the tender documents should mention where to file such complaints (for example, with the competent committee and/or contact person in the contracting authority) and the forms of submission of complaints (for example, if submission of a complaint by fax is allowed).

2.6.2 Drafting of detailed and reasoned contracting decisions

All contracting decisions should set out clearly the grounds, manner and method that provided the basis on which each contracting decision was reached.

This information enables economic operators to understand the contracting decision and to make an informed opinion as to whether the decision was lawfully reached. If they consider that it was unlawful, then a detailed contracting decision would allow them to defend their rights and to prepare a reasoned and relevant complaint or action, which would then possibly allow the contracting authority to correct any involuntary mistakes that it had made. If, on the other hand, the contracting decision was lawful, the fact that it was reasoned and clear would dissuade economic operators from bringing unfounded complaints on the off-chance that the review body might take a different view from that of the contracting authority. As mentioned above in section 2.4.3. on the remedy of set-aside, persons sitting on review bodies, whether they be procurement tribunals or courts, are neither interested in nor empowered to second-guess contracting decisions and only can – or want to – make sure that the law is complied with.

Also, detailed contracting decisions enable supervisory authorities or audit bodies to exercise their duties.

2.6.3 Informing promptly and fully all tenderers or candidates of all contracting decisions (including the decision to abandon the award procedure) and of the general progress of the award procedure

Article 41(1) of Directive 2004/18/EC provides that contracting authorities should inform as soon as possible all candidates or tenderers of all decisions concerning the award of a contract, including the decision (and the underlying reasons) not to award the contract or to restart the procedure. Such a notification requirement should apply to all contracting decisions and therefore include decisions reached at the selection stage as well as other interim contracting decisions. See also module E6 on transparency and communication between the contracting authority and economic operators.

Usually, the time of notification of any contracting decision (including the decision not to award or to restart the procedure) is the starting date for the calculation of deadlines under local laws for the submission of complaints and/or legal remedies. This means that the contracting authority has an interest in notifying all economic operators *as quickly as possible* and at the same time of all contracting decisions so that deadlines start running, in order to see if there are any challenges and, if not, to lawfully proceed with the award procedure or conclusion of the contract or to relaunch the procedure. Economic operators that bring complaints outside such deadlines will normally be time-barred under local laws, and their complaints or legal remedies will be dismissed.

Care should be taken to contact tenderers at their *correct addresses and contact persons*, as stated in their tenders. Failure to observe this simple procedure would normally lead to an extension of deadlines for lack of proper notification.

Article 41(2) of Directive 2004/18/EC imposes a specific obligation on the contracting authority to indicate as soon as possible, on written request from the party concerned, the reasons why an application or tender was rejected. The time for the contracting authority's reply to such a request may not exceed 15 calendar days under any circumstances. See also module E6 on transparency and communication between the contracting authority and economic operators.

Stating the reasons for the decision rejecting a tender

***Adia Interim /Strabag* cases - Judgments of the Court of First Instance (CFI)**

T-19/95 *Adia Interim SA v Commission of the European Communities*, available at http://eur-lex.europa.eu.int/

Facts

The European Commission published an open invitation to tender for the conclusion of a framework agreement with three employment agencies for the supply of agency staff. In the contract notice, three award criteria were set, one of which was price.

Adia Interim was such an employment agency. It was at the time the main supplier of agency staff to the Commission and had worked well with the Commission. Adia Interim placed a tender in response to the contract notice. However, the tender contained a systematic error in the calculation of the offered price, which the selection committee of the Commission detected in the course of assessing the tenders. The Commission did not contact Adia Interim to correct this error. As a result of the error, Adia Interim was placed in tenth position and its tender was rejected. The Commission informed Adia Interim of the rejection of its tender by letter, without stating the reasons for the rejection; it only stated in the rejection letter that "following an in-depth comparative study of the tenders…. the Commission considered that it was unable to accept your proposal". Adia Interim asked by letter to be informed of the reasons for the rejection. The Commission by letter dated 15 days after the rejection letter explained to Adia Interim of the whole selection and award process and informed Adia Interim of the names of the three successful tenderers. However, it did not spell out the exact rejection reason (*i.e.* the calculation error that had made its price more expensive and therefore its tender less competitive than those of other tenderers).

Adia Interim applied to the Court of First Instance (CFI) to annul the Commission's decision rejecting the Adia Interim's tender and to annul the Commission's decision to award the contract to the three successful tenderers, pleading, on the one hand, that the Commission had a duty to state the precise reasons for the rejection in the letter of rejection and that the Commission had breached this duty. Adia Interim pleaded, on the other hand, that the Commission, by not asking it to clarify the systematic calculation error in the tender, had infringed the principles of equal treatment of tenderers and of sound administration.

What is relevant to our analysis is Adia Interim's first plea, *i.e.* the Commission's duty, as the contracting authority, to state the precise reasons for the rejection of Adia Interim's tender in the letter of rejection.

Decision:

The CFI ruled that contracting authorities had an obligation vis-à-vis eliminated tenderers to state the reasons for the rejection of their tenders. However, they would have fulfilled this obligation if they had first immediately informed eliminated tenderers of the fact that their tenders had been rejected, by means of a simple communication that did not set out any reasons, and had subsequently provided tenderers that had made a special request to that effect with a reasoned explanation within 15 days. The fact that tenderers received a reasoned rejection decision only if they had made a special request did not deprive them of legal protection, as deadlines for legal challenges (in the case before the CFI) started after notification of the reasoned decision.

The CFI also ruled that the Commission's second 'reasoned' letter had provided sufficiently detailed reasons for the rejection of Adia Interim's tender to allow the legal challenge of the award decision because it confirmed that the tender was less economically advantageous than the winning tenders.

In Case T-183/00 (***Strabag Benelux NV v Council of the European Union*** available at http://eur-lex.europa.eu.int/), the CFI found that the letter sent by the Council (as contracting authority for a framework agreement for general installation and maintenance works in the Council's buildings in Brussels) to the company Strabag Benelux BV (rejected tenderer for the agreement), stating that the company's tender had ranked highly for the qualitative evaluation criteria but had been unsuccessful because of its price provided an acceptable level of explanation of the reasons for the rejection of Strabag's tender (*i.e.* value not quality). However, that letter did not explain how the ranking had been done.

The amended Directive 89/665/EEC provide in article 2c that the communication of all contracting decisions is to be accompanied by a summary of the relevant reasons. Thus a contracting authority must provide a summary of the reasons for the rejection of an application or tender in the rejection letter itself, even if the candidate/ tenderer did not explicitly request it. For reasons of good practice and in order to comply with the general legal principles of transparency and effectiveness as well as with the rule set forth in article 1 of Directive 89/665/EC that the review of contracting decisions should take place effectively and as quickly as possible, it is recommended that decisions rejecting an application or tender mention the reasons for the rejection *clearly and precisely*.

In the case of the *contract award decision*, according to article 2a(2) of Directive 89/665/EEC, contracting authorities are not only required to notify concerned tenderers/ candidates of the award decision but also to include in the notification a summary of the information set out in article 41(2) of Directive 2004/18/EC, in particular the name of the successful tenderer and the characteristics and relative advantages of the selected tender, before/ without being requested by the concerned tenderer, and in sufficient detail to enable the concerned party to effectively seek review. How to comply with this requirement has to be assessed each time by the contracting authority. The most thorough way (but, to an extent, time-consuming and effort-consuming) is for the authority to compare rejected tenders against the winning tender on the basis of the award criteria. It should be noted that both Directives 2004/18/EC and 2007/66/EC were adopted after, and are stricter than, the CFI's decisions on Adia Interim and Strabag, which had accepted as sufficient information a reference that the rejected tender had been less economically advantageous than the winning tenders (in the case of Adia Interim) or had been more expensive (in the Strabag case).

Mentioning precisely the reasons for the rejection of an application or tender or for the award of the contract to another tenderer/ candidate is required, first of all, because only a clear and precise decision can enable a candidate/tenderer to understand and assess the rejection and to decide which rights are jeopardized and whether or how it will defend them. Secondly, if a contracting authority gives summary information and waits for a special request to state the precise and detailed reasons for rejection and then, by a second communication, states such reasons, it may waste time unnecessarily, since it is likely that candidates/ tenderers will wish and will request to be informed. Also, if this information is adequate and convincing, it is also likely to dissuade a tenderer from pursuing legal action if it is not certain of its grounds.

Article 41(3) of Directive 2004/18/EC allows contracting authorities to admissibly withhold certain information regarding contracting decisions in some restricted cases mentioned in that article. See also module E6 on transparency and communication between the contracting authority and economic operators. Reasons for withholding information linked to prejudice concerning the legitimate commercial interests of economic operators or to fair competition between them are more likely to relate to pre-award circumstances. In post-award circumstances, *i.e.* when the competition is over and at least certain technical characteristics of the winning tender have been made public, contracting authorities would have fewer reasons to withhold information. This essentially means that the reasons for rejecting a tender and in particular the reasons for selecting another tender should always be notified to the rejected tenderer or tenderers (unless commercially sensitive information or trade secrets are involved).

Regarding in particular the decision not to award the contract or to restart the award procedure concerning a contract for which a contract notice has already been published, contracting authorities have the obligation under article 41(1) of Directive 2004/18/EC to inform all candidates or tenderers and to provide reasons for this decision, even without a request by a concerned candidate or tenderer. Therefore, the mere communication that the award procedure has been abandoned or restarted is not sufficient, according to the Directive. The decision not to award must be open to legal challenge, and it must be possible to suspend or annul this decision where appropriate, *i.e.* if it has infringed public procurement law, in the same way as any other contracting decision. Review of the decision to terminate an award procedure should be full and not limited to a mere examination of whether the decision was arbitrary or fictitious (*i.e.* a pretext, hiding a non-stated reason for termination of the procedure).

Review of the decision to abandon the award procedure / extent of review

HI case - Judgment of the ECJ

(C-92/00 *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien*, available at http://eur-lex.europa.eu.int/)

Facts:

The Mayor of the City of Vienna, acting on behalf of the contracting authority, the *Wiener Krankenanstaltenverbund* (Vienna Associated Hospitals), published an invitation to tender for project management of the catering supply in Viennese associated hospitals. After the submission of tenders, including the tender by HI, the City of Vienna withdrew the invitation to tender and informed HI that it had decided to abandon the procedure for compelling reasons. Namely, it was decided to develop the project in a decentralised manner, without the need for an outside project manager. HI then brought a number of claims, seeking, among other actions, the annulment of the withdrawal of the invitation to tender. The review body (the *Vergabekontrollsenat des Landes Wien*, *i.e.* the Public Procurement Review Chamber of the Vienna Region) requested the ECJ to give a preliminary ruling on several questions concerning the interpretation of Directive 89/665/EC, including whether that directive required the review of a decision of a contracting authority to cancel an award procedure and allowed the possibility of setting aside that decision, as well as whether the review could be limited to an examination of whether the cancellation of the award procedure was arbitrary or fictitious.

Decision:

The ECJ ruled that Directive 89/665/EC required that the decision of the contracting authority to withdraw an invitation to tender would have to be open to a review procedure and that the decision could be annulled where appropriate, on the grounds that it had infringed Community law on public contracts or national rules implementing that law.

The ECJ also ruled that the scope of the review of the decision to cancel an award procedure could not be limited to a mere examination of whether the decision was arbitrary. It had to be a full review, allowing the local review body to assess the compatibility of that decision with the relevant EU rules.

The ECJ referred to all legal principles (examined in section 2.5. above) in its decision (principles of equal treatment, transparency and effectiveness).

See also ECJ case C-15/04 *Koppensteiner GmbH v Bundesimmoliengesellschaft mbH*, available at http://eur-lex.europa.eu.int/.

Good practice note – Form of communication

Contracting authorities should communicate with tenderers/ candidates in writing in the interests of the principle of transparency as well as for record-keeping.

The *time limits* for challenges of notified contracting decisions should be communicated. This communication is only compulsory for the contract award decision, but it is good practice to communicate this information in all cases.

Contracting authorities should try, whenever possible, to use *fax or e-mail* to notify tenderers/ candidates of contracting decisions, so that they are informed of all decisions at the same time and that no time is lost in sending/ receiving documents. Often under local law the deadline date for receipt of documents is the starting date for the setting of deadlines for legal challenges (thus the earlier the receipt, the sooner the deadline will expire). Note that, as mentioned above, normally this would only be true if the notified contracting decision also stated specifically and precisely the reasons for the rejection of an application or tender, and otherwise deadlines would only be set once such reasons were duly notified.

In the case of the award decision, notification by e-mail or fax may mean that the shorter deadline for challenging the decision applies (10 days as opposed to 15, if notified by post), depending on local law.

With regard to informing candidates or tenderers of the general progress of an award procedure even if it was not contained in a contracting decision, see in module E6 the discussions on transparency and communication in the Embassy Limousine case (T-203/96, judgment of the Court of First Instance available at http://eur-lex.europa.eu.int/).

2.6.4 Providing all supporting documentation on all contracting decisions

The provision of supporting documentation is actually a duty linked to that of drafting reasoned and detailed decisions (such decisions should contain all elements showing how they were reached) and providing full information to all economic operators of all contracting decisions. Contracting authorities must provide all supporting documentation relevant to the contracting decision together with the notification to economic operators of the contracting decision. Supporting documentation includes opinions or recommendations by procurement officers, which served as a basis for the decision made by the decision-making officer, committee or body, subject to applicable disclosure rules and article 41(3) of Directive 2004/18/EC.

Contracting authorities should also respond promptly to requests by economic operators for disclosure of supporting documentation. Such requests are usually made and the relevant duty of the contracting authority applies:

- before the economic operator lodges a complaint; providing all documentation at this stage helps the economic operator to decide whether or not to lodge a complaint and also prevents allegations of withholding documents, obstructing use of remedies, etc.;
- during a complaint brought by an economic operator; often joined to complaints is a request for disclosure of documents;
- during litigation; requests for disclosure at this stage may come from the economic operator bringing the legal action or from the competent review body.

2.6.5 Providing access to other tenders – Localisation required

To enable economic operators to assess whether or not they have reasons to challenge contracting decisions, it may be regarded as good practice to provide them with the opportunity to check, at every stage of the contract award procedure, the terms of other applications/ tenders. They should therefore be granted access to the applications of other economic operators, as well as to their tenders, with the exception of information that is marked by the submitting economic operator as commercially sensitive. Regarding such commercially sensitive information, as suggested in module E6, contracting authorities should make the disclosure of certain information a condition of participation in the contract award procedure and require economic operators to designate only particular parts of their tender as confidential, so as to allow review of the other parts by other economic operators.

Where member states allow for such access then the terms of access to applications/ tenders of other economic operators should, ideally, be stated in the contract notice, for example the contracting authority could set a specific date, following the opening of the applications/ tenders, on which it would allow economic operators to inspect the applications/ tenders of other operators. Usually, a representative of each economic operator, possibly accompanied by a lawyer, would attend. A procurement officer of the contacting authority should also be present.

2.6.6 Replying to all pre-trial complaints and replying quickly

It may be that under local laws there is no legal requirement as such to reply to a pre-trial complaint. In such cases, the law would usually provide that if a certain period of time passed without a reply, then the complaint is considered to have been tacitly rejected and the economic operator that had submitted the complaint would be able to proceed with legal action. Notwithstanding such a lack of obligation, it is good practice and serves the purpose of sound administration to reply to all complaints within the period of time set for reply (or, as explained above, tacit rejection would apply). One reason for this practice is that if the reply is convincing, economic operators may not try to pursue the matter further before review bodies, not least because a convincing reply would also persuade the review body, which is not usually empowered to re-decide in the contracting authority's place but only seeks to be assured that the law has been followed. If economic operators do pursue the matter further, the response to the complaint will help the review body to understand the case and reach a decision. Also, responding to complaints is a good exercise for contracting authorities, which may find, when they examine the complaint in depth in order to reply, an irregularity that they had not noticed and can still correct (or they can make a note of avoiding such an error in the next award procedure).

Naturally, contracting authorities should respect all applicable local maximum deadlines for responding to complaints. However, even if there are no such deadlines, the competent procurement official should try to prioritise responses to these complaints and to act as quickly as possible.

2.6.7 Suspending the award procedure while a contracting decision is being challenged

We have seen that after an application for interim measures or application to set aside the contract award decision has been filed, the contract cannot be concluded until the review body has decided on the application. For other contracting decisions this is not a requirement under Directive 89/665/EEC; it may nevertheless be the case that local law provides for the suspension of contract award procedures during legal action.

In any event, also with regard to challenges to contracting decisions other than the contract award decision, proceeding with an award procedure before a review body has decided on applications pending before it, may lead to situations where, if the legal action succeeds, the unlawful contracting decision will have tainted the whole procedure. It is up to the contracting authority to assess whether going ahead with the procedure pending review of a complaint is safe or, inversely, whether this may cause future actions or decisions of the contracting authority to be tainted by the challenged contracting decision if it is found to be unlawful.

2.6.8 Notifying tenderers of the contract award decision and of the exact standstill period and observing the standstill period

This obligation is self-explanatory. Contracting authorities should comply with the relevant rules of Directive 89/665/EEC as amended in these respects by Directive 2007/66/EC. It should be kept in mind that contracts concluded in violation of the standstill period may be declared to be ineffective.

2.6.9 Complying with decisions on remedies

This is obvious, but all contracting authorities must comply strictly with all legal decisions and not try to work around them, as this would probably lead to more legal actions and further delays in the conclusion of the award procedure. It would also entail the risk of disciplinary action against the officials involved. EU Member States have an obligation to ensure the enforcement of decisions on remedies under article 2(8) of Directive 89/665/EEC.

2.7 DEFINING THE OVERALL STRATEGY FOR AN EFFICIENT AWARD PROCEDURE: MAIN POINTS THAT A CONTRACTING AUTHORITY SHOULD KEEP IN MIND

The following is a checklist of points that concern the efficient preparation of an award procedure and the minimisation of challenges.

2.7.1 Good preparation

This goes without saying, but the better the preparation of the award procedure, the less likely it is to be challenged. All steps and procedures must be followed, in particular steps mentioned in module E. It is particularly important to have very well thought out the procurement in advance so as to accurately reflect in the contract notice and tender documents the specifications, selection and award criteria, and documentation to be submitted by economic operators as evidence, as well as the procedure to be followed (not only the type – *i.e.* open, restricted, negotiated, etc. – but also the precise steps of each procedure). Then it will be a matter of the procurement officers following the law and the tender documents.

The simpler and clearer these documents are, the better. If the contract award procedure is carefully planned and implemented and the procurement rules are strictly followed, there will be few grounds for economic operators to complain or for review bodies to make a finding of unlawfulness. This does not mean that complaints by economic operators will be avoided entirely, as there may always be a question or doubt as to whether the rules were correctly interpreted, if the contracting assessments and decisions of the contracting authority were sound and/or lawful, etc., but if the contract award procedure is lawful and the contracting authority tries to remain available to explain this award to economic operators (see below in section 2.7.2.) it is possible to avoid, or at least minimise, legal actions before review bodies.

Good preparation is also relevant from the point of view of the relationship between contracting authorities and economic operators. Economic operators sometimes threaten to bring, and may actually bring, legal action, hoping that they can reach an arrangement with the contracting authority so as to secure work in exchange for dropping the claim. Such conduct is less likely when there are no significant uncertainties about the details of the contract award procedure or about compliance with the law, as legal action is unlikely to succeed and therefore unlikely to be effectively used as a threat.

2.7.2 Availability

Contracting authorities should try to keep all economic operators informed of the progress of the award procedure, answer their queries (in compliance with the law) and, in the event that their decisions are challenged, respond quickly and in detail to complaints and refrain from doing anything that could jeopardise the outcome of legal action.

All inefficiencies lead invariably to increased challenges, delays and possibly cancellation of award procedures. It does happen that economic operators initiate a case because they could not obtain adequate responses from contracting authorities.

2.7.3 Planning ahead

Challenges, if brought, lead to delays in the awarding of contracts. Contracting authorities should calculate these possible delays so that they are able to obtain their contracts when they need them. Contracting authorities should bear in mind that the contract notice and tender documents can be challenged and subsequently all contracting decisions (selection and award) as well. In a MEAT (most economically advantageous tender) procedure, there may be more challenges (in number) because the application of the award criteria is more open to interpretation.

2.7.4 Appointment of competent procurement officials

It is very important that competent and trained procurement officers are appointed, at least as leaders, assisted by less experienced staff. On this issue refer in particular to modules B1 and B2.

2.8 HOW DO ECONOMIC OPERATORS APPROACH REMEDIES?

Economic operators that have an interest in a contract want to obtain it. They are therefore more interested in pre-trial complaints (for which they may not even use lawyers and which may thus not be expensive to lodge) or interim measures, *i.e.* courses of action that can quickly correct irregularities in a contract award procedure and allow economic operators to compete fairly for the contract. As discussed in section 2.6.6., if an economic operator obtains a reasoned reply to its pre-trial complaint filed with the contracting authority, it may not pursue the matter further. If it does not obtain a reasoned reply or any reply at all or if it does not receive documents relevant to contracting decisions, the disclosure of which it has requested from the contracting authority, it would at least consider legal action. Depending on the characteristics of the local review system and the economic operator's particular case (*i.e.* cost and duration of proceedings and likelihood of success), it may also proceed to request disclosure, suspension and annulment of the contracting decision that it considers to have been harmful and/ or suspension and annulment of the contract award procedure.

Seeking or not seeking damages will depend on the local review system and on the facility to obtain compensation, as well as on the cost of legal advice. In any event, economic operators are primarily interested in obtaining work, *i.e.* contracts. See module H, which has been prepared for economic operators.

UTILITIES

Adapt all of this section for local use – using relevant local legislation, processes and terminology.

Directive 92/13/EEC (amended by Directive 2007/66/EC) provides that the three remedies of interim measures, set-aside and damages must be available to any economic operator that has or has had an interest in obtaining a particular contract and that has been at risk or risks being harmed by an alleged violation of the applicable procurement rules, and therefore to any economic operator that has expressed an interest in participating in a contract award procedure or that might have done so if the contract had been advertised.

Directive 92/13/EEC gives EU Member States the option, instead of interim measures and the setting aside of unlawful decisions, of providing for the payment of a sum (such as a fine) when a breach of procurement rules occurs. This sum must be sufficiently high to dissuade contracting entities from committing (or assisting) a breach.

The standstill period, the obligation to notify concerning direct awards, and the sanction for ineffectiveness of contract also apply in the case of utilities.

SECTION 3
EXERCISES

Check each exercise for local relevance and adapt accordingly.

EXERCISE 1
ROLE-PLAY PREPARATION

Municipality Y is about to start a restricted procedure to procure digitisation services for the municipal library. It is known that the procedure will be very competitive, as several specialised IT companies are interested in the contract. To the extent it can, the Municipality would like to avoid litigation against the contract award procedure, and asks you, in your role as procurement officer, to advise on how best to avoid or minimise litigation and/or related delays.

1. The Municipality is considering using electronic or postal communication in its notifications of contracting decisions to tenderers. You are requested to advise on deadline implications.
2. Local law provides for a compulsory pre-trial complaints procedure, *i.e.* aggrieved tenderers must seek review with the contracting authority before they proceed with legal action. Under local law, if the contracting authority does not reply to the complaint within 10 days from its receipt, then such complaint is deemed to have been tacitly rejected and deadlines for legal action start to run. The Municipality anticipates receiving complaints due to the competitiveness of the award procedure, but is short on staff. Therefore, it is already considering allowing the 10-day reply deadline to lapse without replying to complaints it does not consider valid, in order not to allocate resources to such a task. You are requested to advise on deadline and
litigation implications.

EXERCISE 2

The Ministry of Culture is running a restricted procedure for the supply of books and provision of related library services to equip 25 museum libraries across the country. At the award stage, when the tender evaluation committee reviews the tenders of the selected tenderers, it discovers that, due to a mistake in the drafting of the tender documents, there is a discrepancy between the instructions to the tenderers in the tender documents and the electronic calculation tables, used for computation of the offered quantities and prices and included (as CD-ROMs) in the tender documents and filled in by tenderers as part of their tender. The discrepancy would lead to the rejection of most tenders as non-compliant, through no fault of the tenderers.

The Ministry of Culture is particularly keen to conclude the contract with the remaining tenderer, because it has obtained approval for a subsidy, which it will lose if the contract is not signed and performed in the relevant calendar year, and it cannot afford to cancel the award procedure and rerun it on the basis of corrected tender documents. The head of the tender evaluation committee asks you, in your role as procurement compliance officer, a number of questions.

1. The Ministry of Culture wishes to notify all tenderers of the contract award decision and immediately conclude the contract with the successful tenderer -if possible, on the same day as notification. Under local law, concluded contracts cannot, in principle, be reversed. You are requested to advise.
2. The Ministry of Culture, while wishing to notify tenderers of the contract award decision, does not wish to explain to them the way in which it has reached this decision, because it does not want to publicise its mistake. You are requested to advise.
3. The head of the tender evaluation committee asks whether the contract, if concluded immediately upon notification of the award, would be allowed to stand, on the ground that the approved subsidy would be lost if the contract is not concluded and performed within a set deadline (the end of that calendar year). The Ministry of Culture has documents proving the deadline and the sanction of losing the subsidy if the deadline is exceeded, as well as the impossibility to ask for an extension.

EXERCISE 3

The association of municipalities of a large city has run a restricted procedure to award the building and operation of a factory to treat the city's waste. It has reached the decision to award the contract to one of the tenderers and, as required under the law, has notified all tenderers of it, providing a summary of the relevant reasons and mentioning the exact standstill period. Because of the size and desirability of the contract due to its profit margins and the experience it offers, the association has already received several pre-trial complaints. The association considers that most complaints are inadmissible but would like to expressly reject them and provide clear reasons for such rejections, as a matter of good practice and sound administration but also to assist auditing procedures, which are likely to be strict due to the sheer size of the contract. You are requested to advise on a number of related questions in your role as procurement officer.

1. A waste treatment company that has not participated in the contract award procedure lodges a complaint, alleging defects in the assessments of the tender evaluation committee at both the selection and award stages and asking for the procedure to be cancelled.

2. A tenderer who was qualified at the selection stage but whose tender was unsuccessful has lodged a complaint against the contract award decision, alleging that the successful tenderer had not submitted sufficient proof of its past experience, which was one of the selection criteria. The tenderer claims that it refrained from challenging the selection decision, which was duly notified to all economic operators who had submitted expressions of interest, in order not to delay the award procedure.

3. A tendering consortium that qualified at the selection stage was unsuccessful; its tender ranked fourth. Out of its three members, two are local companies that work on a number of projects with the city. The third is a foreign company that participated in the consortium because it was eager to enter the country's waste treatment market, which has only recently started to develop and is likely to offer lots of business opportunities. There are doubts as to whether the award criteria were correctly applied as regards weighting of life cycle costs. The two local companies do not wish to lodge a complaint, because they do a large part of their business with several of the municipalities involved and feel that a complaint will harm their relationship with such municipalities. The foreign company wishes to lodge a complaint because it has allocated resources to the preparation of the complaint and considers that it has some valid grounds to ask for the setting aside of the contract award decision. In the end, the foreign company lodges the complaint on its own.

SECTION 4
THE LAW

Adapt all this section using relevant local legislation, processes and terminology.

This section presents and summarises the articles of Directive 89/665/EEC, as amended by Directive 2007/66/EC, on remedies available to economic operators during public sector contract award procedures. It also presents and summarises article 41 of Directive 2004/18/EC regarding provision of information to economic operators.

1. DIRECTIVE 89/665/EEC, AS AMENDED BY DIRECTIVE 2007/66/EC

Adapt all this section for local use – using relevant local legislation (including secondary legislation) and terminology.

Recital 3 (of Directive 89/665/EC) - refers to the requirement of transparency and non-discrimination in order for public procurement to be opened up to Community competition and to the requirement of rapid and effective remedies to achieve this goal.

Article 1 - Scope and availability of review procedures – explains that this Directive applies to all contracts falling within the scope of (and not excluded from) Directive 2004/18/EC, *i.e.* public contracts, framework agreements, public works concessions and dynamic purchasing systems. It also lays down some basic rules applicable to review procedures as follows:

Paragraph 1 (third sub-paragraph) provides that all decisions taken by the contracting authorities must be reviewed effectively and, in particular, as rapidly as possible, to assess if such decisions have infringed Community public procurement law or national rules transposing that law.

Paragraph 2 refers to the principle of non-discrimination.

Paragraph 3 provides that the review procedures must be available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement (of the applicable rules).

Paragraph 5 allows Member States to require that the person concerned first seek review with the contracting authority. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract. The suspension shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting authority has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of either at least 15 calendar days with effect from the day following the date on which the contracting authority has sent a reply, or at least 10 calendar days with effect from the day following the date of the receipt of a reply.

Article 2 - Requirements for review procedures - sets forth the exact types of remedies which must be (at least) available and certain rules on Member Sates obligations or options regarding organisation and structure of the local remedies system, as follows:

Paragraph 1 provides that remedies must include powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

Paragraph 2 allows separate bodies to be responsible for different aspects of the review procedures.

Paragraph 3 provides that when a body of first instance reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period.

Paragraph 4 provides that other review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

Paragraph 5 allows Member States to provide that the review body may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.

Paragraph 7 allows Member States to provide (except where a decision must be set aside prior to the award of damages) that concluded contracts are irreversible, unless the sanction of ineffectiveness is imposed in accordance with articles 2d to 2f of the Directive). In such cases, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

Paragraph 8 sets forth an obligation on Member States to ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

Paragraph 9 sets forth a series of obligations when the bodies responsible for review procedures are not judicial in character: such bodies must provide written reasons for their decisions, there must exist appeal procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it may be reviewed by a court or tribunal independent of both the contracting authority and the review body, members of such court or tribunal must be appointed and leave office under the same conditions as members of the judiciary, at least the president of such court or tribunal must have the same legal and professional qualifications as members of the judiciary, the procedure followed before such court or tribunal must be contradictory (*i.e.* both sides must be heard) and its decisions shall be legally binding.

Article 2a - Standstill period - sets forth requirements applying to the standstill period. In particular:

Paragraph 2 provides that a contract may not be concluded following its award before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

Candidates shall be deemed to be concerned if the contracting authority has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned. The communication of the award decision to each tenderer and candidate concerned shall be accompanied by:

– a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive (which allows contracting authorities to withhold certain information), and,

– a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.

Article 2b - Derogations from the standstill period - provides that Member States may provide that the standstill period does not apply in the following cases:

(a) if Directive 2004/18/EC does not require prior publication of a contract notice in the Official Journal of the European Union;

(b) if the only tenderer concerned is the one who is awarded the contract and there are no candidates concerned;

(c) in the case of a contract based on a framework agreement or on a dynamic purchasing system.

If this derogation is invoked, Member States shall ensure that the contract is ineffective where:

- there is an infringement of the second indent of the second subparagraph of Article 32(4) or of Article 33(5) or (6) of Directive 2004/18/EC (*i.e.* call-off contracts are not awarded according to the applicable rules), and
- the contract value is estimated to be equal to or to exceed the minimum thresholds (set out in Article 7 of Directive 2004/18/EC).

Article 2c -Time limits for applying for review - provides that where a Member State provides that any application for review of a contracting authority's decision taken in the context of, or in relation to, a contract award procedure must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of the receipt of the contracting authority's decision. The communication of the contracting authority's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for review concerning decisions that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.

Article 2d – Ineffectiveness - provides for the sanction of ineffectiveness, if certain conditions are met. In particular:

Paragraph 1 provides that a contract shall be considered ineffective by a review body independent of the contracting authority or that ineffectiveness shall be the result of a decision of such a review body in any of the following cases:

(a) if the contracting authority has awarded a contract without prior publication of a contract notice in the Official Journal of the European Union without this being permissible in accordance with Directive 2004/18/EC;

(b) if any of the following are not respected:

– the automatic suspensive effect of an application for pre-trial review (article 1(5) of the Directive), an application for interim measures or set aside against the contract award decision (article 2(3) of the Directive) or the standstill period (article 2a(2) of the Directive),

– if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies and, in addition, is combined with an infringement of the public procurement rules of Directive 2004/18/EC and has also affected the chances of the tenderer applying for a review to obtain the contract;

(c) if Member States have invoked the derogation from the standstill period for contracts based on a framework agreement or a dynamic purchasing system (and the call-off contracts are awarded in breach of the applicable rules and also exceed the thresholds).

Paragraph 2 allows national law to regulate the consequences of ineffectiveness by either providing for the retroactive cancellation of all contractual obligations or by limiting the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties provided in article 2e(2) of the Directive such as fines.

Paragraph 3 allows Member States to provide that the review body may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained. In this case, Member States shall provide for alternative penalties within the meaning of Article 2e(2), such as fines or shortening of the duration of the contract.

Paragraph 3 specifies that economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences. However, economic interests directly linked to the contract concerned (including the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness) shall not constitute overriding reasons relating to a general interest.

Paragraph 4 allows contracts awarded without prior publication of a contract notice to be free from the risk of ineffectiveness, if:

- the contracting authority considers that the award of a contract without prior publication of a contract notice is permissible;
- the contracting authority has published in the Official Journal of the European Union a notice expressing its intention to conclude the contract, and,
- the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

Paragraph 5 allows call-off contracts based on a framework agreement or a dynamic purchasing system to be free from the risk of ineffectiveness, if:

- the contracting authority considers that the award of a call-off contract is in accordance with the applicable rules,
- the contracting authority has sent a contract award decision, together with a summary of reasons and a statement of the exact standstill period, to the tenderers concerned, and,
- the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned if fax or electronic means are used or, if other means of communications are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Article 2e - Infringements of this Directive and alternative penalties - provides that in case of an infringement of the automatic suspensive effect of an application for pre-trial review (article 1(5) of the Directive), an application for interim measures or set aside against the contract award decision (article 2(3) of the Directive) or the standstill period (article 2a(2) of the Directive) not covered by Article 2d(1)(b), Member States may provide, instead of ineffectiveness, for alternative penalties. In particular:

Paragraph 1 allows Member States to provide that the review body shall decide (*i.e.* choose), after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.

Paragraph 2 sets forth an obligation for these alternative penalties to be effective, proportionate and dissuasive. They shall be:

- the imposition of fines on the contracting authority; or,
- the shortening of the duration of the contract.

Member States may confer on the review body broad discretion to take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting authority and the extent to which the contract remains in force.

The award of damages does not constitute an appropriate penalty for the purposes of this paragraph (and is anyway open to harmed economic operators).

Article 2f - Time limits - provides that Member States may provide the request for a contract to be rendered ineffective must be made:

(a) before the expiry of at least 30 calendar days with effect from the day following the date on which:

- the contracting authority published a contract award notice, provided that this notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the Official Journal of the European Union, or
- the contracting authority informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contains a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive.

(b) and in any case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.

Article 3 of the Directive concerns the Commission's powers as regards enforcement of the public procurement rules.

Article 3a concern the contents of the voluntary notice expressing a contracting authority's intention to conclude a contract, when such contract was awarded without prior publication of a contract notice and the contracting authority considers that the award of a contract without prior publication of a contract notice is permissible. This voluntary notice, if complied with along with the standstill period of 10 days following publication, allows the concluded contract to be immune from the sanction of ineffectiveness.

The rest of the articles of the Directive concern Commission or monitoring procedures, as well as the amendment of Directive 92/13/EEC on remedies in the context of utilities contract award procedures.

2. **THE FOLLOWING ARTICLE OF DIRECTIVE 2004/18/EC IS ALSO RELEVANT:**

Adapt this section for local use – using relevant local legislation (including secondary legislation) and terminology.

Article 41 – Informing candidates and tenderers - establishes that contracting authorities must inform unsuccessful economic operators about the reasons for their rejection. In particular:

Paragraph 1 provides that contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or implement a dynamic purchasing system; that information shall be given in writing upon request to the contracting authorities.

Paragraph 2 provides that upon request from the party concerned, the contracting authority shall as quickly as possible inform:

- any unsuccessful candidate of the reasons for the rejection of his application,
- any unsuccessful tenderer of the reasons for the rejection of his tender, including the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,
- any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement.

The time taken may in no circumstances exceed 15 days from receipt of the written request.

Paragraph 3 allows contracting authorities to withhold certain information referred to in paragraph 1, regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system where the release of such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between them.

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

Check each question for local relevance and adapt accordingly.

1. Is it permitted to deny the right to challenge a contracting decision (for example, the selection decision) to an economic operator who could have, but did not, participate in the award procedure?
2. Is it permitted to deny the right to challenge a contracting decision (for example, the award decision) to an economic operator who was excluded in a previous stage of the award procedure (*e.g.* at the selection stage)?
3. Is the answer to Question 2 the same if the economic operator was (a) lawfully or (b) unlawfully excluded?
4. What are the types of remedies that a state is required to make available?
5. Is it compulsory to provide for pre-trial complaints?
6. Is it permitted to continue with the award procedure after an application for a pre-trial complaint has been filed and before the decision on it is issued?
7. After an application for a pre-trial complaint has been filed, under which conditions can the contracting authority conclude the contract?
8. Must a contracting authority reply to a pre-trial complaint?
9. What is the effect of asking for interim measures or the set-aside of the contract award decision?
10. When we refer to a "concluded" contract, do we mean a "signed" contract? If not, what do we mean?
11. What is the minimum standstill period? Is the minimum length always the same? On what does such minimum length depend?
12. Must the standstill period be expressly mentioned in the communication of the contract award decision to a tenderer or candidate? Is it sufficient if the standstill period is expressly mentioned in the tender documents?
13. What is the effect of a violation of the standstill period on concluded contracts?
14. Are there any exceptions to the sanction of ineffectiveness of contracts concluded in violation of the standstill period? If so, what are they?
15. Is prospective cancellation (*i.e.* annulment of only future and unperformed contractual obligations) of an ineffective contract sufficient, or must the concerned state provide for additional penalties? If yes, what do such penalties consist of and on whom are they imposed?

16. Is there an obligation on contracting authorities to notify tenderers of the progress of the contract award procedure, even if no formal contracting decision is issued?
17. Is it compulsory to allow the decision to terminate the award procedure (without awarding the contract) to be challenged?
18. When a contracting decision is communicated to a tenderer or candidate, must it be accompanied by a summary of the relevant reasons, or does this depend on whether the tenderer or candidate asks for such a summary?
19. What is the likely consequence of omitting to inform tenderers or candidates fully as regards the reasons and grounds for a contracting decision?
20. What is the main difference as regards remedies available to economic operators in the context of public sector award procedures as opposed to utilities award procedures?

USER NOTE FOR INTEGRITY IN PUBLIC PROCUREMENT MATERIALS

This note is to assist users in navigating the materials on preventing corruption and safeguarding integrity in public procurement developed by the OECD Integrity Unit of the Public Governance and Territorial Development Directorate.

1. Principles for Enhancing Integrity in Public Procurement

These Principles were adopted as an OECD Recommendation in October 2008. They reflect a consensus on good practice amongst OECD Member and non-Member countries. The Principles are unique policy instrument that guides governments' practice in **preventing waste, fraud and corruption in the entire procurement cycle** from needs assessment to contract management and payment. The Principles are structured around **four pillars**: transparency, good management, prevention of misconduct, and accountability and control.

- **Checklist: Enhancing integrity at every step of the procurement cycle**

The Checklist provides policy tools to implement the Principles. It provides guidance to practitioners at every stage of the cycle on how to detect fraud, mismanagement and corruption.

- **Risk Mapping: understanding the risks of fraud and corruption in the procurement cycle**

The report equips procurement practitioners with an understanding of the type of risks they may face throughout the procurement cycle. It contains an inventory of "real-life" techniques used to misappropriate funds and also explores various types of fraud that have been uncovered.

2. Toolbox to safeguard integrity in procurement cycle

The Toolbox helps countries put the Principles into daily practice. The tools collected support public officials in designing and developing guidance and procedures to enhance integrity, transparency and accountability in their procurement systems, including tools to ensure integrity in accelerated procurement procedures. The OECD Global Forum on Public Governance: Building a Cleaner World: Tools and Good Practices for Fostering a Culture of Integrity held in Paris in May 2009 also served to collect good practice and tools from experts from Member and non-Member countries.

The Toolbox is a living on-line document that captures emerging good practices in OECD and non OECD countries. For more information http://www.oecd.org/governance/procurement/toolbox

3. Integrity in Public Procurement: Good practice from A to Z

The report is a compilation of good practices in both OECD Member and non-Member countries. The information was collected through a survey primarily targeting procurement practitioners in central governments. Based on the survey, good practices were identified by government officials, representatives from civil society and the private sector in the OECD Symposium on Mapping Out Good Practices for Integrity and Corruption Resistance in November 2006.

OECD Principles for Integrity in Public Procurement

OECD

OECD Principles for Integrity in Public Procurement

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

The OECD is a unique forum where the governments of 30 democracies work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

The OECD member countries are: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The Commission of the European Communities takes part in the work of the OECD.

OECD Publishing disseminates widely the results of the Organisation's statistics gathering and research on economic, social and environmental issues, as well as the conventions, guidelines and standards agreed by its members.

Also available in French under the title:
Principes de l'OCDE pour renforcer l'intégrité dans les marchés publics

Corrigenda to OECD publications may be found on line at: *www.oecd.org/publishing/corrigenda*.

Foreword

At the OECD Symposium and Global Forum on Integrity in Public Procurement in November 2006, participants called for the creation of an international instrument in order to help policy makers reform public procurement systems and reinforce integrity and public trust in how public funds are managed.

Two years later, OECD countries demonstrated their commitment to take action in this major risk area by approving the Principles for Enhancing Integrity in Public Procurement *in the form of an OECD Recommendation. This Recommendation is a policy instrument to help governments prevent waste, fraud and corruption in public procurement. It represents a consensus from member countries that efforts to enhance good governance are essential in the entire public procurement cycle, from needs assessment to contract management and payment. In 2011, OECD countries will report on progress made in implementing the Recommendation.*

The OECD played a pioneer role in recognising the importance of good governance in public procurement. The Principles *are anchored in four pillars: transparency, good management, prevention of misconduct, accountability and control in order to enhance integrity in public procurement. The overall aim is to enhance integrity efforts so that they are fully part of an efficient and effective management of public resources.*

The Principles *reflect a global view of policies and practices that have proved effective for enhancing integrity in procurement. They are intended to be used in conjunction with identified good practices from governments in various regions of the world. Furthermore, a Checklist was developed to provide a practical tool for procurement officials on how to implement this framework at each stage of the procurement cycle. The report also gives a comprehensive map of risks that can help auditors prevent, as well as detect, fraud and corruption. Finally, it features a case study on Morocco, where a pilot application of the* Principles *was carried out.*

The Principles *provide policy guidance for governments in the implementation of international legal instruments developed in the framework of the OECD as well as other organisations such as the United Nations, the World Trade Organisation and the European Union. An extensive consultation was carried out in 2008 on the* Principles *and Checklist with various stakeholders. The consultation with representatives from international organisations confirmed that the* Principles *usefully complement international legal instruments.*

The Principles *also reflect the multi-disciplinary work of the OECD in analysing public procurement from the public governance, aid effectiveness, anti-bribery and competition perspectives. In particular, they build on OECD methodologies such as the Development Assistance Committee's Methodology for assessment of national procurement systems and the Working Group on Bribery's Typology of bribery in public procurement.*

The report was prepared by Elodie Beth, Innovation and Integrity Division of the Public Governance and Territorial Development Directorate. It draws heavily upon the insights gained during the regular meetings of the network of Experts on Integrity in Public Procurement.

Acknowledgements. *The Secretariat is grateful for the views provided by various stakeholders in the development of the* Principles *and Checklist. In particular, the network of Experts on Integrity in Public Procurement provided invaluable contributions throughout the process. In addition, we appreciated the feedback in the consultation process from representatives of governments in non-member economies, the private sector, civil society, bilateral donor agencies and international organisations. Finally, special thanks go to members of the Public Governance Committee, under the chairmanship of Roberta Santi, for their guidance and commitment in bringing the issue to the political level.*

The Secretariat also wishes to acknowledge the contributions from authors of specific chapters in this publication. In particular, Jean-Pierre Bueb prepared the chapter on risk mapping and Anikó Hrubi co-authored the chapter on the pilot application of the Principles *in Morocco.*

Special mention is due to Christian Vergez and János Bertók for their strategic guidance throughout the project, and to Peder Blomberg, Micheal Lawrence and Nicola Ehlermann-Cache for their useful comments. Thanks are also due to Karena Garnier, Kate Lancaster, Marie Murphy and Anne-Lise Prigent for their assistance in the preparation of the publication.

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OECD Principles for Integrity in Public Procurement

Executive Summary

Public procurement: A major risk area

Governments and state-owned enterprises purchase a wide variety of goods, services and public works from the private sector, from basic computer equipment to the construction of roads. Public procurement is a key economic activity of governments that represents a significant percentage of the Gross Domestic Product (GDP) generating huge financial flows, estimated on average at 10-15% of GDP across the world.[1] An effective procurement system plays a strategic role in governments for avoiding mismanagement and waste of public funds.

Of all government activities, public procurement is also one of the most vulnerable to fraud and corruption. Bribery by international firms in OECD countries is more frequent in public procurement than in utilities, taxation, and judicial system, according to a survey of the World Economic Forum.[2] Bribery in government procurement is estimated to be adding 10-20% to total contract costs. Due to the fact that governments around the world spend about USD 4 trillion each year on the procurement of goods and services, a minimum of USD 400 billion per year is lost due to bribery (Peter Eigen, Transparency International, 2002).

Weak governance in public procurement hinders market competition and raises the price paid by the administration for goods and services, direct impacting public expenditures and therefore taxpayers' resources. The financial interests at stake, and the close interaction between the public and private sectors, make public procurement a major risk area.

Beyond the "tip of the iceberg": Addressing the entire procurement cycle

Although it is widely agreed that public procurement reforms should adhere to good governance principles, reform efforts at the international level have focused largely on the formation of contracts in the last decade, when tenders from suppliers are solicited and evaluated. These reforms were made in order to promote competitive tendering for the selection of suppliers, even

though rules also allow, in certain circumstances, less formal selection procedures.

So far, the formation of contracts – starting with the definition of requirements to the contract award – is the most regulated and transparent phase of the procurement cycle, the "tip of the iceberg". However, discussions at the 2004 OECD Global Forum on Governance highlighted the need for governments to take additional measures to prevent risks of corruption in the entire procurement cycle, in particular:

- At the stage of **needs assessment**, which is particularly vulnerable to political interference, and in **contract management and payment**. These stages are less subject to transparency as they are usually not covered by procurement regulations.
- When using exceptions to competitive procedures, for instance in **national security and emergency procurement**.

A commitment from OECD countries

Could countries do more to prevent mismanagement, fraud and corruption in public procurement? OECD countries demonstrated their commitment to take action in this area in October 2008. Following the proposal of the Public Governance Committee, they approved the OECD *Principles for Enhancing Integrity in Public Procurement* in the form of an OECD Recommendation. The Principles are primarily directed at policy makers in governments at the national level, but may also offer general guidance for sub-national government and state-owned enterprises.

The Principles provide a policy instrument for enhancing integrity in the entire public procurement cycle. They take a holistic view by addressing various risks to integrity, from needs assessment, through the award stage, contract management and up to final payment.

Procedures that enhance transparency, good management, prevention of misconduct, accountability and control contribute to preventing the waste of public resources as well as corrupt practices. Efforts to enhance good governance and integrity in public procurement are fully part of an efficient and effective management of public resources.

How to keep the public procurement process transparent?

Corruption thrives on secrecy. A key challenge across countries is to ensure transparency in the entire public procurement cycle, no matter what the stage of the process is or the procurement method used.

The first Principle for Enhancing Integrity in Public Procurement calls on governments to ***provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers***. There are several things governments can do to ensure this. For example, if key decisions on procurement are well-documented and easily accessible, inspectors are able to check whether specifications are unbiased or award decisions are based on fair grounds. The degree of transparency also needs to be adapted according to the recipient of information and the stage of the cycle. In particular, governments should protect confidential information, such as trade secrets of tenderers, to ensure a level playing field.

The second Principle stresses that governments should ***maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering,*** such as extreme urgency or national security. To ensure sound competitive processes, governments should provide clear rules, and possibly guidance, on the choice of the procurement method. No matter what the procedure used, maximising transparency is key, for example through the publication of notices on-line for low-value purchases. Governments could also set up procedures to mitigate possible risks to integrity. In the case of a hurricane or a flood, a risk mitigation board could be set up to bring together key stakeholders to allow for clear policy directions and increased communication during the emergency.

How to achieve value for money?

Common shortfalls in the planning and management of procurement include needs that are not well estimated, unrealistic budgets or officials who are under skilled. Governments realise that procurement should be integrated into a more strategic view of government actions to improve value for money.

The third Principle states that governments need to ***ensure that public funds are used in procurement according to the purposes intended.*** Procurement plans generally include the related budget planning, formulated on an annual or multi-annual basis, with a detailed and realistic description of the financial and human resource management requirements. The management of public funds should be monitored by internal control and internal audit bodies, supreme audit institutions and/or parliamentary committees. When a bridge is to be built, for example, a court of audit may verify not only the legality of the spending decision but also whether the planned bridge responds to a real need.

The fourth Principle calls on governments to ***ensure that procurement officials meet high professional standards of knowledge, skills and integrity.*** Recognising working in public procurement as a profession is critical to reducing mismanagement, waste and corruption. Just like the medical or legal professions, public procurement officials could benefit from well-defined curricula, specialised knowledge, professional certifications and integrity guidelines. For example, if a public official sitting on a tendering commission finds that one of the tenderers is someone with whom he or she has a personal relationship, the official should be able to identify the potential conflict of interest and take action.

How to improve resistance to fraud and corruption?

There is increasing recognition that specific measures are needed in the public and private sectors to identify and address risks of fraud and corruption in public procurement.

The fifth Principle requests governments to ***put mechanisms in place to prevent risks to integrity in public procurement.*** Risks to integrity can pertain to potentially vulnerable positions, activities, or projects. For instance, an anti-corruption agency could draw a "risk map" that identifies the positions of officials who are vulnerable, activities in the procurement where risks arose in the past, and the particular projects at risk due to their value or complexity. These risks can be addressed through mechanisms that foster a culture of integrity in the public service such as integrity training, financial disclosure, or the management of conflict of interest.

The sixth Principle ***encourages close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management***. Governments should set clear integrity standards for the private sector and ensure they are followed. For example, officials who systematically record feedback on experience with individual suppliers are in a better position to evaluate future tenders. Potential suppliers should also be encouraged to take voluntary steps to reinforce integrity in their relationship with the government. These include codes of conduct, integrity training programmes for employees, corporate procedures to report fraud and corruption, internal controls, certification and audits by a third independent party.

The seventh Principle calls on governments to ***provide specific mechanisms for the monitoring of public procurement and the detection and sanctioning of misconduct.*** For example, a public procurement agency could have "blinking" indicators that track decisions and identify potential irregularities by drawing attention to transactions departing from established norms for a project. Procedures for reporting misconduct could also be established, such as an internal complaint desk, a hotline, an external

ombudsman or an electronic reporting system that protects the anonymity of the individual. Governments should not only define sanctions by law but also provide the means for them to be applied in an effective, proportional and timely manner.

How to ensure that rules are followed?

A key condition for a public procurement system to operate with integrity is the availability and effectiveness of accountability and control mechanisms.

The eighth Principle highlights the importance for governments to ***establish a clear chain of responsibility together with effective control mechanisms.*** A clear chain of responsibility is key for defining the authority for approval and based on an appropriate segregation of duties, as well as the obligations for internal reporting. In addition, the regularity and thoroughness of controls should be proportionate to the risks involved. For example, probity advisors could be called upon for purchases that are high value/volume, complex or sensitive in order to advise the procuring authority at key stages of the process and provide a level of independent assistance about the fairness of the procurement.

The ninth Principle stresses that governments should ***handle complaints from potential suppliers in a fair and timely manner***. To ensure an impartial review, an independent body with the power to enforce its decisions should rule on procurement decisions and provide adequate remedies. In particular, potential suppliers should be able to refer to an appeal body. In addition, establishing alternative dispute settlement mechanisms can also be a way to avoid formal litigation and reduce the time for solving complaints. For example, the government could set up an advisory complaint board or a contact point for advice to companies facing problems in cross-border cases.

Last, but not least, the tenth Principle calls on governments to ***empower civil society organisations, media and the wider public to scrutinise public procurement***. Civil society organisations, media and the wider public should have access to public information on the key terms of major contracts. The reports of supreme audit institutions should also be made widely available to enhance public scrutiny. Reviews of procurement activities could also be undertaken. For example, an *ad hoc* parliamentary committee may investigate large infrastructure projects. Direct control by citizens can complement these traditional accountability mechanisms, for example through the monitoring of high-value or complex procurements by a representative from a civil society organisation.

Implementing the Principles

The OECD Principles provide a policy framework for enhancing integrity in the entire public procurement cycle. However, following such principles in real-life situations is the true test.

From simple mistake to deliberate act: Adapting the response

Government contracts can give rise to mistakes, anomalies, fraud, and misappropriation of public funds or instances of corruption. Some of these problems can be avoided through adequate guidance for public procurement officials. Accordingly, the OECD developed a Checklist to help procurement officials implement the *Principles for Enhancing Integrity in Public Procurement*.

The Principles and Checklist are based on acknowledged good practices from governments in various legal and administrative systems. They are intended to be used in conjunction with identified good practices, which provide concrete options for reform for policy makers together with their underlying context (see *Integrity in Public Procurement: Good Practice from A to Z*, OECD (2007), available at *www.oecd.org/gov/ethics*).

For cases when fraud, misappropriation and corruption are the result of an official's deliberate act to circumvent the rules for illicit gain, the government's response needs to be adapted accordingly. A comprehensive map of risks to integrity can help auditors detect misappropriation of public funds, in particular fraud or corruption.

A practical Checklist for procurement officials

The *Checklist for Enhancing Integrity in Public Procurement* provides a practical tool for the implementation of the Principles. The Checklist provides guidance to practitioners at every stage of the public procurement cycle, from needs assessment to contract management and payment. The procurement cycle is defined as three main phases:

- pre-tendering, including needs assessment, planning and budgeting, definition of requirements and choice of procedures;
- tendering, including the invitation to tender, evaluation and award; and
- post-tendering, including contract management, order and payment.

Risk mapping

Gaining a better understanding of risks can help auditors detect fraud and corruption. The report provides insights into risks to integrity at key points of the public procurement process, that is:

- During the needs assessment, this could take the form of studies that are repeated, never delivered, or useless.
- During the planning, the estimate for the project is for instance over or undervalued, unnecessary documents are billed or project specifications are prepared in a way to allow for future gains.
- In relation to the selection method, this may take the form of reduced publicity, abuse of emergency procedures, or a misrepresented operation to split up contracts. For instance, during the contract management, discounts are provided to an "association" registered under the same address of a company, services are modified, invoices are overvalued or work unrelated to the contract is added.

A benchmark for OECD and non-member countries

The Principles are a point of reference with which policy makers can review, assess and further develop existing policies both in OECD and non-member countries.

Promoting policy dialogue

The Principles are used for conducting Joint Learning Studies and formulating capacity development plans in various regions of the world such as the Middle East and North Africa, South East Europe and Asia Pacific. A pilot application of the Principles was carried out in Morocco in 2007 that helped the government strengthen its public procurement procedures in the wider context of the fight against corruption. Highlights of the study on Morocco are presented in the report, in particular key findings and policy recommendations to improve the procurement system.

Acceding to OECD membership

The Principles are also used for countries in the accession process to OECD membership, in particular Chile, Estonia, Israel, Russia and Slovenia, in order to benchmark with OECD standards.

Reporting on progress in 2011

With regard to OECD countries, they will report on progress made in implementing the Recommendation in 2011.

Notes

1. Quantifying the size of public procurement is a difficult task because of the absence of detailed and consistent measurements of government procurement markets for a large number of countries. It is estimated to be the equivalent of 10 to 15% of GDP in OECD countries, depending on whether the compensation for employees is included.
2. Kaufmann, World Bank (2006), based on Executive Opinion Survey 2005 of the World Economic Forum covering 117 countries.

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OECD Principles for Integrity in Public Procurement

PART I

Principles for Enhancing Integrity in Public Procurement

Introduction

The Principles guide governments in developing and implementing an adequate policy framework for enhancing integrity in public procurement, while at the same time, taking into account the various national laws and organisational structures of member countries. They are primarily directed at policy-makers in governments at the national level but they also offer general guidance for sub-national government and state-owned enterprises.

Box I.1. **Aim of the Principles**

The overall aim of the Principles is to guide policy makers at the central government level in instilling a **culture of integrity throughout the entire public procurement cycle**, from needs assessment to contract management and payment.

Key pillars of the Principles

The Principles provide a policy framework with ten key Principles to reinforce integrity and public trust in how public funds are managed (see key pillars of the Principles in Box I.2).

Box I.2. **Key pillars of the Principles for enhancing integrity in public procurement**

The Principles stress the importance of procedures to enhance transparency, good management, prevention of misconduct as well as accountability and control in public procurement.

A. Transparency

1. Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers.

2. Maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering.

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Box I.2. **Key pillars of the Principles for enhancing integrity in public procurement** *(cont.)*

B. Good management

3. Ensure that public funds are used in procurement according to the purposes intended.

4. Ensure that procurement officials meet high professional standards of knowledge, skills and integrity.

C. Prevention of misconduct, compliance and monitoring

5. Put mechanisms in place to prevent risks to integrity in public procurement.

6. Encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management.

7. Provide specific mechanisms to monitor public procurement as well as detect misconduct and apply sanctions accordingly.

D. Accountability and control

8. Establish a clear chain of responsibility together with effective control mechanisms.

9. Handle complaints from potential suppliers in a fair and timely manner.

10. Empower civil society organisations, media and the wider public to scrutinise public procurement.

Public procurement is at the interface of the public and private sectors, which requires close co-operation between the two parties to achieve value for money. It also requires the sound stewardship of public funds to reduce the risk of corrupt practices. Public procurement is also increasingly considered a core element of accountability to the public on the way public funds are managed. In this regard, the Checklist emphasises how governments could co-operate with the private sector as well as with stakeholders, civil society and the wider public to enhance integrity and public trust in procurement.

Defining integrity

Integrity can be defined as the use of funds, resources, assets, and authority, according to the intended official purposes, to be used in line with public interest. A "negative" approach to define integrity is also useful to determine an effective strategy for preventing integrity violations' in the field of public procurement. Integrity violations[1] include:

- corruption including bribery, "kickbacks", nepotism, cronyism and clientelism;

- fraud and theft of resources, for example through product substitution in the delivery which results in lower quality materials;
- conflict of interest in the public service and in post-public employment;
- collusion;
- abuse and manipulation of information;
- discriminatory treatment in the public procurement process; and
- the waste and abuse of organisational resources.

Legal, institutional and political conditions for the implementation of the Principles

In order to implement the Principles, governments should ensure that the effort to enhance integrity in public procurement at the policy level is also supported by the country's leadership and by an adequate public procurement system. The following items are commonly regarded as the essential structural elements of a public procurement system:[2]

- an adequate legislative framework, supported by regulations to address procedural issues not normally the subject of primary legislation;
- an adequate institutional and administrative infrastructure;
- an effective review and accountability regime;
- an effective sanctions regime; and
- adequate human, financial and technological resources to support all elements of the system.

In the following sections the Principles are complemented by annotations that provide options for reform in the implementation of the Principles.

Notes

1. Based on L. Huberts and J.H.J Van den Heuvel, *Integrity at the Public-Private Interface*, Maastricht 1999: Shaker.
2. Based on *United Nations Convention against Corruption: Implementing Procurement-Related Aspects*, paper submitted by the United Nations Commission on International Trade Law at the Conference of States Parties to the United Nations Convention against Corruption in Indonesia in January 2008.

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PART I

Chapter 1

Transparency

Principle 1. Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers.

Governments should provide potential suppliers and contractors with clear and consistent information so that the public procurement process is well understood and applied as equitably as possible. Governments should promote transparency for potential suppliers and other relevant stakeholders, such as oversight institutions, not only regarding the formation of contracts but in the entire public procurement cycle. Governments should adapt the degree of transparency according to the recipient of information and the stage of the cycle. In particular, governments should protect confidential information to ensure a level playing field for potential suppliers and avoid collusion. They should also ensure that public procurement rules require a degree of transparency that enhances corruption control while not creating red tape to ensure the effectiveness of the system.

Governments should ensure access to laws and regulations, judicial and/or administrative decisions, standard contract clauses on public procurement, as well as to the actual means and processes by which specific procurements are defined, awarded and managed. Information on procurement opportunities should be disclosed as widely as possible in a consistent, timely and user-friendly manner, using the same channels and timeframe for all interested parties. Conditions for participation, such as selection and award criteria as well as the deadline for submission should be established in advance. In addition, they should be published so as to provide sufficient time for potential suppliers for the preparation of tenders and recorded in writing to ensure a level playing field. When using national preferences in public procurement, transparency on the existence of preferences or other discriminatory requirements also enables potential foreign suppliers to determine whether they have an interest in entering a specific procurement process. In projects that hold specific risks because of their value, complexity or sensitivity, a pre-posting of proposed tendering documents could provide an opportunity for potential suppliers to ask questions and provide feedback early in the process. This allows the identification and management of potential issues and concerns before the tendering.

Transparency requirements usually focus on the tendering phase. However, transparency measures such as recording information or using new technologies are equally important in the pre-tendering and post-tendering phases to prevent corruption and enhance accountability. Without recording

at decision making points in the procurement cycle, there is no trail to audit, challenge the procedure, or enable public scrutiny. Records should be relevant and complete throughout the procurement cycle, from needs assessment to contract management and payment and include electronic data in relation to the traceability of procurement. These records should be kept for a reasonable number of years after the contract award to enable the review of government decisions. New technologies can also play an important role in providing easy and real-time access to information for potential suppliers, track information and facilitate the monitoring on procurement processes (see also Recommendation 10). Electronic systems, for instance in the form of "one-stop-shop" portal, can be used in addition to traditional off-line media to enhance transparency and accountability throughout the procurement cycle.

Restrictions should apply in the disclosure of sensitive information, that is, information the release of which would compromise fair competition between potential suppliers, favour collusion or harm interests of the State. For instance, disclosing information such as the terms and conditions of each tender helps competitors detect deviations from a collusive agreement, punish those firms and better co-ordinate future tenders. The need for access to information should be balanced by clear requirements and procedures for ensuring confidentiality. This is particularly important in the phases of submission and evaluation of tenders. For instance, procedures to ensure the security and confidentiality of documents submitted could help guide officials in handling sensitive information and in clarifying what information should be disclosed. Furthermore, closer working relationships between competition and procurement authorities should be developed to raise awareness about risks of tender-rigging, as well as prevent and detect collusion.

Ensuring an adequate degree of transparency that enhances corruption control, while not impeding the efficiency and the effectiveness of the procurement process, is a common challenge for governments. Procurement regulations and systems should not be unnecessarily complex, costly or time-consuming, as this could cause excessive delays to the procurement and discourage participation, in particular for small and medium enterprises. Excessive red tape may also create possible opportunities for corruption, for instance in the case of regulatory instability, or when leading to requests for exceptions to rules. Furthermore, special attention should be paid to ensuring the overall coherence of the application of procurement regulations across public organisations.

Principle 2. Maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering.

To ensure sound competitive processes, governments should provide clear rules, and possibly guidance, on the choice of the procurement method and on exceptions to competitive tendering. Although the procurement method could be adapted to the type of procurement concerned, governments should, in all cases, maximise transparency in competitive tendering. Governments should consider setting up procedures to mitigate possible risks to integrity through enhanced transparency, guidance and control, in particular for exceptions to competitive tendering such as extreme urgency or national security.

Open tendering contributes to enhancing transparency in the process. However, a key challenge for governments is to ensure administrative efficiency, and therefore the procurement method could be adapted to the type of procurement concerned. Procurements, irrespective of whether they are competitive or not, should be managed in a clear and transparent framework and grounded in a specific need.

To ensure sound competitive processes, governments should provide clear and realistic rules on the choice of the optimum method. This choice could be governed primarily by the value and the nature of the contract, that is the type of procurement concerned (*e.g.* different procurement methods should apply for goods and for professional services such as the development of computer applications). They could also pro-actively establish additional guidelines for officials to facilitate the implementation of these rules, specifying criteria for using different types of procedures and describing how to use them. Competition authorities may be consulted to determine the optimum procurement method to be used to achieve an efficient and competitive outcome in cases where the number of potential suppliers is limited and where there is a high risk of collusion.

Ensuring a level playing field also requires that exceptions to competitive tendering are strictly defined in procurement regulations in relation to:

- the value and strategic importance of the procurement;
- the specific nature of the contract which results in a lack of genuine competition such as proprietary rights;
- the confidentiality of the contract to protect state interests; and
- exceptional circumstances, such as extreme urgency.

Similarly, when negotiations are allowed, the basis for negotiations should be clearly defined by regulations, so that they can only be held under exceptional circumstances and within a predefined timeframe.

Although the procurement method could be adapted to the type of procurement concerned, governments should, in all cases, maximise transparency in competitive tendering. For instance, in the case of framework agreements, guidance could be provided to ensure adequate transparency throughout the process, including in the second stage that is particularly vulnerable to corruption. Furthermore, governments should consider setting up complementary procedures for mitigating risks of corruption, in particular for exceptions to competitive tendering, such as extreme urgency or national security:

- *Transparency*. Restricted or limited tendering does not necessarily justify less transparency. On the contrary, it may require even more transparency to mitigate risks of corruption. For instance, in the case of limited tendering, the requirements of a contract may be publicised for a short period of time when there is a possibility that only one supplier can perform the work. This could provide suppliers with a chance to prove that they are able to satisfy requirements, which may lead to the opening of a competitive procedure. Similarly, amendments to the contract could be publicised through the use of new technologies. The derogation from competitive tendering should be justified and recorded in writing to provide an audit trail.
- *Specific guidance*. Guidelines and training materials, as well as advice and counselling, provide examples of concrete steps for handling limited or non-competitive procedures for both procurement and finance officials. Restrictions are also important for setting clearly defined boundaries. For instance, follow-on contracting may be allowed only under strict conditions defined in the contract, taking into account the amount of the procurement.
- *Additional or tightened controls*. The independent responsibility of at least two persons at key points of the decision making or in the control process contributes to the impartiality of public decisions. In addition, other measures could be used, such as independent review at each stage of the procurement cycle, specific reporting and public disclosure requirements, or random audits to check compliance on a systematic basis.
- *Enhanced capacity*. The best available skills and experience could be deployed depending on the assessment of the potential risk of the project. For large procurements, independent validation may be necessary through a probity auditor or the involvement of stakeholders. For emergency procurement, a risk mitigation board may be set up bringing together key actors – procurement, control officials and technical experts – to allow for clear policy direction and increased communication.

The procurement capacity available in the country and, in the case of post-conflict countries, the urgency of fulfilling needs, should be taken into account before introducing these procedures for mitigating risks of corruption.

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PART I

Chapter 2

Good Management

Principle 3. Ensure that public funds are used in public procurement according to the purposes intended.

Procurement planning and related expenditures are key to reflecting a long-term and strategic view of government needs. Governments should link public procurement with public financial management systems to foster transparency and accountability as well as improve value for money. Oversight institutions such as internal control and internal audit bodies, supreme audit institutions or parliamentary committees should monitor the management of public funds to verify that needs are adequately estimated and public funds are used according to the purposes intended.

Public procurement systems are at the centre of the strategic management of public funds to promote overall value for money, as well as help prevent corruption. To reflect government needs and provide a strategic outlook in relation to the attainment of government or department objectives, procurement planning is a key management instrument. Procurement plans – generally prepared on an annual basis – may include the related budget planning, formulated on an annual or multi-annual basis (often as part of a department investment plan), with a detailed and realistic description of financial and human resource requirements. Planning requires that officials are adequately trained in planning, scheduling and estimating projects costs so that projects are well co-ordinated and fully funded when works need to begin. Procurement plans could also be published to inform suppliers of forthcoming opportunities providing that the information released is carefully selected to avoid possible collusion. Project-specific plans may be prepared for purchases of goods and services that are considered high value, strategic or complex to establish project milestones and an effective structuring of payment. Performance reporting can also contribute to aligning procurement activities with expected outputs or outcomes, particularly when it is linked to associated expenditures.

Public procurement should be considered an integral part of public financial management and to the fostering of transparency and accountability from expenditure planning to final payment. Transparency and accountability begin with the budget process, with the full disclosure of all relevant fiscal information in a timely and systematic manner.[1] Electronic systems can help connect with the overall financial management system to ensure that procurement activities are conducted according to plans and budgets, and that all necessary information on public procurement is made available and

tracked. To enhance the responsibility of high-ranking officials, fiscal reports may contain a statement of responsibility by the Minister and the senior official responsible for producing the report. The budget should be implemented in an orderly and predictable manner with arrangements for the exercise of control and stewardship of the use of public funds, taking into account the whole life of the contract.

Sound reporting is fundamental throughout key management processes to support investment decisions, asset management, acquisition management, contract management and payment. A dynamic system of internal financial controls, including internal audit, helps ensure the validity of information provided. Budget, procurement, project and payment verification activities should be segregated. These activities should be conducted by individuals or entities from separate functions and distinct reporting relationships. Electronic systems can provide a way to integrate procurement with financial management functions while providing a "firewall" between individuals, as direct contact is not required.

The management of public funds in procurement should be monitored not only by internal auditors but also by independent oversight institutions, such as Supreme Audit Institutions and Parliamentary Committees depending on the country context. Oversight institutions should have the opportunity and the resources to effectively examine fiscal reports. In particular, they may verify not only the legality of a spending decision but also whether it has been carried out in line with government needs. Reports may be audited on a random basis by the Supreme Audit Institution, in accordance with generally accepted auditing practices. Parliament can also play a role in scrutinising the management of public funds in procurement, particularly by reviewing the reports of the supreme audit institution and calling upon the government for action, where necessary. Fiscal reports should be made publicly available to enable stakeholders, civil society and the wider public to monitor the way public funds are spent (see also Recommendation 10).

Principle 4. Ensure that procurement officials meet high professional standards of knowledge, skills and integrity.

Recognising officials who work in the area of public procurement as a profession is critical to enhancing resistance to mismanagement, waste and corruption. Governments should invest in public procurement accordingly and provide adequate incentives to attract highly qualified officials. They should also update officials' knowledge and skills on a regular basis to reflect regulatory, management and technological evolutions. Public officials should be aware of integrity standards and able to identify potential conflict between their private interests and public duties that could influence public decision making.

Public procurement is increasingly recognised as a strategic profession (rather than a simple administrative function) that plays a central role in preventing mismanagement, waste and potential corruption. Adequate public employment conditions and incentives – in terms of remuneration, bonuses, career prospects and personnel development – help attract and retain highly skilled professionals. Capacities should also be sufficient to ensure that procurement officials are able to fulfil their various tasks. Mobility in the administration should also be encouraged to the extent possible and supported by adequate training. Human resource management policies may encourage exchanges between the public and private sectors to cross-fertilise talent and commercial know-how, provided that public service regulations define an adequate framework for preventing conflict-of-interest situations, especially for post-public employment.

In light of new regulatory developments, technological changes and increased interaction with the private sector, it is essential that a systematic approach to learning and development for procurement officials be used to build and update their knowledge and skills. Governments should support officials with adequate information and advice, through guidelines, training, counselling, as well as information sharing systems, databases, benchmarks and networks that help them to make informed decisions and contribute to a better understanding of markets. To prevent risks to integrity, guidance is all the more important in countries that put emphasis on managerial approaches and that provide more discretion and flexibility to officials in their daily practice.

Training plays an important role in helping officials recognise possible mistakes in performing administrative tasks and improving their practices accordingly. Formal and on-the-job training programmes should be available for entry-level as well as more experienced procurement officials, to ensure

that officials involved in public procurement have the necessary skills and knowledge to carry out their responsibilities and keep abreast of evolutions. In addition, certification programmes, established in co-operation with relevant stakeholders such as institutes or universities, help ensure that both programme managers and contractors have acquired an appropriate level of training and experience. Officials, as well as suppliers' organisations, may also be consulted in the revision of procurement standards to ensure that the policy's rationale is understood and accepted and that the standards can be realistically implemented.

Integrity standards are a core element of professionalism, as they influence the daily behaviour of procurement officials and contribute to creating a culture of integrity. To prevent the influence of individual private interests on public decision making, officials should be aware of the circumstances and relationships that lead to conflict-of-interest situations. These situations may be the reception of gifts, benefits and hospitality, the existence of other financial and economic interests, personal and family relationships, affiliations with organisations, or the promise of future employment. The communication of integrity standards is essential to raise awareness and build officials' capacity to handle ethical dilemmas and promote integrity. This is equally important for managers, high-level officials, as well as external employees and contractors involved in procurement. Furthermore, detailed guidelines could be provided for officials involved in public procurement, for instance in the form of a code of conduct. These guidelines help ensure impartiality in their interactions with suppliers, manage conflict of interest and avoid the leak of sensitive information.

Note

1. See also OECD *Best Practices for Budget Transparency*, May 2001 (*www.oecd.org/dataoecd/33/13/1905258.pdf*).

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PART I

Chapter 3

Prevention of Misconduct, Compliance and Monitoring

Principle 5. Put mechanisms in place to prevent risks to integrity in public procurement.

Governments should provide institutional or procedural frameworks that help protect officials in public procurement against undue influence from politicians or higher level officials. Governments should ensure that the selection and appointment of officials involved in public procurement are based on values and principles, in particular integrity and merit. In addition, they should identify risks to integrity for job positions, activities, or projects that are potentially vulnerable. Governments should prevent these risks through preventative mechanisms that foster a culture of integrity in the public service such as integrity training, asset declarations, as well as the disclosure and management of conflict of interest.

To protect procurement officials from undue influence, in particular political interference and internal pressure from high-level officials, public organisations should have adequate institutional or procedural frameworks, sufficient resources to effectively carry out responsibilities and supportive human resource policies. For instance, providing guarantees to ensure that a public procurement official can appeal against a decision of dismissal contributes to the impartiality of the official in making decisions by protecting him or her from undue influence. In addition, merit-based selection procedures and integrity screening processes for senior officials involved in procurement enhance resistance to corruption. This is particularly important as senior officials serve as a role model in terms of integrity in their professional relationship with political leaders, other public officials and citizens. More generally, there should be a clear commitment from senior officials in the administration to set the example and provide visible support to the fight against corruption.

A "risk map" of the organisation(s) could be developed to identify the positions of officials which are vulnerable, those activities in the procurement where risks arise, and the particular projects at risk due to the value and complexity of the procurement. This risk map could be developed in close co-operation with procurement officials. On that basis, training sessions could be developed to inform officials about risks to integrity and possible preventative measures. Suppliers could also follow integrity training to raise awareness of the importance of integrity considerations in the procurement process. In addition, specific procedures may be introduced for officials in positions that are especially vulnerable to corruption, such as regular performance appraisals, mandatory disclosure of interests, assets, hospitality

and gifts. If the information disclosed is not properly assessed, risks to integrity, including potential conflicts of interests, will not be properly identified, resolved and managed. This information should be recorded and kept up-to-date. Integrity procedures should be clearly defined and communicated to procurement officials and to other stakeholders when relevant.

Avoiding the concentration of key areas in the hands of a single individual is fundamental in the prevention of corruption. The independent responsibility of at least two persons in the decision making and control process may take the form of double signatures, cross-checking, dual control of assets and separation of duties and authorisation (see also Recommendation 3 in relation to the budget). To the extent possible, separating the responsibilities for authorising transactions, processing and recording them, reviewing the transactions, and handling related assets also helps prevent corruption. A key challenge with the separation of duties and authorisation is to ensure the flow of information between management, budget and procurement officials and to avoid the fragmentation of responsibilities and a lack of overall co-ordination. The separation of duties and authorisation should be organised in a realistic manner in order to avoid creating overly burdensome procedures that may create opportunities for corruption.

Depending on the level of risk, a system of multiple-level review and approval for certain matters, rather than having a single individual with sole authority over decision making, may introduce an independent element to the decision making process. These reviews may focus for example on the choice of competitive and non-competitive strategies prior to the tendering or on significant contract amendments. They may be carried out by senior officials independent of the procurement and project officials or by a specific contract review committee process. However, multiple-level reviews often involve officials with less detailed knowledge of individual procurements and hold the risk of fragmenting accountability.

Prolonged contact over an extended period of time between government officials and suppliers should also be avoided. The rotation of officials – involving when possible new responsibilities – could be a safeguard for positions that are sensitive or involve long-term commercial connections. However, sufficient capacity and institutional knowledge should be ensured at the government level over time. Electronic systems also provide a promising instrument for avoiding direct contact between officials and potential suppliers and for standardising processes. The use of new technologies may require security control measures for the handling of information, such as: the use of unique user identity codes to verify the authenticity of each authorised user; well-defined levels of computer access rights and procurement authority; and the encryption of confidential data. A cost-benefit analysis of technical solutions should be carried out early in the process, especially for low-value procurement.

Principle 6. Encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management.

Governments should set clear integrity standards and ensure compliance in the entire procurement cycle, particularly in contract management. Governments should record feedback on experience with individual suppliers to help public officials in making decisions in the future. Potential suppliers should also be encouraged to take voluntary steps to reinforce integrity in their relationship with the government. Governments should maintain a dialogue with suppliers' organisations to keep up-to-date with market evolutions, reduce information asymmetry and improve value for money, in particular for high-value procurements.

Governments should set clear standards for integrity throughout the entire procurement cycle starting with the selection process. The selection of tenderers should be based on criteria, which are defined in a clear and objective manner, are not discriminatory and cannot be altered afterwards. Requirements could be placed on potential suppliers and contractors to show evidence of anti-corruption policies and procedures and to contractually commit them to comply with anti-corruption standards. This could be accompanied by a contractual right to terminate the contract in the event of non-compliance. Several options could be considered for taking into account integrity considerations in the selection process. For instance, potential suppliers may make declarations of integrity in which they testify that they have not been involved in corrupt activities in the past. Alternatively, governments may also lead by example by using "Integrity Pacts" that require a mutual commitment by the government and all tenderers to refrain from and prevent all corrupt acts and submit to sanctions in case of violations.

The information provided by potential suppliers needs to be verified and compared with other internal and external sources of information, such as government databases. Databases may include information such as past performance, prices, and possibly a list of suppliers that have been excluded from procurement with the government. Furthermore, suppliers should be closely monitored in contract management to maintain high standards of integrity and ensure that they are kept accountable for their actions. For instance, there could be a rigorous verification of identity of contractors and sub-contractors early in the process, based on reputable sources of information, to avoid that subcontracting is used as a means to conceal fraud or corruption. More generally, feedback on the experience with individual suppliers should be kept to help public officials in making decisions in the future.

It is also the responsibility of the private sector to reinforce integrity and trust in its relationship with government through robust contractor integrity and compliance programmes. These programmes include codes of conduct, integrity training programmes for employees, corporate procedures to report fraud and corruption, internal controls, certification and audits by a third independent party. They should apply equally to contractors and sub-contractors. Voluntary self-regulation can be undertaken by individual suppliers or members of an industry or a sector, which pro-actively engage in the adoption of integrity measures, in particular by committing to anti-corruption agreements. It is essential that the information is accurate and maintained up-to-date to ensure the effectiveness of voluntary self-regulation by the private sector.

Fostering an open dialogue with suppliers' organisations contributes to improving value for money by setting clear expectations and reducing information asymmetry. For instance, engaging representatives of the private sector in the review or the development of procurement regulations and policies helps ensure that the proposed standards reflect the expectations of both parties and are clearly understood. To foster a more strategic approach to public procurement, governments could provide the opportunity for the industry to discuss innovative solutions so that governments know how marketplaces operate and align with those markets and the opportunities they create. Similarly, governments should regularly conduct market surveys and dialogue with the private sector to keep abreast of suppliers, products and prevailing prices for goods and services.

This dialogue is critical throughout the procurement cycle, from needs assessment to contract management in order to foster a trustful relationship between government and the private sector. Potential suppliers may have the possibility to seek clarification before the tendering, especially for high-value procurements, for instance in the form of public hearings to clarify what is needed. This disclosure of information should be carefully considered, taking into account possible risks of collusion between private sector actors. In order to clarify expectations and anticipate possible misunderstanding with potential suppliers, elements of good practice include prompt responses to questions for clarification and the availability of dispute boards to prevent or resolve disputes on major projects. In the case of responses to questions for clarification, the information should then be transmitted to potential suppliers in a consistent manner to provide a level playing field. The grounds for selecting the winner could be made public, including the weighting given to qualitative tender elements. At a minimum, debriefing should be provided to unsuccessful tenderers on request so that they understand why their proposal fell short in relative terms of other tenders, without disclosing commercially-sensitive information about other tenders. In the contract management, dialogue between both parties is also needed to enable problems to be quickly identified and resolved.

Principle 7. Provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly.

Governments should set up mechanisms to track decisions and enable the identification of irregularities and potential corruption in public procurement. Officials in charge of control should be aware of the techniques and actors involved in corruption to facilitate the detection of misconduct in public procurement. In order to facilitate this, governments should also consider establishing procedures for reporting misconduct and for protecting officials from reprisal. Governments should not only define sanctions by law but also provide the means for them to be applied in case of breach in an effective, proportional and timely manner.

The public procurement process should be closely monitored to detect irregularities and corruption. Governments should set up mechanisms that help track decisions and enable the identification of potential risks. Management controls, approval and reporting are key to monitoring public procurement. In addition, the use of electronic systems increases transparency and accountability while allowing officials to use their discretion and judgement for achieving value for money. For instance, a set of "blinking" indicators could be developed in relation to existing computer data-mining to draw attention to transactions that appear to depart from established norms for a project. These indicators, developed on the basis of risks identified, would preferably not be communicated to procurement practitioners to avoid influencing their behaviour. When a number of indicators start "blinking", follow-up should be initiated by auditors to facilitate the detection of irregularities or corrupt practices (see also Recommendation 8). Where justified, this information could be brought to the attention of law enforcement authorities to enable possible investigations.

Officials in charge of control should be aware of the techniques and actors involved in corruption in public procurement to facilitate the detection of misconduct. These officials could follow specialised training on a regular basis to inform them about corrupt techniques used in procurement. Knowledge of the actors involved in corruption and the understanding of their underlying motivations, as well as the techniques used to carry out corrupt agreements also assists in detecting potential corruption. Given the capacity of criminals to devise new techniques, these training sessions could be updated and carried out at regular intervals.[1] Experts' assistance could also be

required to examine a particular technical, financial or legal aspect of the procurement process and gather evidence that could be presented in court.

Public authorities may also develop clear procedures to report misconduct, such as an internal complaint desk, or a hotline, an external ombudsman or an electronic reporting system that protects the anonymity of the individual who reports misconduct yet allows clarification questions. A key challenge is to ensure the protection of public officials who report misconduct against retaliation, in particular through legal protection, protection of privacy information, anonymity or the setting up of a protection board. At the same time, particular attention should be paid to ensuring that the management of complaints is well documented and impartial to avoid harming unnecessarily the reputation of individuals affected by allegations.

Effective, proportional and timely redress, as well as sanctions should not only be defined by law but also promptly applied in case of irregularities, fraud, as well as active and passive corruption in public procurement. Governments should enforce administrative, civil and criminal sanctions.[2] Traditional redress and sanctions include the denial or loss of the contract, liability for damages and the forfeiture of tender or performance bonds. In addition, these could include confiscation of ill-gotten gains and debarment from future contracts to deter private sector actors from engaging in corrupt practices.[3] With regard to officials, redress, consequences and sanctions could encompass administrative, civil and criminal sanctions, including confiscation of ill-gotten gains. Administrative consequences may also exist at the organisational level to punish the contracting authority, for instance in the form of a pecuniary fine in proportion to the value of the contract.

Notes

1. See *Bribery in Public Procurement: Methods, Actors and Counter-Measures*, OECD, 2007.
2. For further information about country practices in relation to sanctions in Asia and the Pacific, see *Curbing Corruption in Public Procurement in Asia and the Pacific: Progress and Challenges in 25 Countries*, ADB/OECD, 2007.
3. For further information on the challenges of introducing debarment, see *Fighting Corruption and Promoting Integrity in Public Procurement*, OECD, 2005.

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PART I

Chapter 4

Accountability and Control

Principle 8. Establish a clear chain of responsibility together with effective control mechanisms.

Governments should establish a clear chain of responsibility by defining the authority for approval, based on an appropriate segregation of duties, as well as the obligations for internal reporting. In addition, the regularity and thoroughness of controls should be proportionate to the risks involved. Internal and external controls should complement each other and be carefully co-ordinated to avoid gaps or loopholes and ensure that the information produced by controls is as complete and useful as possible.

Defining the level of authority for approval of spending, sign off and approval of key stages, based on an appropriate segregation of duties, is essential to establish a clear chain of responsibility. Internal guidelines should clarify the level of responsibility, the required knowledge and experience, the corresponding financial limits and the obligation of recording in writing of key stages in the public procurement cycle. In the case of delegated authority, it is important to explicitly define the delegation of power of signature, the acknowledgement of responsibility and the obligations for internal reporting. These processes should be embedded in daily management and supported by adequate communication and training. Managers play an important role in leading by example and enhancing integrity in the culture of the organisation. They are in charge of setting expectations for officials in performing to appropriate standards and are ultimately responsible for irregularities and corruption.

Regular internal controls by officials independent of those undertaking the procurement may be tailored to the type of risk; these controls include financial control, internal audit or management control. External audits of procurement activities are important to ensure that practices align with processes; they are carried out to verify that controls are being performed as expected. Financial audits help detect and investigate fraud and corruption while performance audits provide information on the actual benefits of procurements and suggest systemic improvements. Performance audits review not only compliance with expenditure rules but also the attainment of the physical and economic objectives of the investment. It is important to ensure that external audit recommendations are implemented within a reasonable delay.

The frequency of audits could be determined by factors such as the nature and the extent of the risks, that is the volume and associated value, the various types of procurement, the complexity, sensitivity and specificity of the

procurement (for instance for exceptions to competitive tendering). There should be no minimum threshold for conducting random audits. For instance, for procurements that are particularly at risk, the use of a probity advisor or a probity auditor may be considered. On the one hand, probity advisors give advice during the procurement to provide a level of independent assurance about the openness and fairness of the process. On the other hand, probity auditors are an external party that is engaged to verify afterwards that a procurement activity was conducted in line with good practice.

Given that public procurement is subject to various controls, attention should be paid to ensuring that controls complement each other and are carefully co-ordinated to avoid gaps and overlaps in controls. A systematic exchange of information between internal and external controls could be encouraged to maximise the use of information produced by different controls. Auditors should promptly report to criminal investigators for follow-up investigation when there are suspicions of fraud or corruption. Information from external audits on procurement should be publicised to reinforce public scrutiny. Furthermore, public disclosure of internal controls may also be considered.

Principle 9. Handle complaints from potential suppliers in a fair and timely manner.

Governments should ensure that potential suppliers have effective and timely access to review systems of procurement decisions and that these complaints are promptly resolved. To ensure an impartial review, a body with enforcement capacity that is independent of the respective procuring entities should rule on procurement decisions and provide adequate remedies. Governments should also consider establishing alternative dispute settlement mechanisms to reduce the time for solving complaints. Governments should analyse the use of review systems to identify patterns where individual firms could be using reviews to unduly interrupt or influence tenders. This analysis of review systems should also help identify opportunities for management improvement in key areas of public procurement.

Providing timely access to review mechanisms contributes to ensuring the overall fairness of the procurement process. A key challenge for governments is to resolve complaints in a fair manner while ensuring administrative efficiency, that is the delivery of goods and services to citizens in a timely manner. Decisions that could be challenged should include not only the award decision but also key decisions in the pre- and post-award phases, such as the choice of the procurement method or the interpretation of contract clauses in the management of the contract. To enable the timely resolution of complaints, a range of measures may be used, for example:

- Using e-procurement, when possible, to ensure that the information on the award is communicated in a prompt manner to all tenderers and that they have a reasonable delay to challenge the decision.
- Providing remedies to challenge the decision early in the process, such as the setting aside of the award decision, the use of a standstill period for challenging the decision between the award and the beginning of the contract, or the decision to suspend temporarily the award decision when relevant. In all cases, a sufficient period of time to prepare and submit a challenge should be provided to unsuccessful tenderers.
- Reviews could also be allowed during contract management and after the end of the contract for a reasonable time in order to claim damages.

To ensure the impartiality of review mechanisms, review decisions should be ruled upon by a body with enforcement capacity that is independent of procuring entities. As a first stage, potential suppliers should have an opportunity to submit their complaints to the procuring authority in

order to prevent confrontation and the costs of a quasi-judicial or judicial review. Officials participating in the review should be secure from external influence. Their decisions may also be published, possibly on-line. In all cases, potential suppliers should be able to refer to an appeal body – administrative and/or judicial – to review the final decision of the procuring authority.

Efficient and timely resolution for complaints is essential for the fairness of public procurement. Different approaches may be used to ensure the enforcement of procurement regulations within a reasonable delay. For example, using a review body with specific professional knowledge in dealing with complaints may reinforce the legitimacy of decisions and reduce the time for solving complaints. Similarly, alternative resolution mechanisms may be established to encourage informal problem solving and prevent a formal review.

Finally, the use of review systems could be analysed to identify opportunities for management improvement in key areas of public procurement as well as patterns where individual firms may be using them to unduly interrupt or influence tenders. In addition, cases of undue pressure on officials from individual firms, such as intimidation and threats of physical harm, should be closely reviewed and handled.

Adequate remedies should be available for tenderers, such as setting aside of procurement decisions, interim measures, annulment of concluded contracts, damages and pecuniary penalties.[1] The review body could have the authority to define and enforce interim measures, such as the decision to discontinue the procedure, taking into account the public interest. The review body should have the authority to enforce final remedies to correct inappropriate procuring agency actions and apply sanctions accordingly, in particular the annulment of a concluded contract. Potential suppliers may be compensated for the loss or damages caused, not only through the reimbursement of tendering costs but also through damages for lost profits. Pecuniary penalties could be applied to force contracting authorities to adhere strictly to their legal obligations.

Principle 10. Empower civil society organisations, media and the wider public to scrutinise public procurement.

Governments should disclose public information on the key terms of major contracts to civil society organisations, media and the wider public. The reports of oversight institutions should also be made widely available to enhance public scrutiny. To complement these traditional accountability mechanisms, governments should consider involving representatives from civil society organisations and the wider public in monitoring high-value or complex procurements that entail significant risks of mismanagement and corruption.

Scrutiny practices enhance assessment and review of government actions focusing on the power of information to enhance accountability. Governments should enable civil society organisations, media and the general public to scrutinise public procurement through the disclosure of public information. Freedom of information laws represent a key instrument for enhancing transparency and accountability in the public procurement process. For instance, records could be made available for civil society organisations, media and the wider public, to uncover cases of mismanagement, fraud, collusive behaviour and corruption. In addition, electronic systems are a useful tool for governments to disseminate information on major contracts and therefore enable public scrutiny.

The effective implementation of freedom of association laws and the existence of strong civil society organisations, including trade unions in the public and private sectors, contribute to a broader institutional environment that is conducive to enhanced transparency and accountability in public procurement. This also facilitates civil society initiatives that track the management of public funds in procurement by disseminating information relative to budgetary and financial execution. A promising mechanism is the "open agenda", which obliges procurement officials to disclose every meeting they have with the private sector, in order to ensure a level field for competition. Education of civil society organisations, media and the wider public, for instance through awareness-raising programmes and communication campaigns, is crucial in supporting the integrity of the procurement process.

Oversight institutions such as Parliament, Ombudsman/Mediator and Supreme Audit Institution play an important role in enhancing public scrutiny through their reports on public procurement (see also Recommendation 3). Oversight bodies may undertake reviews of procurement activities, through an *ad hoc* parliamentary committee or a review by the Supreme Audit

Institution, for investigating a specific issue. In addition, an Ombudsman/ Mediator should examine the legality of public administration actions, in particular with respect to laws on access to information, and undertake investigations.

Scrutiny practices may also require the involvement of other stakeholders in the public procurement process. For development assistance programmes, bilateral and multilateral donors could play a role in strengthening and assessing the quality and functioning of public procurement systems.[2] For procurements that involve important risks of mismanagement and possibly corruption, governments should consider the possibility of involving representatives from civil society, academics or end-users in scrutinising the integrity of the process. "Direct social control" mechanisms encourage their involvement as external observers of the entire procurement process or of key decision making points.[3]

This practice of "direct social control" could complement more traditional accountability mechanisms under specific circumstances. Strict criteria should be defined to determine when direct social control mechanisms may be used, in relation to the high value, complexity and sensitivity of the procurement, and for selecting the external observer. In particular, there should be a systematic verification that the external observer is exempt from conflict of interest to participate in the process and is also aware of restrictions and prohibitions with regard to potential conflict-of-interest situations, such as the handling of confidential information. Governments should support these initiatives by ensuring timely access to information, for instance through the use of new technologies, and providing clear channels to allow the external observer to inform control authorities in the case of potential irregularities or corruption.

Notes

1. See *Public Procurement Review and Remedies Systems in the European Union*, SIGMA Paper No. 41, 2007.
2. For instance, the OECD-DAC Joint Venture for Procurement has developed with donor members and partner countries a common country-led approach to strengthening the quality and performance of public procurement systems.
3. This practice is used in particular by Transparency International as part of Integrity Pacts to involve an independent monitor in the process. The independent expert, who may be provided by civil society or commercially contracted, has access to all documents, meetings and parties and could raise concerns first with the principal, and of no correction is made, with the prosecution authorities.

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PART II

Implementing the Principles

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PART II

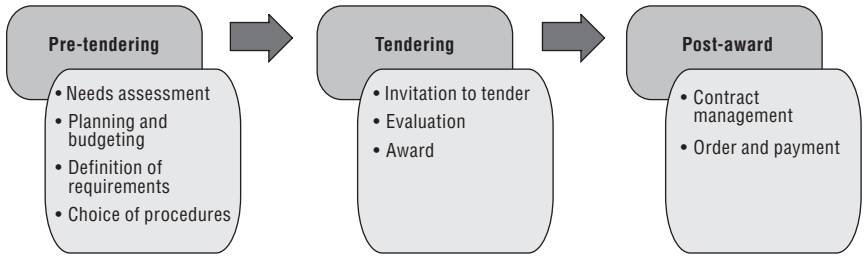
Chapter 1

Enhancing Integrity at Each Stage of the Procurement Cycle: A Checklist

This Checklist provides a practical tool for implementing the policy framework for enhancing integrity at each stage of the public procurement cycle, from needs assessment to contract management and payment. The procurement cycle comprises three main phases:

- pre-tendering, including needs assessment, planning and budgeting, definition of requirements and choice of procedures;
- tendering, including the invitation to tender, evaluation and award; and
- post-tendering, including contract management, order and payment (see Figure II.1.1).

Figure II.1.1.



For each stage of the procurement cycle, practical guidance is provided concerning common risks to integrity and precautionary measures to reduce these risks.

The Checklist focuses on concrete processes and measures that can set up or developed by practitioners to enhance integrity in the public procurement cycle. Governments should ensure that these measures are adequately supported by wider legal, institutional and political conditions in the country.

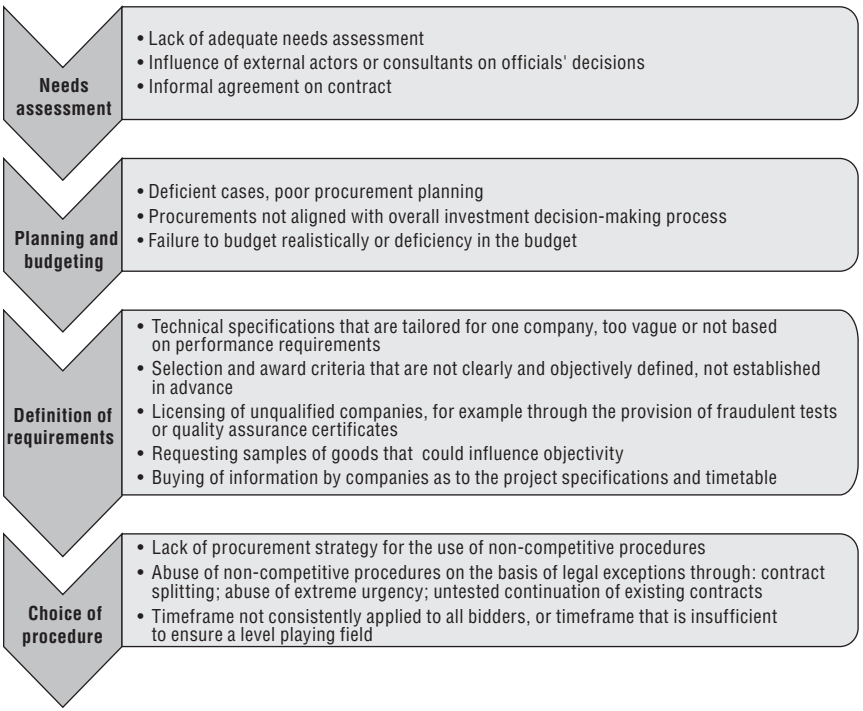
1. Pre-tendering phase

Risks to integrity in pre-tendering

In the pre-tendering phase, common risks to integrity include:

- the lack of adequate needs assessment, planning and budgeting of public procurement;
- influence of external actors, including political interference;
- requirements that are not adequately or objectively defined;
- an inadequate or irregular choice of the procedure; and
- a timeframe for the preparation of the tender that is insufficient or not consistently applied.

Figure II.1.2. **Pre-tendering: Risks to integrity at each stage of the procurement**



Source: Based on Integrity in Public Procurement: *Good Practice from A to Z*, OECD, 2007.

Precautionary measures in pre-tendering

Stage 1. Needs assessment

- **Reduce information asymmetry with the private sector to take a strategic approach to the management of procurement markets based on government needs, for instance:**

  a) gather as much information as possible on the industry or the goods and services (*e.g.* through a market study, existing databases); and

  b) organise consultations with the private sector where appropriate, in cases where a large number of potential suppliers could be involved in relation to a specific procurement project. Attention should be paid to ensuring that the information exchange is organised in an open, structured and ethical manner to avoid collusion between potential suppliers and that the outcomes of discussions are recorded.

- **Provide an assessment of the need for the procurement, in particular whether:**

  a) the need is for the replacement or enhancement of existing resources or to meet an entirely new requirement;

  b) there are no alternatives, including the use of in-house resources or the enhancement of existing capacity through enhanced efficiency;

  c) procurement would be essential for the conduct of business or to improve performance; and

  d) the planned capacity or size is actually needed.

- **Use a validation system that is independent from the decision maker, in particular:**

  a) ensure that decisions to launch a specific procurement are taken by more than one official to the extent possible, especially for projects of high value, to minimise the risk of lobbying or collusion with a specific firm;

  b) for projects at risk because of their value, complexity or sensitivity, consider the use of independent validation of the process (*e.g.* approval by a review committee, use of a probity advisor), and

  c) consult representatives from end-user organisations and the wider public in the needs assessment (*e.g.* in the form of a survey of public utility).

Stage 2. Planning and budgeting

- **Ensure that the procurement is aligned with:**
  - *a)* the strategic priorities of the organisation; and
  - *b)* the overall investment decision making process and the general budget process which should be completed prior to the commencement of the tendering process.

- **As part of the planning, ensure clear and reasonable time frames for each stage of the procurement process by:**
  - *a)* ensuring that these timeframes can be consistently applied; and
  - *b)* taking into account the value, complexity and sensitivity of the contract when fixing the timescale for responses.

- **Provide a realistic estimation of the budget and ensure its timely approval, in particular by:**
  - *a)* preparing a realistic estimate of all phases of the procurement, based on sound forecasting methods;
  - *b)* verifying that funds are available to meet the procurement to the extent possible;
  - *c)* requesting the budget holder to approve expenditure; and
  - *d)* taking into account possible variations over time, which could have an impact on the contract.

- **Prepare a business case for major projects that are particularly at risk because of their value, complexity or sensitivity by:**
  - *a)* taking specialised advice from project and technical experts to assess costs and benefits in a realistic manner. Also possibly request independent peer review of economic, environmental, and social forecasts (*e.g.* involve independent oversight body, specialised public agencies, panel of experts or representatives from civil society, or academic institutes or think tanks, etc.);
  - *b)* ensuring a sound project management regime. In particular: make sure that project management costs are properly funded, that dedicated project officials are in place, and that key stages of the project are appropriately documented;

c) preparing project-specific procurement plans to determine the level of risk of the project and plan precautionary measures accordingly (*e.g.* use of gateway reviews to provide an independent review at each stage of the procurement cycle, probity auditor, etc.); and

d) ensuring that criteria for making procurement decisions are defined in a clear and objective manner, included in the tendering documents, and that decisions demonstrate that criteria have been respected.

- **Clearly define responsibilities taking into account possible risks by:**

  a) attributing the responsibility of project development and implementation to one project organisation, with directors being held accountable;

  b) defining the delegated levels of authority for approval of spending, sign off and approval of key stages;

  c) performing an assessment of the positions of officials which are vulnerable and those activities in the procurement where risks may arise; and

  d) planning senior-level review within the organisation at key stages of the procurement process and considering additional control depending on the value, complexity and sensitivity of the procurement.

- **Make sure that officials are aware of the requirements for the transparency of the procurement system and well prepared to apply them by:**

  a) designating the official(s) in charge of ensuring publicity over government decisions;

  b) publishing any law, regulation, judicial decision, administrative ruling, standard contract clauses mandated by law or regulation, and procedure regarding procurement, and any modifications thereof;

  c) using an electronic and/or paper medium that is widely disseminated and remains readily accessible to the public;

  d) ensuring adequate record storage and management for recording key decisions throughout the procurement cycle; and

  e) reaping the benefits from the use of new technologies that can automatically process and record transactions while avoiding human intervention.

- **Ensure separation of duties and authorisation, which can take several forms such as:**

  a) ensuring segregation of technical, financial, contractual and project authorities for the approval process when possible. The following functions could be handled by different personnel: issue of purchase orders; recommendation of award; certification of the receipt of goods and services; and payment verification; and

  b) identifying separate personnel with clear responsibility for key stages of the procurement process, including definition of requirements, evaluation, control of performance and payment. When these duties cannot be separated, compensating controls should be put in place (*e.g.* random audit).

Stage 3. Definition of requirements

- **Take precautionary measures to prevent conflict of interest, collusion and corruption and promote integrity, in particular by:**

  a) obtaining declarations of private interests from officials involved in the procurement process and, in case of consultation, of other parties involved where appropriate;

  b) ensuring that officials are informed and have received guidance about how to handle conflict-of-interest situations. For officials and other actors involved in the process (*e.g.* civil society monitors), make them aware of restrictions and prohibitions (*e.g.* receipt of gifts, handling of confidential information);

  c) ensuring that officials are familiar with identified risks to integrity in the procurement process (for instance through a risk map or training) and encourage them to liaise with competition and/or enforcement officials in case of doubt of collusion or corruption; and

  d) promoting integrity, not only by delineating minimal standards but also by defining a set of values that officials should aspire to.

- **Take into account integrity considerations in the selection process, in particular by:**

  a) establishing satisfactory evidence of identity of potential suppliers and sub-contractors, including documentary evidence of the identity of key actors who have the legal power to operate in the business;

  b) where applicable, collecting declarations of integrity from potential suppliers in which they testify that they have not been involved in corrupt activities in the past. Consider possible sources of information to verify the accuracy of the information submitted. In addition, consider the possibility of placing requirements on potential suppliers/contractors to show evidence of anti-corruption policies and to contractually commit to complying with anti-corruption standards;

  c) when selecting tenderers on the basis of criteria that include integrity considerations, ensure that this information can be collected and that it can be obtained from a reputable source (*e.g.* official certificate of absence of convictions in Court);

d) considering the use of Integrity Pacts to ensure the mutual commitment of officials and potential suppliers to integrity standards; and

e) where applicable, excluding tenderers who have been involved in corruption or debarred on corruption charges.

- **Make requirements available to all parties by:**

  a) publishing requirements for participation and recording them in writing; and

  b) where possible, providing potential suppliers with the right to seek clarifications, especially for high-value procurements, while ensuring that the answers are widely shared and recording them in writing.

- **When considering the use of a list of suppliers, ensure that:**

  a) inherent risks to competition and transparency are taken into account before deciding to use a list of suppliers;

  b) the list of suitable suppliers is published on the basis of a set of criteria that are clearly defined and stated;

  c) the list is updated on a regular basis (at least on a yearly basis) and that a clear channel and sufficient timeline is advertised for application; and

  d) proposed prices are compatible with goods and services, in reference to established market prices or based on the knowledge of prior procurements of a similar nature (*e.g.* through a database or data mining).

- **Ensure that specifications are:**

  a) based on the needs identified. Suppliers and end-users may be consulted in the drafting of specifications, provided that the number of participants is sufficiently large and representative, and that the results are reviewed in light of market analysis done by the procuring authority to provide objective analysis;

  b) designed in a way to avoid bias, in particular that they are clear and comprehensive but not discriminatory (*e.g.* no proprietary brands or trade descriptions). It is necessary to avoid any form of specification that favours a particular product or service; and

  c) designed in relation to functional performance, with a focus on what is to be achieved rather than how it is to be done in order to encourage innovative solutions and value for money.

- **Ensure that award criteria are clearly and objectively defined by:**

  a) using evaluation criteria on the basis of the economically most advantageous, unless this is a commodity purchase for which the basis of the lowest price may be used;

  b) specifying the relative weightings of each criteria and justifying them in advance;

  c) specifying to what extent these considerations are taken into account in award criteria when using economic, social or environmental criteria; and

  d) including any action that the procuring agency is entitled to make in the criteria (such as negotiations, under what conditions, etc.) and recording them.

Stage 4. Choice of procedures

- **Guide officials in determining the optimum procurement strategy that balances concerns of administrative efficiency with fair access for suppliers, in particular by:**

  a) making sure that the choice of the method ensures sufficient competition for the procurement and adapting the degree of openness depending on the procurement concerned;

  b) providing clear rules to guide the choice of the procurement method, ensuring a competitive process and developing additional guidelines for officials to help the implementation of these rules;

  c) reviewing and approving procurement strategies for all procurements, to ensure that they are proportional to the value and risk associated to the procurement; and

  d) considering consulting with officials in competition authorities to ensure that the procurement strategy adopted is the one that is most likely to achieve an efficient and competitive outcome.

- **Take precautionary measures for enhancing integrity where competitive tendering is not required by regulations. These measures may be proportionate to the value of the contract and include for instance:**

  a) clear and documented requirements;

  b) the justification of the choice of procedure (when using non-competitive procedures) and the appropriate records;

  c) a specification of the level of the authorising personnel;

  d) planning of random reviews of results of non-competitive procedures;

  e) a consideration of the possibility of involving stakeholders and civil society to scrutinise the integrity of the process, especially for exceptional circumstances such as extreme urgency or for high-value contracts;

  f) the publication of the criteria to be applied for the selection of the supplier, and the expected terms of the contract; and

  g) after the award of contract, a publication of the contract agreement.

- **For restricted/selective tendering methods, specific measures could be taken to enhance integrity, such as:**

  a) considering the minimum number of suppliers to be invited for tendering according to regulations, estimating the maximum number of suppliers that could be realistically considered for the specific procurement, and recording justifications if the minimum number of tenders cannot be met; and

  b) conducting spot checks to confirm suppliers' offers and contacting suppliers who do not respond to repeated invitations to tender with a view to detecting potential manipulation.

- **For negotiated/limited tendering methods, specific measures could be taken to enhance integrity, such as:**

  a) providing more detailed record, including for instance the particular supplier who was selected; and

  b) including the terms agreed upon in the contract, with a specification reflecting the supplier's solution.

- **Ensure transparency for qualification processes that cover multiple procurements and are not open at all times for application (*e.g.* framework agreements) by:**

  a) publishing the current list of qualified suppliers;

  b) publishing the invitation to apply for qualification on a regular basis, including the qualification criteria;

  c) ensuring that specifications are set up in advance and published; and

  d) publishing all awards under framework agreements, either per order or on a regular basis.

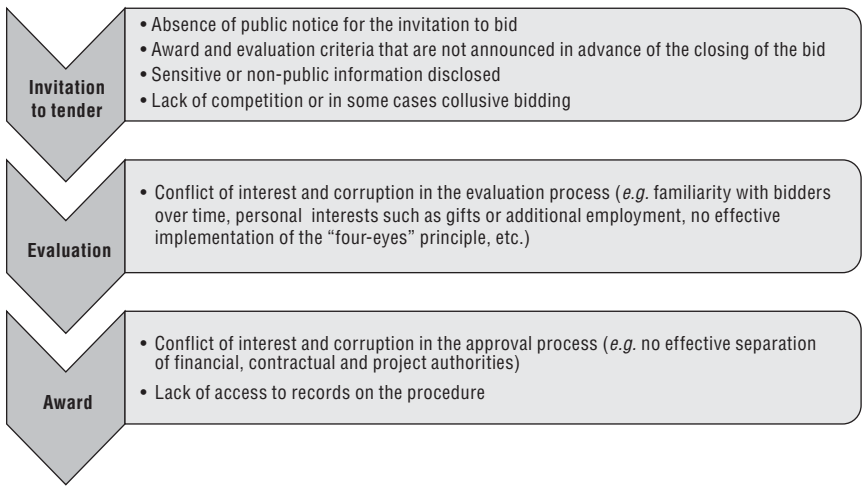
2. Tendering phase

Risks to integrity in tendering

In the tendering phase, common risks to integrity include:

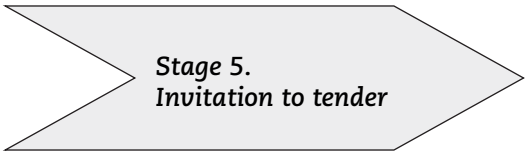
- inconsistent access to information for tendering in the invitation to tender;
- lack of competition or, in some cases, collusive tendering resulting in inadequate prices;
- conflict-of-interest situations that lead to bias and corruption in the evaluation and in the approval process; and
- lack of access to records on the procedure in the award that discourages unsuccessful tenderers to challenge a procurement decision.

Figure II.1.3. **Tendering: Risks to integrity at each stage of the procurement**



Source: Based on Integrity in Public Procurement: *Good Practice from A to Z*, OECD, 2007.

Precautionary measures in tendering



- **Ensure a sufficient level of transparency in the procurement opportunity:**
  - *a)* for open tendering: make the information on the procurement publicly available, including related evaluation criteria; and
  - *b)* for restricted/selective and negotiated/limited methods: publish information on how to qualify in a readily available medium within a timeframe and in a manner that would reasonably allow eligible suppliers to apply.

- **Publish a tender notice that includes:**
  - *a)* information on the nature of the product or service to be procured, specifications, quantity, timeframe for delivery, realistic closing dates and times, where to obtain documentation, and where to submit tenders;
  - *b)* a clear and complete description of selection and award criteria that is non discriminatory and cannot be altered afterwards;
  - *c)* details on the management of the contract and the plan and method for payment and possibly the guarantees when required; and
  - *d)* details of the contact point for enquiries.

- **Communicate to potential suppliers in the same timeframe and in the same manner, in particular by:**
  - *a)* encouraging information exchange on a formal basis (*e.g.* contact points for enquiries, information sessions, on-line module to observe clarification meetings, on-line posting of questions and answers);
  - *b)* ensuring that questions for clarification are promptly responded to and that this information is transmitted to all interested parties;
  - *c)* communicating changes immediately, preferably in the same channel originally used; and
  - *d)* publishing information, preferably on-line, to allow for external monitoring and public scrutiny.

Stage 6. Evaluation

- **Ensure security and confidentiality of information submitted, in particular by:**
  - *a)* ensuring that measures are in place for the security and storage of tendering documents (*e.g.* keeping a document register, numbering all documents or having a central storage area for all documents), as well as for limiting access to documents; and
  - *b)* considering electronic security issues and having documented processes for electronic storage and communication (*e.g.* tenders submitted electronically are safeguarded from access before the closing time; the system has the capacity to reject late tenders automatically).

- **Define a clear procedure for the opening of the tender, in particular by:**
  - *a)* having a team open, authenticate and duplicate sealed tenders as soon as possible after the designated time, immediately followed by public opening, if possible;
  - *b)* performing the opening of tenders, preferably before a public audience where basic information on the tenders is disclosed and recorded in official minutes;
  - *c)* specifying clear policy defining circumstances under which tenders would be invalidated (*e.g.* tenders received after the closing time are invalidated unless it is due to a procuring agency error);
  - *d)* ensuring that any clarification of submitted tenders does not result in substantive alterations after the deadline for submission; and
  - *e)* ensuring that a clear and formal report of all the tenders received is produced (including their date and time of arrival, as well as the comments received from tenderers) before passing them to the officers responsible for their evaluation.

- **Ensure that the evaluation process is not biased and confidential by:**
  - *a)* undertaking evaluations with more than one evaluating official or preferably a committee. Depending on the value of the procurement and the level of risk, the committee could include not only officials from different departments but also possibly external experts;
  - *b)* using notified evaluation criteria systematically and exclusively and assessing them independently (*e.g.* technical, project and risk criteria

could be assessed prior to and separately from financial criteria). Tenders should be evaluated against notified criteria, preferably on a "whole-of-life basis";

c) verifying that officials in charge of the evaluation are not in a conflict-of-interest situation (*e.g.* through mandatory disclosure) and are bound by confidentiality requirements. In the case of an evaluation committee, integrity and professional considerations must be taken into account in the selection of members and involve a member that is external to the procurement team when possible; and

d) including all relevant aspects of the evaluation in a written report signed by the evaluation officers/committee.

- **When allowing negotiations after the award to prevent waste and potential corruption (*e.g.* only one tender is received):**

  a) ensure that negotiations are conducted in a structured and ethical manner and are held within a predefined period of time so that they do not discriminate between different suppliers;

  b) handle information on tenders in a confidential manner; and

  c) keep detailed records of the negotiation.

Stage 7. Award

- **Inform tenderers as well as the wider public on the outcome of the tendering process by:**

  a) promptly notifying unsuccessful tenderers of the outcome of their tenders, as well as when and where the contract award information is published;

  b) publishing the outcome of the tendering process in a readily available medium. A description of goods or services, the name and address of the procuring entity; the name and address of the successful supplier, the value of the successful tender or the highest and lowest offers taken into account in the award of the contract, the date of award; and the type of procurement method used should be included. In cases where limited tendering was used, a description of the circumstances justifying the use of limited tendering should also be included;

  c) considering the possibility of publishing the grounds for the award, including the consideration given to qualitative tender elements. Do not disclose commercially-sensitive information about the winning tender or about other tenders, which could favour collusion in future procurements; and

  d) allowing the mandatory standstill period, where one exists, before the beginning of the contract.

- **Offer the possibility of debriefing to suppliers on request by:**

  a) withholding confidential information (*e.g.* trade secrets, pricing);

  b) highlighting the strengths and weaknesses of the unsuccessful tender;

  c) for debriefings in writing, ensuring that the written report is approved beforehand by a senior procurement official; and

  d) organising oral debriefings, provided that discussions are carried out in a structured manner so that they do not disclose confidential information, and that they are properly recorded.

- **Resolve possible disputes through constructive dialogue when possible, and provide an identified channel for formal review by:**

  a) in the case of problems with potential suppliers, making an effort to resolve disputes through negotiation as a first step;

b) providing information on how to lodge a complaint related to the procurement process;

c) providing the possibility to use dispute resolution mechanisms not only before but also after the award; and

d) considering the possibility of using interim measures to enable the prompt processing and resolution of complaints. The possible overriding adverse consequences for the interests concerned, including the public interest, should be taken into account when deciding whether such measures should be applied.

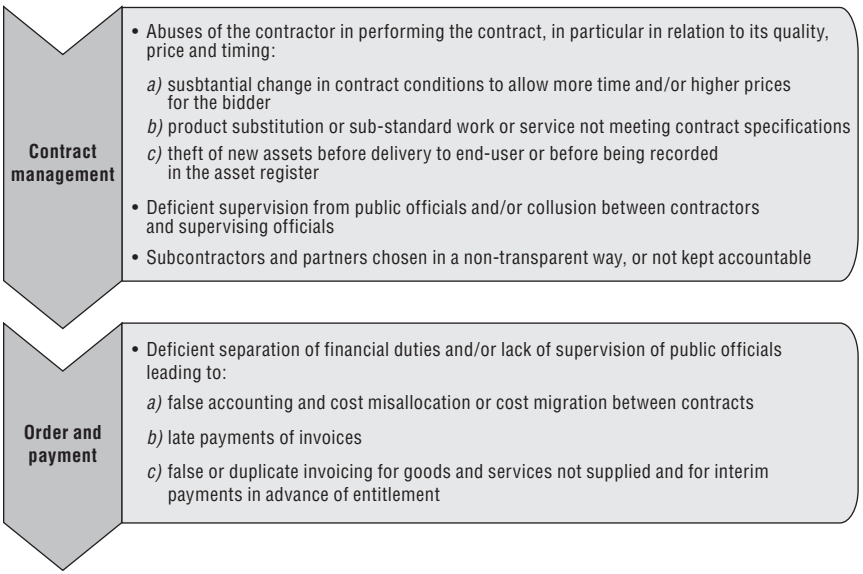
3. Post-tendering phase

Risks to integrity after the award

In the phase following the contract award, common risks to integrity include:

- abuse of the contractor in performing the contract, in particular in relation to its quality, price and timing;
- deficient supervision from public officials and/or collusion between contractors and supervising officials;
- the non-transparent choice or lack of accountability of subcontractors and partners;
- lack of supervision of public officials; and
- the deficient separation of financial duties, especially for payment.

Figure II.1.4. **Post-tendering: Risks to integrity at each stage of the procurement**



Source: Based on Integrity in Public Procurement: *Good Practice from A to Z*, OECD, 2007.

Precautionary measures in post-tendering

Stage 8.
Contract management

- **Clarify expectations, roles and responsibilities for the management of the contract by:**
  - *a)* ensuring that the contracting agency and the supplier are aware of policies in order to prevent conflict of interest and corruption (*e.g.* publication of the policies, reference in the contract) and that the supplier communicates this information to potential sub-contractors;
  - *b)* ensuring that contract and purchase orders provide sufficient information to enable the supplier to deliver the goods/services of the correct description and quantity within the specified time;
  - *c)* including models in the contract for appropriate risk sharing between the contracting authority and the contractor, especially for complex procurements (*e.g.* performance bond, penalty for late delivery and/or payment);
  - *d)* including the payment in the contract, and where this is not possible, informing suppliers of the payment period following approval of invoice; and
  - *e)* stating in the contract possible compensation in case of undue withholding of payment by contracting officials.
- **Supervise closely the contractor's performance and integrity, in particular by:**
  - *a)* monitoring the contractor's performance against specific targets and levels laid down in the contract at regular intervals;
  - *b)* ensuring that costs are monitored and kept in line with contract rates and approved budgets;
  - *c)* organising inspection of "work-in-progress" (especially regarding structural elements that could be hidden by ongoing construction) and completing work and random sample checks;
  - *d)* using electronic systems to monitor progress of contract and timely payment and sending warnings regarding possible irregularities or corruption;
  - *e)* involving third parties to scrutinise the process (*e.g.* selected member from an end-user organisation); and

f) where possible, testing the product, system or other results in a real-world environment prior to delivery of the work.

- **Control change in the contract by:**
  - *a)* ensuring that contract changes that alter the price and/or description of the work are supported by a robust and objective amendment approval process;
  - *b)* ensuring that contract changes beyond a cumulative threshold are monitored at a high level, preferably by the decision making body that awarded the contract;
  - *c)* allowing contract changes only up to a reasonable threshold, and changes that do not alter the quality of the good or service. Beyond this threshold, a review system could be set up to understand the reasons for these changes and consider the possibility to re-tender;
  - *d)* clearly tying in the variation with the main contract to provide an audit trail; and
  - *e)* recording changes to the contract and possibly communicating them to unsuccessful tenderers as well as other stakeholders and civil society.

- **Enable stakeholders, civil society and the wider public to scrutinise public procurement by:**
  - *a)* recording, co-ordinating and communicating information in relation to contract management;
  - *b)* organising regular review meetings between the customer and contractor, and recording end-user satisfaction with the service; and
  - *c)* ensuring access to records for stakeholders and possibly civil society and the wider public for a reasonable number of years after the contract award.

Stage 9. Order and payment

- **Verify that the receipt of goods/services is in line with expected standards by:**
  - *a)* inspecting the goods against the purchase order and the delivery invoice before payment. It is also necessary to assess and certify the standard of service to ensure quality;
  - *b)* when possible, involving at least two officials in the verification that the receipt of goods/services is in line with expected standards; and
  - *c)* involving, in addition to procurement officials, end-users when possible to enhance checks and balances.

- **Ensure that the final accounting or audit of a project is not carried out by personnel involved in former phases to ensure the separation of duties and authorisation, for instance:**
  - *a)* officials who examine the invoice against the goods and orders/delivery note should differ from those officials who give the payment order to the accounting department; and
  - *b)* payments should be cross-checked by the accounting entity afterwards.

- **Ensure that the budgeting system provides for a timely release of funds to make payment against contractual conditions, in particular by:**
  - *a)* committing budget funds promptly prior to or during the award of the contract;
  - *b)* using innovative methods such as purchase cards for small value procurements, provided that their use is limited to purchases of specified items and that expenditure is limited;
  - *c)* organising random supervisory checks on payments and, where financial systems permit, monitor outstanding payments; and
  - *d)* preparing systematic completion reports for certification of budget execution and for reconciliation of delivery with budget programming.

- **Consider the possibility of a post project assessment, in particular by:**
  - *a)* selecting projects for post project assessment on the basis of identified criteria, including the value of the procurement as well as its

complexity, sensitivity and specificity (*e.g.* exceptions to competitive procedures);

b) reviewing the procurement process, drawing lessons that can be learned for any future contracts and placing this information on record;

c) considering the possibility of a "feedback loop" through the consultation of end-users in the post project assessment, particularly for high-value procurements, and involving civil society representatives who monitored the project, if applicable;

d) including information on discrepancies and abnormal trends in procurement (*e.g.* possible collusion, split orders) in the report for information management as well as liaising with competition and/or law enforcement agencies, when relevant; and

e) transmitting information on high-value procurements to the supreme audit institution or other oversight bodies.

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PART II

Chapter 2

Risk Mapping: Understanding Risks of Fraud and Corruption in the Public Procurement Cycle

Public procurement is an activity particularly vulnerable to fraud and corruption. With the governments of countries – developed and developing alike – facing the same problem, it is important to explore crackdown and prevention techniques for reducing such misconduct. To be able to tackle a problem, however, any good practitioner must first study and understand it. This chapter will therefore explore the techniques used to misappropriate funds, and will also look at the various types of fraud that have been uncovered. The aim is to make stakeholders (public procurement practitioners, elected officials, businesses, investigators, magistrates and so forth) aware of the risks of fraud and corruption.

This chapter strives to offer the most comprehensively possible (albeit non-exhaustive) inventory of the means detected to date by which the main types of procurement contracts have been tainted by corruption or fraud. The examples have been chosen from European Union member states, and they span many years. This is no accident: they show that fraud is possible even in countries with longstanding and abundant legislation, and in which numerous checks are performed by officials whose honesty is beyond reproach. They reveal that fraud can strike even at the heart of European Union services.

Despite the controls in place, a number of government contracts give rise to errors, anomalies, fraud, misuse of public funds or corruption. Most errors and anomalies can be explained by a lack of awareness on the part of the people involved – purchasing agents, accountants, auditors, etc. – and this can be put right through training. However, misappropriation – for instance in the form of fraud and corruption – is more difficult to correct because it results from a deliberate desire to circumvent the rules for illicit gain, and to cover up the perpetrator's actions.

This research has focused primarily on:

- methods used, at each stage of the procurement cycle, to make a fraudulent transaction look legitimate to observers or auditors; and
- techniques for misappropriating funds initially earmarked for a transaction, how the funds are used (whether there is personal gain or not), and the networks that make it possible to arrange such dealings.

In describing these mechanisms, it is useful to distinguish between risks of fraud and corruption *i)* in the needs assessment; *ii)* in the planning; *iii)* in relation to the selection method; and *iv)* during the contract management.

1. Risks in the needs assessment

Even before a contract is signed, there are many different ways to misappropriate public funds in relation to scoping studies, timeliness, cost and so on. The amounts involved in this type of misappropriation are often smaller than can be extracted once a contract has been awarded, but they are easier to conceal. The number of payments can also be increased, since this type of misappropriation can take place at each stage of the contract-planning process.

Whatever the purpose of the scoping study, the mechanism for illegally diverting public funds remains the same. Procedures may differ, however, depending on the usefulness of the proposed study. If the purpose is to check out a hypothesis, choose an option or ensure that a decision is adopted, the study must be conducted with utmost seriousness, by a competent consultancy. If, however, the study serves no real purpose (for example, when such aspects are perfectly clear), it can be contracted out to any firm, which will provide a document that delivers the desired justification without having to expend much time or thought. In some cases it will provide nothing at all, simply collecting the agreed amount of money. Thus, the documents received can either be of high quality or else be "empty". Clearly it is easier to detect misappropriation if the studies are useless or of poor quality, or if they are not delivered at all. But the quality of the study and the amount of money diverted are not always correlated: very good studies may conceal major misappropriation, while poor-quality studies may have been conducted honestly. Above all, it is necessary to ascertain how much is at stake, and thus to tailor controls to the amount of money involved.

Minor studies

This category includes all studies for which the cost falls below the national regulatory threshold. In this case the official is generally free to deal with whomever they choose, practically without justification, since in most cases a simple voucher or order letter is all that is needed to commit to the expenditure. An invoice will trigger payment, provided that the amount and the description match the order. Conventional controls would be unlikely to detect any fraud.

There are a few ways the decision-maker can "divert" money for him or herself, for associates or relatives, or for a group with which he or she has connections, but he or she needs the help of a consultancy. Firstly, the money must leave the local authority or public body through the following "legitimate" channels before it can be "re-allocated" to the chosen recipient using one of the techniques described earlier:

- "Friendly" consultancies. The decision-maker can contact a "friendly" consultancy or organisation to ask it to perform the work. This is a

procedure that has been used extensively by certain political parties to collect funds. With this "friend", there is no problem of competition. The chosen firm can thus obtain a fee far in excess of the work performed (over-billing), corresponding to the normal cost of providing the study (whatever its quality) plus whatever amount the decision-maker would like to have.

- An entity belonging to the decision-maker. The decision-maker may ask an entity belonging to him or her, or to family members, to perform the study.

Duplicating studies

The decision-maker can also have the same study conducted by more than one party, either simultaneously or not. If they are to submit their studies simultaneously, firms may be prompted to get together and form a "cartel" (see Box II.2.1 for an example). Their prices will be "harmonised" to achieve a wide profit margin. They divide up contracts amongst themselves and in some instances call upon colleagues or competitors to subcontract out a part of the study. This benefits each party, including the decision-maker, who will receive the amount of money requested from a consultancy that did not take part in the selection process. If the decision-maker allows them to submit their work on different dates, the last parties to deliver their proposals may take advantage of the work done by the first consultancies; in the best-case scenario, the first, highly competent firm will prepare a study from which the others will copy extensively and thus be able to earn wide profit margins. In any event, this abnormally large margin will find its way back to the decision-maker, or to his designated beneficiaries, via the slush fund and using false-invoicing.

Box II.2.1. **Repeating the same study**

To prepare for a major public event, the organising body needed to calculate electricity requirements. A contract for an initial study was awarded to a highly specialised consultancy through a standard tender process. When the report was delivered, the decision-maker, claiming a need to verify the findings, hired two other consulting firms to conduct the same study for a price equivalent to the amount paid to the first firm. At the same time, he provided them with the findings of that first study. The other two companies copied the report already prepared, confirmed the findings, and sent their invoices to the decision-maker. The invoices were highly overpriced for the work involved, and the decision-maker recovered most of the money *via* a transfer to his bank account in a tax haven.

Studies never delivered

The decision-maker may order studies that will be paid for in instalments (which can theoretically amount to as much as 80% of the total contract prior to delivery, although most commonly the initial payment is half the total cost). It will then not be possible to obtain the commissioned study, either because the consultancy fails and vanishes, or because the decision-maker never asks for it (because it has "become unnecessary"), even if the firm has not shut down after collecting its down payments. In either case, none of the down payments are lost for the people involved in the fraud (the slush fund being used for a kickback to the decision-maker), as the (false) invoices enable the firm receiving the payments to show that the payments correspond to services that have in fact been performed and from which it derived no benefit.

Studies above the national threshold

If the cost of a study exceeds the national threshold, the decision-maker must launch a call for tenders or resort to the negotiated procedure (see Section 3).

Circumventing the procedure

In the event of a tendering process, in order to be sure of working with the firm that suits him or her, the decision-maker generally chooses the "economically most advantageous" tender, taking care to list a number of subjective elements[1] as additional selection criteria, such as the individual competence of study managers, the firm's reputation, past accomplishments in the region and so forth. Having taken these precautions, the decision-maker can decide to award the study to the firm he or she deems most "competent" and likeliest to respond to his solicitations.

If, because of intense competition, the stipulated price for the study is not high enough to generate the planned margin, the decision-maker will in many cases be "convinced" by the chosen consultancy to expand the study beyond its initial mission, so as to shed greater light, for example, on the implications of the proposed project. This triggers a spiral of contract amendments by the decision-maker or his designated representatives, the prices of which are set arbitrarily (*e.g.* unit prices are the same as in the initial contract, but the number of hours' work is set arbitrarily). Such amendments make it possible to create the additional margin, which will be redistributed to the decision-maker or his friends.

Altering the outcome of the selection process

Sometimes the decision-maker may also launch a conventional call for tenders and choose the lowest tenderer for his intended project. The

successful tenderer will then have a number of different ways to pay the decision-maker a commission:

- *If the successful tenderer has not been forewarned about the commission*, he or she is the victim of genuine extortion by the decision-maker, who has officially accepted the tender but will only allow the successful tenderer to begin work after paying an illegal commission. The tenderer then pays up to avoid losing the right to tender on future contracts. To be able to pay this unforeseen contribution to the decision-maker, the tenderer either: *i)* obtains an amendment whereby he or she can generate the amount needed *via* false invoices; *ii)* trims his or her margin but creates additional fictitious expenses (false invoices) to avoid being taxed on a profit that was never made; or *iii)* is forced to employ undeclared workers or, more frequently, *via* a subcontractor.
- *If the successful tenderer has been forewarned*, he or she will have already factored for the amount of the "commission" into his or her tender. There is no distortion of competition because all tenderers have been treated equally. The commission can be paid to the decision-maker via the classic procedure of false invoices which are generally channelled through another "friendly" consultancy specialising in such practices. The decision-maker imposes this consultancy on the contract-holder as a subcontractor before signing the contract. This subcontractor gets paid generously by over-billing for fairly useless work that requires no particular technical expertise (in many cases just re-arranging study findings) but that will generate the money ultimately destined for the decision-maker.

Above the European threshold, notification of the contract must be published in the *Official Journal of the European Union*. In many cases, the decision-maker then uses the above procedures to award the contract to the most accommodating consultancy. In other cases, the decision-maker makes sure (through underestimation) that the call for tender is unsuccessful, in which case he or she can then use the negotiated procedure with a variety of consultancies so as, ultimately, to select the "best" candidate, *i.e.* the one known to be most amenable to corruption practices. It should be noted that this procedure is also used extensively in connection with nationwide calls for tender.

2. Risks in the planning

Before the contract-awarding process is launched, and to complement the preliminary studies described above, decision-makers must call upon their own staff or specialised bodies to perform a number of other services. Here, the aim is to establish the precise cost of the project that has theoretically been given the go-ahead. This allows for a sound analysis of the tenders, as well as the preparation of the administrative and technical documentation needed for launching a call for tender that meets all needs and regulations. As laudable as these objectives are, however, they can be diverted from their true purpose by a dishonest decision-maker or business.

Estimating project costs

To decide in principle whether a proposed project is feasible, the decision-maker needs only the rough estimates that are provided by the preliminary studies. To move forward in the decision-making process, the decision-maker has to fine-tune the estimate. But the estimate presented to the decision-maker's superiors to justify the proposed option may be deliberately skewed in the following ways because of an intent to reap some personal financial or moral benefit from the deal.

Overvalued estimates

The estimate may be overvalued if the project concerned is of clear benefit to various stakeholders. The decision-maker may take advantage of the situation, for example, by turning the construction of essential infrastructure into more prestigious facilities that will enhance his or her fame (see Box II.2.2). More practically, the decision-maker may exhibit skills as a "good manager" – the cost having been grossly overestimated to begin with – by successfully completing the project within budget. Moreover, there can be no suspicion that he or she has subsequently enjoyed any "favours" from the firms awarded the contract (although the overestimation makes such favours perfectly feasible), since the actual price ends up being very close to the estimate.

Undervalued estimates

In most cases, estimates are undervalued because the decision-maker must win the approval of the group for which he or she acts, and to which he or she reports (*e.g.* the city council). The decision-maker does so by maximising the expected benefits while minimising the cost of the investment. This raises the risk of having to ask for additional finances during project execution, thus exposing the decision-maker's management to criticism. He or she nevertheless believes that once the project is underway such budget increases will not be called into question, as long as there was

Box II.2.2. **Overvaluing the estimate**

A city council decided to rebuild the city hall, which was outdated, too small and no longer met public access requirements. The estimated cost of refurbishing the existing building would be higher than the cost of building a new one, according to the city's technical departments. Therefore land was chosen for a new downtown location. However, it involved removing several thousand square metres of land from a public garden. Thus, the mayor was able to boast of a remarkable achievement: building a new city hall perfectly integrated with its surroundings, while keeping within the initial budget. He gained a reputation as a good mayor and a good manager.

The unvarnished truth was discovered a few years later by some of his opponents. Apart from the refurbishment, the initial cost had also included the purchase of land adjacent to the old city hall for building the planned extensions. Since this land was not vacant, it was necessary to factor in the cost of demolishing the existing structure. In the end, although these expenditures were never made, their costs were included in the budget for the new building. Moreover, a simple calculation using available prices showed that the construction costs amounted to more than double the usual amounts. And finally, a short time after the project was completed, the mayor acquired a splendid country house, and his re-election campaign the following year featured the use of especially glossy publications.

initial agreement on the principle of carrying it out. These increases, which will take the form of amendments to the initial contract, will also enable him or her to receive "commissions" from the firms to which contracts have been awarded (Box II.2.3).

Box II.2.3. **Undervaluing the estimate**

In the initial estimate for the construction of an underground car park, the cost of lighting was "forgotten". This was rectified later by adding nearly 20% to the value of the contract. But the omission, by keeping the initial costs low, helped to get the go-ahead for a project that was being challenged by the municipal opposition. It also helped in selecting the most accommodating contractor.

Immediate misappropriation during document preparation

Defining project specificities

After submitting a precise estimate of the project's cost, the main input from any service providers involves setting out the "specificities" of the proposed project and preparing documents for the selection process: specifications, technical clauses, administrative clauses, etc.

Since these documents are vital, one simple technique for misappropriating sums of money is for the decision-maker to have them prepared in-house, by his own staff, while at the same time commissioning identical work from an outside service-provider. The outside firm needs only to copy the documents prepared by the decision-maker's technical staff, affix its own logo and collect the fee stipulated in its contract. Without expending much effort, the outside firm submits a report that corresponds precisely to what the decision-maker wants. Substantially overpaid, it is in a position (via false invoicing, *inter alia*) to pay into a slush fund which will be used, among other things, to pass some of the money back to the decision-maker. A variation on this technique, and one which avoids any involvement of the decision-maker's technical staff, is to subcontract the preparation of projects for which there exist standard documents (contemporary works, licensed models, standard models, etc.), which enables the contractor to do his work easily and provide all the necessary regulatory guarantees.

Making project particulars and tenders understandable

Technical studies, even if done well, can sometimes be difficult to understand and even more difficult to explain to laymen (such as city councillors, for example). It is thus perfectly reasonable to hire an organisation to make the findings understandable. However, it is not necessary to commission a private company for this purpose, since usually the decision-maker's technical staff and the office handling the project study are fully capable of explaining complex documents and making their work understandable to anyone. Hiring a private company can therefore be used to camouflage commission payments to the decision-maker or his friends, as discussed in the previous section on minor studies.

"Ordinary" commissions

Lastly, irrespective of the chosen service-provider, and whatever the quality of the services rendered, the decision-maker can always arrange to be paid "commissions" by using the technique of over-billing, as long as the potential providers have been informed of his intention and the amount of his needs before taking part in a regular call for tenders. Thus all tenderers will

have factored the cost of the commission into their proposals and there is no discrimination since all of them have been informed.

Arranging for misappropriation in the future

Not all misappropriation is necessarily immediate. There are far more subtle techniques, which are used, for example, when preparing project specifications to arrange for future diversions of funds. These can be organised in a virtually scientific manner to avoid any risk of detection over the life of the contract (see also Section 4 on the management of the contract).

Affiliated entities

The first opportunity for this type of misappropriation arises when a decision-maker commissions a service-provider to prepare some or all of the tender documents. If this service provider is affiliated to a group that includes another subsidiary likely to submit a tender on the future project, it might be tempted to favour companies in its own group by providing them with exclusive information that would enable them to get the contract, or by inserting specifications that companies in its group alone would be able to meet. This situation is not unusual. Cross-shareholdings, takeovers and mergers have mushroomed in recent years to the point that decision-makers and their staff often do not know which group of companies might stand to benefit from the information and specifications. This is because each company within a group generally retains its own identity and a certain degree of independence (Box II.2.4).

Box II.2.4. **Using affiliated entities**

A local government needed to install a new computer system. The work was commissioned to a specialised company which recommended the use of specific products, materials and software. All of these proposals involved supplies for which one firm held exclusive rights. On investigation, it turned out that this firm was another subsidiary of the group to which the specialised company belonged.

Two scenarios are possible when there is dependency or collusion among the company establishing the tender specifications and certain firms planning to compete for the contract. If the decision-maker has not been informed of these ties, and if he or she fails to take the precaution of checking whether any exist, he or she may be "manipulated" (even if the decision-maker was contemplating being paid "commissions" when the contract was awarded). If the decision-maker has in fact been informed of the connection between the

service-provider and one or more tenderers, and if, having that information, the decision-maker attempts to capitalise on it by soliciting a "commission" payment, the collusion, which in this case becomes especially important, is very difficult to prove. It can only be proved if it is revealed by an unsuccessful tenderer, or if an external auditing body looks into any ties between the firm compiling the specifications and the company whose offer, being especially well-matched to the decision-maker's requirements, was successful and thus won the contract.

Another technique is to persuade the decision-maker or his staff to specify services that only particular companies can provide because of their exclusive rights to a material, product or manufacturing process. The use of the phrase "Product N or the equivalent" attempts to reduce the number of cases in which a particular supplier or manufacturer is given the upper hand. Nonetheless, it is still not uncommon for specifications to name a certain service, giving one particular firm an edge over all others (see Box II.2.5).

Box II.2.5. **Using exclusive rights**

Specifications for computer equipment should not state "Windows operating system", since this would automatically eliminate a number of competitors, including those that use the Linux system or the system developed by Apple.

Non-standard specifications

Apart from particular specifications that certain firms alone can meet, specifications sometimes stipulate values far in excess of prevailing standards. Obviously, there could be many reasons for this. However, one should ask whether these specifications will in fact be used in the implementation of the project (Box II.2.6).

Box II.2.6. **Using non-standard specifications**

Specifications for reinforcing concrete in a particular project called for steel bars with a diameter of 12 mm, justified on the grounds that the height of the proposed building might be increased. When the work was carried out, inspectors were informed that the building could not be made any higher. They therefore checked the building's safety against conventional standards, which required only 10 mm-diameter bars. Nevertheless, the company billed for 12 mm bars. On this item alone, the savings amounted to 44% of the price of the steel bars.

This scheme would be impossible without the complicity of the decision-maker's representative who certifies the work that is carried out. The scheme allows the holder of the contract to generate sums of money, part of which can be used to "compensate" dishonest inspectors. The balance can be recovered in full by the company without the decision-maker being informed,or shared with the decision-maker if the latter has approved the scheme.

Another approach is for a company, acting together with the decision-maker, to submit a tender that does not adhere to standard specifications and, as a result, is lower than those of the other competitors. This proposal generally enables the firm to get the contract and to pay a "commission" to the decision-maker without trimming its margin.

Lastly, it is worth mentioning that there may be a technician on the decision-maker's staff who "operates" for his or her own benefit. Knowing that they have the employer's trust, technicians are in a good position to impose "exorbitant" specifications, to ensure that they are or are not factored in by certain companies when they submit their tenders, and then to check and certify whether or not they have been adhered to. The fact that the same technician is present throughout the entire process enables to engineer significant misappropriation for its own benefit, needing only the complicity of the firm's local manager, with the decision-maker not knowing about this.

"Errors"

Another misappropriation technique involves making "errors" in quantities or quality specifications. Any estimate will contain a provision of about 5 to 10% of the total amount of the contract to allow for unforeseen on-site incidents. For example, a road-building project may encounter an error in the volume of rock fill to be destroyed, or its hardness may not have been realised. Also, despite extensive geological studies, the full extent of certain pockets of clay that have to be removed before the road can be built may be underestimated.

But in some cases these "unforeseen" events may not be unknown at all; instead they have been deliberately concealed, or omitted from the documentation distributed to potential tenderers. This is one of the most effective means of misappropriating substantial amounts of money. While information that is known to be incomplete or erroneous is planted into specifications, the correct information is provided to a "privileged" enterprise. When the corrupt decision-maker or technician informs one of the firms about the actual quantities or quality specifications, the following scenarios are possible:

- The informed firm neglects to incorporate an especially costly requirement into its estimate and wins the contract thanks to an offer that is lower than

its competitors, yet which still leaves it with a wide profit margin. This type of favouritism is sometimes used to bolster the chances of local firms that are well acquainted with the territory, at the expense of outside firms that based their offers on the specifications alone.

- The firm submits a proposal with an attractive total price in order to win the contract and, in its price list, indicates high unit prices for work that it knows has been underestimated in terms of quantity (Box II.2.7). When the quantities stipulated in the specifications have been reached but the problem has not yet been solved, it will request a continuation of the work until the desired result is achieved. There will be no further tenders. The additional work is performed by the contract-holder and paid at the unit price stipulated in the initial price list submitted by the company. The profit margin will be restored, and then some, which will leave room for substantial rebates.

This system implies collusion between the official preparing the specifications and the firm that is favoured to get the future contract.

Box II.2.7. **Collusion between the official in charge of specifications and a supplier**

Along the planned route of a new roadway through a mountainous limestone area, there are caves, filled to varying extents with clay, that need to be "purged" (that is emptying the caves of their compressible clay content and subsequently filling them with an incompressible substance). Because this is a very expensive operation, exploratory boring is carried out prior to construction to determine the volume of purging necessary. However, the specifications are amended to indicate a smaller volume of boring.

If the volume indicated in the specifications is smaller than the estimated volume, the informed contractor will submit an overall offer that is lower than the others to get the contract but will state a high unit price for purges. Once the quantities mentioned in the specifications have been reached, further purges will then be necessary. Confronted with this totally "unforeseeable" situation, a contract amendment will be signed with the on-site contractor, using the unit prices stipulated in its offer. As a result, the contractor will more than cover its costs and be able to "reward" its informant.

If the volume indicated in the specifications is overstated, the contractor, thanks to its knowledge of the ground, will commit to a lower volume of purges, offering to cover the cost of any overruns from its estimate. It will underbid the others and get the contract while still having the resources to "reward" its informant.

"Omissions"

In many contracts, when disputes arise it can emerge that the decision-maker has no means of enforcing the terms of the contract because the "penalties" section has been deleted from the original document. As a result, if a contractor intentionally fails to meet its commitments, no penalties can be imposed on it.

There is nothing new about this procedure, which is used fairly often when there is collusion between decision-maker and contractor. It gives a firm a special advantage by waiving the obligations that bind its competitors, such as deadlines for project completion. It can also lead to payments of subsidies or advances with nothing in return.

"Imposed" maintenance

The final method commonly used to generate long-term substantial and steady inflows of cash is to acquire equipment or materials that can only be maintained either by the installer or an exclusive contractor. While the procurement contract can be negotiated on particularly attractive terms, the same cannot be said for the maintenance of the equipment or materials, since here the supplier imposes their own terms.

This scenario is especially prevalent in computer technology and office automation systems. Here, the acquisition of hardware, in some cases at highly competitive prices, is conditional upon acceptance of a multi-year maintenance contract for servicing the equipment, as well as the compulsory purchase of a range of specific maintenance products (without which the manufacturer's guarantee is null and void). These highly profitable sales enable the supplier to make steady and substantial profits, at least part of which they can return in any form to the decision-maker to retain his or her custom.

A similar approach is to sell equipment that is incompatible with the purchaser's existing stock. In time, the purchaser will have to make costly changes to its existing stock to make it compatible with the new devices or, more radically, will have to replace its stock entirely. It goes without saying that in either case, "aids to decision-making" (in the form of commissions or other benefits) are planned to help the decision-maker make the best choice, and that these "aids" are maintained over the entire life of the contract, thus ensuring years of income for both partners.

The cases so far are of services provided by entities independent of the decision-maker. However, similar situations can arise if work is performed in-house by the decision-maker's own staff if they have no choice but to implement their boss's instructions. They too, then, may be prompted to "skew" the results of their studies, *e.g.* by neglecting to enumerate all of the

consequences of a technological choice (materials currently used made obsolete; the need for periodic upkeep by the contractor; rewriting of computer software used until that point; "erroneous" estimates of certain items of expenditure, etc.).

In most cases, such voluntary omissions are used to justify subsequent contracts (using the negotiated procedure), which enables the decision-maker to look forward to "commission" payments for his personal benefit for many years to come.

3. Risks in relation to the selection method

The type of procedure chosen to launch the procurement process can indicate a desire to circumvent legislation. The procedures themselves are not at fault, since they are all designed to ensure fair access and equal opportunities to candidates for public procurement contracts. But in the wrong hands, each of these procedures can camouflage the misappropriation of public funds, corrupt practices, influence-peddling, and acquisition of illegal interests. They can also undermine the equality of tenderers. The risks are not always the same, however, depending upon whether the call for tenders is open or restricted, whether a negotiated procedure is followed or whether a group is used as an intermediary. Some procedures lend themselves more readily than others to misuse. In addition, the decision-maker can sometimes manage to avoid having to initiate a call for tender, which reduces the transparency of the procurement and creates opportunities for abuse.

Abuses involving buying groups

A buying group helps procurement managers with relatively low procurement requirements by circumventing the need to issue a call for tender. The mandatory call for tender is issued by the group, and the public procurement manager simply chooses which goods to buy from a catalogue. In addition, if only a small volume of goods is needed, the prices offered by the group are usually lower than those that the public procurement manager would be able to obtain directly from suppliers. In return for dispensing with the procedure and in order to cover expenses, the group charges a commission on the goods it sells.

This simple and useful mechanism can nonetheless be abused. There are two practices in particular that can lead to the genuine misuse of the procedure.

A buying group customer may want one of their own suppliers to be benchmarked by the group to avoid having to issue a call for tender every time when ordering a product. He or she may therefore ask the group to issue a "tailor-made" call for tender – a call for tender for a highly specific product. Regardless of the number of offers received, only one product is capable of meeting all the requirements given that the specifications were tailored for that particular product. The product is therefore benchmarked and can be used by the customer. If, despite all these precautions, another supplier still submits an equivalent offer, it would always be possible to charge a slightly higher than normal commission in order to "erode" the profit margin and thereby make it of little interest to the supplier to be benchmarked. Such procedures have been reported in countries where the buying group has a virtual monopoly on procurement.

The group may also decide to favour suppliers who are already benchmarked at the expense of new arrivals. This process can be used when an innovative tender is submitted. The group draws up, usually with the firm proposing the new product, a specification corresponding precisely to the distinctive characteristics of the new product. This unofficial document is then discreetly circulated to the group's friends and the group only initiates the tendering procedure once its usual suppliers are ready to respond to the call for tender. Several products therefore correspond to the tender specification and, for a variety of reasons, the contract is always awarded to one of the group's usual suppliers with which it has agreed various "arrangements", such as kickbacks on commissions.

Abuses of open calls for tender

Although an open call for tender implies that all candidates are entitled to submit offers, various techniques can bias the equality of access to public procurement contracts. The following techniques are the most noteworthy.

Reduced publicity

Where publication of a notice in the *Official Bulletin of Publication of Public Procurement Notices Contracts* (BOAMP) is not mandatory, the call for tender may be published in journals or reviews with very limited circulation (Box II.2.8). In some cases, regardless of the value of the contract in question, an "oversight" can mean that the call for tender is not published at all, whether at local, national or international level. Thus only a few privileged firms who are "in the know" will be able to respond to the notice or submit a tender.

Box II.2.8. **Reducing publicity**

In the 1990s, a large number of the calls for tender for constructing a metro in a European city were only published in the national press, not in the *Official Bulletin of Publication of Public Procurement Notices*.

Subjective criteria

Although selection criteria for tenders must be justified, certain additional criteria may be more subjective, which may skew the assessment of tenders. This is the case, for example with the "architectural aspect" or "environmental appropriateness" of a project, which are a matter of subjective, personal choice.

Unrealistic deadlines

Despite all the precautions set out in the regulations, the deadlines for disseminating information may be too short to allow firms not notified in advance to submit a credible tender or even to study the project. Indeed, in some cases even the regulatory notice periods are too short to allow potential tenderers to carry out a serious cost appraisal.

Decision-makers often justify shortened deadlines on the grounds of urgency, if not compelling urgency, but experience has shown (Box II.2.9) that in fact such excuses are only given because short deadlines can exclude undesirable candidates. National regulations should give an exact definition of the conditions under which the concept of urgency may be applied.

Box II.2.9. **Abusing the use of urgency**

In the extension of a university, the increase in the number of students at the start of the academic year in September was put forward as an urgency to use non-competitive procedures. However, as it was already known two years previously therefore it could not be held to be an unforeseeable event.

Difficult conditions for obtaining documents

Even when the minimum regulatory deadlines are respected, the conditions for obtaining the specification may mean that only local firms or very large groups can obtain it. For example, it might have to be obtained on the spot (with no provision made for posting it to tenderers) or the cost of making specifications available may be very high. In addition, in some calls for tender, important documents included in the specification (drawings, geological studies, etc.) may not be ready at the start of the selection process. They are sent later, but even when the deadline for submitted tenders is extended (which is not always the case), there is often not enough time to study these documents properly to submit a technically well drafted tender. The only firms that can study their tender properly and submit prices within the deadlines are therefore firms which had prior knowledge of the contents of these documents.

Information leaks

The person drawing up the specification or the decision-maker may release, in advance to certain suppliers, important information on the content of the call for tender (Box II.2.10). This contravenes the principle that all candidates should be dealt with equally.

Box II.2.10. **Leaking information**

During a call for tenders for constructing a building near a watercourse, the competitors were not informed of the construction of a dam upstream of the future construction site. By lowering the level of the water table, the dam avoided the need for special foundations, which all of the competitors, apart from the local firm involved in the construction of the dam, had included in their tenders.

Restricted calls for tender

Calls for tender are known as "restricted" when only a short-list of candidates is permitted to submit a tender. In principle, this procedure is used when the work can only be performed by a limited number of firms or for low value contracts. However, it is also misused to exclude firms that may be less favourably disposed towards the decision-maker (*e.g.* those that will not accept being discriminated against) or that are less familiar with local "practices" (*e.g.* foreign firms).

Drawing up a list of candidates

The most important step in a restricted call for tender is to make a list of candidates, based solely on technical criteria, who could be consulted. Failure to issue a notice of the call for candidates or failure to call for candidates are the most commonly observed infringements of the regulations and are done to avoid too many candidates coming forward for inclusion in the list of firms invited to tender.

The decision-maker (the person in charge of the contract or the tender review board) chooses firms from this list, without having to state the criteria on which the selection is based. These firms will be asked to submit a tender. If these firms should fail to give the decision-maker satisfaction, he or she can deselect them or invite new candidates (increased competition) to submit proposals in subsequent consultations.

As a general rule, everything proceeds "smoothly" and the contracts are split among a restricted number of selected suppliers. In reality, the decision-maker prefers to select firms that he or she knows because he or she has already used them (for example) and because they provide the guarantees of quality, compliance or procurement that he or she expects. For their part, the firms on the list have no interest in seeing new competitors added to their group. They thus seek to retain the trust of the decision-maker by supplying suitable services and by sometimes offering, in addition, some personal "advantages".

Conspiracy

When the decision-maker always consults the same firms, he or she obtains satisfactory service within reasonable deadlines and consequently feels that he or she is making the best use of the community's resources by taking few risks. Indeed, in many cases he or she justifies the policy in terms of safeguarding local jobs. However, this approach can encourage some corrupt practices amongst the firms in the favoured group, which usually involve the following steps.

Group agreement. Firms that are regularly selected sometimes agree among themselves on a "*modus vivendi*" which will allow them to satisfy the decision-maker without having to compete fiercely to secure contracts. This practice allows them to divide contracts among themselves according to their own criteria (work planning, difficulty of the work, deadlines, etc.), provided that the decision-maker makes no changes to either the selection method or the list of candidates. Any firm that does not play along is excluded from the public procurement contract, whereas those which do play the game increase their prices to reflect the constraints imposed upon them and are therefore able to "compensate" both their colleagues who have not been selected (through sub-contracting or various forms of compensation) and the decision-maker (via commissions). Ultimately, it is the taxpayer who foots the bill for all these additional expenses.

Decision-making approach. This conspiracy between firms (which in most cases arises without any prompting by the decision-maker) can take various forms: an official association; a secret association to nominate the firm that will submit the "best" tender and agree on an acceptable contract price; or a secret association to choose which members will alone be in a position to obtain the contract, while the others receive kickbacks from this or subsequent transactions. A number of the members in charge of such transactions set out the rules to be followed in forthcoming projects or projects already in progress, note the operations in a book and discuss the tenders that will be submitted. Such meetings can be held at several levels: national, regional and local. Members are organised according to both table and trade in order to respond to the technical complexity of operations. Such groups are therefore highly corporatist organisations.

To ensure that the system works properly, prior knowledge of forthcoming contracts (the type of operation and provisional cost) is required. Thus if firms are informed beforehand or if information is leaked on other offers, the association has at its disposal, before the call for tender is issued, details that will aid internal discussions. Such discussions allow contracts to be shared out in advance.

Implementation of decisions. When the call for tender is issued, the review of candidates' proposals must be purely formal. The "competitors" (the other members of the group) have submitted unusable quotations or have proposed prices that are too high.[2] The firm selected by the group is the only one to submit a satisfactory tender and therefore wins the contract. Sometimes, the decision-maker is confronted with a conspiracy between firms in which all submit tenders far higher than the price estimate drawn up by his or her departments. The decision-maker therefore has to declare the call for tender inconclusive and commit to a negotiated procedure (see next Section). However, irrespective of the firm with which the decision-maker will subsequently negotiate, he or she will be dealing with one of the members of the conspiracy. The outcome of this will therefore be an increase in the cost of the operation, which will ultimately be borne by the taxpayer.

It should be noted that while these behaviours may not be qualified as corrupt, they nonetheless seriously compromise the equality of candidates' access to public procurement contracts and the overall integrity of the process.

Kickbacks. The competitors who have deliberately ruled themselves out of the contract will receive kickbacks. For example, they may be actively involved in the operation as sub-contractors, they may benefit indirectly from the operation or they may be awarded (by the group) another national or local contract. In the event that they cannot receive compensation in the form of a contract within a short period of time, they may receive, almost officially, compensation through an invoice (obviously false) for services supplied or work carried out.

Stock market manipulation and insider dealing. A conspiracy, in the case of major work contracts, can also give rise to stock market manipulation. If a major group listed on the stock exchange is awarded a large contract obtained through a conspiracy, those in the know can use this information to their own advantage. They may decide, for example, to purchase cheap shares in the successful company before the outcome of the call for tender has been announced. The value of these shares will automatically increase when the good news over the contract is released. All they have to do then is to immediately sell the shares to cash in their profits.

Likewise, the sale of shares in a company before official notification of its failure to win a major contract is a way of avoiding the loss in share value that will automatically follow the announcement. If circumstances permit, using these two levers can be doubly rewarding. In addition, provided only a small number of shares are involved, these activities are very difficult to detect. However, such practices cannot be overlooked as they offer scope for substantial earnings and, if the conditions are right, constitute insider dealing.

The negotiated procedure

All negotiated contracts – when only chosen suppliers are invited to negotiate a contract – are suspect in the eyes of inspectors because direct negotiation between a decision-maker and a supplier can give rise to all sorts of manipulation leading to fraud, misappropriation of public funds and corruption. This is why use of this procedure has only been permitted in a number of specific cases (those listed in EU Directives and various national regulations). Of these permitted cases, special attention should be paid to the following because they are susceptible to abuse.

Tests, research and experiments

Although this technique requires the decision-maker to prove that the work, supplies or services being ordered are to be used for experimental or R&D purposes, any major civil work or specialised building can easily fall into this category. However, while such justification is acceptable for this type of civil work, it is not acceptable in the case of common or customary construction work (typical civil works, construction of residential buildings based on a specific model or conventional industrial workshops, etc.).

After an unsuccessful call for tender

This is the most common case. It can easily occur; all that is required to have a call for tender declared inconclusive is to specify stringent technical requirements and a low contract price. In the course of the "negotiation", it is then a straightforward matter to reduce the services to the level of the standards that usually apply and/or to increase the initial financial package so that, in return for "compensation", the contract can be awarded to the most amenable firm.This is one of the easiest forms of misappropriation and inspectors should give priority to investigating such cases.

In the event of urgency or compelling urgency

This process is used frequently, even though national and EU case history has helped to considerably reduce the cases that can be covered by this provision (totally unforeseeable events and serious risks if the work or the procurement is not carried out immediately).

National security or military secrecy

European Court of Justice case history has, in a number of cases, helped to curtail use of this concept, significantly reducing the frequency with which it is invoked at both the national and EU level. We should therefore no longer see purchases of blankets for the army covered by the provisions of military secrecy or painting work in a consulate for which the interests of the nation are invoked.

There is no consultation procedure that can effectively avoid all risks of fraud or corruption. Dishonest individuals will always try to use the loopholes in different types of procedure for fraudulent ends that are likely to be punished by criminal law.

Procedures to avoid issuing a call for tender

A call for tender must be issued for any contract whose value exceeds a level set by a member country. However, decision-makers may use certain techniques to avoid having to follow this procedure, which they feel leaves too much to chance given that their aim is to choose a firm that is friendly to them. They may therefore try to arrange things so that the code no longer applies, in the ways described below.

Splitting-up contracts

A common technique is to ensure that public procurement procedures no longer apply by awarding contracts whose value does not exceed the specified thresholds. For example, an attempt may be made to misrepresent a building or operation (Box II.2.11), or to split projects into smaller components.

Box II.2.11. **Misrepresenting an operation to split up contracts**

In the building industry, instead of issuing a call for tender for the entire operation, consultations are carried out by activity: plumbers, glass-fitters, painters, carpenters, etc. While such practices are banned, the waters can be muddied to avoid detection by using different addresses for the same building, first specifying the address on one street and then on another. In addition, contracts can be staggered over time and, if necessary, guarantees can be provided that the building is usable in its current state, that the various work contracts are not linked and that they do not have an impact on its use.

Splitting-up invoices

It is also possible to use the fact that, following a merger or a take-over, the same firm may have a number of different trading names. Consequently, when the number of orders placed during the same financial year is about to exceed the threshold, which would at the very least require the signing of a contract to ensure compliance with the regulations, the supplier is asked to submit his invoices under another of his trading names. Each "different firm" is then awarded a volume of contracts that falls short of the threshold and can therefore continue to work under the shorter consultation procedures.

4. Risks during the management of the contract

The preceding chapter primarily described "subtle" forms of misappropriation, such as fraudulent intellectual services, false projects, illegal commissions and fraudulent arrangements to facilitate misappropriation during the management of the contract. In most cases these take the form of tangible services that have not been supplied or that have been poorly carried out, use of illegal (or undeclared) workers, overseers and inspectors who are accomplices in misappropriation, as well as a series of practices and tricks of the trade. All these "tricks" allow the contract holder to generate the financial flows required to fund a bribery pact.

Once the contract has been awarded, there are several other possible ways that misappropriation can occur during the execution of work, the supply of a service or the purchase of supplies.

Delivery of supplies

Misappropriation during the delivery of supplies is relatively easy to detect or uncover. It may take several forms.

Discounts

When the government buyer obtains promotional discounts, in quantitative terms or otherwise, they are usually incorporated into the invoice in the form of reductions or increases in the quantities delivered. This is not always the case, however, as these discounts are sometimes offered directly to the buyer:

- The supplier opens an account in the name of the buyer. This account is credited with amounts corresponding to the discounts omitted from the invoices. Using this account, the buyer purchases additional goods sold by the firm. Sometimes it is used to purchase equipment for which the buyer does not have credit or which is subject to administrative licences that are not readily obtainable. In some cases the buyer may make purchases for him or herself, family members or friends. The goods concerned will not be listed in any inventory because they do not legally exist.
- The discount is paid by transferring the sum into an account that does not belong to the buyer's administration but to an association with a very similar name with which the buyer is linked (Box II.2.12). This process can be used to endow parallel structures (associations linked to the buyer, for example) with financial or material assets. Its main advantage is to give such structures the means to buy everything they may need and not only the products listed in the supplier's catalogue.

- Part of a deal offered to the buyer (*e.g.* buy three products and receive a fourth one free) is shared with a friendly organisation. So three products may be bought, delivered and paid for by the purchaser at the normal rate; the fourth, which is free, is delivered later and to another address. This process thus also provides a friendly organisation, or individuals, with equipment or operating resources.

Box II.2.12. **Providing discounts to an association**

As part of a major sporting event, contracts were awarded to a well-known company by a public body called XYZT. In agreement with the managers, quantitative discounts were invoiced separately, under the name XYZt, an association registered at the same address and whose chairman was an elected official.

Amendments to the order

Amending the order is another technique used to misappropriate funds. A product is ordered and an invoice raised. Just before the product is due to be delivered, the supplier is asked to modify the order and supply a cheaper product, but the original invoice is sent to the local authority. Since the price paid is higher than the value of the goods delivered, the supplier provides the customer with a credit voucher or a cheque to make up the difference. However, the credit voucher or cheque is made out to a similar beneficiary that resembles, but is not the same as the purchaser. This process requires the purchaser to collude with the person in charge of verifying the service supplied (since the invoice does not match the goods supplied). It also means there will be irregularities in the books, in that the reimbursement is not made out in the name of the customer, even though such similar names are sometimes used so that a "mistake" can easily be made.

Another, much simpler, process involves giving the product purchased a generic name which does not exactly match the product desired (for example, a printer will be described as a "typewriter"), but which has exactly the same reference as the product supplied, the price having been agreed beforehand by the purchaser and the supplier. This system is used to acquire equipment that could not otherwise be bought due to a lack or shortage of specific funds. However, it can also be used to misappropriate public funds for personal profit.

Part-exchange of equipment

When buying new equipment, the purchaser must often dispose of the old equipment because it is worn out, broken, unsuitable or has simply

become obsolete (although often still in good working order). As a general rule, the purchaser gets rid of these old products by selling them at a very low price, either directly, if his or her status allows, or through a middleman in the form of a specialist agency. In the latter case, the purchaser does not profit from the sale because the income goes straight into the public purse. However, in some cases the purchaser can come to an arrangement whereby the supplier buys the now useless goods from the purchaser. A part-exchange price, generally very low, is agreed from which, in certain cases, the costs of disconnecting, dismantling and removing the equipment must be deducted. The final sum, usually fairly small, is then deducted from the price of the new equipment or offered as a credit to the purchaser of the new equipment.

When the equipment in question consists of computer or office equipment that is still in good working order, slightly more complicated arrangements may be found which will put a higher value on the transfer of ownership. The old equipment is dismantled and transported to a depot for destruction but is not actually destroyed. The price of dismantling and transporting the equipment corresponds to a set part-exchange price. The firm that has signed the contract (to supply the new equipment) therefore finds itself in the possession of goods that have a zero book value (purchase price equal to the costs of dismantling and transporting the goods) but which are nonetheless in perfect working order. The firm can therefore dispose of this equipment without entering the transfer into its books. It thus sells these goods on to a buyer specialised in buying unwanted stock (a broker) who, depending on his or her status, can either sell it on as second-hand equipment or dismantle the equipment to sell on as spares. The declared price of this transaction between the firm and the broker will be zero. In contrast, the firm will be given a sum of money in cash which it can either keep for use as a slush fund or, more probably, partly hand over to the original owner (the purchaser of the new goods) as a "thank you" present.

Supply of services

The supply of services may also give rise to misappropriation, although the mechanisms are usually more sophisticated than for the procurement of goods. This discussion is limited to phenomena internal to the service provider, since such practices take the form of tax evasion (concealing profits) which is not necessarily linked to corruption, even though in some cases the need to increase income and profits is imposed by the need to pay "compensation" after securing the contract.

Modification of services

In a number of cases, once the contract has been awarded the decision-maker and the service supplier agree to downgrade the services specified in

the contract. The aim here is to reduce the quality of the services the supplier is required to provide so that a commission can be paid to the decision-maker (Box II.2.13).

Box II.2.13. **Modifying services**

A contract was awarded for office cleaning services. This contract called for full, daily cleaning of the furniture in each office. Afterwards, following negotiation, it was agreed that only wastebaskets and ash-trays would be emptied every day, while the offices would be cleaned once a week rather than once a day. A share of the resulting savings made would be remitted to the decision-maker either in the form of cleaning services (for his personal residence), or as cash which would ensure regular income for him for several years given that the contract, which was multi-year from the very onset, would be regularly renewed.

In the case of intellectual services, a verbal agreement between the decision-maker and the service supplier may be sufficient for the latter to reduce the supply of services. In this way, the planned work-load can be significantly reduced, the requirements restricted and the supplier of services freed of contractual obligations to his or her advantage, while still respecting the obligation to provide progress reports which are usually used to authorise the payment of advances. The supplier then pays the agreed "contribution" requested by the decision-maker.

Double (or multiple) payments

Another technique consists of ordering a study that already exists. The intention here, once the contract has been awarded, is to rewrite a study that the decision-maker or supplier already possesses. This practice, known as "recycling", allows a share-out of substantial gains because the decision-maker purchases, under another name, a service which has already been received and paid for. This process can even be repeated several times in a row. This procedure is easy to use but difficult to detect unless one has already been informed of the existence of the first study, prepared under a different name.

Carrying out the work

This is the most complex technique to detect because public works and buildings are constructed in stages, each of which may be awarded to different contractors who may or may not be linked to each through group or sub-contracting contracts. Misappropriation arises from the existence of many types of so-called preparatory works which are often dealt with independently

of the contract itself; additional work, regardless of the reasons for such work; and work which will not be carried out or which will not comply with the selection process specifications. It should also be noted that the same people are involved in all operations: site manager, foremen, representative of the design office heading the operation. All of these people are, to a lesser or greater extent, subordinated to the contract holder and undoubtedly find it easier not to oppose any misappropriation they may see or in which they may be involved, but rather to exact, in their turn, their own benefits. Alternatively, they themselves may be the organisers of the misappropriation.

Preparatory work

The construction of a building or a civil work often requires some initial land preparation (for example, ground preparation and demolition) and other construction-related activities (rubble clearance, traffic deviation and restoration of traffic flows, landscaping, etc.). The contract holder could sub-contract these operations, which are usually covered by private law contracts. The contract holder selects the first tier of sub-contractors and submits his or her selection to the official for approval. Subsequently, each of these sub-contractors can choose other contractors to carry out part of the work contract. These cascaded sub-contracts can be used to produce sums that will then be remitted to the decision-maker using the system of false invoices or undeclared work.

However, the decision-maker may also decide to carry out this preparatory work since it is often independent of the main contract. In order to obtain commissions on these contracts, the decision-maker may use a number of specific practices. In the case of demolitions or ground preparation (grubbing up tree stumps), contracts are awarded as lump-sums that are often determined purely arbitrarily. If there are several firms competing for the contract, which would mean lower lump-sums, the number of units can be increased (*e.g.* trees to be felled) or reference made to unexpected difficulties (*e.g.* need to use more powerful plant) in order to obtain the payment of additional sums that will allow the firm awarded the contract to maintain its profit margin while still paying a commission to the decision-maker (Box II.2.14).

The removal of rubble, particularly for major building projects in urban areas, can be a fundamental issue for the local authority. For example, as part of the preparatory work for building a major library, 900 000 tons of gravel were excavated and removed by waterway to avoid nuisance and the destruction of highways surrounding the site. Such contracts, paid on a unit basis (per cubic metre or tonne transported) may give rise to corrupt misappropriation, regardless of the mode of transport used.

Box II.2.14. **Overvaluing invoices**

As part of the preparatory work for which contracts were awarded on a lump-sum basis, the specification called for the felling and grubbing up of trees and removal of the ground cover along the route of a future road. The estimates called for the removal of ground cover to an average depth of 20 cm and the felling of 2 000 trees more than 30 cm in diameter. Oddly, the invoices submitted six months later referred to the removal of ground cover and soil to a depth of 40 cm and the felling of 4 000 trees.

Additional work

Contractors are often asked by the decision-maker to perform additional work during the term of the contract. This work is covered either by riders to the original contract or by service orders. In any event, such work should be justified on technical grounds.

Additional work commissioned by a "service order". Where an incorrect estimate means that the work originally planned is not sufficient (greater volume of drainage effluent than initially foreseen, poor quality of local sub-soil requiring larger foundations, deeper or greater number of footings, etc.), the prime contractor orders the work to be carried out by means of a service order, provided that the additional quantities do not exceed 20% of the initial estimate. Since it is very difficult, under the circumstances, to determine whether the wrong initial estimate was established deliberately or accidentally, it is clear to see how, for work covered by such a service order, all types of misappropriation would be possible.

Additional work covered by a rider. When the volume of additional work exceeds the initial estimate, perhaps because the estimate was not drawn up properly or unforeseen events occur or come to light during the project, a rider to the contract must be drawn up. For example, land was found to be polluted by oil products to a greater depth than initially foreseen during construction of a stadium, which led to the drawing up of a rider to increase the level of decontamination work required.

However, the grounds for issuing such riders are not as clear-cut as might seem at first; this process is sometimes used to enable the firm to pay large commissions to the decision-maker. For example, the establishment of a rider may be the result of a deliberately undervalued estimate for certain work items or a deliberate failure to take account of the inclusion of a civil work or building in the site (no car parks, access road, etc.). In this type of work, we are faced with either a genuinely unforeseeable technical difficulty or a study in

which certain items have been deliberately miscalculated or omitted so that it is technically possible for the contract-holder to establish or re-establish sufficient margins that will be used in part to pay commissions to the decision-maker.

In both cases, the work continues without a new call for tender being issued at the unit price set by the contract-holder in his or her tender. Since the contractor has been told that the quantities have been deliberately underestimated, he or she specifies high unit prices for the work in question and is able to tender a low bid in order to win the contract. Although the overall proposal is cheaper than that of competitors, the contractor is sure to be able to recover and generate profits without too many risks. The same would be true if the documents had deliberately overpriced certain jobs that were hard to complete. Being aware of these "deviations", the contractor would have been able to hone his or her tender price and obtain the contract while still being able to make a profit. Since it is always hard to distinguish between a deliberate mistake and an unforeseeable event, the contractor can easily release the financial resources which will allow him or her to express gratitude to the decision-maker.

"Extensions" to the initial contract are another form of additional work that are encountered frequently. In such cases, the decision-maker, who agrees with the quality of the service supplied by the firm, decides to extend the scope of the contract: instead of resurfacing the road over two kilometres, it will now be resurfaced over three, for example. This practice, commonly employed by certain decision-makers, distorts the rules of competition and is increasingly condemned by the competent authorities – when they notice it.

Far more serious is the case of additional work unrelated to the contract but which is demanded by decision-makers (Box II.2.15). It may be performed

Box II.2.15. **Adding work unrelated to the contract**

After the construction of a motorway, a general finance inspectorate strongly criticised the financial misappropriation, disavowal of responsibilities and lack of realism that often surrounds major development projects. In detail, it criticised the construction of a luxurious operating centre in which each employee (in principle working on the motorway) had over 17 m^2 of office space, the existence of five full motorway interchanges in a valley inhabited by only 41 000 people, the financing of a sports club by the firm, etc. In contrast, the technical manuals describe this motorway as an "exemplary construction project completed on time and to very high standards in terms of its architectural design and integration into the environment".

for the good of the community (surfacing a public square, for example) but may also be for the personal benefit of the decision-maker, such as the construction of a private swimming pool, restoration of a building, etc. In both cases, if corruption is involved, there will be false documents in the firm's accounts.

Modified or incomplete work

Through the "skewed" drafting of the technical specifications used solely for work performance, there are two other types of misappropriation possible that were mentioned earlier in the section on the planning of the contract. Work that has been planned to specific, and sometimes exacting, standards is either not performed at all or performed to only conventional standards. This allows the contracted firm to realise large profit margins that it can appropriate or remit to the decision-maker. The connivance of the departments responsible for inspecting the work and certifying the service rendered is essential, since the work actually carried out is different to that specified in the contract. In practice, the firm which does not perform a given number of services sees its profits rise without having to resort to a system of false invoices. It is the decision-maker who instigates all the actions since he or she has taken it upon themselves to certify, through a "friendly" inspection agency, that the work has been performed in compliance with the document submitted to the firm.

Notes

1. The use of such criteria is theoretically prohibited, but it is sometimes difficult to distinguish between specified criteria that are objective and those that are subjective.
2. These quotations may have been "fabricated" for them by the candidate chosen to win the contract, notably through the use of specialised software.

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OECD Principles for Integrity in Public Procurement

PART II

Chapter 3

A Pilot Application of the Principles in Morocco

Introduction

The economic interests at stake of public procurement in Morocco are considerable. In terms of transactions, 11 614 government contracts were awarded in 2007 and 10 143 in 2005, 88.8%[1] and 88.9% respectively, through open tendering.

Public procurement plays an important strategic role in sustaining growth through investment projects initiated and financed by the government and carried out by market actors. Both Moroccan and foreign firms are potential tenderers for public procurement contracts. Recent statistics indicate that public procurement accounts for 70% of the business of construction firms in Morocco and 80% of the business of engineering firms.

Given the financial interests at stake, public procurement is one of the areas of government activity exposed to the risk of corruption, both in OECD member countries and in Morocco. A perception study carried out by *Transparency Maroc* in 2002 revealed that 60% of firms taking part in the survey considered that public procurement in Morocco was not systematically transparent and that illegal payments were frequent.

Recent reforms

The government has gradually come to realise the scale of the problem and the issues involved. Although public procurement has not been a policy priority in the past – no reforms were made between 1976 and 1998, the measures taken in 1998 and 2007 underline the State's growing determination to reform this area of its action.

The current reform of public procurement in Morocco is based on a set of government modernisation measures, including:

- Decree 2-06-388 of 5 February 2007 setting conditions and terms for the award of government contracts and certain rules relating to their management and control (referred to in the report as the "2007 Decree").
- Dahir[2] 1-02-25 of 3 April 2002 promulgating Act 61-99 on the responsibility of public authorising officials, controllers and accountants.
- Decree 2-01-2332 of 4 June 2002 approving the general administrative terms and conditions applicable to service contracts for studies and general contracting awarded on behalf of the State.

- Dahir 1-03-195 of 11 November 2003 promulgating Act 69-00 on state financial control of state-owned enterprises and other bodies.
- Decree 2-99-1087 of 4 May 2000 approving the general terms and conditions of contract applicable to work performed on behalf of the State. And
- Decree 2-98-884 of 22 March 1999 regarding the system for approving design and main contractor services.

Objectives of the study

The objective of the study was to examine Morocco's progress in modernising public procurement, placing particular emphasis on fighting corruption and enhancing integrity. The government aims at reducing the risks of corruption, while ensuring that the procedures in place contribute to overall value for money in public procurement, in order to enhance integrity and optimise the use of public resources in the production of goods and services.

The study covers the entire public procurement process from needs assessment to award and contract management. It seeks to identify the strengths and weaknesses of the system and to frame policy recommendations for improvement.

Fighting corruption and enhancing integrity in public procurement involves not only formulating and implementing a solid legal framework for procurement but also enforcing it and imposing sanctions in the event of non-compliance. This study seeks to identify and examine the legislative, institutional and practical aspects of the management and control of public procurement in Morocco within the broader framework of improving the probity of public life.[3]

Analytical framework

The OECD Principles for Enhancing Integrity in Public Procurement provide the analytical framework for the study. They guide governments in the preparation and implementation of a policy framework that enables them to enhance integrity in public procurement.

The Principles define integrity as the use of funds, resources, assets, and authority for the official purposes for which they are intended to be used, in line with public interest. The offering and acceptance of bribes, conflicts of interest, nepotism, the abuse and manipulation of information, discriminatory treatment and the waste and abuse of organisational resources are actions and situations that can compromise integrity in public procurement.

Methodology

The Joint Learning Study, which is a pilot project for the region, was prepared in several phases.

- The first phase consisted of preliminary research work conducted by the OECD Secretariat and the preparation of a questionnaire framework for interviews.
- Next, experts went on a fact-finding mission in October 2007 to conduct an initial assessment of the system and the progress made. One noteworthy feature of the mission was the involvement of government experts from OECD countries (Canada and France) and the region (Dubai, United Arab Emirates) in order to provide a variety of viewpoints for the analysis. Interviews were conducted with officials from the various Moroccan government agencies concerned, and meetings were held with representatives of the private sector, civil society and international organisations.
- Preparation of the draft study in close co-operation with the government experts who took part in the fact-finding mission.
- Validation of the draft study with representatives from the government, private sector and civil society that had been met during the field mission.[4]
- Further to this pilot project in Morocco, a workshop was organised in Morocco in April 2008 on the theme of integrity in public procurement to discuss the results of the study done with stakeholders, as well as to allow exchanges between experts from the region. On this occasion, participants showed they were in favour of the Joint Learning Study's methodology, with certain countries in the Middle East and North Africa region expressing an interest in a study of their system.

1. Overview of the 2007 Decree on public procurement

The 2007 Decree on public procurement

Reasons for the reform

The Decree setting conditions and terms for the tendering phase and certain rules relating to their management and control, which came into effect on 1 October 2007, seeks to address:

- the shortcomings and loopholes of the 1998 Decree (*e.g.* absence of procedures for the settlement of disputes, limited public notification, lack of clarity in relation to selection criteria, etc.);
- the need to update and modernise public spending management tools;
- developments in international standards and the government's international commitments (*e.g.* European Union, World Bank and Free Trade Association); and
- firms' and citizens' demands for and expectation of better quality service.

The principles

The principles of the 2007 Decree are consistent with those that guide reforms at the international level such as the WTO Agreement on Public Procurement and EU Public Procurement Directives, *i.e.* increased transparency and competition as well as the equal treatment of tenderers. The simplification of procedures and improved probity in public life are also stated objectives of the 2007 Decree.

Main advances

The main advances of the 2007 Decree are:

- increased transparency with regard to potential suppliers and within the administration (*e.g.* wider publication of tender notices, automatic notification of unsuccessful tenderers of the reasons for non-selection and a more systematic requirement to keep documents relating to awarded contracts for a minimum period of five years);
- introduction of specific anti-corruption measures for both tenderers and the contracting authority;
- better regulation of certain at-risk practices, such as the use of sub-contractors and negotiated contracts; and
- better co-operation with the private sector by simplifying administrative procedures and introducing forms of recourse.

Scope of the 2007 Decree

The 2007 Decree provides a detailed framework for regulating the public procurement procedure in Morocco at central government level and regional and local level. It applies to local authorities by virtue of Article 48 of Decree 2-78-576 of 30 September 1976 regulating the accounts of local authorities and their consolidation. In the case of public establishments operating under the oversight of the Ministry of the Economy and Finance, each establishment is required to draw up its own regulations on public procurement in compliance with the basic rules of transparency, competition and fair treatment. Because they did not have regulations of their own, some public enterprises have decided to apply the 2007 Decree. Some enterprises which already had their own regulations, such as the National Electricity Board and the National Water Board, are thinking about harmonising their regulations, in light of recent developments.

It was said during the interviews that local authorities may well find it hard to implement the provisions of the 2007 Decree. To overcome any such difficulties, fresh thought is being given to introducing supplementary regulations for local procurement, within the broader framework of modernising and upgrading the organisation, financing and staffing of local government. Although public procurement is decentralised from a technical and managerial standpoint, financial decisions on the commitment of funds are taken centrally. The situation of Rabat, the capital city, is more complex and unique, since the presence of a mayor and a prefect *(Wali)* with different responsibilities means that the procurement process is split in two.

The 2007 Decree contains more exceptions than the 1998 Decree. For example, the 2007 Decree does not apply to:

- agreements and contracts concluded by central government under the rules of ordinary law;
- delegated management contracts for public services and infrastructure;
- asset disposals and services provided between government agencies under the prevailing regulations; and
- concessions and delegated management contracts are regulated by the February 2006 Act on the delegated management of public services.

REMARK. Steps to harmonise the provisions of the 2007 Decree with the regulations applicable to public establishments and state-owned enterprises is necessary to make the regulation of public procurement more coherent. The role of the Government General Secretariat could be enhanced in this context to ensure intergovernmental co-ordination to facilitate the harmonisation or even standardisation of regulatory provisions whenever possible. In some OECD member countries, a single regulatory text applies to the State, local authorities and public

establishments. Moreover, it will be essential to put in place the means to implement the 2007 Decree; to do this, adequate human and financial resources will have to be provided at both central and local level.

Actors in the reform and supporting texts

Actors

Several public sector actors are involved in the planning, tendering, performance and control of public procurement contracts. Only senior officials – ministers at national level, and regional council presidents and governors at local level – have the power to authorise budget commitments. Authorising officials entrust the procurement procedure to contracting authorities. The contracting authorities in turn draw up, manage and monitor procurement contracts, from the preparation of specifications and award of the contract to the monitoring and control of contract implementation. Control staff is responsible for ensuring the compliance of the process in terms of budgetary and regulatory procedures. The payment office's staff is responsible for settling the corresponding expenditure and discharging the public entity's debts. Budgetary commitment, planning and expenditure payment functions are therefore kept separate.

Supporting texts

In order to supplement and the specific provisions of the 1998 Decree and other regulations relating to public procurement, a number of supporting texts are being created, notably through:

- the adaption of the general conditions of contracts applicable to works and design contracts (2000 and 2004); and
- the standardisation of other terms and conditions, like the common conditions of contract and the special conditions of contract.

It was also pointed out in interviews that several projects were planned in this respect, such as a standard format for special specifications, the amendment of general terms and conditions of contract in order to ensure compliance with the provisions of the 2007 Decree, a guide to public procurement drawn up by the General Treasury and a common classification for documentary evidence of commitments and payments.

REMARK. These measures to support implementation of the 2007 Decree in the form of explanatory notes, manuals and standardised documents for contracts relating to the provision of work, supplies and services must be continued. These texts will play an essential part in clarifying the provisions of the regulations, ensuring consistent interpretation at central government level and defining the implementing conditions for the 2007 Decree.

Raising awareness

In order to advertise the content of the new public procurement reform, the General Treasury of the Kingdom of Morocco organises training days for the departments affected by the reform. The experts trained will assist with awareness-raising days organised at local level by territorial authorities in several regions of Morocco. Led by experts and practitioners, these workshops, which explain the new regulations, are designed to provide training in the new regulations to central and local government officials responsible for public procurement. An information day for the private sector has been organised by the General Treasury. This training is essential in order to facilitate harmonised interpretation and implementation of the 2007 Decree.

2. Strengths and weaknesses of the public procurement system

The following points sum up the identified strengths and weaknesses of the public procurement system in Morocco.

The 2007 public procurement regulations: A detailed framework for public procurement

The 2007 Decree setting conditions and terms for public procurement, which came into effect on 1 October 2007 in Morocco, seeks to remedy the shortcomings of the 1998 Decree. It provides a detailed framework for public procurement and is conform to principles of good governance, which guide efforts at an international level.

The 2007 Decree applies to central government and local authorities. Public enterprises and establishments can adopt their own specific regulations provided that they comply with regulations regarding competition and transparency. Authorities that do not have their own regulations in place must apply the 2007 Decree. It will important in the future to harmonise existing regulations for all public enterprises and establishments with the provisions of the 2007 Decree.

In addition, although the 2007 Decree partly covers the needs assessment (Article 4) and contract performance (Articles 91 and 92) phases, more emphasis could be placed on the pre- and post-tendering phases in order to ensure the integrity of the entire procurement process. In particular, it would be advisable that regulations and additional guidelines such as the General Terms and Conditions of Contract, provide further details on the preventative mechanisms that apply to these grey zones.

Lastly, attention should be paid to ensuring that the 2007 Decree is effectively implemented at central, regional and local levels. In particular, adequate human and financial resources must be provided at the regional and local levels to allow implementation of the 2007 Decree.

More transparency in the procurement cycle

The 1998 Decree already reflected the principle of increased transparency in public procurement. The 2007 Decree introduces new features such as increased scope for informing firms of tender notices, increased transparency for negotiated contracts and automatic notification of unsuccessful tenderers and more systematic conservation of documents relating to awarded contracts in order to facilitate any subsequent research.

While the aim is to make the best purchase possible (work, supply of goods or services), one of the challenges of implementation lies in striking the right balance between increased transparency and procedural efficiency. Care

must be taken to ensure that the implementation of provisions regarding transparency do not lead to delays in the award of contracts and additional costs for the administration.

Electronic procedures: Creation of a national public procurement portal

The creation of the new electronic portal has particularly ambitious objectives, including publication on the portal of planned procurement programmes, tender notices, the results of tendering, excerpts from the minutes of tender review sessions and progress reports on the performance of contracts.

Further consideration should be given to ways of facilitating the transition from a paper-based system to a system that combines paper and electronic media, especially in terms of improving the management capacities of procurement departments and enterprises with regard to the electronic portal.

Introduction of anti-corruption measures in the 2007 Decree

The 2007 Decree introduces anti-corruption measures for the first time, both for the tenderer (sworn oath, undertaking not to use dishonest practices or corruption) and for the contracting authority (abstention from any relationship or action that could compromise its independence).

It is considered important that these measures should be applied within a solid legal framework that regulates conflicts of interest for the actors involved in public procurement in order to strengthen the integrity of the entire system. Some public enterprises such as the National Electricity Board in Morocco have taken the initiative to develop ethical rules and procedures (see Box II.3.1).

Besides this legislative framework, attention should also be paid to the effective implementation of sanctions against corrupt officials, regardless of their rank or seniority, in order to bolster confidence in this new system.

First step towards the introduction of an appeals mechanism

Any tenderer who challenges the outcome of a tendering procedure and is dissatisfied with the decision taken is entitled to take the matter up with the contracting authority. If the tenderer is not satisfied with the contracting authority's response, it may, as a second step, take up the matter with the minister concerned and, as a third step, with the presiding Government Secretary General over the Public Procurement Review Board to consider the request. The Public Procurement Review Board issues an opinion in an advisory capacity.

Box II.3.1. **Efforts to prevent risks of corruption in public procurement: The National Electricity Board in Morocco**

With 10 000 employees and 3.5 million customers, the National Electricity Board is a public establishment of an industrial and commercial nature, created in 1963, with activities focused on the production, transportation and distribution of electricity. After the government itself, it is the largest investor in the country with planned investment of MAD 11.6 billion in 2008 (compared with MAD 36.07 billion from the government's general budget and a total of MAD 66.6 billion* by all state-owned enterprises and public establishments). It is subject to supervision by the Court of Accounts, the IGF, the Directorate of State-Owned Enterprises and Public Establishments and Parliament (through specific parliamentary committees).

Given the sums at stake, the power sector is particularly vulnerable to corruption. In order to minimise risks of corruption that could tarnish its reputation, the National Electricity Board has taken a proactive stance to strengthen the integrity of its procedures. It established an ethics committee in 2007 that includes the CGEM and staff representatives. The remit of this Committee is to propose binding ethical rules and procedures for both staff and other stakeholders, including suppliers.

Its first task was to develop a code of ethics which would encourage staff to comply with the Act on the status of personnel. The consultation process for preparing the code was based on a representative sample that included not only managers but also operational staff (around 40% of representatives were from management, *versus* 60% from workers on the ground). Adherence to the code was made voluntary, as a means of encouraging all staff to sign on willingly. The next task will be to evaluate conflict-of-interest risks within the firm.

The National Electricity Board is also playing a driving role in the use of new technologies to strengthen transparency and accountability in procurement. Thus, it was publicising invitations to tender at its Internet site even before the 2007 Decree made this mandatory. It also maintains a database not only for storing information on calls for tender but, more generally, to keep records of decisions taken in the procurement process, and thereby make staff accountable. Information on suppliers is centralised and classified to facilitate evaluations on the basis of objective parameters such as price and timeliness of delivery.

The next phase should be to examine National Electricity Board's current operating regulations to harmonise them with the provisions of the 2007 Decree and have them validated by its Board of Directors.

* Statistics published by the Directorate of State-Owned Enterprises and Privatisation.

To ensure that complaints are treated fairly, plaintiffs should be given easier access to the Review Board by eliminating a number of existing filters and the Board itself should be given more powers and more resources in both financial and human terms.

A shift from control of compliance to performance-based controls of public spending

The aim of the reform is to relax *ex ante* control based on procedural compliance in favour of *ex post* control which would improve efficiency by emphasising control of the outcome and tangibility of the service supplied. Despite the numerous and cumbersome control efforts of such prestigious institutions as the General Treasury (*Trésorerie Générale*), the Inspectorate General of Finance (*l'Inspection Générale des Finances*) and the Court of Accounts Office (*la Cour des comptes*), these controls have proved unable to produce sufficient material evidence for judges to investigate cases of corruption in public procurement.

Tightening up *ex post* controls requires a change of mindset and therefore calls for a structural reorganisation and the professionalisation and support of the staff concerned. Training has a key role to play in this enhancement of professional skills in order to keep actors abreast of reforms, familiarise them with the new procedures to follow and also help them to prevent any risks of corruption.

3. Policy recommendations: How to improve the system

The analysis of procurement in Morocco identified a number of possible adjustments for enhancing the integrity of the system. To assist the Moroccan government in its efforts to reform public procurement, five priority lines have been identified through an analysis of the system:

- strengthen professional skills in public procurements in order to give authorising officials sufficient management capacity as part of the process of relaxing *ex ante* controls;
- increase the powers of the Public Procurement Review Board;
- continue with the assignment of responsibilities and auditing process;
- ensure the harmonised interpretation and implementation of the 2007 Decree; and
- introduce specific measures to prevent corruption in public procurement.

Professionalise public procurement

The reform now underway to simplify *ex ante* controls contributes to speeding up procurement procedures and avoiding excessive red tape in verifying their compliance with regulations. The plan is to transfer *ex ante* control gradually to the most capable authorising officials. While this should be feasible in the case of ministries that have a long tradition of procurement such as the Ministry of Equipment, the transfer may be more difficult for other line ministries that do not have the same skills profile. The issue is still more complicated for local governments, where there is even less available capacity.

In this context, the professionalism could be enforced by developing a common body of knowledge and skills. One possibility would be to create a professional category of public procurement specialists, whose function would be devoted entirely to planning, contracting and executing purchases, and who would assist the authorising officials in a context where the authorising officials themselves are responsible for internal controls. This function should have its own status and recognition within the hierarchy of civil service posts. In addition, specific procurement training could be organised so that procurement specialists can keep their skills up to date in line with the latest regulatory and technological developments, especially those relating to the electronic procurement portal. Over the longer term, a system for certifying purchases could be developed, with the support of international partners.

These measures would allow procurement to be recognised as a profession in its own right and ensure that contracting authorities at both the central and local level have the contract management capacity needed, which cannot but facilitate the move towards *ex post* control.

Strengthen the independence of the Public Procurement Review Board

The possibility of invoking the Public Procurement Review Board for the friendly settlement of disputes represents a step towards instituting an effective right of appeal for tenderers (Article 95 of the 2007 Decree). In fact, there is a widespread climate of mistrust among firms *vis-à-vis* the government, and firms are reluctant to file complaints. Yet the Public Procurement Review Board's mandate is very narrow, for appeals to it are submitted indirectly through the General Secretary of Government, and its opinion has merely advisory force. This means that the government is both judge and party, for it is the line minister who has the final say in the dispute. Although its creation dates back to 1936, the committee's human and financial resources are grossly inadequate for the proper handling of complaints. Finally, the right of challenge only relates to the award of the contract. This right therefore does not apply to the choice of procurement procedure or to the criteria for the selection of candidates, to a decision by the Review Board to reject all tenders, or to a decision by the competent authority to cancel the call for tenders.

A speedy mechanism for dealing with complaints is needed to ensure that tenderers are treated fairly, and there are a number of ways in which this can be achieved:

- The 2007 Decree should be amended to remove a number of filters on access to the Review Board, notably by allowing it to be consulted directly.
- Consideration might be given to speeding up the appeals procedure by making more systematic use of the right to refer cases to the Administrative Judge, which would allow appeals to be judged within a reasonable period of time.

If the aim is to put in place a proper appeals mechanism, consideration might be given to guaranteeing the independence of the Review Board by:

- Enhancing its statutes. Its opinions could be made binding so that they cannot be contested by the administrative and judicial tribunals. Furthermore, the exceptions mentioned in the 2007 Decree under which the procedure cannot be disputed could be removed to allow the procedure to fully fulfil its role as an appeals mechanism.
- Increasing its budgetary and human resources which are too limited and which do not allow it to successfully meet its remit.

Furthermore, other considerations must be taken into account to ensure the independence of the appeals mechanism. To avoid any undue influences, notably at a political level, certain guarantees for integrity could be introduced, for example the appointment of its members could be based on

precise professional and ethical criteria (*e.g.* no conflicts of interest, a reputation of integrity and neutrality).

Pursue the initiative to reinforce accountability and control

There has been significant progress in recent years in terms of provisions making the authorising officials accountable before the budget discipline court (Act 61-99 promulgated by Dahir 1-02-25 of 3 April 2002) and overseeing them (mandatory audit for contracts exceeding MAD 5 million since 1998). Another move in the right direction is the ambitious reform to ease *ex ante* control, which can lead to excessive formalities. In addition, the control is under reform to become more performance based. Yet despite these efforts, it was indicated during our interviews that ministers and senior officials are not systematically held responsible for their decisions and are rarely taken to task for violating the rules.

This can be attributed to the fact that when the authorising official is a minister, they cannot be held legally liable even if they has issued a requisition order (Article 52 of Act 62-99, on the Code of Financial Jurisdictions, 13 June 2002). More generally, there is no real control over the appropriateness of expenditure, and this leaves the authorising official broad powers of discretion when it comes to defining needs. With respect to *ex post* control, it was indicated in the interviews that the audit requirement for major contracts is not systematically enforced.

The move to accountability and *ex post* control of the authorising officials should be pursued. Several steps could be considered. The Code of Financial Jurisdictions could be amended to make authorising officials more accountable. The role of the IGF in the pre-tendering phase could also be expanded so that it can ensure the proposed procurement is consistent with the nature and scope of needs, which would help to verify the appropriateness of the expenditure. Finally, steps should be taken to ensure not only that large contracts are audited, but that audits are conducted more systematically for contracts worth less than MAD 5 million. One possibility would be to set audit priorities for the IGF in light of the risks inherent in the contract (for example the amount, the type of procedure used, etc.), without any minimum threshold for such audits.

Ensure harmonised interpretation and implementation of the 2007 Decree

The 2007 Decree constitutes a detailed and modern framework for regulating public procurement at the level of both central and local government. Its principles are consistent with those apply internationally, such as the WTO Agreement on Public Procurement, especially when it comes

to transparency, promoting competition, and preventing corruption. The private sector's involvement in preparing the 2007 Decree has enhanced its relevance, for it broadly reflects the expectations of stakeholders. It establishes clear rules governing procurement. It covers the entire procurement cycle, from the definition of needs to management of the contract, although it is focused primarily on the tendering phase. However, the Decree solely applies to state-owned enterprises and public establishments which do not have their own specific regulations.

The main challenge is to ensure that the decree is taken into consideration and actually implemented:

- Measures to publicise the decree have been initiated and should be stepped up. Training is underway within government departments and agencies, at both the central and local levels. This effort should be extended to firms, to familiarise them in particular with the new electronic portal and encourage them to use it.
- Similarly, more explanatory notes, manuals and standardised documents focusing on works, goods and services should be developed to ensure a common interpretation and implementation of the 2007 Decree. These explanatory notes would be particularly important for pre- and post-tendering phases.
- To ensure implementation of the Decree, consideration might be given to organising, within a year's time, a review of the application of its provisions by the administrations concerned and to make public the results of this review.

Moreover, it is essential to harmonise the provisions of the 2007 Decree with the regulations applicable to public establishments and state-owned enterprises, in order to make procurement regulation more consistent. The role of the General Secretary of Government could be useful here, in fostering intergovernmental co-ordination to facilitate harmonisation of texts. Moreover, adequate capacity must be provided at the local level to permit implementation of the Decree.

Introduce specific measures to fight corruption in procurement

The 2007 Decree introduces for the first time provisions targeted specifically at combating corruption in public procurement, by tenderers and officials alike. However, there are no detailed, government-wide ethical standards defining private interests and situations that might compromise officials' impartiality. More generally, government officials do not have a thorough understanding of the phenomenon of corruption and its causes, particularly when it comes to procurement.

It would be useful for the Central Corruption Prevention Office to take into consideration the specific measures for preventing corruption in public procurement. A first step would be to compile a "risk map" for the different departments and agencies to identify the positions of officials which are vulnerable, those procurement activities where risks arise, and the particular projects at risk due to the value and complexity of the procurement. To achieve this, the various administrations will have to co-operate with the Office and provide the required information. On this basis, the strategy and the means for combating corruption in procurement could be properly adapted. For example, training sessions could be organised to inform procurement officials and the controllers about the risks of corruption and measures for preventing and detecting it.

If ethical standards are to be thoroughly instilled in procurement activities, it is essential to develop regulations on conflicts of interest that will clearly define private interests or situations that could compromise an official's independence. In addition, officials involved in procurement could be made aware of ethical issues, with the adoption of a professional code that would help them manage potential conflict-of-interest situations (for example the receipt of gifts and other advantages) in their relations with suppliers.

Notes

1. The figure of 88.8% by open tendering in 2007 does not include purchase orders. The remaining contracts were awarded by restricted open tendering tendering (6%) or negotiated (5.2%). *Source: Statistiques de la trésorerie générale du royaume du Maroc.*
2. A Dahir is a decree issued by the King of Morocco.
3. Improving the probity of public life in Morocco is a government priority. An Action Plan against Corruption was framed in August 2005.
4. A detailed description of the methodology is given in the document "Terms of Reference for the Pilot Project on the Integrity of Public Procurement in Morocco – Joint Learning Study".

ANNEX A

OECD Recommendation on Enhancing Integrity in Public Procurement

THE COUNCIL,

Having regard to articles 1, 2a), 3 and 5b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Having regard to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted on 21 November 1997, the Revised Recommendation of the Council on Combating Bribery in International Business Transactions adopted on 23 May 1997 and the related Recommendation on Anti-corruption Proposals for Bilateral Aid Procurement endorsed by the Development Assistance Committee on 7 May 1996;

Noting that legislation in a number of member countries also reflects other international legal instruments on public procurement and anti-corruption developed within the framework of the United Nations, the World Trade Organisation or the European Union;

Recognising that public procurement is a key economic activity of governments that is particularly vulnerable to mismanagement, fraud and corruption;

Recognising that efforts to enhance good governance and integrity in public procurement contribute to an efficient and effective management of public resources and therefore of tax payer's money;

Noting that international efforts to support public procurement reforms have in the past mainly focused on the promotion of competitive tendering with a view to ensuring a level playing field in the selection of suppliers;

Recognising that member countries share a common interest in preventing risks to integrity throughout the entire public procurement cycle, starting from needs assessment until contract management and payment;

On the proposal of the Public Governance Committee:

I. RECOMMENDS:

(1) That member countries take appropriate steps to develop and implement an adequate policy framework for enhancing integrity throughout the entire public procurement cycle, from needs assessment to contract management and payment;

(2) That, in developing policies for enhancing integrity in public procurement, member countries take into account the Principles which are contained in the Annex to this Recommendation of which it forms an integral part;

(3) That member countries also disseminate the Principles to the private sector, which plays a key role in the delivery of goods and services for the public service.

II. INVITES the Secretary General to disseminate the Principles to non-member economies and to encourage them to take the Principles into account in the promotion of public governance, aid effectiveness, the fight against international bribery and competition.

III. INSTRUCTS the Public Governance Committee to report to the Council on progress made in implementing this Recommendation within three years of its adoption and regularly thereafter, in consultation with other relevant Committees.

Appendix
Principles for Enhancing Integrity in Public Procurement

I. Objective and scope

The Recommendation provides policy makers with Principles for enhancing integrity throughout the entire public procurement cycle, taking into account international laws, as well as national laws and organisational structures of member countries.

The Recommendation is primarily directed at policy makers in governments at the national level but also offers general guidance for sub-national government and state-owned enterprises.

II. Definitions

Public procurement cycle

In the context of the present Recommendation, the public procurement cycle is defined as a sequence of related activities, from needs assessment, to the award stage, up until the contract management and final payment.

Integrity

The Recommendation aims to address a variety of risks to integrity in the public procurement cycle. Integrity can be defined as the use of funds, resources, assets, and authority, according to the intended official purposes and in line with public interest. A negative' approach to define integrity is also useful to determine an effective strategy for preventing integrity violations' in the field of public procurement. Integrity violations include:

- corruption including bribery, "kickbacks", nepotism, cronyism and clientelism;
- fraud and theft of resources, for example through product substitution in the delivery which results in lower quality materials;
- conflict of interest in the public service and in post-public employment;
- collusion;
- abuse and manipulation of information;
- discriminatory treatment in the public procurement process; and
- the waste and abuse of organisational resources.

III. Principles

The following ten Principles are based on applying good governance elements to enhance integrity in public procurement. These include elements of transparency, good management, prevention of misconduct, as well as accountability and control. An important aspect of integrity in public procurement is an overarching obligation to treat potential suppliers and contractors on an equitable basis.

A. Transparency

1. Member countries should provide an adequate degree of transparency in the entire public procurement cycle in order to promote fair and equitable treatment for potential suppliers

Governments should provide potential suppliers and contractors with clear and consistent information so that the public procurement process is well understood and applied as equitably as possible. Governments should promote transparency for potential suppliers and other relevant stakeholders, such as oversight institutions, not only regarding the formation of contracts but in the entire public procurement cycle. Governments should adapt the degree of transparency according to the recipient of information and the stage of the cycle. In particular, governments should protect confidential information to ensure a level playing field for potential suppliers and avoid collusion. They should also ensure that public procurement rules require a

degree of transparency that enhances corruption control while not creating red tape' to ensure the effectiveness of the system.

2. Member countries should maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering

To ensure sound competitive processes, governments should provide clear rules, and possibly guidance, on the choice of the procurement method and on exceptions to competitive tendering. Although the procurement method could be adapted to the type of procurement concerned, governments should, in all cases, maximise transparency in competitive tendering. Governments should consider setting up procedures to mitigate possible risks to integrity through enhanced transparency, guidance and control, in particular for exceptions to competitive tendering such as extreme urgency or national security.

B. Good management

3. Member countries should ensure that public funds are used in public procurement according to the purposes intended

Procurement planning and related expenditures are key to reflecting a long-term and strategic view of government needs. Governments should link public procurement with public financial management systems to foster transparency and accountability as well as to improve value for money. Oversight institutions such as internal control and internal audit bodies, supreme audit institutions or parliamentary committees should monitor the management of public funds to verify that needs are adequately estimated and public funds are used according to the purposes intended.

4. Member countries should ensure that procurement officials meet high professional standards of knowledge, skills and integrity

Recognising officials who work in the area of public procurement as a profession is critical to enhancing resistance to mismanagement, waste and corruption. Governments should invest in public procurement accordingly and provide adequate incentives to attract highly qualified officials. They should also update officials' knowledge and skills on a regular basis to reflect regulatory, management and technological evolutions. Public officials should be aware of integrity standards and be able to identify potential conflict between their private interests and public duties that could influence public decision making.

C. Prevention of misconduct, compliance and monitoring

5. Member countries should put mechanisms in place to prevent risks to integrity in public procurement

Governments should provide institutional or procedural frameworks that help protect officials in public procurement against undue influence from politicians or higher level officials. Governments should ensure that the selection and appointment of officials involved in public procurement are based on values and principles, in particular integrity and merit. In addition, they should identify risks to integrity for job positions, activities, or projects that are potentially vulnerable. Governments should prevent these risks through preventative mechanisms that foster a culture of integrity in the public service such as integrity training, asset declarations, as well as the disclosure and management of conflict of interest.

6. Member countries should encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management

Governments should set clear integrity standards and ensure compliance in the entire procurement cycle, particularly in contract management. Governments should record feedback on experience with individual suppliers to help public officials in making decisions in the future. Potential suppliers should also be encouraged to take voluntary steps to reinforce integrity in their relationship with the government. Governments should maintain a dialogue with suppliers' organisations to keep up-to-date with market evolutions, reduce information asymmetry and improve value for money, in particular for high-value procurements.

7. Member countries should provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly

Governments should set up mechanisms to track decisions and enable the identification of irregularities and potential corruption in public procurement. Officials in charge of control should be aware of the techniques and actors involved in corruption to facilitate the detection of misconduct in public procurement. In order to facilitate this, governments should also consider establishing procedures for reporting misconduct and for protecting officials from reprisal. Governments should not only define sanctions by law but also provide the means for them to be applied in case of breach in an effective, proportional and timely manner.

D. Accountability and control

8. Member countries should establish a clear chain of responsibility together with effective control mechanisms

Governments should establish a clear chain of responsibility by defining the authority for approval, based on an appropriate segregation of duties, as well as the obligations for internal reporting. In addition, the regularity and thoroughness of controls should be proportionate to the risks involved. Internal and external controls should complement each other and be carefully co-ordinated to avoid gaps or loopholes and ensure that the information produced by controls is as complete and useful as possible.

9. Member countries should handle complaints from potential suppliers in a fair and timely manner

Governments should ensure that potential suppliers have effective and timely access to review systems of procurement decisions and that these complaints are promptly resolved. To ensure an impartial review, a body with enforcement capacity that is independent of the respective procuring entities should rule on procurement decisions and provide adequate remedies. Governments should also consider establishing alternative dispute settlement mechanisms to reduce the time for solving complaints. Governments should analyse the use of review systems to identify patterns where individual firms could be using reviews to unduly interrupt or influence tenders. This analysis of review systems should also help identify opportunities for management improvement in key areas of public procurement.

10. Member countries should empower civil society organisations, media and the wider public to scrutinise public procurement

Governments should disclose public information on the key terms of major contracts to civil society organisations, media and the wider public. The reports of oversight institutions should also be made widely available to enhance public scrutiny. To complement these traditional accountability mechanisms, governments should consider involving representatives from civil society organisations and the wider public in monitoring high-value or complex procurements that entail significant risks of mismanagement and corruption.

ANNEX B

The Multi-disciplinary Approach of the OECD on Procurement

Following the Global Forum on Governance in 2004, the Public Governance Committee (PGC) and the Working Group on Bribery in International Business Transactions, and the Development Assistance Committee (DAC), have jointly carried forward the multi-disciplinary work on preventing corruption in public procurement:

- The Public Governance Committee mapped out good practices to enhance integrity, in particular through transparency (*e.g.* e-procurement), professionalism, corruption prevention, as well as accountability and control measures. Drawing on the experience of procurement specialists, as well as audit, competition and anti-corruption specialists, the OECD report *Integrity in Public Procurement: Good Practice from A to Z* provides a comparative overview of practices to enhance integrity in the entire procurement cycle, from needs assessment to contract management and payment.
- The Working Group on Bribery in International Business Transactions, the body responsible for monitoring the implementation of the OECD Convention on Bribery of Foreign Public Officials in International Business Transactions, developed a typology on bribery in public procurement. Based on contributions from law enforcement and procurement specialists, the report *Bribery in Public Procurement: Methods, Actors and Counter-Measures* describes how bribery is committed through the various stages of government purchasing; how it is related to other crimes, such as fraud and money laundering; and how to detect such crimes and apply sanctions accordingly.
- The Development Assistance Committee has been working with developing countries to strengthen procurement systems through the Working Party on Aid Effectiveness. It has also been working with its members to enhance their collective efforts to address corruption through the DAC Network on Governance.

- The Competition Committee has addressed competition issues arising in the context of public procurement. Recently it has developed a checklist to help public procurement officials detect bid-rigging during procurement tenders and limit the risks of collusion by careful design of the procurement process.

The Principles take into account the following legal instruments, policy instruments and tools in relation to public procurement and anti-corruption:

- The 1997 *OECD Convention on Bribery of Foreign Public Officials in International Business Transactions* and the revised *Recommendation on Combating Bribery in International Business Transactions*. The revised Recommendation states that:

i) Member countries should support the efforts in the World Trade Organisation to pursue an agreement on transparency in government procurement.[1]

ii) Member countries' laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that member's national laws and, to the extent a member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials.

iii) In accordance with the Recommendation of the Development Assistance Committee, member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts.

In commentary 24 to Article 3, an explicit reference is made to the "temporary or permanent disqualification from participation in public procurement".[2]

Over the last decade, the 37 Parties to the OECD Anti-Bribery Convention have made commendable progress in detecting, investigating and prosecuting foreign bribery – levelling the playing field for international business. Thanks especially to the rigorous peer review monitoring mechanism, governments have passed anti-bribery laws and created special investigation and prosecution units. Businesses have started to change the way they trade and invest worldwide, in the face of increased public scrutiny. The Shared Commitment to Fight Against Foreign Bribery, adopted at the 2007 Rome Ministerial Conference, provides a clear mandate for future work. Among others commitments, Parties pledge to maintain the robust monitoring mechanism – and to remain at the forefront of the global fight against foreign bribery by ensuring relevant and effective anti-bribery standards. The Working Group on Bribery is conducting a review of the OECD anti-bribery instruments, which might impact these instruments' procurement provisions and their subsequent enforcement.

- The 1996 Development Assistance Committee (DAC) *Recommendation on Anti-Corruption Proposals for Bilateral Aid Procurement*. The DAC recommends

that Members introduce or require anti-corruption provisions governing bilateral aid-funded procurement. The anti-corruption provision of the Recommendation was integrated in the 1997 revised Recommendation on combating bribery in international business transactions. However, the Recommendation did not apply to procurement carried out by developing countries themselves. Therefore developing countries, bilateral and multilateral donors have in the past years worked together through a Round Table process. As a result, the Working Party on Aid Effectiveness has developed a benchmarking methodology that developing countries and donors can use to assess the quality and effectiveness of national procurement systems through the DAC Joint Venture on Procurement.[3] In addition, the DAC Network on Governance has identified an agenda for collective donor action and *Principles for Donor Action in Anti-Corruption*[4] to ensure coherent support to country-led anti-corruption efforts.

Instruments and tools in relation to corporate governance and competition have also been considered, in particular the 1998 *Recommendation of the Council on Effective Action Against Hard Core Cartels*, the 2000 *Guidelines for Multinational Enterprises and the Risk Awareness Tool for Multinational Enterprises in Weak Governance*.

Notes

1. On 1 August 2004, the WTO General Council adopted a decision, which addressed, *inter alia*, the handling of the issue of transparency in government procurement, as well as the issues of the relationship between trade and investment and the interaction between trade and competition. The Council agreed that "those issues will not form part of the Doha Work Programme and therefore no work towards negotiations […] will take place within the WTO during the Doha Round". Since this decision, the Working Group on Transparency in Government Procurement has been inactive.
2. Article 3 of the Convention states that criminal sanctions shall be imposed on natural persons. While countries were convinced that sanctioning legal persons for foreign bribery was particularly important when negotiating the terms of the Convention, they did not stipulate that sanctions be of criminal nature. Consequently, Article 2 asks countries to introduce the "responsibility of legal persons" while Article 3(2) states that non-criminal sanctions against a corporation are also acceptable, provided that they include sanctions that are "effective, proportionate and dissuasive". See also *Fighting Corruption and Promoting Integrity in Public Procurement*, OECD, 2005.
3. For further information about the benchmarking and assessment methodology, please refer to: *www.oecd.org/document/40/0,3343,en_2649_19101395_37130152_1_1_1_1,00.html*.
4. See the Policy Paper and Principles on Anti-Corruption, Setting an Agenda for Collective Action, OECD, 2007, as well as the following web link: *www.oecd.org/dac/governance/corruption*.

ANNEX C

The Consultation on the Principles and Checklist with Stakeholders

An extensive consultation was carried out in 2008 on the Principles and Checklist. The consultation with representatives from OECD bodies working on related issues helped reflect the multi-disciplinary approach of the OECD. The Principles reflect the richness of the multi-disciplinary approach of the OECD that analyses public procurement from various perspectives: good governance, anti-bribery, development assistance, competition and international trade.

Furthermore, a consultation was carried out with representatives from government from non-member economies, private sector, civil society, bilateral donor agencies and international organisations – such as the United Nations, the World Trade Organisation or the European Union. The consultation with different stakeholders, in particular international and regional organisations working on public procurement issues, was an essential step to verify that the Principles provide guidance at the policy level that is in line with existing international legal instruments and usefully complements them. In addition to the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, these instruments include, notably:

- the *United Nations Convention against Corruption* (Chapter II on Preventative measures, in particular article 9 on Public procurement and management of public finances); (see Note)
- the *United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Services, Construction and Services*;
- the *World Trade Organisation Agreement on Government Procurement* (GPA);
- the legislative package of the *Directives of the European Parliament and of the Council on Procurement*; and

- the *International Labour Organisation's Labour Clauses (Public Contracts) Convention*.

In addition, other international and regional organisations such as the multilateral development banks, as well as bilateral aid agencies, were consulted to build on their experience in procurement reform work at the country level. Their experience was also particularly useful as they have developed related guidelines, even if these guidelines are tailored to the special conditions applicable under their financing. These include guidelines for anti-corruption and fiduciary risk assessment, such as the Public Expenditure and Financial Accountability (PEFA) Program.

Note

Article 9 of the United Nations Convention Against Corruption states that:

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision making, that are effective, *inter alia*, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, *inter alia*:

a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;

b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;

c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;

d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed; and

e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, *inter alia*:

a) Procedures for the adoption of the national budget;

b) Timely reporting on revenue and expenditure;

c) A system of accounting and auditing standards and related oversight;

d) Effective and efficient systems of risk management and internal control; and

e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph.

3. Each State Party shall take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of its domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents.

Glossary

Audit Trail	A chronological record of procurement activities enabling the reconstruction, review and examination of the sequence of activities at each stage of the public procurement process.
Debarment	Exclusion or ineligibility of a contractor from taking part in the process of competing for government or multilateral agency contracts for a definite or indefinite period of time, if, after enquiry or examination, the contractor is adjudged to have been involved in corruption to secure past or current projects with a government agency.
Direct Social Control	The involvement of external actors – for example end-users, representatives from civil society or the wider public – in scrutinising the integrity of the public procurement process.
Integrity Pact	An agreement between a government or government department with all tenderers for a public sector contract that neither side will pay, offer, demand, or accept bribes, or collude with competitors to obtain the contract or while carrying it out. In case of breach, the contract terms and conditions include the possibility of cancellation of contract, forfeiture of bond, liquidated damages and debarment.[1]
Limited/negotiated Tendering	Limited/negotiated tendering means a procurement method where the entity contacts supplier(s) individually.
Mismanagement	Mismanagement could conceivably cover a range of actions from a simple mistake in performing an administrative task to a deliberate transgression of relevant laws and related policies.[2]
Open Tendering	Open tendering means a procurement method where all interested suppliers may submit a tender.
Public Procurement Cycle	The procurement cycle encompasses a sequence of related activities, from needs assessment, to the award stage, up until the contract management and final payment.

Restricted/selective Tendering Restricted/selective tendering means a procurement method where a limited number of suppliers are invited by the procuring entity to submit a tender.

Reverse Auction A traditional auction is where there is a single seller and many potential buyers tendering for the item being sold. A reverse auction, used for e-purchasing and generally using the internet (an e-auction), involves, on the contrary, one buyer and many sellers. The general idea is that the buyer specifies what it wants to purchase (and often its price ceiling), and then invites suppliers to prepare a tender. Reverse auction lends itself well to the procurement or purchase of items that are in large supply and for which price savings can be gained through increased competition.

Risk-based Approach This approach identifies potential weaknesses that individually or in aggregate could have an impact on the integrity of procurement-related activities, and controls are then aligned to these risks.

Transparency Transparency in the context of procurement refers to access to information on:

- laws and regulations, judicial decisions and/or administrative rulings, standard contract clauses for public procurement; and
- the actual means and processes by which specific procurements are defined, awarded and managed.

Notes

1. See also the website of Transparency International: *www.transparency.org/global_priorities/public_contracting/integrity_pacts*.
2. This definition has been extracted from the 1985 Canadian Financial Administration Act (*laws.justice.gc.ca/en/F-11/index.html*).

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OECD Principles for Integrity in Public Procurement

Many governments have heavily invested in reforming public procurement systems, both to ensure a level playing field for potential suppliers and to increase overall value for money. Yet although government contracts are increasingly open to competition, about 400 billion dollars in taxpayers' money are still lost annually to fraud and corruption in procurement. What can countries do better?

The *OECD Principles for Integrity in Public Procurement* are a ground-breaking instrument that promotes good governance in the entire procurement cycle, from needs assessment to contract management. Based on acknowledged good practices in OECD and non-member countries, they represent a significant step forward. They provide guidance for the implementation of international legal instruments developed within the framework of the OECD, as well as other organisations such as the United Nations, the World Trade Organisation and the European Union.

In addition to the Principles, this exhaustive publication includes a Checklist for implementing the framework throughout the entire public procurement cycle. It also gives a comprehensive map of risks that can help auditors prevent as well as detect fraud and corruption. Finally, it features a useful case study on Morocco, where a pilot application of the Principles was carried out.

"*The Checklist will help governments and agencies to develop more transparent, efficient procurement systems*", Nicolas Raigorodsky, Under-secretary of Transparency Policies, Anticorruption Office, Argentina

"*Public procurement is one of the most important public governance issues. Action is needed to ensure integrity by reducing bribery and corruption*", Business and Industry Advisory Committee to the OECD

"*The general thrust and content of the document is commendable. Much of it tracks very closely to the United Nations Convention Against Corruption and the United Nations Commission on International Trade Law Model Law*", Stuart Gilman, Head of the UN Global Programme Against Corruption and the Anticorruption Unit, United Nations Office on Drugs and Crime

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Integrity in Public Procurement

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Also available in French under the title:
L'intégrité dans les marchés publics
LES BONNES PRATIQUES DE A À Z

Foreword

Public procurement is the government activity most vulnerable to corruption. Lack of transparency and accountability were recognised as a major threat to integrity in public procurement at the 2004 OECD Global Forum on Governance: Fighting Corruption and Promoting Integrity in Public Procurement.

To verify this hypothesis, the OECD Public Governance Committee has launched a survey primarily targeted at procurement practitioners in charge of designing, supervising and managing procurement processes in central governments. Auditors, members of competition authorities and anti-corruption specialists have also been involved. On the basis of the information collected, good practices were identified by government officials, representatives from civil society and private sector at the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement in November 2006.

This project maps out good practices, that is, successful measures for enhancing integrity in public procurement. It is a complementary part of multidisciplinary efforts in the OECD to improve public procurement systems, in particular:

- Assessments of public procurement systems in developing countries by the Aid Effectiveness and Donor Practices Working Party of the Development Assistance Committee[1];
- Analysis of bribery in public procurement by the Working Group on Bribery in International Business Transactions;
- Studies of the central procurement structure and capacity as well as review and remedies systems of the European Union Member States by

1. For further information, see the following webpage: http://www.oecd.org/document/40/0,2340,en_2649_19101395_37130152_1_1_1_1,00.html.

the Support for Improvement in Governance and Management Programme (SIGMA)[2].

The publication was prepared by Elodie Beth in collaboration with János Bertók of the OECD Public Governance and Territorial Development Directorate, Innovation and Integrity Division, under the leadership of Christian Vergez. The author wishes to thank the nominated experts on integrity in public procurement for their invaluable contributions, and in particular the chair of this expert group, Robert Burton, Deputy Administrator of the Office of Federal Procurement Policy in the Executive Office of the President of the United States. Special thanks go to Anikó Hrubi for her preparatory work in the identification of good practices and Marie Murphy for her assistance in finalising the publication.

2. SIGMA is a joint initiative of the OECD and the European Union, principally financed by the EU.

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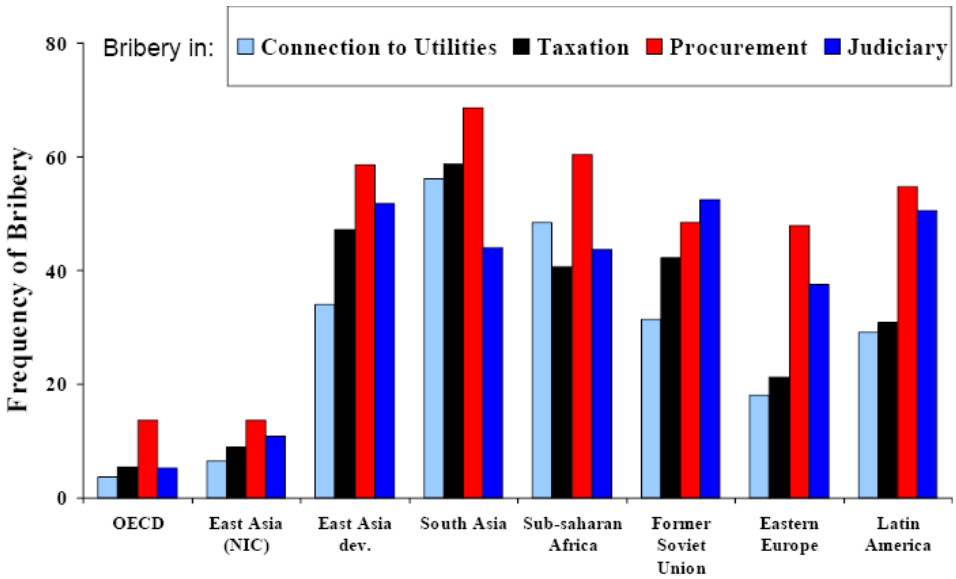
The most vulnerable government activity

Public procurement has been identified as the government activity most vulnerable to corruption. As a major interface between the public and the private sectors, public procurement provides multiple opportunities for both public and private actors to divert public funds for private gain. For example, bribery by international firms in OECD countries is more pervasive in public procurement than in utilities, taxation, judiciary and state capture, according to the 2005 Executive Opinion Survey of the World Economic Forum (see also Annex A).

Frequency of bribery in procurement



Source: Kaufmann, World Bank (2006), based on Executive Opinion Survey 2005 of the World Economic Forum covering 117 countries. Question posed to the firm was: In your industry, how commonly firms make undocumented extra payments or bribes connected with permits / utilities / taxation / awarding of public contracts / judiciary?

Public procurement is also a major economic activity of the government where corruption has a potential high impact on tax payers' money. In the European Union, public procurement equalled approximately EUR 1.5 trillion in 2002[3]. In OECD countries, existing statistics suggest that public procurement accounts for 15 percent[4] of Gross Domestic Product. The financial interests at stake, the volume of transactions on a global level and the closer interaction between the public and private sectors make it particularly vulnerable to corruption.

Balancing transparency and accountability with other aims of public procurement

Corruption thrives on secrecy. Transparency and accountability have been recognised as key conditions for promoting integrity and preventing corruption in public procurement. However, they must be balanced with other good governance imperatives, such as ensuring an efficient management of public resources – "administrative efficiency" – or providing guarantees for fair competition. In order to ensure overall value for money, the challenge for decision makers is to define an appropriate degree of transparency and accountability to reduce risks to integrity in public procurement while pursuing other aims of public procurement.

Beyond the "tip of the iceberg": Addressing the whole procurement cycle

The bidding process has been the traditional focus of international efforts. However, this is only the "tip of the iceberg", the most well-regulated and transparent phase of the procurement process. At the 2004 OECD Forum[5] countries called for specific attention to grey areas that are less subject to transparency requirements and therefore potentially vulnerable to corruption. Grey areas include in particular:

- The **pre-bidding** and **post-bidding** phases, from needs assessment to contract management and payment;

3. This includes the purchase of goods, services and public works by governments and public utilities. For further details, please refer to *A report on the functioning of public procurement markets in the EU*, European Commission, February 2004.

4. The ratio indicates the total government expenditure, including compensation for employees and defence-related expenditure. For further detail, see *The Size of Government Procurement Markets,* OECD, 2002.

5. OECD Global Forum on Governance: Fighting Corruption and Promoting Integrity in Public Procurement.

- **Exceptions to competitive procedures**, that is to say special circumstances such as extreme urgency and low-value contracts.

DEFINING AN ADEQUATE FRAMEWORK FOR INTEGRITY IN PUBLIC PROCUREMENT

Providing concrete solutions, based on practice

If international efforts put forward common goals guiding public procurement reforms, that is, efficient, non-corrupt, and transparent procurement, little information is available on means and, in particular, on concrete solutions that countries can adopt to improve their public procurement systems.

In order to define an adequate framework for promoting integrity in procurement, the OECD has surveyed countries' experiences on effective practices in the full public procurement cycle. The publication maps out good practices for integrity in procurement "from A to Z". It addresses not only the bidding process but also grey areas that have been neglected by international reform efforts. It also takes a global view of procurement by including elements of good practice in OECD countries, as well as in Brazil, Chile, Dubai, India, Pakistan, Romania, Slovenia and South Africa. Identified good practices are measures that have been successful in promoting integrity in procurement in a given context.

Transparency, accountability and professionalism

The findings of the survey among procurement practitioners in central governments confirmed that transparency and accountability are key for enhancing integrity throughout the whole procurement cycle, including in needs assessment and contract management. It also revealed that public procurement is regarded increasingly as a **strategic profession** that plays a central role in preventing mismanagement and minimising the potential of corruption **in the use of public funds**.

Challenge 1: What level of transparency?

A key challenge across countries has been to define an adequate level of transparency to ensure fair and equal treatment of providers and integrity in public procurement:

- Transparency in public procurement bears an immediate cost both for government and bidders. However, it is a key element to support

fundamental principles of the public procurement system, especially competition and integrity. Governments need to find an **adequate balance** between the objectives of ensuring transparency, providing equal opportunities for bidders, and other concerns, in particular efficiency. The drive for transparency must therefore be tempered by making transparent what sufficiently enables corruption control. If the level of transparency is adequately defined, the benefits will outweigh the cost, especially when comparing the initial cost of transparency with the potential negative consequences of corruption on the use of public funds related to procurement and possibly on public trust.

- In "**grey areas**" in the public procurement process, countries may use various approaches and solutions to ensure integrity, ranging from minimum transparency requirements to additional control mechanisms. Exceptions to competitive procedures represent a "grey area", that is, vulnerable to mismanagement and potentially corruption because of limited competition. However, it is important to highlight that limited competition does not necessarily require less transparency. For example, countries may use specific measures (e.g. reporting requirements, advance contract award notice, risk management techniques, etc.) to enhance transparency and integrity while counterbalancing the lack of competitiveness in the procedures. Similarly, some countries indicated that the phases before and after the bidding are regarded rather as internal management procedures and therefore not subject to the same transparency requirements as the bidding process. This makes it all the more important to have effective accountability and control mechanisms in daily management to keep public officials accountable.

- If information is not disclosed in a consistent or timely manner (e.g. disclosure of information on other bids in the award in a context of limited competition), it might be counter-productive by increasing the opportunity of collusion between bidders who can identify their competitors early in the process and contact them. While countries are progressively disclosing more information on public procurement procedures and opportunities in accordance with Freedom of Information Acts, they are also selecting **what information cannot be disclosed**, at what stage of the process and to whom – bidders, other stakeholders and the public at large.

Challenge 2: How to turn public procurement into a strategic profession

If transparency is an integral part of good governance in procurement, it is a necessary but not a sufficient condition for integrity in procurement. Building professionalism among procurement officials with a common set of professional and ethical standards is equally important. Survey results highlighted that public procurement is a significant factor for successfully managing public resources and should therefore be considered as a strategic profession rather than simply an administrative function:

- Driven by considerations of value for money, governments have put increasing efforts into rationalising and increasing efficiency of procurement. There has been recognition that procurement officials need to be equipped with **adequate tools** for improving planning and management and that their decisions need to be well informed. For example, countries have heavily invested in new information and communication technologies (e.g. through databases on goods' prices) to support procurement officials in their daily work and decisions. With emphasis being put on efficiency, some governments have faced difficult choices, with the reduction or stabilisation of the number of procurement officials while the volume of transactions has increased over the years.

- As most countries have adopted a more decentralised approach, enhancing **professionalism** in procurement has become all the more important. Efforts have been put into providing procurement officials with adequate skills, experience and qualification for preventing risks to integrity in public procurement. Procurement officials, who are increasingly required to play a role of "contract manager" in addition to their traditional duties, have begun to gain new skills, that is, not only specialised knowledge related to public procurement, but also project management and risk management skills.

- In a devolved management environment, procurement officials also need **ethical guidance** clarifying restrictions and prohibitions to prevent conflict-of-interest situations and, more generally, corruption. At the organisational level an emerging challenge is to ensure the separation of duties between officials to avoid conflict-of-interest situations while avoiding that these "firewalls" result in a lack of co-ordination between management, budget and procurement officials.

Challenge 3: Accountability to whom?

When defining priorities, policy makers need to decide what stakeholders public procurement primarily serves – end-users, government, the private sector, the media, or the public at large. Because of the important financial interests at stake and their potential impact on tax payers and citizens, public procurement is increasingly regarded as a core element of **accountability of the government to the public** on how public funds are managed.

- Governments have reinforced their control and accountability mechanisms on public procurement in recent years. A key challenge is to define a clear chain of approval and responsibility in the public procurement process in a context of devolved procurement. Furthermore, some countries have indicated the difficulty of co-ordinating internal controls and external audits in procurement. There has been growing recognition that internal controls and external audits should be based on a more **risk-based approach** in order to help prevent and detect corruption in procurement, based on the type of procurement (e.g. specificity, complexity, value and sensitivity) and the vulnerable points in the procurement process.

- Recourse systems for challenging government decisions have become a central mechanism for bidders and other stakeholders to verify the fairness and integrity of the public procurement process, both in the public and private sectors. Several countries have established **alternative resolution systems** to judicial decisions dedicated to procurement in order to promote an effective and timely resolution of bid protests and avoid the cost of litigation. In addition to bidders, procurement officials and other stakeholders have been involved in the control of public procurement through the establishment of administrative complaint systems. Whistleblowing has only been used in a few countries despite its potential for raising concerns about public officials' misconduct, including in public procurement.

- Although countries have various accountability and control mechanisms, they have increasingly involved bidders, other stakeholders and the wider public in monitoring the public procurement process through increased access to information and active participation. Some countries have also introduced **direct social control** mechanisms by involving stakeholders – not only private sector representatives but also end-users, civil society, the media or the public at large – in scrutinising the integrity of the public procurement process.

TAKING A PROSPECTIVE VIEW OF PUBLIC PROCUREMENT: EMERGING TRENDS

From a process-based towards a knowledge-based organisation

Procurement officials' role is shifting nowadays from a simple transactional role ("buy transaction") to a management role embracing the entire procurement process, from needs assessment to contract management and payment. In many countries, the procurement process has been delegated to departments and agencies while the central procurement authority has centralised more strategic functions such as the management of new technologies as well as the dissemination of knowledge and good practice. This could indicate an emerging trend to evolve from a process-based to a **knowledge-based procurement organisation**. Being less involved in the daily management, the organisation focuses on knowledge sharing among departments and provides an enabling environment for achieving value for money.

Survey results have confirmed that one of the most pervasive change factors for procurement is the use of **new information and communication technologies**. They have influenced policies and practices and revolutionised how goods and services are purchased. They have also become a central instrument for promoting transparency in procurement and keeping procurement officials and contractors accountable. In particular they have provided easy and real-time access to information, new ways for interaction between bidders and government officials, and facilitated the monitoring and tracking of information on procurement.

A convergence of integrity instruments for the public and private sectors

As public procurement officials are increasingly working closely with private sector actors to develop and deliver the solutions that promote value for money, they need adequate guidance. Enhancing professionalism requires not only management procedures but also a clear set of values and ethical standards clarifying how to achieve this objective. Countries expressed the need to develop a **model code of conduct** for procurement officials defining clear restrictions and prohibitions, as well as giving recommendations on how to handle their interaction with the private sector[6].

6. There was consensus on that issue at the 2006 OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement.

In light of increasing public expectations and potential reputation risks for individual companies and professions, **private actors** are also starting to take positive steps in this regard. They have developed integrity standards and instruments, for example with the adoption of quality management and integrity norms, codes of conduct or the certification and audit by a third independent party of their integrity systems. This raises the question of how governments could encourage these initiatives and under what conditions. When selecting a supplier, should the government include criteria linked to corporate social responsibility, and if so, how to ensure that these efforts are founded and that the criteria do not artificially reduce competition? With the convergence of integrity instruments used by public and private actors, partnerships between governments and potential suppliers could be further encouraged.

Exploring the conditions for public procurement to be a lever for wider economic, social and environmental change

Public procurement is increasingly recognised as an instrument of government policy and a lever for wider economic, social and environmental change. There is a debate in multilateral institutions such as the European Union and the World Trade Organisation on the extent to which international regulations allow for a wider view of public procurement than a business process. If countries are concerned about how **economic, social and environmental criteria** may be used in public procurement without harming the integrity of the process, few have tackled the issue. A challenge is to define how to possibly include economic, social or environmental considerations in the process while ensuring that government decisions are fair and transparent.

As public procurement has become increasingly global, it is turning into a global concern. Procurement decisions illustrate the challenges of achieving **sustainability** in a global economy. In particular, one of the difficulties for governments is to monitor the implementation of the contract by contractors and subcontractors that are often outsourced and ensure that labour and environmental standards are respected. It is the ultimate responsibility of governments to set and enforce clear public standards for both the main contractor and subcontractors, defining the parties' responsibilities for integrity.

POSSIBLE NEXT STEPS FOR THE OECD

Building on a better understanding of successful strategies and practices for enhancing integrity in public procurement, there is a new impetus for developing a non-binding policy instrument at the international level. At the OECD Symposium and Global Forum on Integrity in Public Procurement in November 2006, country experts called for a **Checklist** for enhancing integrity at all stages of public procurement, from needs assessment to contract management and payment. The Checklist could list the key building blocks, that is, policies and tools for promoting integrity, transparency and accountability in the public procurement process. In order to ensure that this policy instrument fits into different regional contexts, a series of regional dialogues will be organised to test the Checklist. This will involve all major stakeholders, in particular representatives from government, the private sector, civil society organisations and international organisations.

INTRODUCTION

Public procurement is increasingly recognised as a central instrument to ensure efficient and corruption-free management of public resources. In this context, the role of procurement officials has changed dramatically in recent years to cope with the demand for integrity in public procurement. Countries have devoted efforts to ensure that:

- Public procurement procedures are transparent and promote fair and equal treatment;
- Public resources linked to public procurement are used in accordance with intended purposes;
- Procurement officials' behaviour and professionalism are in line with the public purposes of their organisation;
- Systems are in place to challenge public procurement decisions, ensure accountability and promote public scrutiny.

The approach in this publication is to analyse public procurement from a good governance perspective, identifying the conditions under which elements of good governance – in particular transparency and accountability – contribute to integrity and corruption prevention in public procurement (see Survey Methodology in Annex B).

Considering that there is not a single "one size fits all" solution, this publication provides a comparative overview of solutions used by public organisations for ensuring integrity and corruption resistance at all stages of public procurement, from needs assessment to contract management. It also highlights elements of good practice to illustrate the range of policy options available to policy makers and procurement officials for improving public procurement systems.

In order to help central governments modernise existing procurement policy and practice, four issues are reviewed:

- **Risks to integrity at each stage of the public procurement process.** The publication starts with an inventory of risks to integrity that have been identified in countries at all stages of the public procurement process, that is, not only in the bidding but also in the pre and post-bidding phases.
- **Promoting transparency: potentials and limitations**. The second Part reviews the potentials and limitations of transparency in promoting a level playing field for bidders. It also maps out alternative solutions to competitive procedures used in countries to ensure integrity in public procurement.
- **Enhancing professionalism as a key element to prevent risks to integrity in public procurement.** The third Part highlights efforts to equip procurement officials with adequate skills and instruments to increase professionalism and value for money, as well as a clear set of ethical standards clarifying how to achieve these objectives.
- **Ensuring accountability and control in public procurement.** The fourth Part reviews existing and emerging mechanisms used for ensuring accountability and control in public procurement.

I. RISKS TO INTEGRITY AT EACH STAGE OF THE PUBLIC PROCUREMENT PROCESS

Based on the results of the survey questionnaire, this Part provides an inventory of the risks to integrity that have been identified in countries. It is important to recognise that risks may stem from a simple mistake in performing an administrative task to a deliberate transgression of relevant laws and related policies.

The inventory highlights that there are **critical risks to integrity at all stages** of the public procurement process, from the needs assessment through the bidding to contract management and payment. The following tables indicate the particular risks[7] for each stage of the public procurement process.

PRE-BIDDING: STARTING FROM NEEDS ASSESSMENT

In the pre-bidding, the most common risks include:

- The lack of adequate needs assessment, planning and budgeting of public procurement;
- Requirements that are not adequately or objectively defined;
- An inadequate or irregular choice of the procedure; and
- A timeframe for the preparation of the bid that is insufficient or not consistently applied across bidders.

7. These risks or concerns were mentioned by countries in the response to the OECD Questionnaire on Integrity in Procurement, as well as in discussions at the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement in November 2006.

Table I.1. Risks in pre-bidding

Pre-bidding	Risks identified
- Needs assessment, planning and budgeting	- The lack of adequate needs assessment, deficient business cases, poor procurement planning (e.g. in the Netherlands, New Zealand, Spain, Turkey); - Failure to budget realistically (e.g. in the United Kingdom), deficiency in the budget (e.g. in Spain); - Procurements not aligned with the overall investment decision-making process in departments (e.g. in Canada); - Interference of high-level officials (e.g. in the Czech Republic, Poland, the Slovak Republic) in the decision to procure; - Informal agreement on contract (e.g. in Brazil).
- Definition of requirements	- Technical specifications: a) Tailored for one company (e.g. in Belgium[8], Canada, Poland, Spain and the United Kingdom); b) Too vague or not based on performance requirements (in countries such as Chile and Germany). - Selection and award criteria: a) Not clearly and objectively defined (in countries such as Poland and Slovenia); b) Not established and announced in advance of the closing of the bid (for instance in New Zealand); c) Unqualified companies being licensed, for example through the provision of fraudulent tests or quality assurance certificates (for instance in the United Kingdom).
- Choice of procedure	- Lack of procurement strategy for the use of non-competitive procedures based on the value and complexity of the procurement which creates administrative costs (for instance in Canada); - Abuse of non-competitive procedures on the basis of legal exceptions (e.g. in Belgium, Finland, Netherlands and Slovenia) through: a) Contract splitting on the basis of low monetary value contracts; b) Abuse of extreme urgency; c) Abuse of other exceptions based on a technicality or exclusive rights, etc; d) Untested continuation of existing contracts.
- Time frame for preparation of bid	- A time frame that is not consistently applied for all bidders, for example, information disclosed earlier for a specific bidder (in countries such as Belgium and Norway); - A time frame that is not sufficient for ensuring a level playing field (for instance in New Zealand).

Sources: - Country responses to the OECD Questionnaire.
- Discussions at the OECD Symposium, Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement, November 2006.

8. For further information on the risks identified in Belgium and the responses developed, see Box IV.5.

In the needs assessment phase, risks have been recognised[9] as being particularly high, due to the potential **influence of external actors** such as politicians or consultants on officials' decisions. In the 2006 *Handbook on Curbing Corruption in Public Procurement*, Transparency International identified examples of the most usual manifestations of corruption in the needs assessment:

- The investment or purchase is unnecessary. Demand is induced so that a particular company can make a deal but the purchase is of little or no value to society.
- Instead of systematic leak detection or grid loss reduction (both of which offer little reward), new capacity is installed (which offers bribe potential).
- The investment is economically unjustified or environmentally damaging.
- Goods or services that are needed are overestimated to favour a particular provider.
- Old political favours or kickbacks are paid by including a "tagged" contract in the budget (budget for a contract with a "certain" pre-arranged contractor).
- Conflicts of interest are left unmanaged and decision makers decide on the need for contracts that have an impact on their former employees ("revolving doors").

This shows that procurement processes provide opportunities for political corruption[10] in the needs assessment. This may encompass a variety of situations, including the use of procurement as a public policy tool to pay back political support or ensure future support (e.g. political campaign financing, rewarding supporters, etc.) or in some cases directly finance politicians' own private benefits. If public procurement is used for supporting national goals (e.g. local industry, employment of targeted groups, etc.) without the necessary transparency in the procurement process, this may also possibly lead to corruption.

9. This was highlighted in the discussions at the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement, November 2006.

10. *Global Corruption Report, Special Focus: Political Corruption*, Transparency International, 2004.

BIDDING

In the bidding phase, countries indicated the following risks:

- Inconsistent access to information for bidders in the invitation to bid;
- Lack of competition or in some cases collusive bidding resulting in inadequate prices;
- Conflict-of-interest situations that lead to bias and corruption in the evaluation and in the approval process;
- Lack of access to records on the procedure in the award that discourages unsuccessful bidders to challenge a procurement decision.

Table I.2. Risks in bidding

Bidding	Risks identified
- Invitation to bid	- Information on the procurement opportunity not provided in a consistent manner; - Absence of public notice for the invitation to bid (e.g. in Finland); - Sensitive or non-public information disclosed (e.g. in Belgium, Mexico, the United Kingdom, the United States); - Lack of competition or in some cases collusive bidding that leads to inadequate prices or even illegal price fixing (e.g. in Austria, the United Kingdom).
- Award	- Conflict of interest and corruption (e.g. in Canada, Germany, New Zealand, Norway, the United Kingdom) in: a) The evaluation process (e.g. familiarity with bidders over the years, personal interests such as gifts or additional/secondary employment, no effective implementation of the "four-eyes" principle, etc.); b) The approval process: no effective separation of financial, contractual and project authorities in delegation of authority structure; - Lack of access to records on the procedure.

Sources: - Country responses to the OECD Questionnaire.
- Discussions at the OECD Symposium, Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement, November 2006.

The bid evaluation has been considered a particularly vulnerable step[11]. A key concern is the lack of transparency when using economic, social and environmental criteria to evaluate bidders (e.g. favouring bidders from

11. This was highlighted in the discussions at the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement and the back-to-back Global Forum, November 2006.

economically disadvantaged areas, using environmental-friendly materials, etc.). For countries that allow the use of these criteria, regulations do necessarily clarify how they may be used together with other evaluation criteria without harming the integrity of the public procurement process. Even when the evaluation criteria are defined in a transparent and precise manner, they usually offer discretion to evaluators. If bidders are to trust and respect the outcome, they need to know how discretion was exercised and how criteria were applied.

POST BIDDING: TAKING IN CONTRACT MANAGEMENT AND PAYMENT

In the post-bidding phase, the most frequent risks to the integrity of the public procurement process include:

- The insufficient monitoring of the contractor;
- The non-transparent choice or lack of accountability of subcontractors and partners;
- Lack of supervision of public officials;
- The deficient separation of financial duties, especially for the payment.

Table I.3. Risks in post bidding

Post bidding	Risks identified
- Contract management	- Failure to monitor performance of contractor (e.g. in Ireland, Norway, New Zealand, Mexico, Slovenia, Spain), in particular lack of supervision over the quality and timing of the process that results in: a) Substantial change in contract conditions to allow more time and higher prices for the bidder; b) Product substitution or sub-standard work or service not meeting contract specifications; c) Theft of new assets before delivery to end-user or before being recorded in the asset register; - Subcontractors and partners are chosen in a non-transparent way, or not kept accountable.
- Order and payment	- Deficient separation of duties and/or lack of supervision of public officials (e.g. in Belgium, Italy, the United Kingdom) leading to: a) False accounting and cost misallocation or cost migration between contracts; b) Late payments of invoices, postponement of payments to have prices reviewed so as to increase the economic value of the contract; c) False or duplicate invoicing for goods and services not supplied and for interim payments in advance of entitlement.

Sources: - Country responses to the OECD Questionnaire.
- Discussions at the OECD Symposium, Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement, November 2006.

Several countries emphasised that the phases before and after the bidding are not regulated by procurement laws but rather by civil and contract law. Therefore they are often less subject to transparency and accountability requirements, which entail risks to integrity in public procurement.

Regarding the specific risk of bribery in public procurement, information can be found in *Bribery in Public Procurement: Methods, Actors and Counter-Measures*, OECD, 2007[12].

To address risks to integrity, the next Parts review the following issues:

- **The lack of transparency in procurement** – This may take various forms such as the provision of inconsistent or incomplete information to bidders, insufficient transparency in the use of non-competitive procedures, or procurement regulations and procedures that are unclear for bidders.
- **Insufficient professionalism of officials** – This may translate into poor planning, budgeting and risk management for procurement, leading to unnecessary delays and cost overruns for projects. In other words, public officials are not necessarily well prepared to keep up with professional standards. Furthermore, officials may not necessarily be aware that their acts are unethical or may bias the process which can lead to conflict-of-interest situations and sometimes corruption.
- **Inadequate accountability and control mechanisms** – Unclear accountability chains for officials, lack of co-ordination between different control mechanisms or insufficient supervision over contractors' performance might lead to mismanagement and even

12. The report describes how bribery is committed through the various stages of government purchasing; how bribery in public procurement is related to other crimes, such as fraud and money laundering; and how to prevent and sanction such crimes. The typical motivations and conduct of the various actors engaging in corruption are also highlighted.

corruption, especially in "grey areas" where there are fewer requirements for transparency.

The publication looks at approaches and solutions for promoting integrity in the full procurement cycle, from needs assessment, planning and budgeting, through the bidding to contract management and final payment.

II. PROMOTING TRANSPARENCY: POTENTIALS AND LIMITATIONS

Attracting a sufficient number of bidders in public procurement through processes that are open and fair is a key concern. To ensure a level playing field for bidders, all countries recognise the need to provide:

- Transparent and readily accessible information on general laws, regulations, judicial decisions, administrative rulings, procedures and policies on public procurement; and
- Equal opportunities for participation of bidders through a competitive procedure, and the provision of consistent information to all bidders on the procurement opportunity, in particular on the method for bidding, specifications, as well as selection and award criteria.

Transparency could be considered a public good[13] that bears an immediate cost for both government and bidders. A balance must be found between transparency and its contribution to corruption control with other considerations such as efficiency. In practice countries have adapted the level of transparency and openness of the procurement procedure according to a number of factors, including the sensitivity of the information and the **specificity and value** of the public procurement.

BALANCING THE NEED FOR TRANSPARENCY WITH OTHER CONSIDERATIONS

The sensitivity of the information

There are some restrictions on the information governments make available to protect:

- **Commercially-sensitive** information for bidders (e.g. content of competitive bids such as commercial secrets, individual prices, etc.); and

13. This concept was introduced by Steven Schooner, Keynote Speaker at the 2006 OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement.

- **Security-sensitive** information for the State (e.g. defence, national security) that could harm interests of the bidders or of the State.

For example, if the names of bidders are disclosed before the submission of the bids, this could encourage firms to co-ordinate their bids on procurement, leading to collusive price-fixing behaviour. Firms may agree to submit common bids, thus eliminating price competition or alternatively agree on which firm will be the lowest bidder and rotate in such a way that each firm wins an agreed upon number or value of contracts. The example below highlights the prevention measures that Japan has put in place in recent years to prevent bid rigging in procurement.

Box II.1. Bid rigging in public procurement in Japan: Prevention measures and recommendations

Bid rigging in the procurement process, when favoured bidders have the possibility to adjust their bids after receiving information about rival bids, is one of the most serious breaches of the Antimonopoly Act. Accordingly, the Japan Fair Trade Commission has taken proactive and strict measures against bid rigging.

The following table highlights the numbers of the Japan Fair Trade Commission's legal actions in recent years against antitrust violations as a whole and against bid rigging.

Fiscal Year	2001	2002	2003	2004	2005
Number of Legal Actions against Anti-trust	38	37	25	35	19
Of which Bid Rigging	33	30	14	22	13
Number of Entrepreneurs Object of Legal Actions against Anti-trust	928	805	405	472	492
Of which Bid Rigging	908	762	376	449	473
Amount of Surcharge (billion yen) against Anti-trust	2.2	4.33	3.87	11.15	18.87
Of which Bid Rigging	1.72	3.22	3.83	3.45	18.8
Number of Entrepreneurs Object of Surcharge against Anti-trust	248	561	468	219	399
Of which Bid Rigging	240	546	467	194	392

In addition, the recent amendments of the Antimonopoly Act – came into effect in January 2006 – introduced a leniency programme to give companies an incentive to voluntarily refrain from collusive bidding. It also introduced compulsory measures for criminal investigations and increased the surcharge rate to make the provision prohibiting bid rigging more effective.

Moreover, for the purpose of preventing procurement officials from getting involved in bid rigging, the Act on Elimination and Prevention of Involvement in Bid Rigging came into force in January 2003. This Act provides that the head of procurement institutions shall take action to

eliminate involvement if requested by the Japan Fair Trade Commission. The recent amendment enacted in December 2006 introduced criminal penalties against officials involved in bid rigging.

In order to promote competition and prevent cartels in public procurement, the Japan Fair Trade Commission made the following recommendations:

- For cases that should be subject to competition, open bidding should be the appropriate form.
- To prevent bid rigging, the names of designated bidders should be announced after the submission of bids, because the prior announcement of their names would enable those planning bid rigging to obtain information about candidate bidders, thereby making it easier for them to conduct bid rigging.
- It would also allow those planning bid rigging to obtain important information and would raise a contract price if the estimated price by a procurement institution is announced before the submission of bids. In view of this, the estimated price should only be announced after the submission of bids.

Sources: - Japan, response to the OECD Questionnaire.
- *Roundtable on Competition in Bidding Markets: Note by Japan,* discussion document, September 2006.

The specificity and value of the procurement

A balance must be found between the need for transparency and other considerations such as efficiency depending on the type of contract at stake. Therefore, the information made available and the means for its dissemination vary proportionally to the size of the contract and the specificity of the object to be procured. Box II.2 highlights an example of application of the proportionality principle in publicising procurement opportunities in France and how the discretionary power of official for low-value contracts has been balanced with stronger accountability mechanisms.

Box II.2. Applying the principle of proportionality in publicising procurement opportunities in France

The legal principle of proportionality requires administrative actions be proportionate in a reliable and predictable way with the objectives pursued by the law.

In procurement, the proportionality principle requires that information be made public according to the size of contracts. The Code of Public Procurement Contracts, which came into effect on 1 January 2006, stipulates the principle of proportionality for publicising bidding opportunities in France, namely:

- Public procurement procedures above the threshold defined by the European Directives must be published in the Official Journal of the European Union (OJEU), as well as in the procurement publications part of the official gazette of the French Republic (*Bulletin officiel des annonces des marchés publics*, BOAMP).
- Public bids above EUR 90 000 but under the European threshold are to be published in the BOAMP, and can also be published in specialised journals.
- The publication of bids below the value of EUR 90 000 must be adapted to the size and importance of the contract. Finding the most adequate solution for publishing is the responsibility of the procurement officer who has discretionary power to select the most adequate solution amongst available options, including the official gazette, regional or national bulletins, specialised journals or press. To balance this increased discretionary power of procurement officers, control has also been strengthened to detect mismanagement or abuse and transfer of such cases to court.
- Contracts below EUR 4 000 are exempt from mandatory publication.

Source: France, response to the OECD Questionnaire.

For **major procurement projects**, governments may use additional requirements such as increased transparency, guidance or controls. For instance, in Poland, for contracts above a certain amount, an *ex-ante* control of the award of public contracts is carried out by the Public Procurement Office.

Box II.3. *Ex-ante* control of the award of major public contracts in Poland

With the 2004 Public Procurement Law, the *ex-ante* control of the award became mandatory for public contracts of high value in Poland. The mechanism is used for contracts above EUR 20 million for public works and EUR 10 million for public supplies and services.

The aim of this preventive mechanism is to avoid improper spending of public money and reveal possible infringements before the conclusion of contracts, such as:

- Negligent preparation of contract award procedures;
- Incorrect evaluation of submitted bids or requests to participate in award procedure;
- Definition of the terms of participation in the award procedure in a way obstructing fair competition;
- Failure of demand to submit documents necessary to evaluate whether an economic operator satisfied the conditions for participation in the award procedure;
- Failure to exclude economic operators from a procedure in a situation when the premises for exclusion existed;
- Failure to reject a bidder in a situation when the premises for rejection existed.

Awareness-raising and training activities were also carried out to reinforce the professionalism of procurement officials.

In case of major infringement of public procurement that influenced the results of the procedure or the selection of the bidder, the Public Procurement Office may recommend the re-evaluation of the bidders, or the cancellation of the whole procedure. When infringements of the Public Procurement Law are neither substantial nor had influence on the result of the procedure, the recommendations may concern future proceedings in the scope of confirmed infringements.

As a result of these reforms, the statistics below indicate the decline of the number of infringements:

Results of ex-ante controls carried out by the Public Procurement Office (in %)

	May 2004 – Jan. 2005	*Jan. – July 2006*
No infringements found	14	23
Recommendation to cancel procedure	18	3
Recommendation to re-evaluate bid	5	2
Minor infringements	63	72
Total	100	100

The findings of the *ex-ante* controls are published in periodic reports every six months and are widely distributed (e.g. on the website of the Public Procurement Office). The information included in those reports have a preventive effect as they draw the attention of awarding entities to the scale, type and weight of infringements found and, as a result, enable to avoid similar errors in future procedures.

Sources: - Case study provided by Poland for the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.
- Report on *Functioning of the Public Procurement System in 2005*, Public Procurement Office, June 2006.

BEFORE, DURING AND AFTER THE BIDDING: WHAT LEVEL OF TRANSPARENCY FOR EACH STAGE?

Another key factor for defining the level of information is **the stage** of the public procurement process. Contrary to the bidding process that is strictly regulated, the phases before and after the bidding are less subject to transparency and accountability requirements in a majority of countries.

Pre-bidding

In the pre-bidding, in **a third of countries** potential bidders and other stakeholders, in particular end-users have an opportunity to be associated in the drafting of specifications for the object to be procured. Governments consult stakeholders on the specifications of procurement items prior to the bid notice in order to engage in a dialogue with the private sector and encourage innovation, especially for complex contracts (e.g. technical issues, difficulty in estimating prices, etc.). This may take the form of an invitation to companies to submit suggestions on line, surveys among bidders or a market study.

A concern is to ensure that the process for integrating their views is **not biased** to avoid specifications being targeted at one company. Countries indicated the necessity to have a sufficiently large number of participants to represent the views of the industry, as well as clear criteria to select them to avoid potential conflict-of-interest situations. For instance, in Belgium, a pre-information notice may be used to invite all interested bidders to participate in the preparation of the market study and then the results of this consultation are reviewed in light of the initial market overview prepared by the procuring authority. In Germany, precautionary measures include a formal commitment by stakeholders not to commit misconduct and corruption, its exclusion from follow-up contracts and its potential liability for prosecution in case of breach.

More generally, it is increasingly recognised that the public sector needs to take a more systematic and **strategic approach** to managing major government markets and providing industry with clearer view of public sector demand in order to improve competition and long-term capacity. An emerging practice is to organise seminars together with bidders early in the process to increase the exchange of information between the public sector and companies and provide the opportunity for the industry to discuss possible solutions (e.g. in Belgium, Finland, Germany, Ireland and the United Kingdom).

Bidding

In the bidding process, three quarters of countries use **new information and communication technologies** (ICTs) in order to release information on procurement opportunities in an open and competitive manner. At the European level, one of the ambitious targets of the Action Plan is that by 2010 all public administrations across Europe will have the capacity to carry out a hundred percent of their procurement electronically, where legally permissible, thus creating a fairer and more transparent market for all companies. The example of Portugal below illustrates how countries are progressively moving the different stages of procurement activities on line, including contract management and payment, in order to enhance transparency and efficiency.

Box II.4. Implementing an online platform covering all stages of procurement in Portugal

The Portuguese e-Procurement Programme was launched in June 2003 as a priority target of the National Action Plan for the Information Society. This system, implemented by the Knowledge Society Agency (UMIC), was set up with the main objectives of creating a centralised and high-quality technological platform that promotes efficiency and competition through increased transparency and savings in the whole public procurement process.

The National e-Procurement Portal (http://www.compras.gov.pt) started as a portal only providing information, but now it also offers the possibility of downloading the whole bid documentation and specifications free of charge. Also, the portal automatically releases public bid announcements, allows public or restricted procedures, receives suppliers' queries and manages all communication and information exchange on line. The next steps include the implementation of a Contract Management Tool that allows consulting and monitoring of contracts concluded as well as enables e-invoicing. The Information Management System will also help collect, store and systemise information and statistics on the procurement process.

In order to aggregate at a central level the needs of public bodies, an Electronic Aggregation Tool was developed to promote standardisation of goods and services as well as to facilitate planning, management and control. In the near future, further tools will be implemented, such as the National Register of Suppliers, which is a central suppliers' repository, and the Central Electronic Catalogue with information on products and services from the registered State suppliers.

In addition to increased transparency, the acquired knowledge and proactive management orientation, the system has also produced significant cost and time savings as well as structural rationalisation. As a result, total savings reached EUR 7.8 million for a total negotiation of EUR 39 million since September 2003. Eight ministries have already adopted new procedures, 796 public bodies and 1389 people were involved in the project.

Successful implementation of the project requires an adapted human resource management approach in order to motivate and mobilise the stakeholders. It also necessitates further standardisation of processes on the one hand, and product and service codification and standardisation on the other hand.

Sources: - Portugal, response to the OECD Questionnaire.
- The Portuguese e-Procurement Programme, 2006.

In order to ensure a level playing field in the bidding process, a majority of countries have not only ensured the wide dissemination of the bid notice but also developed specific measures to ensure that bidders:

- **Receive clear documentation on the procurement opportunity** to ensure an accurate understanding by bidders. A vast majority of countries have devoted significant efforts in recent years to develop model documents (e.g. through template bid documentation, standard sets of clauses and conditions, standard procurement guidelines, etc.). In Hungary, a legality control before the publication of procurement notices has been established (see Box II.5);

- **Receive information early about evaluation criteria**, i.e. how bids will be evaluated in the process. In Pakistan, Letters of Invitation are often used for ensuring that the short listing of consultants is based on clear and objective evaluation criteria (see Box II.6). The criteria and relative weightings, if appropriate, must be published in a timely manner so that bidders are aware of them when preparing their bid, for instance in Mexico and Norway. In Mexico, criteria are included in the bidding conditions and may be revised by a Bidding Conditions Revising Sub-Committee as well as be subject to public scrutiny before the publication of the notice. In the United Kingdom, the software for bid evaluation requires that criteria are established early in the process and also records them to ensure the possibility of auditing them;

- **Receive information at the same time** when bid requirements change. This is done in a written form through online notification or additional information published on e-procurement websites (e.g. in Belgium, Canada, Ireland, Mexico and Norway). In addition, it may be published in an official gazette or posted by suppliers in query mailboxes, for instance in the United Kingdom;

- May ask for further **clarification** or information, keeping in mind that information on questions and answers should be consistently disseminated to all bidders. Countries usually organise information sessions and may provide a contact point for information (e.g. in Belgium, Canada, Germany and Mexico) that sends back information to all bidders. In Mexico an online module enables bidder to observe clarification meetings;

- Have **sufficient time to prepare bids.** For example, additional information must be delivered - at least twelve days in the Czech Republic - before the time limit for receiving bids.

Box II.5. *Ex-ante* legality control of procurement notices in Hungary

It is the task of the Public Procurement Council to monitor the public procurement processes in Hungary. The Council is an autonomous public body reporting directly to Parliament every year on public procurement. It contributes to the development of public procurement policy, and its recommendations also assist in preparing and amending legislation.

In addition to available *ex-post* control and remedy possibilities, a specific filter mechanism was established to check compliance of procurement notices with national legislation and to detect and prevent any unlawful element before the bidding process starts. The Public Procurement Council requires a legality control, by the Editorial Board, before the publication of all procurement notices. In case of non-compliance with the law, the Public Procurement Council calls upon the bidder to complete or modify the notice before submitting it for publication.

According to the statistics available to the year 2005, out of 25 000 documents, the Council had to call on nearly 75%, requesting that the procurement notices be adjusted before their publication. Once the Public Procurement Council has required precisions and modifications from public authorities, they have generally accepted to make changes in line with the legal requirements. If not, the President and the Members of the Public Procurement Council may initiate an ex officio proceeding of the Arbitration Board. This *ex-ante* filter mechanism has therefore helped prevent a high number of *ex-post* remedies.

In addition to *ex-ante* legal control, since 2004 the Public Procurement Act also requires the contracting authorities to publish a notice on the amendment and execution of the contract in the Public Procurement Bulletin. The provisions of the Public Procurement Act set out strict conditions for amending the contract. The provisions narrowed this possibility to such events that were not foreseeable and would jeopardise the legitimate interests of a party in case of executing the contract in its original form.

Source: Hungary, response to the OECD Questionnaire.

Box II.6. Definition of objective criteria for evaluation in Pakistan

In the last seven years Pakistan made various efforts to promote good governance and accountability in its government contracting system. In co-operation with Transparency International (TI) Pakistan, the government implemented **practical tools for increasing transparency,** particularly the Integrity Pact that was first applied for the project of K–III Greater Karachi Water Supply Scheme in 2001. This project consisted of two successive phases assisted and monitored by TI to help implement the Integrity Pact: the selection of consultants for the design and supervision; and the selection of contractors.

In the first phase of the project, the IP for contracts related to the K–III was signed by all consultants and contractors participating in the bidding. For the selection of the consultants TI Pakistan assisted in the transparent short listing of consultants based on **clear** and **objective evaluation criteria included in the "Letter of Invitation"**. The selection was based on the two-envelope system, that is, two separate envelopes; one for the technical and one for the financial proposals. Opening the envelopes with the financial proposals is preceded by the verification and approval of the technical proposal. This system ensures that the evaluation not only takes into account the price but also the quality of each bid. The contract was finally awarded to the proposal with the highest technical requirements and the possible best price for this technical level.

The second phase of the project, that is, the bidding process for the contractors was concluded in September 2003, and the overall cost attained nearly PKR 4 485 million (Pakistan rupee). TI Pakistan estimated the net savings at PKR 837 million.

Sources: - Case study provided by Pakistan for the OECD Global Forum on Governance: Sharing Lessons on Promoting Integrity in Procurement, November 2006.
- *Curbing Corruption in Public Procurement*, Transparency International, December 2006.

Countries have recognised the importance of **communicating award results** in a transparent manner. The objective is to create a relationship of trust with the bidder that the process has been conducted in a fair manner and improve value for money for future procurements by providing feedback and advice to bidders on how to improve their bids.

All countries provide at the minimum the name of the successful bidder and the reasons for the rejection of the offer to the unsuccessful bidder. However, the level of information provided varies significantly depending on the country. For instance in the United Kingdom, the Ministry of Defence has decided to publish on line information on contract award that it cannot reasonably expect to protect under the Freedom of Information Act. This information includes the contractor's name, nature of goods and services, award criteria, rationale for contract awards, headline price of winning bid, and the identities of unsuccessful bidders. However, no information should be released on the competitor's bid. On the contrary, in Finland, bidders may ask for the winning bid document after **confidential information** has been removed by the successful bidder (e.g. business secrets).

The provision of information is done in **three quarters of countries** through the publication of the contract award as well as a debriefing on request. Several European countries have a double publication at the national level and in the Official Journal of the European Union. More than half of countries use new information and communication technologies to communicate award results.

The debriefing is usually made in writing. Very few countries mentioned the procedure used for approving the debriefing reports. In Norway, all reports must be approved by the procurement division and normally also by a specific board. In a few countries there is a possibility to request an **oral debriefing** that is usually carried out after the award (e.g. in Canada, Ireland, the United Kingdom and the United States). However, in the United States the debriefing can also be requested before the award so that bidders who have been excluded in the pre-qualification receive information early in the process. Some countries have developed detailed guidance for procurement officers to ensure that they do not release commercial in-confidence information (e.g. business secrets) that could contribute to the collusion of bidders, and that they have necessary experience or sensitivity to carry out the interview with the bidder successfully. The example of the United Kingdom below illustrates the potential benefits of debriefing for both the procuring authority and the bidders (see Box II.7).

Box II.7. Debriefing in the United Kingdom

If regulations require departments to debrief candidates in contracts exceeding European thresholds in the United Kingdom, the Office of Government Commerce (OGC) also strongly recommends debriefing in contracts below thresholds.

Debriefing candidates not selected for a bid list and unsuccessful bidders is incumbent on the contracting agency or public organisation. Debriefing provides a valuable opportunity for both parties to gain benefit from the process, and thus it is considered a useful learning tool for the parties.

Debriefing is also useful **for the buyer** department or agency because it may:

- Identify ways of improving processes in the future;
- Suggest ways of improving communications;
- Make sure that good practice and existing guidance are updated to reflect any relevant issue that have been highlighted;
- Encourage better bids from those suppliers in future;
- Get closer to how that segment of the market is thinking (enhancing the intelligent customer role);
- Help establish a reputation as a fair, open and ethical buyer with whom suppliers will want to do business in the future.

Debriefing also has **potential benefits for the supplier,** as it:

- Helps companies to rethink their approach in order to make future bids more successful;
- Offers targeted guidance to new or smaller companies to improve their chances of doing business in the public sector;
- Provides reassurance about the process and their contribution or role (if not the actual result);
- Provides a better understanding of what differentiates public sector procurement from private procurement.

Debriefing discussions – either face-to-face, over the telephone or by videoconference – are held within maximum 15 days after the contract is awarded. The sessions are chaired by senior procurement personnel who have been involved in the procurement.

The topics for discussions during the debriefing depend mainly on the nature of the procurement. However, the session follows a predefined structure. First, after introductions, the procurement selection and evaluation process is explained with openness. The second stage concentrates on the strengths and weaknesses of the supplier's bid to build a better understanding. After the discussion, the suppliers are asked to describe their views on the process and raise any further concerns or questions. More importantly, at all stages it remains forbidden to reveal information about other submissions. Following the debriefing, a note of the meeting is made for the record.

The most important result of an effective debriefing is that it reduces the likelihood of legal challenge because it proves to suppliers that the process has been carried out correctly and according to rules of procurement and probity. Although the causality between the introduction of detailed debriefing and legal reviews cannot be proven, there has been a sharp decrease in the last decade in the number of reviews (from approximately 3 000 in 1995 to 1 200 in 2005).

Nevertheless, debriefing contains risks and costs if it is not properly conducted. In particular debriefing should never be delegated to employees who do not have the necessary experience or sensitivity to carry out the interview successfully. Inaccurate debriefing led to complaints resulting in the European Commission beginning infraction proceedings against the United Kingdom and legal proceedings against the contracting authorities themselves in the High Court.

Sources: - United Kingdom, response to the OECD Questionnaire.
- *Supplier Debriefing*, OGC Publications.
- *Debriefing Unsuccessful Suppliers*, Environment Agency, United Kingdom.

To provide bidders with sufficient time to challenge the decision before the contract starts, most countries have a **standstill period** between the date of notifying bidders of their contract award decision and the date they may enter into the contract. This standstill period varies significantly in practice, for example 5 days in Portugal, 10 days in Korea, and 21 days in Finland. At the European level, the Commission has proposed an amendment to the Remedies Directive to include a mandatory standstill period of 10 calendar days. The introduction of a standstill period at the European level has been highly debated. If it does promote the fairness of the procedure by providing

a dedicated time for challenging the decision, it also has the potential of influencing decision makers towards systematically using competitive procedures to avoid their decision being challenged. This illustrates the difficulty in procurement to balance concerns of fair and equal treatment with efficiency concerns.

Post-bidding

The post-bidding phase is regarded as an **internal management process** between the administration and the supplier that is subject to less strict requirements for transparency. It is not covered by procurement laws and regulations but rather by contract law. Very few countries, such as Denmark and Sweden indicated that the contract should be open to the extent that it does not reveal secret information that could harm the interests of the contractor or the State.

In a vast majority of countries, the contract management is only known by the contracting agency and the contractor. As mentioned earlier, a core challenge is to ensure that the project is being carried out in accordance with specifications, in particular in terms of quality and quantity of materials used, timely provision of all components. Another common issue in the post-bidding process is whether the payment is carried out in a timely manner.

Therefore, it is all the more essential to strengthen **guidance and accountability** mechanisms for procurement officials and contractors to prevent risks to integrity in the post-bidding phase. Countries have introduced various measures, such as:

- **Adequate planning**. Having an adequate plan for public procurement can help the agency to analyse its need and select the best procurement option to prevent mismanagement and even corruption in procurement. The bid notice may include details on the way the contract is to be managed as well as the plan and method for payment, for instance in Canada, Ireland and the United Kingdom;
- **Risk management techniques**. An internal risk matrix for the administration helps ensure the involvement of specialist contract staff for high-risk contracts, for instance in Australia, New Zealand and the United Kingdom. In Canada, risk assessment and risk management plans are provided as part of the bidder's solution;
- **Restrictions and controls over change in the terms of the contract**. The procurement authority needs to justify variations, e.g. in Italy, Korea, Mexico and the United Kingdom. This may be subject to an internal or external review including a third party (e.g. involvement of

an unsuccessful bidder in the monitoring in the case of changes to the contract). Furthermore, the delegation of authority for approving technical or financial variations may also be done only up to a certain threshold, which requires that additional change orders beyond this threshold be approved by higher authorities;

- **Accurate and timely supervision** by managers, control agencies, with regular reporting on the progress of the project, for instance in Belgium. An emerging practice in countries such as Spain is for the government to use companies specialised in monitoring;
- **New technologies to monitor** the progress of the contract and the payment, which are widely used in Mexico and Korea. In Portugal, a contract management tool will allow the change and validation of commercial aspects and the control of compliance to contract terms by suppliers. Box II.8 illustrates the experience of the Central Vigilance Commission in India, which has made risk management tools an integral part of the e-bidding and e-payment processes with the support of new technologies (e.g. automatic reports, exception alerts, etc.);
- **Shared** accountability. Countries often use models for risk sharing between the contracting authority and the contractor, such as performance bonds. For example, the government receives a substantial sum in the event of default in the execution of the contract in Japan. On the other hand, if invoices are not paid within the term established in the contracts, the government agency agrees to pay interest, which may be a cause of liability for the procurement officer in charge, such as in Mexico;
- **Public scrutiny**. A key condition of public scrutiny is the access of stakeholders and the public to records. In Norway archived contracts and all related documents are available to the press. This is all the more important if there have been changes to the contract, for instance all amendments are recorded in writing in the United Kingdom. In very few countries, public scrutiny is ensured through the involvement of stakeholders in the post-bidding phase (see Box II.9 on the experience of Korea in using new technologies to involve third parties).

Box II.8. Increasing transparency in vulnerable areas through new technologies in India

The Central Vigilance Commission is an independent central body in the Indian administration which was set up by the Government in 1964 with the objective of advising and guiding Central Government agencies in planning, executing, reviewing and reforming their anti-corruption efforts.

Following numerous complaints about the mishandling of administrative processes that may lead to corruption in the administration (e.g. delays and arbitrariness; non-adherence to the 'first-come-first-served' principle, etc.), the Commission decided that all organisations that deliver services or are at the interface with the general public or with private businesses, must increase the transparency and accountability of their activities through the use of new information technologies.

As far as the public procurement process is concerned, the Commission identified the following areas where information technology can promote efficiency as well as curb corruption through increased transparency:

- E-bidding, in particular with the mandatory publication of procurement opportunities and documentation on line;
- E-payment, which helps reduce transaction costs as well as curb corrupt acts that may accompany handing over cheques to contractors and suppliers.

With the support of new technologies risk management tools are made an integral part of the main processes. For example, the accounting software can be built in such a way that the computer system generates 'exception reports' and gives alerts wherever there are significant deviations from certain benchmarks and norms, and it can also make comparisons of expenditures on procurement items.

The extensive use of the website can be used both as a tool for communication with stakeholders and for curbing corruption through increased transparency in processes that are vulnerable, not only in public procurement but also in customs and in the collection of income tax.

Sources: - Case study provided by India for the OECD Forum on Governance: Sharing Lessons on Promoting Integrity in Procurement, November 2006.
- Circular N°40/11/06: Improving vigilance administration by leveraging technology, Central Vigilance Commission, Government of India, 2006.

Box II.9. Involving third parties to monitor on line the contract management in Korea

The nationwide integrated Korea Online E-Procurement System (KONEPS) enables online processing of all procurement from purchase request to payment. Through the digitalised system, customer organisations and companies are involved in scrutinising the way public funds are managed in the procurement process. The System covers all stages of the procurement process, from the pre-bidding to contract management and payment. For example, the Public Procurement Service releases specifications of procurement items on the KONEPS prior to the bid notice in order to encourage interested suppliers to submit suggestions.

The Korean experience illustrates how new technologies can support the involvement of a third party - an insurance company - that provides a guarantee for the contract between the administration and the bidder. The successful bidder and the contracting agency establish an e-contract through KONEPS, and in the process, a surety insurance company, as a third party, shares part of that information regarding the contract. In practice, the contracting official receives both the contract documents provided by the contractor and the written guarantee for the contract provided by the surety insurance company, and replies to the guarantee. The contracting officer drafts the final version of the contract after clarification and sends it to the contractor and the end-user organisations.

Another feature of the information system is that it helps monitor the payment and prevent risks to integrity during payment. The contractor submits a payment request and receives payment upon receipt, which is sent by an inspector from an end-user organisation. Since the e-payment is connected to the Finance Settlement, the end-user organisation, the contractor and the bank share information in the flow of payment. Payment is automatically completed on line within two working hours upon payment request to avoid overdue payment.

Source: South Korea, response to the OECD Questionnaire.

EXCEPTIONS TO COMPETITIVE PROCEDURES: HOW TO ENSURE INTEGRITY?

If open procedures are favoured in all countries, procurement laws and regulations define alternative procedures – restrictive/selective as well as negotiated/limited procedures that can be used under strict conditions. The method favoured is often based on the **type** of product or service and its **overall value**. At the European level a procedure, competitive dialogue, can also be used for complex contracts where the open or restricted procedure is not appropriate, but there are no grounds for using the negotiated procedure.

Types of exceptions

To ensure a level playing field, procurement laws and regulations define **a strict list of exceptions** to competitive procedures that are based on the following circumstances:

- Specific nature of the contract to be procured which results in a lack of genuine competition in the market (e.g. technical or artistic reasons, proprietary rights, etc.);
- Low value of the contract: the national thresholds under which direct purchasing is allowed vary across countries (e.g. equivalent to EUR 17 500[14] in Canada, EUR 6 000 in Poland, EUR 5 000 in Portugal);
- Commodity (e.g. goods that are traded at the same price);
- Exceptional circumstances such as extreme urgency. As a principle, factors giving rise to extreme urgency must be unforeseeable and outside of the control of the contracting authority;
- Confidentiality of the procurement to protect State interests, such as national security and other public interests.

Limited competition does not necessarily requires less transparency

A key challenge is to ensure equal and fair treatment for bidders, even when using procedures that are less subject to competition. Experience shows that limited competition does not necessarily require less transparency. In these circumstances, **alternative measures** have been used in countries for reinforcing the fairness and integrity of the procurement process, in particular:

- The **strict definition of criteria for using non-competitive procedures** and their application under verified conditions (e.g. impossibility to have follow on contracting for contracts of low value to avoid splitting of contracts);
- The **publication of an advance contract award notice** in order to provide an opportunity for potential bidders to participate in the procedure in cases where there is not absolute certainty that only one firm has the ability to perform the contract (in Canada, see Box II.10);

14. Calculated as an equivalent to CAD 25 000 in January 2007.

- The **opening of bids in an official manner**, involving several persons, especially for negotiated/direct procedures, supported by double signatures, for instance in Belgium;
- **Specific guidance** to procurement officials for ensuring the fairness of the procedure through directives and internal policies, in countries such as the Czech Republic and Ireland;
- **Additional controls to verify** the justification of the legal derogation in the approval phase by specific internal control agencies or departments (e.g. in Belgium, Canada, Ireland and the Netherlands). On the other hand, there may be a committee bringing together officials involved in procurement and representatives from internal control agencies for instance in Mexico;
- **Specific reporting requirements** for using exceptions to competitive procedures (e.g. in Australia, Belgium, Luxembourg, Mexico, Portugal, the Slovak Republic and the United States);
- The **verification of the justification** for using direct procedures by the Supreme Audit office, in countries such as Germany, Ireland, Norway and Portugal;
- **Minimum transparency requirements**. This can lead to the publication of the contract award notice to ensure sufficient publicity, for instance, in New Zealand and Korea. Other transparency requirements may include a written record on the justifications of derogation from competitive procedures for possible review, in countries such as Australia, Ireland and New Zealand. In a few countries, publicity rules apply for all procedures, only the means for communication vary, for instance in the Netherlands and Sweden (see Box II.11).

Box II.10. Ensuring a level playing field: The Advance Contract Award Notices in Canada

The Advance Contract Award Notice (ACAN) is an electronic bidding methodology that is normally used when there is a possibility that only one supplier can perform the work defined in the bid documentation. In circumstances where detailed market knowledge confirms this as fact then the contract should be awarded on a non-competitive basis with transparency achieved through a contract award notice.

The objectives of the Advance Contract Award Notice process are to:

- Provide a procurement process that is efficient and cost effective;
- Provide potential suppliers with the opportunity to demonstrate, by way of a statement of capabilities, that they are capable of satisfying the requirements set out in the ACAN; and
- Respect the principles of government contracting by enhancing access and transparency.

An Advance Contract Award Notice contrasts with non-competitive contracts in a number of ways. Notices provide all suppliers with an opportunity to signal their interest in bidding, through a statement of capabilities. They are posted for a minimum of 15 calendar days on the Internet on the government's electronic bidding service. The system operates 24 hours a day, 7 days a week. Notices open the process to additional electronic or traditional processes if a supplier's statement of capabilities is valid.

The Advance Contract Award Notices may be used when there is a justifiable reason not to call for bids, provided that the notice clearly explains the nature of the work to be done, the name of the proposed contractor, the estimated cost, why bids are not being called, and sufficient time (15 days) is allowed for potential challengers to come forward. If there is a valid challenge to the proposed contract award, it must not be ignored.

Sources: - Canada, response to the OECD Questionnaire.
- Guide for Managers – Best Practices for Using Advance Award Notices, http://www.tbs-sct.gc.ca

Box II.11. Ensuring transparency below the European Union threshold in Sweden

In Sweden, public procurement is regulated by the Public Procurement Act (LOU), which is based on the Directives of the European Commission. After 1992, when the Swedish Government implemented the Public Procurement Act, the share of openly advertised public procurement in the GDP[15] increased significantly at the European Union level (from 0.12% in 1993 to 3.4% in 2004). It is one of the highest among EU member states.

The Government took one step further in July 2001 by making the publication of notices below the European Union threshold mandatory in Sweden. Before this date, there were no laws regarding advertisement, only rules that the public bodies had to invite at least three bidders in an open procurement process.

The Swedish procurement procedures below European thresholds are very similar to the ones above the thresholds. Having one set of rules above and below the threshold helps promote transparency and equal treatment for bidders. In accordance with the Public Procurement Act, all three options that could be used for procurement procedures below the threshold ensure a minimum of publicity in procurement, namely:

- The simplified procurement procedure, the most commonly used procedure below the threshold, requires that notices be published through an electronic database readily accessible for all potential bidders.
- In a selective procurement procedure (the equivalent of the selective procedure in the case of procurements over the European threshold values), the notices must also be published through an electronic database accessible to all.
- Even in case of direct procurement procedures, the notice must be openly accessible to all stakeholders on the public procurement website.

Information on stages of the public procurement process from the pre-bidding, through the selection and award, to the debriefing of award results and contract management and payment are openly accessible on the procurement website.

Sources: - Sweden, response to the OECD Questionnaire.
- A Brief Description of LOU by the National Board for Public Procurement.
- Eurostat*:* http://epp.eurostat.ec.europa.eu/portal/page?_pageid=1996,39140985&_dad=portal&_schema=PORTAL&screen=detailref&product=STRIND_ECOREF&language=en&root=STRIND_ECOREF/ecoref/er040.

15. Openly advertised public procurement refers to the value of public procurement that is openly advertised as a percentage of GDP. The nominator is the value of public procurement, which is openly advertised: for each of the sectors - work, supplies and services - the number of calls for competition published is multiplied by an average based, in general, on all the prices provided in the contract award notices published in the Official Journal during the relevant year. The denominator is the GDP.

Specific efforts for procurement projects at-risk

Some countries have made particular efforts to ensure the integrity of the process when using non-competitive procedures that are considered particularly at risk, especially low-value contracts, emergency procurement and defence procurement.

Low-value contracts

In the case of **low-value contracts**, a balance must be found between the need for transparency and other considerations, in particular efficiency. For example, at the European level, there are no mandatory rules for public contracts with respect to specific services ("IIB services") and for contracts with a low monetary value. However, following a notice of the European Commission in this respect (2006/C179/02) and a recent opinion of the Advocate General in the case Commission v. Ireland (C-507/03 and 532/03), some countries in the European Union have initiated efforts to address this issue. For instance, in the Netherlands, since 2006, contracting authorities publicly announce a request for competition regarding low-value contracts to ensure transparency while they have the flexibility to determine the medium through which contracts will be publicly announced. In the Czech Republic, a central register was created in 2006 for publishing above and below-the-threshold contracts in the form of a notice in the Information System on Public Contracts (see Box II.12).

Box II.12. Central register for publishing contracts in the Czech Republic

With the accession to the European Union (EU) in May 2004, the Czech Republic committed to enhancing transparency in public procurement.

Accordingly, the Act on Public Contracts which came into force on 1 July 2006 makes the publication of public contracts below EU thresholds mandatory both at national and EU levels. The contracting authority is obliged to publish contracts above and below the threshold in the form of a notice in the Information System on Public Contracts. This central register - a sub-system of the Information System on Public Contracts - was created and launched with the Act on 1 July 2006, and replaced the former publication system (the Central Address).

The data on public procurement is collected in the Information System on Public Contracts run by the Ministry for Regional Development. On the basis of this data it is possible to compare the proportion of above-the-threshold contracts or small size contracts or to verify whether negotiated procedures without publication are not excessively used or whether the contracting entities fulfil their duties concerning publication of contract notices. These findings can help prevent and detect irregularities in the system.

In accordance with the "National Plan for the Introduction of Electronic Public Procurement over the Period 2006-2010", the notification will be entirely in electronic form by 2010.

Sources: - The Czech Republic, response to the OECD Questionnaire.
- Case study provided by the Czech Republic for the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.

Emergency procurement

As for **emergency procurements**, derogations from competitive procedures offer the needed flexibility for procurement officials to order on-the-spot goods and services to face emergencies. However, there is growing awareness that emergency procurements hold important risks for mismanagement and possibly corruption resulting from the amount of funds that are transferred in a short period of time, the lack of a co-ordinated response from government agencies and the possible disorganisation of accounting systems. The example below illustrates the inherent difficulties in preventing fraud and corruption in emergency contracting and the lessons learned from the Hurricanes Katrina and Rita in the United States.

Box II.13. Emergency contracting in the United States: Improving transparency and accountability

The Federal Government's response to Hurricanes Katrina and Rita in August and September 2005 resulted in increased oversight of its contracting practices. The devastation of the Gulf Region and the unparalleled response and recovery efforts created significant challenges for public procurement officials.

During the emergency, communication among agencies was limited, authorities of the various response organisations were unclear, and contracting oversight was not commensurate with the risk inherent in the disaster. These factors adversely affected contracting transparency and raised questions regarding the scope of the contracts awarded and the work being done. The federal government saw the need to improve emergency communication plans, preparedness, and oversight and institutionalise improved emergency response capabilities.

Public procurement experts created an Emergency Response and Recovery Team to address issues that arose during Hurricane Katrina. The Team developed an Internet-based resource that includes checklists, existing contracts, samples, emergency field guides, training, best practices, and other resources.

The team surveyed personnel who were deployed to the Gulf Region and identified numerous lessons learned regarding transparency and accountability (see: http://www.acc.dau.mil/emergency response). Lessons learned are being shared government-wide and provided in training to improve emergency contracting in the future. Some of the lessons learned are listed below:

- Agencies should consider the creation of a risk mitigation board to control the increased risks during an emergency. Such boards allow for increased communication, clear policy direction, and effective resource utilisation. The board is most effective when integrated into the agency's management structure and when composed of key agency stakeholders, including contracting officers, procurement policy analysts, small business representatives, representatives from the Office of the Chief Financial Officer, representatives from the Inspector General's office, and technical experts, such as programme managers.
- Agencies should develop stewardship plans to review the results from an appropriate sampling of their emergency acquisitions. Reviews should give increased attention to

transactions that are conducted using emergency acquisition flexibilities, These transactions comprise increased thresholds sole-source transactions of a high-dollar value, and other risky acquisitions, including those involving complex technical requirements or marketplace solutions.

– Agencies should consider limiting the value and length of a contract to address only the most immediate emergency and should pursue firm-fixed price contracts whenever practicable.

Although significant efforts were made, the 2006 report of the Government Accountability Office (GAO) called for further efforts to reinforce more effective controls to prevent and detect fraud in emergency contracting. According to the GAO report, tens of millions of dollars have continued to be lost through improper and/or fraudulent payments following the hurricanes Katrina and Rita. Payments include rental assistance paid to individuals who had already been provided with free housing, duplicate payments to individuals who claimed damages to the same property from both hurricanes Katrina and Rita as well as financial support for foreign students, temporary workers and other individuals who were not eligible.

Sources - Case study provided by the United States for the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.
- *Hurricanes Katrina and Rita Disaster Relief – Continued Findings of Fraud, Waste and Abuse,* United States Government Accountability Office, 2006 (http://www.gao.gov/new.items/d07252t.pdf).

Defence procurement

Some countries have also initiated specific efforts to improve integrity in the area of **defence procurement**, which often requires the use of non competitive procedures to keep national security interests confidential. For instance, in Korea, the Defence Acquisition Programme Administration, based on the 2005 Law on Defence Acquisition, ensures that external experts are engaged in the decision-making process of major projects through a specific Committee aimed at strengthening transparency and monitoring of the procurement system. In Poland, the Ministry of Defence has co-operated with a civil society organisation to address risks in defence procurement (see Box II.14).

Box II.14. Partnering with civil society organisations to address risks in defence procurement in Poland

In 2004 Transparency International (TI) launched a project to reduce corruption and build integrity in defence and security institutions. As defence is a particularly sensitive sector, governments are aware of the potential costs of corruption in defence and are therefore willing to take preventive anti-corruption measures.

This project is based on several pillars. First of all, to build awareness and co-operation with key groups –exporting and importing governments, defence ministries, suppliers and international institutions such as the North Atlantic Treaty Organisation (NATO) – then build practical experience, and apply this in practical work with reform-minded governments. A crucial point is the political will and support of arms exporting governments. The support of NATO is also very important, considering its influence in many countries and its capacity to promote leadership training and education.

In Poland, anti-corruption efforts have focused primarily on more effective detection of criminal activity and subsequent punishment with the creation of a special secret service, the Central Anti-corruption Bureau. As a result of co-operation with TI United Kingdom, the Defence Ministry of Poland has also taken the following steps:

- Appointment of a Director to set up an anti-corruption policy;
- Efforts to eliminate conflicts of interests among members of bidding commissions;
- Limitations to the use of single-source procedures and promotion of competition;
- Prosecutions at high level (e.g. First General charged in a corruption case);
- Introduction of elements of Defence Integrity Pacts in bids for VIP aircraft and transport helicopters;
- Use of electronic auctions (30 in 2006, 400 planned for 2007) in the Defence Ministry.

Transparency International is assisting anti-corruption projects for defence procurement in other countries including Colombia, India, Latvia, Poland and South Korea.

Source: M. Pyman and M. Wnuk, *Reducing Corruption, Building Integrity in Defence and Security Institutions*, XIIth International Anti-Corruption Conference, November 2006. (http://www.transparency.org/content/download/12840/127158/file/12thIACC_Pyman-presentation.pdf).

III. ENHANCING PROFESSIONALISM TO PREVENT RISKS TO INTEGRITY IN PUBLIC PROCUREMENT

Public procurement is increasingly recognised as a profession that plays a significant role in the successful management of public resources. In the last decade reform efforts have often occurred in **cycles**, as public procurement has gone through substantial changes in terms of priorities, needs and capacity. In many cases these reforms been driven by *ad hoc* scandals.

As countries have become more aware of the importance of procurement as an area vulnerable to mismanagement and potentially corruption, they have recently initiated efforts to integrate procurement in a more **strategic view of government actions**.

This has also led some countries to recognise procurement as a **strategic profession** rather than simply an administrative function. This requires specific guidelines as well as restrictions and prohibitions to:

- Ensure that public funds are used for the purposes intended;
- Enable public officials to adapt in a changing environment;
- Minimise the potential for corruption.

USING PUBLIC FUNDS ACCORDING TO THE PURPOSES INTENDED

Public officials need to be equipped with **instruments,** as well as a range of procurement, project and risk management **skills** to properly plan and manage procurement processes, in accordance with the budget.

Planning

As part of an effort to adopt a long term and strategic view of their procurement needs and management, **more than a third of countries** have used annual procurement planning. Procurement authorities are required to

review their purchasing processes, and identify improvement goals, targets and milestones that closely link with their business plans, outputs and government objectives. Annual procurement plans may also be publicised so as to inform providers of forthcoming procurement opportunities (e.g. in Australia, Chile, Mexico, Poland). These plans usually contain a short strategic procurement outlook for the agency supported by details of any planned procurement, in particular the subject matter and the estimated date of the publication of the bid notice.

In addition, project-specific procurement plans can also be prepared for specific purchases of goods and services that are considered high value, strategic or complex in countries such as Australia, Finland and New Zealand. The purpose of project-specific plans is then to assist the agency to analyse its need and select the best procurement option for large-scale procurements that are particularly vulnerable to mismanagement (e.g. overrun costs, failure to complete work on time, defective product, etc.) and potentially corruption. The government of Australia has identified a Checklist of probity issues that can be used in the construction of a probity plan (see Annex C for details).

In order to ensure that public funds are used according to the purposes intended, annual procurement planning might encompass various aspects linked to the attainment of **government or department objectives**, in particular:

- **Financial and human resources requirements** for attaining objectives, initiatives and planned results - over a period of one year in Belgium and three years in Canada. For instance, in Belgium, it is necessary to justify not only the object but also the amount, and prove that the amount is based on a realistic price assessment.

- **Departmental or individual performance** to provide accounts of results achieved in the most recent fiscal year against performance expectations, for instance in Canada and Chile. Balanced scorecards are a tool used in countries such as Belgium and Korea that translate the strategy into action and provide feedback on a regular basis to improve strategic performance and results. To provide the right incentives for procurement officials and encourage them to improve value for money, individual performance appraisals should be carried out at different points of the contract, especially for multi-year contracts, and take into account criteria that are not only linked to timeliness but also quality.

- Some countries, have extended accountability from using expenditures for the "purposes intended" to **outcomes achieved with those expenditures**, for instance in Canada (see Box III.2). This approach can

help verify, for example, that transparency policies in procurement are defined in line with the government strategy and support it in practice. A specific process is used to justify the use of public procurement procedures and verify whether the aggregation of the benefits and costs - including overhead costs - of a procedure contribute to the overall value for money.

Budgeting

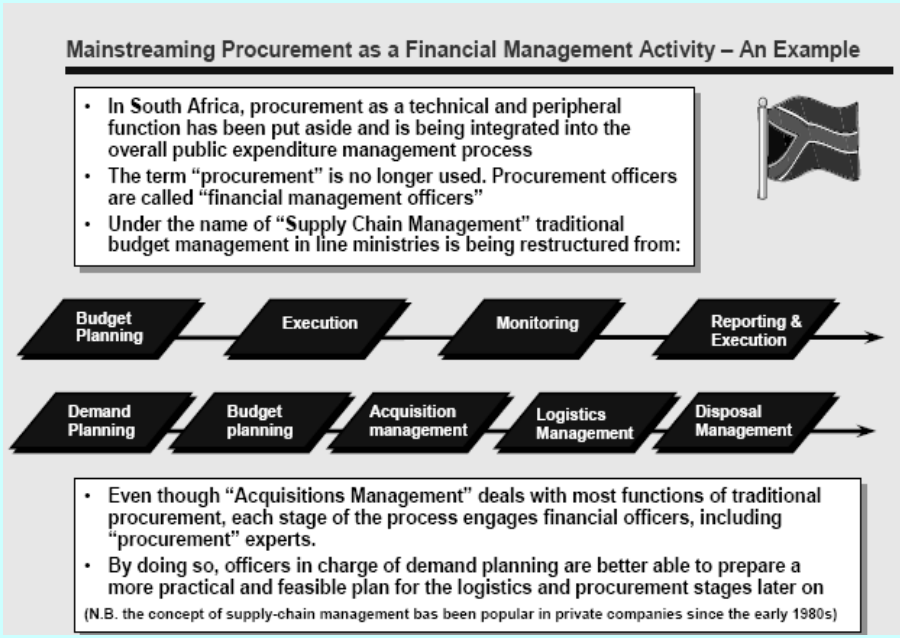
Appropriately budgeting procurement is a key element of transparency and accountability in the way public funds are managed. The budget is the **single most important policy document** of governments, whereby policy objectives are reconciled and implemented in concrete terms.

Budget transparency can be defined as the full disclosure of all relevant fiscal information in a timely and systematic manner. Countries have indicated that **financial commitments** need to be approved before starting the procurement. For instance, in Luxembourg, the first step is the control of the commitment and the order to pay all expenses, the verification of the availability of credits, the correctness of the budgetary commitment, the regularity of proofs and the correct execution of internal controls. Public agencies are also required to justify expense and show that they fit into the objectives of the budget allocated.

A growing concern is to ensure that **public procurement is an integral part of the public financial management**. Transparency and therefore visibility in management and financial performance begins with the budget process. It must be reflected throughout key management processes and practices to support investment decisions, asset management, procurement, and in the final results be reflected in sound corporate reporting. Transparency is an essential condition of integrity in the management of the entire life-cycle from expenditure planning to final results. Box III.1 illustrates the efforts in South Africa to establish strong integration across the budget cycle in order to make the entire public financial management system accountable for achieving results.

Box III.1. Integrating procurement in financial management in South Africa

A higher degree of integration of procurement and financial management has been achieved in South Africa since the change of regimes in 1994. Within this overall approach, procurement has been recast as a process of supply chain management – involving decisions to acquire assets, maintain assets, and sell off unnecessary assets. The scheme below represents the different elements of the South African system for managing public procurement.



As a consequence of this redesign, procurement is no longer treated as a purely technical process, and procurement specialists now work alongside other leading officials and participate in decision making on how agencies manage their assets and spend their resources. The designation of "procurement specialist" may have lapsed as a result, but the changes have served to highlight the importance of having professionals with wide-ranging skills in the planning and execution of procurement.

Source: *Harmonising Donor Practices for Effective Aid Delivery: Strengthening Procurement Capacities in Developing Countries*, OECD, 2005.

Similarly, strengthening **accountability for public expenditures** has been an important part of reform efforts in the last decade. This may take various forms:

- Providing the opportunity and the resources to **Parliament** to examine fiscal reports on public procurement;

- Making reports **publicly available**, for example, on the Internet;
- **Promoting an understanding** of the budget process by civil society organisations and the wider public[16].

Furthermore, some countries have put efforts into reinforcing internal **responsibility mechanisms**, in particular through a statement of responsibility by the senior official responsible, more stringent performance reporting in departments and improved systems of internal financial control. For instance, in Canada, the current reform has not only reinforced planning and budgeting reporting requirements but also created an integrated model linking appropriation, budgeting, investment, procurement and contract management processes, validated by a robust audit process (see Box III.2).

Box III.2. Promoting integrity in public procurement: Budgeting and financial management reforms in Canada

Canada's long-established Financial Administration Act requires that funds be used for the purposes intended as approved by Parliament. It is also the basis for ensuring an **appropriate segregation** whereby budget procurement, project and payment verification activities are conducted by individuals from separate functions and **distinct reporting relationships**.

Current reform efforts are underway to **extend accountability** from using expenditures for the "purposes intended" to "**outcomes achieved**" with those expenditures. In particular the Management Reporting and Results Structure Policy establishes more structured and detailed appropriations documents and performance reporting both in departments and to Parliament. An Assets and Acquired Services Policy Framework also requires since November 2006 that procurement activities be clearly aligned with expected results of key programme activities and demonstrate how they contribute to expected outcomes.

The 2006 Federal Accountability Act also seeks to reinforce citizens' confidence in procurement through:

- An overarching **statement of procurement principles** that commits the government to promoting fairness, openness, and transparency in the bidding process;
- The inclusion of **integrity provisions in contracts**;
- The creation of a **dedicated Procurement Auditor** to review procurement practices across government, handle complaints from potential suppliers, review complaints from contract management, manage an alternative dispute resolution process for contracts and submit an annual report to Parliament.

In addition to establishing the planning and budgeting reporting requirements, the new frameworks and supporting policies recognise the importance of:

- An **enabling environment** for contributing to realising outcomes that promotes governance and effective processes (e.g. management reporting, management capacity);

16. For further details, see the *OECD Best Practices for Budget Transparency*, OECD, May 2001.

- Having an **integrated model** linking appropriation, budgeting, investment, procurement and contract management processes, validated by a robust audit process. This is a significant departure from long-established practice of silo functions with limited financial management and performance information and a transactional approach to audit;
- **Building capacity** through training at all levels of management as well as greater reliance on professionally accredited or certified communities of practice and external recruitment.

Sources: - Canada, response to the OECD Questionnaire.
- Case study provided by Canada for the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.

New technologies may also be a tool for facilitating the integration of different processes linked to the procurement process. Box III.3 illustrates how Dubai has brought together in a mixed online system the budget, purchasing and payment processes, which helps reduce the duplication of procurement functions and promote a more unified flow of information within the administration.

Box III.3. Integrating processes on line for budget, purchasing and payment in Dubai

Dubai has established regulations to enable the development of an integrated e-procurement system, *Tejari*. *Tejari* is a government-initiated, profit-driven online marketplace that enables all phases of the negotiation to take place on line. In addition, government departments use an Enterprise Resource Planning system that can be used for making purchases requests since it is linked to the accounting and invoicing system. These systems are used together in an integrated manner. All government departments use a shared internal information system collecting all information together. Tejari consists of several purchase processes and functions:

- *e-Bidding: Tejari* collects and evaluates bids;
- *e-Cataloguing*: It gives the possibility of uploading and searching;
- *e-Ordering* for orders and invoices;
- *e-Auctioning*, including e-Marketplace, negotiation, reverse auctions;
- *Tejari Link:* This market-making facility supports small and medium-size businesses, where a company can log on to a national directory and view contracts, promotions and messages, as well as establish showrooms;
- *Tejari Expert:* This consulting service helps streamline the procurement process for large organisations.

In 2006 Tejari has more than 4 000 suppliers, and the vast majority are from the private sector. As the Government is the largest buyer in the region, 60% of the procurement spending comes from the government sector. Since the launch of e-procurement in 2000, the value of business through this system represents over two billion USD, and over 100 000 items in the catalogue are available.

With the introduction of Tejari, Dubai has benefited in particular from the reduced duplication of procurement functions and offices, and a more unified and user-friendly procurement system that brings together budget, purchasing and payment processes on line. Obstacles that still need to be overcome include the lack of adequate skills in the government and the need to ensure a wider participation by suppliers. Efforts have been initiated in that direction with awareness raising activities as well as training for both public sector employees and suppliers.

Online purchases were made in two important sectors in the public administration, the Armed Forces and the Ministry of Health. The government estimated resulting average savings of 40% on equipment and 14% on hardware compared to traditional purchasing modalities.

Sources: - Presentation of Dubai at the OECD High Level Seminar on E-procurement. Good Governance for Development in Arab Countries Initiative, Naples, January 2006.
- E-procurement in the United Arab Emirates, in *E-procurement for Good Governance and Development in Italy, North Africa and the Middle East*, Centre for Administrative Innovation in the Euro-Mediterranean Region.

Another related challenge is the difficulty of **defining a budget consistent with the expected costs of a solution** ensuring value for money. To develop a sound cost estimate for procurement based on a good

understanding of the market and solutions available, countries have used solutions, in particular:

- Making reference to established market prices – e.g. in the United Kingdom with commercial catalogues – or calculating the cost based on detailed market research, for instance in Turkey;
- Engaging with a representative group of suppliers to that market early in the process, in countries such as Belgium, the Netherlands and Turkey;
- Another common practice is to use knowledge of prior procurements of a similar nature, for example through a database or data mining.

A CHANGING ENVIRONMENT: ENABLING PROCUREMENT OFFICIALS TO ADAPT

From procurement officer to "contract manager"

Public procurement systems in countries have moved increasingly from a situation where procurement officers are expected to comply with rules to a context where they are given more flexibility to achieve the wider goal value for money. As countries have developed flexible regulatory frameworks and simplified procedures, a trend is to develop uniform documentation to ensure consistent implementation of rules. In order to raise awareness about evolving procurement standards, procurement officials have been involved – directly and/or through professional associations – in the **drafting or revision of procurement laws, regulations and guidelines**. More than a third of countries have consulted officials involved in the procurement process. Some countries such as Finland have even sought public comment to reflect the views of other actors, in particular of business and non-governmental organisations. This has contributed to building a mutual understanding among officials of expected standards and to facilitating their implementation.

Furthermore, most governments have provided increasing responsibility for procurement, daily management being passed to individual public sector entities, while overall oversight and co-ordination of public procurement activities has been concentrated in the central public procurement body. A report from SIGMA on *Central Procurement Structures and Capacity in Member States of the European Union* highlights the difference in the

central public procurement structure[17] between the group of recently acceded member states to the European Union that are centrally-driven and other countries in Europe. For countries in the process of building up their public procurement systems, the establishment of a strong focal point for public procurement at high central level, which is given a fairly wide scope of functions and responsibilities, has been seen as a vital measure. In other EU member states, the establishment of central procurement structures is the result of a peripherally-driven approach, where the pressure for strengthening certain, but not all functions at the central level could be regarded as an effect of changes in the external environment. These changes stem from different factors, such as the demand for more efficient government (e.g. through framework agreements, co-ordinated purchasing), technological changes (e.g. e-procurement), and external commitments (e.g. membership in the EU and the WTO).

More centralised procurement can contribute to efficiency in public procurement by improving management information through aggregation of demand, lowering prices through reduced production costs and transaction costs and enhancing the efficiency of the supply chain. It may also reinforce the **integrity and neutrality** of the public procurement system since:

- The central public procurement body often has a "firewall" position that avoids direct contact between the contractors and end-users;
- Promoting integrity and auditing actual practices is easier in a single entity than hundreds of government entities, and contributes to more uniform and professional working methods;
- Transparency and openness are often a key factor for the credibility of the public procurement body to achieve good results for end-users of the contract, in particular government agencies, in their negotiations with bidders.

For instance, in Finland, there is a central procurement unit that establishes framework agreements for procurements, which contributes to more efficient and transparent purchasing (see Box III.4).

17. The table in Annex D provides a comparative analysis of central procurement structures, capacity and their respective functions in the European Union. For further reference, see *Central Procurement Structures and Capacity in Member States of the European Union,* SIGMA Paper No 40, 2007.

Box III.4. Framework agreements: More centralised, efficient and accountable purchasing in Finland

Hansel Ltd is the central procurement unit of the State of Finland that aggregates the procurement needs from ministries and ministerial offices, as well as from state agencies and publicly-owned enterprises. Through competitive bidding it establishes framework agreements for procurement of products and services.

In June 2006, the Ministry of Finance reformed Hansel Ltd to promote more centralised procurement for goods, services and information technology systems that are widely used in government. As a result, some phases of the procurement process such as the bid notice and the contracting are done in the central procurement body, which produces framework agreements used by public authorities. The use of centralised purchasing is considered as:

- A more efficient and cost saving way to perform public procurement in areas involving large volumes or standardised products and services.

- An opportunity to advance the competence of its personnel as well as its internal communication to improve integrity and performance in government purchases.

- An easier way to keep accountable a limited number of procurement officials in their interaction with the private sector, while they make the link between multiple government agencies and private sector actors.

When using framework agreements, there are a number of advantages and costs to weigh up. In certain cases they may prevent entry of new players and reduce participation from small and medium companies, and possibly discourage innovation.

Sources: - Finland, response to the OECD Questionnaire.
- http://www.hansel.fi.

In a context of increased devolved management of the procurement process, officials who have never managed a contract are now required to do so in addition to their usual duties. This calls for adequate guidance for procurement officials to enhance management effectiveness in public procurement. Procurement officials also deal with a profoundly changed procurement process by the use of new technologies where basic tasks such as placing orders with suppliers have become largely automated. Therefore, the role of the procurement official now encompasses **new responsibilities** such as strategic sourcing and auctioneering, as well as negotiation management. There is growing recognition that organisations need to provide managers with the opportunity to acquire the necessary skills - such as negotiation, project and risk management skills - and personal attributes to adapt to this changing environment.

A particular concern in some countries is the lack of qualified staff to monitor the contract management phase. The commercial pressure to "buy" at the best value for money may lead to a resource shift away from the

contract management and to an **irresponsible delegation of governance to the private sector.** The risk lies in the contractor defining the level of quality for the contract rather than the public authority. This question is all the more difficult in a context of global procurement. Governments have difficulties monitoring contractors and subcontractors that are often outsourced and ensuring that integrity, labour and environmental standards are respected.

In order to provide staff with **up-to-date skills, experience and qualifications** for preventing mismanagement and potentially corruption, countries are starting to use:

- Certification requirements. For instance, in the United States, they have been harmonised in the Federal Government since 2005;
- Specific training linked to new technologies or to specific situations, such as emergency contracting, which hold important risks of mismanagement and potentially corruption.

Providing adequate skills

Procurement officials have to deal with a substantial amount of work - the number of procurements has significantly increased in recent years while the number of officials has often been stable or sometimes reduced. The issue of capacity, that is, the ability of people, organisations and society as a whole to successfully manage their affairs, is critical both in OECD countries and in developing countries. Although efforts in recent years have often focused on limiting the procurement workforce, countries are starting to invest **in human capital** to improve efficiency in procurement and potentially reduce the temptation for corruption.

Some countries have initiated efforts to **attract well-skilled professionals**, for example through **adequate incentives** in countries such as Chile and the United Kingdom. A key incentive is the provision of **salaries and bonuses** for procurement officials that are competitive with those in the private sector. In countries where salaries are particularly low, inadequate compensation may also increase the temptation for corruption. The example of Chile (see Box III.5) illustrates how performance indicators can be developed within a management improvement programme and linked to rewards at individual and organisational levels in order to enhance professionalism in procurement.

Box III.5. Establishing performance indicators in procurement in Chile

The Public Management Improvement Programme *(Program de Mejoramiento de Gestión)* is a national programme – run by the Directorate of Budgets of the Ministry of Finance – in order to achieve measurable improvement in key aspects of public management. In particular, the programme focuses on the following: human resources, customer assistance, planning and implementation, internal audit, financial management and quality of service. Public procurement is identified as an important issue in the programme, and the procurement goals are included in financial management.

The public procurement component of the management improvement programme specifies key performance indicators and establishes rewards at individual and organisational levels. In order to give recognition to the procurement function through adequate salaries and therefore improve capacity, the programme has included agency and employees' incentives linked to performance. Thus salary increases are tied to achievement of PMG goals. **Performance indicators,** among others, include:

- The rate of acquisitions made as an emergency purchase process;
- The amount of the acquisition's budget executed via public bids; and
- The difference between annual plan and actual acquisitions made during the year.

The agency responsible for fixing goals and evaluating improvement results in the field of procurement is the Directorate of Public Procurement Contracting (DCCP). By the end of 2003 some 131 agencies had included procurement in their PMG plans and nearly all of them had achieved a higher quality level in the procurement function. These results can be partly explained by the efforts devoted to training for employees, in which about 7 900 individuals were included until 2004, and by investments in information services.

Sources: - Chile, response to the OECD Questionnaire.
- Country Procurement Assessment Report of the World Bank on the Republic of Chile, 2004.

In the case of **e-procurement**, the enabling environment is key for successful implementation of the platform in government, in particular by:

- Providing adequate incentives for officials, for example, commitment from the political level, sufficient wages, etc.;
- While minimising the barriers for using the system, for example, through stable legal environment, training for officials and progressive implementation of the system.

Box III.6 below illustrates the current efforts carried out in Romania to implement a national single portal for the transmission of public procurement notices.

Box III.6. Incentives and results: Involving stakeholders in e-procurement in Romania

E-procurement in Romania started as a pilot project in March 2002, initially including 159 public authorities and 7 product categories. At present, the system assists 1000 public authorities, more than 3 000 supplier companies and 80 categories of goods. The extended version of the e-Licitatie (Extended Electronic System for Public Acquisitions – SEAP) is in compliance with the European Directives. Since 1 January 2007, http://www.e-licitatie.ro has been the national single portal for the transmission of public procurement notices to the EU Official Journal.

To ensure successful implementation and functioning of the e-procurement system, specific attention has been paid to involving all stakeholders and providing them with adequate incentives. Key components of the enabling environment include:

- Strong political commitment;
- Gradual implementation;
- Mandatory use of electronic means for specific procedures;
- Low tariffs;
- SME-user friendliness;
- Massive advertising campaigns;
- Constant training.

The deployment costs of the overall system exceeded EUR 4 million, while the total value of public acquisitions affected by the system is EUR 1 billion. Implementation revealed some deficiencies in the system, such as the lack of long-term procurement strategy, the lack of secure digital infrastructures and inefficient processes of knowledge sharing at national and international levels.

One of the most serious problems remains the low wages for public procurement officials. The Inspectorate is currently implementing a special incentive system for them, in which part of the money savings due to the e-Procurement system will be redistributed among officials.

Sources: - Presentation of Romania at the OECD Forum on Governance: Sharing Lessons on Promoting Integrity in Procurement, November 2006.
- E-Government Good Practice Framework, http://www.egov-goodpractice.eu.

Attracting professionals with adequate skills and in particular **commercial know-how,** for example, skills for negotiation, is a core challenge across countries. This makes it all the more important to the **cross-fertilise government and private sector talent**. Career movement between government and industry is critical to efficiency and to the evolution of procurement regimes. A key condition is that public service regulations and policies define the right balance between encouraging exchanges between the public and private sectors and preventing conflict-of-interest situations. For instance, in Brazil, the 2006 bill on conflict of interest expanded the "quarantine time" in which public officials are not allowed to work for the private sector from four months to one year and reinforced civil and administrative sanctions in case of non compliance (e.g. a fine up to 100 times the civil servant wage plus debt recovery, loss of

political rights, etc.). At the same time officials may obtain financial compensation under certain conditions to encourage movement between the public and private sectors (see also page 71, Preventing conflict of interest and corruption). Further efforts include making **job descriptions** in the public service more attractive, possibly by describing the positions as "contract managers" rather than simple administrative employees ("paper-pushers") to reflect the recent evolution in the tasks and responsibilities of procurement officials.

Furthermore, **retaining talent** is just as critical, for example by providing procurement officials with opportunities for growth and gaining new skills through training, coaching programmes or even lateral rotation. More generally, an environment that provides clear paths for career development and promotion for procurement officials is a key factor. Box III.7 highlights the prominent efforts of the Office of Government Commerce in the United Kingdom to provide guidance, disseminate good practice, as well as define possible career paths in senior management for procurement officials.

Box III.7. Centre for sharing expertise: the Office of Government Commerce in the United Kingdom

The Office of Government Commerce (OGC) is an independent office of the Treasury in the United Kingdom, created in April 2000. It helps departments achieve efficiency and promote value for money in their procurement activities. It supports initiatives that encourage better supplier relation, sustainable procurement, the benefits of using smaller suppliers and the potential of e-procurement, as well as promotes capacity building and professionalism.

OGC develops and publishes recommendations, guidance and best practices that cover a wide range of management practices, including programme and project management, procurement and service management. Best practices are available both on line (http://www.ogc.gov.uk), and in published form.

In addition to Gateway Reviews (see Box IV.3), the OGC introduced the following key initiatives to reinforce professionalism:

- *The Successful Delivery Toolkit* – an online guide which brings together procurement policy, tools and good practice for procurement, project and risk management;
- *The Successful Delivery Skills Programme and Project Management Specialism* – a scheme providing a career route into senior management through specialisation into professional delivery and project management; and
- The promotion of *Centres of Excellence* – within departments to support specific programmes and projects by providing oversight and advice, and working to enhance skills and capacities.

Following a review in 2004, OGC put more efforts into tailoring its engagement with departments to better meet individual requirements.

Source: *The impact of the Office of Government Commerce's initiative on the delivery of major IT-enabled projects*, Report ordered by The House of Commons, 2005.

Helping officials make informed decisions

There has also been an effort to equip procurement personnel with a number of tools and practices to help them make informed decisions regarding acquisition operations. In recent years several governments have developed internal information systems to support officials in making informed decisions about procurements. A key challenge for governments is to select procurement information that is accurate, objective and relevant for decision making, while not making it burdensome for procurement officials and bidders.

To help officials make informed decisions about procurements, internal information systems may provide data on:

- **Bidders/contractors**, in particular their potential or actual performance and integrity (e.g. technical capability of bidders, list of parties excluded, past performance, etc.), which is particularly useful in the process of selection, for instance in Ireland, Italy, Korea and the United States;
- **Former procurement contracts**, in particular on the types of goods and services and their individual prices. This helps define the needs in a realistic manner and facilitates the evaluation of procurements (e.g. in Belgium, Portugal, Turkey, the United Kingdom and the United States);
- **The execution of the contract**, in particular to monitor the progress and actual performance of the contractor, for instance in Korea and Mexico.

In a few countries, this information is also filtered and integrated at the government-wide level in a statistical report analysing **trends and patterns** in procurement, which is available to policy makers and the public at large. This may even be used at the supranational level. For instance, in Poland, the data entered in the Public Procurement Office database is processed in a national statistical report for the European Union. Box III.8 illustrates how the United States has used a variety of databases to support decisions of procurement officials by providing information on the performance of suppliers, and the details of products or services to be purchased.

Box III.8. The use of information systems to support decisions on procurement in the United States

"Acquisition Central" (http://www.acquisition.gov) seeks to provide a single-point-of-entry for government procurement in the United States on regulations, systems, resources, opportunities, and training. One of its features is to provide a link to the numerous databases that help collect, structure and communicate information about public procurement. The following information systems, among others, contribute to unifying and streamlining the federal acquisition process:

- The **Central Contractor Registration** (CCR) is the Federal Government's primary vendor database that collects, validates, stores, and disseminates vendor data in support of agency acquisition missions. Both current and potential vendors are required to register in the CCR to be eligible for federal contracts. Once vendors are registered, their data will be shared with other federal electronic business systems that promote the paperless communication and co-operation between systems (see http://www.ccr.gov).
- The **Excluded Parties Lists System** (EPLS) is a web-based system that identifies parties excluded from receiving federal contracts, certain subcontracts, and certain types of federal financial and non-financial assistance and benefits. The EPLS is updated to reflect government-wide administrative and statutory exclusions, and also includes suspected terrorists and individuals barred from entering the United States. The user is able to search, view, and download current and archived exclusions (see http://www.epls.gov).
- The **Past Performance Information Retrieval System** (PPIRS) is a web-based, government-wide application that provides timely and pertinent information on a contractor's past performance to the federal acquisition community for making source selection decisions. PPIRS provides a query capability for authorised users to retrieve report card information detailing a contractor's past performance. Federal regulations require that report cards be completed annually by customers during the life of the contract. The PPIRS consists of several sub-systems and databases (e.g. Contractor Performance System, Past Performance Data Base, Construction Contractor Appraisal Support System, etc. (see http://www.ppirs.gov).
- The **Federal Procurement Data System** (FPDS) facilitates decision making of procurement officers by raising their knowledge and awareness on annual trends in government purchasing. The FPDS collects information from purchasing agencies concerning their number and value of bids awarded, the dates and conditions of the contracts, the contracting partners and methods, the form of payment, etc. The system structures and forwards the information to the President, the Congress, the Government Accountability Office, executive agencies and the general public, in order to measure and assess the impact of federal procurement on the nation's economy, the extent to which awards are made to businesses in the various socio-economic categories, the impact of full and open competition on the acquisition process, and other procurement policy purposes (see https://www.fpds.gov).

Although these databases have been useful in supporting decisions on public procurement, there is growing awareness that they may become burdensome if the information included is not appropriately selected and officials not sufficiently trained to use it. Furthermore, some concerns have been raised regarding the confidentiality and accessibility of the data for contractors.

Source: United States, response to the OECD Questionnaire.

Furthermore, some countries have also encouraged the exchange of information between government officials through the creation of **networks and centres of expertise in the administration** to identify and disseminate good practice. In the United Kingdom, the centres of excellence in the various ministries provide a detailed and constantly updated advice documentation regime, regular process quality assurance in conjunction with auditors and networking with departments and the Office of Government Commerce. In the Netherlands, a professional and innovative public procurement network for contracting authorities *PIANOo* was established in the Ministry of Economic Affairs to provide exchange of know-how and training among contracting authorities. Other ways to increase the exchange of information in the administration include the creation of multi-disciplinary committees involving representatives of various parts of the administration to review and discuss specific issues of concern related to procurement, for instance in Norway.

There has been a clear trend in countries (e.g. in France, Ireland, the Netherlands, New Zealand, Norway and the United Kingdom) to invest in the development of **good practice guidance** for procurement officials. This trend is illustrated with the examples of the Irish Government Contracts Committee, whose role has evolved towards a general guidance role on issues of concern for public procurement, and the recent creation of the Government Procurement Development Group in New Zealand to enhance professionalism in procurement (see Box III.9 and Box III.10).

Box III.9. From approval to guidance: An evolving role for the Irish Government Contracts Committee

Initially created to provide external approval for contract awards above EUR 25 000 that are not using competitive procedures in exceptional circumstances, the role of the Government Contracts Committee (GCC) has evolved since January 2003 towards a more general guidance role on issues of concern for public procurement.

The GCC is a committee of procurement officers from central government departments and agencies, which have a significant procurement function or have responsibility for key procurement sectors. The GCC therefore concentrates on advising on procurement issues of general concern to the State sector. It also has a role in developing, together with the National Public Procurement Policy Unit in the Department of Finance, good practice guidance for supplies, services and construction procurement. Departments benefit from guidance material to enable them to comply with fair and transparent public procurement rules and to secure value for money. The national public procurement website also plays an important role in disseminating guidance and relevant procurement information.

With the suppression of the approval by the GCC, internal control over non-competitive procedures was therefore strengthened to ensure the integrity and efficiency of those contracts being awarded under exceptional circumstances, such as extreme urgency, or when only one product or producer meets the contract requirements. A review should be completed within the department concerned, preferably by the Internal Audit Unit or by a senior official who is not part of the

procurement process. The reporting procedures were also revised with the completion of an annual report signed off by the Accounting Officer for these contracts, which should be forwarded to the Comptroller and Auditor's General Office, with a copy to the National Public Procurement Policy Unit of the Department of Finance. Each department should also maintain a central up-to-date register of such exceptional purchases and contracts.

*Source*s: - Ireland, response to the OECD Questionnaire.
- Circular 40/02: Public Procurement Guidelines - revision of existing procedures for approval of certain contracts in the Central Government Sector, 2003.

Box III.10. Enhancing professionalism: The Government Procurement Development Group in New Zealand

In July 2006 a Government Procurement Development Group (GPDG) was established in the Ministry of Economic Development (MED) in New Zealand. The mission statement is "to drive the best possible procurement outcomes for government, the taxpayer and business in New Zealand.

An important focus of its work programme is to spread and improve knowledge of procurement good practice by:

- **Raising the profile of procurement** – contributing to more widespread awareness of the benefits of good procurement practice; recognition by Chief Executives and Board level management of the value of and need for good practice within their agencies; increased demand for procurement professionals; and increased investment in staff training and education; and
- **Acting as a catalyst for learning and knowledge sharing** – contributing to increased training and education opportunities for agencies and industry; more active knowledge sharing (between agencies; the public and private sectors; and GPDG and its MED colleagues and overseas counterparts); and increased peer pressure.

The GPDG maintains an interactive electronic "Community of Practice" workspace as a vehicle for good practice promotion, advice and information sharing between public sector procurement practitioners. It also organises a regular programme of seminars, workshops, conferences and training courses on all aspects of the public sector procurement process.

Recognising the value of international benchmarking of procurement good practice and professional standards, the GPDG developed links with the Australian chapter of the Chartered Institute of Purchasing and Supply (CIPSA), and is collaborating with CIPSA on programmes to further develop procurement professionalism in New Zealand.

Source: New Zealand, response to the OECD Questionnaire.

Another emerging practice in countries such as Australia and Canada is the use of **applied procurement research** to help senior officials and policy makers take major procurement decisions. Contemporary procurement research is beginning to reveal increasing complexity within the supply environment, as procurement activities are related to many academic disciplines. This complexity is also the result of limited co-ordination of procurement knowledge between government agencies, such as between procurement, competition and audit, as well as with the private sector.

PREVENTING CONFLICT OF INTEREST AND CORRUPTION

In a devolved management context, enhancing professionalism requires not only management procedures but also a clear set of values and ethical standards clarifying how to achieve these objectives. Specific ethical guidance has been developed in several countries defining clear restrictions and prohibitions for procurement officials in order to avoid **conflict-of-interest** situations and prevent corruption both at individual and organisational levels.

Organisational measures

At the organisational level, there are requirements that are used across countries for ensuring the **separation of duties and authorisations**, in particular between:

- Entities: There is a separation between entities of the administration that require specific goods and services, and procuring entities, in countries such as Austria and Germany;
- Functions: Strategic planning, budget and performance programme, accounting and reporting, and internal control functions are clearly separated, for instance in Turkey;
- Stages of the procurement process: The approval of spending, the approval of key procurement milestones, the recommendations of awards and the payment should be conducted separately, for instance in the United States;
- Commercial and technical duties: The commercial and technical evaluations are conducted separately and information is brought together to independently inform the recommendation of award, for example in the United Kingdom;
- Financial duties: Ex-ante control in the financial services unit and the financial transaction process should be conducted separately. In particular, the duty of authorising officer and accounting officer cannot be combined in one person (e.g. in Ireland, Luxembourg and Turkey).

An emerging challenge is to ensure the separation of duties between officials to prevent conflict of interest and potentially corruption while avoiding that "**firewalls**" result in a lack of co-ordination between management, budget and procurement officials. In the United Kingdom, the Ministry of Defence has developed several preventative measures against fraud and corruption in procurement, including the effective separation of duties, rotation of duties, effective supervision, custodial controls over assets and records, prevention of accumulated backlogs of work, as well as systems built-in safeguards (see Box III.11).

Box III.11. Preventing fraud and corruption in defence procurement in the United Kingdom

From the early 1980s, the Ministry of Defence (MoD) in the United Kingdom adopted a commercial approach to procurement, aiming to increase competition for contracts. The Ministry identified various potential areas of risk for corruption or other types of fraud in the procurement system, including:

- Manipulating bids and collusive bidding (including cartels);
- Rigging specifications in favour of one supplier;
- Product substitution or sub-standard work or service not meeting contract specifications;
- Theft of new assets before delivery to the end-user and before being recorded in the asset register;
- Fraudulent (false or duplicate) invoicing for goods and services not supplied or for interim payments in advance of entitlement;
- Improper or unauthorised use of Government furnished equipment or information;
- False accounting and cost misallocation or cost migration between contracts;
- Goods ordered for personal use, including misuse of the Government Procurement Cards and e-procurement facilities;
- Provision of fraudulent test or quality assurance certificates;
- Corruption or attempted corruption of Crown Servants.

These areas of risk are made known to the MoD's acquisition staff through fraud awareness training. Moreover, the ministry informs Her Majesty's Treasury annually of all cases of suspected or proven frauds, including fraud perpetrated by, or suspected to have been perpetrated by, departmental staff or contractor or supplier frauds. The Annual Government Fraud Reports are available at: http://www.hm-treasury.gov.uk/.

Preventative steps against fraud and corruption in procurement fraud have been taken, including:

- Effective separation of duties preventing one or two individuals securing control over a whole system, particularly where computers multiply the volume of information available to one source;
- Rotation of duties, particularly in sensitive posts or those giving staff the opportunity for long term commercial connections, possibly in an environment of non-competitive procurement;
- Effective supervision, particularly where separation of duties is difficult to achieve or where staff work in remote locations. The delegation of authority should not be construed as a substitute for effective supervision;
- Effective custodial controls over assets and records that protect stores, cash, property, cheques, warrants, payable orders, confidential information and computer resource;
- Prevention of accumulated backlogs of work, guarding against short cuts to retrieve the situation or concealment of attempted fraud;
- Built-in safeguards against internal and external threats in the design of new systems.

Experience shows that the prime causes of fraud, theft and irregularity are the absence of proper control procedures. MoD relies on the vigilance of its acquisition staff to prevent corruption and has created a dedicated "hotline" for reporting fraud operated by the Defence Fraud Analysis Unit and the MoD Police. The Defence Fraud Analysis Unit uses the latest data mining and fraud detection techniques in a proactive response to fraud risk. Other detective techniques include reconciliation of accounts; physical verification of assets (e.g. stock checks, etc) and spot checks.

Source: United Kingdom's Ministry of Defence, response to the OECD Questionnaire.

In order to ensure that **interaction between officials and bidders** does not lead to bias and more generally corruption, measures have been set up to define clear restrictions for procurement officials in their interaction with bidders at different stages of the procurement, in particular during negotiations. In this regard, new information and communication technologies have increasingly played a role in ensuring that interactions are transparent and accountable. For example, e-auctions – a means of carrying out purchasing negotiations via the Internet – have been used in an increasing number of countries such as Brazil, Mexico and the United Kingdom. They are a real time event that occurs on line, allowing multiple suppliers in different geographic regions to place and modify bids simultaneously. Their main objectives are to:

- Reduce the overall cost of the procurement;
- Avoid direct contact between suppliers and with officials during negotiations, since processes take place electronically and in an anonymous manner; and
- Promote transparent negotiations, for example by providing citizens with the opportunity to monitor the procurement on line.

The first example below highlights the use of e-auctioning in the Federal Government of Brazil while the second example focuses on its application in a key government sector in the United Kingdom, the National Health Service (see Box III.12).

Box III.12. E-auctioning for transparent and cost-effective online negotiations in Brazil and the United Kingdom

Electronic auctioning has been increasingly used in recent years to identify the best price possible in an online competition, for instance in Brazil and the United Kingdom. This method is generally used for homogenous products, where the decision on purchasing is mostly based on the price factor.

E-auctioning in the Federal Government of Brazil

In Brazil, the electronic reverse bidding is regulated by the Law of July 2002. The complete procurement documentation is published on the Procurement Portal of the Federal Government – *Comprasnet* (http://www.comprasnet.gov.br), in the government's Official Gazette and is also broadly disseminated in newspapers, in 2004, BRL 8 billion (Brazil reals) was spent on consumer goods and services – contracted through reverse bidding, according to studies of the Ministry of Planning, Budget and Management of the Federal Government of Brazil. Considering that the total amount used in this area was BRL 15 billion, the share of reverse bidding accounts for over 50% of total spending.

Electronic reverse bidding reduced the cost of participation in competitions, as bidders are not physically required and only need to be connected to the Internet. One of the consequences is the higher number of suppliers. In the past four years there has been an increase of suppliers from 150 000 to 214 000, that is a 42% increase. Last year alone, 20 000 new companies became suppliers of the largest buyer in the country, the Federal Government. Electronic reverse bidding has also helped increase the transparency of negotiations. Contacts between suppliers and between the government and the administration have been avoided while citizens have monitored the procurement on line.

Applying e-auctions in the National Health Service in the United Kingdom

In 2005, the *OGCbuying.Solutions*, the Executive Agency of the UK Office of Government Commerce, used the key sector of national health as one of the pilots for e-auctions. It enabled specialists in the National Health Service (NHS) to source health framework agreements.

In 2006, the NHS Purchasing and Supply Agency completed an e-auction transaction of a GBP £1.2 billion worth of temporary agency staff cost. Following a five month bidding and evaluation process, 176 employment agencies were identified as being successful at the evaluation stage and were invited to participate in the e-auction. These suppliers were given the opportunity to participate and bid in a fully transparent environment, with multiple opportunities to revise their pricing, while gaining an insight into the current level of market pricing. 70,000 bids were placed during the event which ran over three days and resulted in significant savings for the NHS. The e-auction contributed to an additional 10.3 percent saving in addition to the savings provided under the Best and Final Offer in the initial bid.

Even if reverse e-auctions speed up the price-discovery process and improve market transparency, they require an important initial investment to set up the technological infrastructure and supporting legal environment.

Sources: - Brazil, response to the OECD Questionnaire.
- Case study provided by the United Kingdom for the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.

To avoid prolonged contact between government officials and bidders, some countries have encouraged the **rotation of officials** involved in procurement, rotation proved useful particularly in posts that are sensitive or involve long-term commercial connections where the number of suppliers is limited. Time limits may vary significantly depending on the post and the country, for example:

- Accounting-related officers in Korea are rotated every one to three years;
- Financial controllers every three to five years in Luxembourg;
- Commercial officials within a period of maximum five years in the United Kingdom;
- Procurement Commission members yearly in Brazil.

Another commonly used method for controlling risk internally is the application of the **four-eyes principle** which ensures the joint responsibility of several persons in the decision making - in particular through separation of various functions, double signatures, and cross-checking. For example, public bid committees are usually formed to balance the discretionary power of a single procurement official in the process. They may also benefit from the expertise from various specialisations, by involving accountants, economists, judges, etc. As the importance of the project increases, the number of officials involved may also increase. For instance, in Korea, for contracts of high value or difficult decisions, the responsibility is delegated to the Contract Review Committee, which consists of independent experts, including representatives from NGOs and academics. A key condition of the effectiveness of a committee is to define an appropriate organisation and composition, as well as clear obligations and restrictions for its members, in particular when involving experts from outside the government.

Defining ethical standards for public officials

At the individual level, core values provide guidance for the judgement of public servants on how to perform their tasks in daily operations. To put the values into effect, a vast majority of countries have legislated standards expected of officials across the whole public service, in civil service regulations or in specific conflict-of-interest regulations - most recent examples being the Slovak Republic and Spain. Two-thirds of countries have also put forward ethical standards in the form of a code of conduct or ethics for the public service. More than a third of countries have developed guides or guidelines as internal management instruments to help the implementation of ethical standards in the administration (see Table III.1).

Table III.1. Ethical standards for the public service - Rules and guidance

Laws and regulations	Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, Norway, Poland, Portugal, the Slovak Republic, Spain, Turkey, the United Kingdom, the United States
Code of conduct, code of ethics	Australia, Brazil, Canada, the Czech Republic, France, Germany, Greece, Ireland, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Norway, Poland, the Slovak Republic, Spain, Switzerland, Turkey, the United Kingdom
Guides, guidelines	Australia, Canada, Denmark, France, Germany, Ireland, Korea, the Netherlands, New Zealand, Norway, the United Kingdom, the United States

Sources: - Based on *Trust in Government: Ethics Measures in OECD Countries*, OECD, 2000.
- OECD surveys on conflict of interest in the public service in 2002 and 2006.

Defining specific standards for public procurement

A more detailed description of the **standards of conduct** expected for procurement officials, in particular specific restrictions and prohibitions, helps ensure that officials' private interests do not improperly influence the performance of their duties and responsibilities. Potential conflict-of-interest situations may be in relation to:

- Personal, family or business interest, outside activities in particular in relationship to contract (e.g. in Chile, Ireland, Mexico, the Netherlands, New Zealand, Poland and Spain);
- Gifts and hospitality – in countries such as Belgium, Ireland, and Japan;
- Involvement in the activities of a political party, for instance in Turkey;
- Disclosure of confidential information, in countries such as Belgium, Mexico and Turkey;
- Future employment, for instance in the Netherlands and the United States.

In Spain, in the last two years the government has taken several measures to modernise expected standards of behaviour in the administration and prevent conflict of interest for officials who are particularly vulnerable to conflict of interest due to their position – high-ranking officials as well as procurement officials working at the interface of the public and private sectors (see Box III.13).

Box III.13. Preventing conflict of interest in public procurement: Recent reforms in Spain

Spain has recently introduced several measures to avoid conflict of interest, promote good conduct and improve transparency in public contracting. These measures aim at preventing conflict of interest generally for public officials, and also more specifically for procurement officials.

In February 2005, the Council of Ministers approved the Code of Good Governance, binding to members of Government and high-ranking officials of the General State Administration, which was an important declaration of values to set direction for public action in the future.

Furthermore, the Law on Conflict of Interest for Members of Government and High-ranking Officials of the General State Administration was approved in April 2006. This Law introduces requirements in the legal regime for high-ranking positions to avoid situations that put impartiality at risk:

- Absolute incompatibility with other positions;
- Requirements for high-ranking officials to abstain from intervening in procedures - including public procurement - where the companies they (or their family) managed or represented in the two years prior to their appointment in public office are concerned; and
- The obligation to declare assets and income.

Following the recommendations of the report on Study and Diagnosis of Public Contracting in Spain in 2004, the government has similarly clarified and made more precise the scope and requirements of incompatibility rules in the procurement legislation. The Spanish government approved a Project of Law for Public Sector Contracts in July 2006, which was sent to Parliament. This Project of Law strengthens the current prohibitions for officials in charge of public procurement to intervene in procurement procedures when they have an interest in the bidding company. In addition, companies are excluded from bidding or contracting with the administration when high-ranking officials or members of government have investments in over 10% of their capital.

To ensure the application and enforcement of these regulations, mechanisms have been set up in order to identify and manage conflicts of interests. The Office of Conflict of Interest is in charge of the management of the Registry of Activities, Goods and Patrimony, and responsible for the custody, security and integrity of the data and documents filed. In addition, financial assets of members of Government and certain high-ranking officials will be managed in a "blind trust fund", unknown to or not operated by interested parties.

The law also reinforced the sanctioning regime. In the event of incompatibility special sanctions will be applied and proceedings started, publication of which will appear in the Official Bulletin of the State and a special communication given to the business contractor of a high-ranking official. Those that infringe the regulation, if still in office, will lose the right to receive a compensatory pension. High-ranking officials infringing the regulation will also be disqualified from a public position for a period of five to ten years.

These measures are crucial steps for modernising expected standards of behaviour in the Spanish Administration and preventing conflict of interest for officials who are particularly vulnerable due to their position. A key challenge will be to implement them effectively, and, in particular ensure the impartiality of the Office of Conflict of Interest.

Source: Case study provided by Spain for the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.

Specific standards for public procurement may be described in:

- Formal laws and regulations, in countries such as Mexico, New Zealand, and the United States;
- Specific ethics codes or codes of conduct for procurement officials, in countries such as Austria, Belgium and Canada; and
- Guidance materials, for instance in Australia and Ireland.

In Italy, a binding code of ethics has been adopted by *Consip (Concessionaria Servizi Informatici Pubblici)* a private company in charge of e-procurement. The code applies to personnel as well as suppliers and stakeholders (see Box III.14).

Box III.14. Adopting and implementing a Company Code of Ethics for public procurement in Italy

Consip is a company entrusted with information technology activities for Italy's Ministry of the Economy and Finance (MEF) and responsible for the e-procurement system. It has recognised that public procurement is highly exposed to conflict of interest and corruption, and has thus introduced a Code of Ethics.

This Code of Ethics sets standards for *Consip*'s personnel as well as anyone who co-operates with the company, including employees, consultants, suppliers, the Ministry of Economy and Finance and other stakeholders. It provides general standards of behaviour which must be respected in activities with *Consip*.

The Code of Ethics contains several provisions for standards of behaviour in the following areas:

- General rules on ethics and behaviour and in relations with suppliers and stakeholders;
- Conflict of interest;
- Gratuities;
- Interaction with the Public Administration, civil society, politics and the media;
- Confidentiality of information and documentation.

The Code has put in place internal controls to evaluate the compliance with the Code and verify periodically that corporate procedures, organisation and management of the company are in conformity with existing laws and regulations. To support compliance and application of the Code, the Office of Compliance was established with the following functions:

- Communication and interpretation of the Code;
- Verification of the effective application of the Code, and in case of violations, recommendations of appropriate measures to comply with existing laws and regulations;
- Information to the heads of departments in case of inappropriate behaviour in order to allow for the adoption of adequate measures.

Sources: - Company Code of Ethics, Consip, 2005: http://www.consip.it/sc/pdf/Code_of_ethics.pdf.
- P. Magrini, *Transparency in Public E-Procurement: The Italian Perspective*, OECD, 2005.

A key challenge across countries is to find solutions to ensure the **protection** of officials involved in procurement **from any pressure and influence**, including political influence, in order to ensure the impartiality of decision making and to promote a level playing field for procurement officers. Key conditions for protection from political influence include:

- Clear ethical standards for procurement officials;
- An adequate institutional framework, budgetary autonomy, human resource management based on merit (e.g. appointment, selection and career development); as well as
- Working independence for procurement officials, where procurement officials are solely responsible for decisions.

Box III.15 describes the reform undertaken in 2002 in Turkey to prevent pressure from interest groups and set higher ethical standards for procurement officials.

Box III.15. Setting clear ethical standards for procurement officials: The 2002 public procurement reform in Turkey

The Turkish public procurement system underwent a major reform in 2002 in order to address shortcomings identified such as:

- Most public agencies were not covered by the law, and had the right to issue their own regulations on procurement. This resulted in a dozen of regulations covering different public agencies.
- Publication of notices was not required for all procurement methods and even when it was obligatory, announcement periods were too short to inform interested economic operators.
- Selection and evaluation criteria were not objectively determined and pre-announced.
- Unsuccessful bidders were not informed about the decision of the contracting entity.

With the 2002 Public Procurement Law (PPL), the Public Procurement Authority (PPA) was established as an administratively and financially autonomous entity at the central governmental level to regulate and monitor public procurement. In order to prevent problems encountered previously, measures were introduced by the law to prevent pressures from interest groups and set higher ethical standards for officials, in particular:

- The Authority shall be independent in the fulfilment of its duties. No organ, office, entity or person can issue orders or instructions for the purpose of influencing the decisions of the Authority.
- The Authority is comprised of the Public Procurement Board, the Presidency and service units. Members of the Public Procurement Board are appointed by the Council of Ministers and must fulfil criteria, including higher education, more than 12 years of experience in public institutions, and knowledge and experience in the field of national and international public procurement procedures. Candidates shall

have no past or present relationship of membership or task with any political party. Members of the Board are nominated for a five-year term[18] and, once appointed, cannot be revoked before the expiry of their term.

- Board members shall take an oath in witness of the First Bureau of Assembly of the High Court of Appeal that they will fulfil their duties in an honest and impartial manner, that they will not violate and let others violate the provisions of the PPL Law and related legislation.
- Members of the Board, except for some legally-defined exceptions, cannot be involved in any official or private jobs, trade or freelance activities, and cannot be a shareholder or manager in any kind of partnerships based on commercial purposes.
- The Board members are obliged to submit a declaration of property, within one month following the date of commencement and expiry of office, and every year during their service period.
- When executing their duties, the Board members and the staff of the Authority cannot disclose any confidential information or document concerning the related officials or third parties to any entity except for those authorised by law for such disclosures, and cannot use them for the benefit of their own or third parties. This liability of confidentiality shall also continue after they leave their offices.

*Source*s: - Turkey, response to the OECD Questionnaire.
- Extracts from Public Procurement Law no: 4734 of Turkey, 2002.

Applying standards

The application of standards of conduct starts with recruitment. Some countries have indicated that they take into account ethical considerations in the recruitment process by:

- Issuing security clearance for positions representing a potential risk to national security or other important national interests, for instance in the United Kingdom;
- Verifying the background of officials before their appointment. In Mexico, public officials, including procurement officials, must show evidence that they have not been barred or disqualified to hold positions in the Federal Administration;
- Going through a public selection based on objective methods of assessment of their capacity and knowledge in the field and then being subject to a three years probationary period of training. In Brazil, this

18. Among the 10 members of the Board, two of them were initially designated by the Council of Ministers and selected among the candidates proposed by the Ministry of Finance and the Ministry of Public Works and Settlement. These two members - the Chairperson and the Secondary Chairperson of the Board - are on duty for seven years.

applies to at least two of three members of Procurement Commissions who are permanent members of the Public Administration;

- Evaluating candidates' capacity to handle ethical dilemmas. This may take the form of certification process that assesses competence and skills as well as preparedness to handle ethical risks.

A growing number of countries use **training** to build public officials competence and skills for handling complex procurement procedures and to raise awareness of possible risks to integrity. Training on procurement and integrity issues may be induction, prior to joining the office, to raise awareness of ethical issues and/or offered on an on-going basis to tackle emerging issues or address specific risks linked to a position. In the United Kingdom, all commercial officers within the Ministry of Defence are required to undertake training courses before being issued with a commercial licence by a senior officer. Training may also be done on a voluntary basis – in Norway, open training programmes are offered to public officials by important agencies, the private sector and the National Public Procurement Board – or mandatory such as in the United States. Box III.16 illustrates how integrity training, together with measures such as staff rotation and counselling for officials, contributes to embedding a culture of integrity in the Federal Procurement Agency in the German Ministry of Interior.

Box III.16. Integrity training in Germany

The Federal Procurement Agency is a government agency which manages purchasing for 26 different federal authorities, foundations and research institutions that fall under the responsibility of the Federal Ministry of the Interior. It is the second largest federal procurement agency after the Federal Office for Defence Technology and Procurement.

The Procurement Agency has taken several measures to promote integrity among its personnel, including the support and advice by a corruption prevention officer, the organisation of workshops and training dealing with corruption and the rotation of its employees.

Since 2001, it is mandatory for new staff members to participate in a corruption prevention workshop. With the help of a prosecutor from the district prosecution authority, they learn about the risks of getting involved in bribery and the briber's possible strategies. Another part of the training deals with how to behave when these situations occur, for example, by encouraging them to report it ("blow the whistle"). Workshops highlight the central role of employees whose ethical behaviour is an essential part of corruption prevention. In 2005 the target group of the workshops was enlarged to include not only induction training but also on-going training for the entire personnel. About ten workshops took place with 190 persons who gave a positive feedback concerning the content and the usefulness of this training. The involvement of the Agency's "Contact Person for the Prevention of Corruption" and the Head of the Department for Central Services in the workshops demonstrated to participants that corruption prevention is one of the priorities for the agency.

Another key corruption prevention measure is the staff rotation after a period of five to eight years in order to avoid prolonged contact with suppliers, as well as improve motivation and make the job more attractive. However, the rotation of members of staff still meets difficulties in the Agency. Due to a high level of specialisation, many officials cannot change their organisational unit, their knowledge being indispensable for the work of the unit.

Source: Case study provided by Germany for the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.

Some governments have developed procedures that enable procurement officials to identify and **disclose relevant private interests** that potentially conflict with their official duties. It may be restricted to financial interests (e.g. shareholdings, investments) or also include other interests such as relationships and additional/secondary employment. Such disclosure is usually required to be provided periodically, generally on commencement in office and thereafter at regular intervals, usually annually, and in writing. Some countries have made it mandatory for senior officials involved in procurement to disclose relevant private interests (e.g. in Korea, Spain, Turkey and the United Kingdom). For this tool to be effective, the reliability and effective mechanism for verifying the reliability and completeness of the information disclosed must be verified on a regular basis.

In recent years a few countries have introduced specific restrictions and prohibitions for procurement officials not only for the time of their tenure but also for employment after leaving their public office. In the United States specific **post-employment** prohibitions have been developed for officials involved in procurement and contract administration for contracts over USD 10 million (see Box III.17). However, a key challenge is to enforce post-public employment provisions as well as detect possible breaches. For instance, in Brazil, the Office of the Comptroller General conducted a significant investigation as part of "the Sabujo project"[19]. It found that, despite prohibitions, 313 officials were owners and 2 479 were shareholders of 1 928 companies that had contracts with the Central Government and that between 2004 and 2006 these companies sold over BRL 407 million[20] in goods and services to the government.

19 The "Sabujo Project" is a search and data matching system used by the Brazilian Office of the Comptroller General as a decision making system.

20. Approximately EUR 145 million in January 2007.

Box III.17. Post-employment prohibitions for procurement and contract administration in the United States

In addition to the generally applicable post-employment restrictions for federal employees in the executive branch, there are certain post-employment prohibitions in place for those involved in procurement functions and contract administration.

Former officials may not accept compensation from a contractor for one year as an employee, officer, director or consultant of the contractor if:

- They served as a procuring/contracting official, or a source selection authority at the time a contract exceeding USD 10 million was awarded, or a member of the source selection evaluation board, or chief of a financial or technical evaluation team; or
- They served as administrative contracting officer, or programme manager or deputy programme manager for a contract exceeding USD 10 million; or
- They personally made a decision to award a contract, subcontract, task order or delivery order over USD 10 million, establish overhead or other rates in excess of USD 10 million; approve issuance of contract payment(s) in excess of USD 10 million, or pay or settle a claim for more than USD 10 million.

Partnering with bidders to prevent conflict of interest and corruption

Most countries require bidders to **demonstrate** at least that they have adequate financial resources to perform the contract. In Poland, bidders are required to make a declaration that they fulfil the requirements to participate in the public procurement. The requirements include: having the necessary authorisations, appropriate knowledge experience, technical and human capacity to perform the contract; being in a financial and economic situation to ensure the performance of the contract; and not being subject to exclusion from the award procedure. In Ireland bidders go through a selection process that verifies the company's tax law compliance, as well as its professional standing, financial capacity and expertise.

Furthermore, some countries use specific anti-corruption criteria for ensuring that bidders have a **satisfactory record of integrity**. Criteria for pre-selecting bidders may include the compliance with anti-corruption laws, no involvement in the past in corrupt activities or the implementation of an ethics code ("white listing"). For instance, in the Netherlands, a declaration of integrity was recently introduced, which requires a declaration by the Ministry of Justice that no objections have been raised against the economic operator on the basis of an investigation concerning the conduct of the economic operator in the past.

There is increasing awareness that the information provided by the prospective bidder must be systematically verified and the bidder kept

accountable for its performance and integrity. Box III.18 illustrates the key components of a sound policy for promoting an efficient and corruption-free interface with bidders, based on the recommendations from the United Nation's Procurement Task force.

Box III.18. Managing the relationship with bidders: Recommendations of the United Nation's Procurement Task Force

Based on a review of internal procurement procedures, the United Nations' Procurement Task Force of the Office of Internal Oversight Services developed a number of recommendations to help prevent corruption in the relationship with bidders, including:

- **Registration**: To be a supplier for the United Nations (UN), registration is required and based upon identified factors, including proven expertise in providing the goods or services, financial stability and capacity to undertake the particular project. However, the declaration is not sufficient if it is not followed by a thorough verification of the information provided by the prospective bidder and its comparison with other sources of information to verify its capacity to participate in the procurement process.
- **The periodic review of vendor status***:* A periodical review of bidders' status helps track whether circumstances have changed after the registration.
- **Assistance to the Investigation Office**: The bidder should be obliged to co-operate or risk breaching the contract or to be suspended if it fails to co-operate (e.g. through the inclusion of a specific clause in the contract of the UN).
- **Performance bond***:* It is a common feature of procurement contracts to lodge or pledge a substantial sum in the event of default in the execution of the contract. In the event of fraud, corruption or significant irregularity on the part of the bidder the performance bond should be automatically forfeited to the UN.
- **Financial disclosure***:* Financial disclosure obligations imposed on officials dealing with procurement should promote a culture of openness in the organisation, supported by a regular verification of the reliability and completeness of the information.
- **Black listing***:* Systems to ensure that adverse findings in relation to a bidder in one mission or duty station should be automatically disseminated widely among United Nation's agencies.
- **Commercial responsibility**: The UN should join proceedings more systematically when the integrity of a supplier is challenged by competitors, in cases when the organisation is a victim of corrupt acts and could therefore obtain damages.

Source: Presentation of the United Nations Procurement Task Force at the OECD Forum on Governance: Sharing Lessons on Promoting Integrity in Procurement, November 2006.

An emerging practice is to **deny access** to bidders in the public procurement process when irregularities or corruption have been proven to promote the integrity of the procurement process and discourage bidders from engaging in illegal or corrupt activities. For example, in Spain since 2005 central, autonomous and local governments are allowed to stop

working with business contractors employing a former high-ranking official who has infringed incompatibility rules. The basis for denial of access in a procurement procedure may take different forms, such as:

- The exclusion of a company to participate in a specific procurement, for instance in Belgium, the permanent or temporary disqualification for a firm to participate in future public procurements;
- Deletion from the list of entrepreneurs in the Slovak Republic;
- Disqualification based on criminal activities in the past that are not necessarily linked to procurement.[21]

A key question is **how this information is made available and shared** across the administration. For instance in Germany the list of registers is shared between *Länder* to facilitate information sharing.

Furthermore, there is a growing trend among companies to take **steps for voluntary self-regulation**, specific instruments against corruption at:

- The sector level - sector agreements such as Business Principles for Countering Bribery in Engineering and Construction Industry; or
- Company level - company codes of ethics or other guidelines for integrity in public procurement.

Guidelines or codes aim at enhancing the reputation of an industry or organisation as well as decreasing the risk of corrupt activities by raising awareness about specific prohibitions and restrictions. Another instrument that has been increasingly used is the **dispute board**, set up at the outset of a project, with the intention that it operates actively throughout the whole period of the contract, not only to resolve disputes, but also to prevent them. In 1999, the International Federation of Consulting Engineers (FIDIC) amended standard forms of contract to incorporate dispute boards as a first step in the contractual framework for the resolution of disputes between the employer and the contractor. In 2004, the International Chamber of Commerce published a set of rules for the operation of dispute boards, together with standard clauses that may be adopted for large infrastructure contracts. A more recent initiative by the FIDIC has been the development of a Government Procurement Integrity System (see Box III.19).

21. For further information on debarment, see *Fighting Corruption and Promoting Integrity in Procurement,* OECD, 2005.

Box III.19. FIDIC's Government Procurement Integrity Management System

The International Federation of Consulting Engineers (FIDIC) is the leading organisation representing the international consulting engineering industry. Since 1995 it has raised the importance for the private sector to take positive steps against corruption. A key initiative has been to develop a practical tool, namely a comprehensive Business Integrity Management System (BIMS) for consulting firms, which includes integrity as part of the ISO 9001-2000 quality management. It has proved to be an efficient standards-based approach for integrity assurance in private-sector procurement. A 2005 FIDIC survey revealed that since the creation of the tool, over 70 small, medium and large firms in 12 developed and developing countries have adopted BIMS.

Pursuant to this effort on the supply side of corruption, FIDIC's Integrity Management Committee was mandated to apply its experience to help develop a complementary preventive integrity assurance system for the demand side of corruption, and created in 2006 the Government Procurement Integrity Management System (GPIMS).

The principles identified for the Government Procurement Integrity Management System are the followings:

- **Leadership** – for example the commitment of the Director General of the Procurement Agency is crucial to the success of the GPIMS;
- **Involvement of staff** – in particular through effective communication and co-ordination;
- **A process approach** – each process performed by the agency must be accomplished with integrity;
- **A system approach** – identifying potential areas of corruption in the interrelated processes;
- **A documented process** – documenting and auditing information.

The GPIMS includes a voluntary set of good practices adopted by a government procurement agency as well as a checklist to help identify vulnerabilities in the procurement system.

Sources: - Case study provided by FIDIC for the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.
- Government Procurement Integrity Management System, Guidelines, 2006, available at: http://www1.fidic.org/resources/integrity/.

Some governments have also created **partnerships for integrity with business and non-governmental organisations**. For instance, a public-private partnership in Denmark, in conjunction with Transparency International and the UN Global Compact, led to the creation of a Business Anti-corruption Portal that provides small and medium-sized companies with the necessary knowledge and tools to invest in emerging markets, including detailed information on the integrity of procurement practices.

Governments often require integrity pledges, where bidders must testify the absence of conflict of interest and corruption. On the other hand, the

Integrity Pact[22] requires a mutual commitment by the principal and all bidders to refrain from and prevent all corrupt acts and submit to sanctions in case of violations. Bidders pledge to disclose all payments to agents or any other third parties in connection with the contract in question, responding to the concern that independent agents and other intermediaries are frequently used by exporting companies to obtain contracts. The Integrity Pact binds bidders and contractors to refuse to pay or accept bribes or to engage in anti-competitive transactions. If a bidder acts in breach of the rules during the selection process, this can result in that bidder's exclusion from the process. Any breach after winning a tender can result in the annulment of the contract. Other sanctions could include the forfeiture of the bid or performance bonds, liability for damages and debarment regarding future contract opportunities for a period of time reflecting the seriousness of the violation.

Ideally the Integrity Pact is monitored by an independent expert Monitor, who may be provided by civil society or commercially contracted. The Monitor would have access to all documents, meetings and parties and could raise concerns first with the principal and, if no correction is made, with the prosecution authorities. An Integrity Pact was used recently for the major international airport project in Berlin Brandenburg in Germany. Considering the amounts involved - a total investment of EUR 2 billion is anticipated between 2005 and 2010 - the use of the Integrity Pact helps send a clear signal in support of fair competition, corruption prevention and against illegal transactions.

22. The Integrity Pact was developed by Transparency International. For further details on the application of the Integrity Pact in Korea, see Box IV.17.

IV. ENSURING ACCOUNTABILITY AND CONTROL IN PUBLIC PROCUREMENT

Within the public sector, procurement is seen as increasingly important in delivering value to governments and ultimately to tax payers and society. Procurement officials are **in the public eye** because of the significant impact of procurement on the economy.

The cornerstone of a public procurement system operating with integrity is the availability of mechanisms and capacity for ensuring effective internal control and audit. Furthermore, mechanisms for lodging complaints and challenging administrative decisions contribute to ensuring the fairness of the process. In order to respond to citizens' demands for greater accountability in the management of public expenditures, some governments have also introduced direct social control mechanisms by closely involving stakeholders – not only the private sector but also end-users, civil society, the media or the public at large – in scrutinising integrity in procurement.

ACCURATE RECORDS: A PRE-CONDITION FOR ACCOUNTABILITY AND CONTROL

Accurate written records of the different stages of the procedure are essential to maintain transparency, provide an audit trail of procurement decisions for controls, serve as the official record in cases of administrative or judicial challenge and provide an opportunity for citizens to monitor the use of public funds. Agencies need procedures in place to ensure that procurement decisions are well documented, justifiable and substantiated in accordance with relevant laws and policies in order to promote accountability.

Written records may be kept in paper and/or electronic form. Some countries have used information systems to coercively support the documentation of all steps of the public procurement process and to allow real-time monitoring of officials' performance and integrity (see the example of the Federal Procurement Agency of the Ministry of the Interior in Germany in Box IV.1).

Box IV.1. Electronic workflow: Processing and tracking information on public procurement in Germany

The Federal Procurement Agency in the Ministry of the Interior has set up an electronic workflow that helps centralise all information related to the procurement system and provide a record of the different stages of the procurement procedure. Employees are assisted by an electronic workflow, which leads through the process and coercively supports the application of the four-eyes principle. Each decision is to be well founded and documented along the milestones of the procurement procedure. All files are stored in a document management system.

The Federal Procurement Agency has also recognised the importance of accurate records for maintaining transparency and providing an audit trail of procurement decisions. In addition, supervisors may access any document at anytime. In case of suspicion the contact person of prevention for corruption may also have access to documents for inspection. This access is not visible for the official concerned. The department for quality management randomly examines documents in the system, while the internal audits review transactions of the previous year. These inspections are not exclusively used to prevent corruption, but also to ensure lawful and economically advantageous public procurement.

Sources: - Germany, response to the OECD Questionnaire.
- *Das Beschaffungsamt*, *A procurement agency that does more,* Bonn, 2004.

Information systems often have the advantage of recording information per user, which keeps officials accountable for their actions and can help track irregularities in the process. Information systems have been used to record and analyse data on:

- The **financial aspects** of procurement, in particular accounting records, for instance in Brazil and Italy;
- **Characteristics of procurement** processes, such as the criteria used, the frequency and reasons for using exceptions to competitive procedures, in countries such as Germany, Mexico, Portugal and Turkey;
- The number of **administrative complaints and recourse mechanisms**, for instance in Poland, Mexico and Turkey;
- The number and types of **controls** carried out on procurement in Poland, irregularities detected and sanctions applied in Mexico.

Keeping records depends on the objective sought. The most frequent objective of records is to provide an **audit trail**. The maintenance of proper accounting records is an important element of internal control. Records can also contribute to the safeguarding of assets, including the prevention and detection of fraud. The type of records, level of documentation and retention time on procurement may be proportionate to the nature and risk of the procurement. In particular, records will vary depending on the timeframe,

the complexity and the sensitivity of the purchase, as well as the procedure used. For example, records will be stricter for exceptions to competitive procedures.

In most countries, appropriate records are not only kept by the procurement agency and/or internal control agencies but also made available to the public. The objective is then to provide bidders and other stakeholders with the necessary information for **challenging the fairness of the procedure**. Records might cover part of the procedure - for example the contract award in Turkey - or the whole procurement process. In Norway, a recent reform introduced the obligation of documenting all steps of the procurement process for contracts above the national threshold. The records might be restricted to bidders, or on the contrary open to other stakeholders - for instance, in Italy citizens and consumer associations that have a concrete interest.

In a few countries (e.g. Brazil, Chile, Poland, Sweden, and the United States), records on procurement are publicly available. In Sweden anybody who has an interest can have access to records, which enables **the media, law-enforcement agencies and the public at large to uncover cases** of mismanagement and potential corruption in public procurement. More importantly, freedom of information acts as a deterrent since the risk of detection of illicit or questionable practices increases. In Brazil, it is mandatory for federal public administration bodies to disseminate through Internet all the information relative to budgetary and financial execution, including public procurements. This provides an opportunity for citizens to monitor the use of public funds. Another example is the General Controller's Office in Mexico that makes public the data on all administrative sanctions applied since 2001 to federal public servants, as a result of disciplinary investigations (see Box IV.2).

Box IV.2. Publicising information on sanctions related to procurement in Mexico

The Ministry of Public Administration – through its Unit of Normativity of Procurement, Public Works, Services and Federal Patrimony – gathers and publishes information regarding bidders, intermediaries and contractors, as well as public officials who have been sanctioned for breaches of public procurement laws and regulations. This information is made available to the public in the Report of Activities of the Ministry of Public Administration.

During 2005, 1 153 **bidders, intermediaries and contractors** were sanctioned with disqualification, debarment from participating in procurements and fines. The list of sanctioned bidders, intermediaries and contractors can be consulted on the Ministry's website (http://www.funcionpublica.gob.mx/index1.html).

In regard to **public officials**, 3 592 administrative sanctions were applied against 2 618 public officials between January and August 2005. Among the sanctions imposed, 2% were warnings, 27% were admonishments, 20% were suspensions, 7% were dismissals, 24% were disqualifications and 20% were economic sanctions for a total amount of MXN 3733.7 million (Mexican pesos).

Among the causes that motivated the imposition of administrative sanctions, 1 931 were due to administrative negligence, 1 193 occurred due to violation of laws or norms that regulate the Federal Expense Budget, 235 derived from non-compliance with procurement procedures, 174 were due to abuse of authority and 59 resulted as a consequence of acts of bribery.

The primary sources for revealing such breaches were unsuccessful bidders and other external stakeholders. Of the administrative sanctions imposed, 1 612 originated from a complaint or citizen accusation, 1 480 were the result of audits practiced at the agencies or entities of the Federal Public Administration and 500 emerged from internal investigations.

Source: Mexico, response to the OECD Questionnaire.

The retention time for general records also varies significantly among countries. In Australia, records have to be retained for at least three years and may be kept longer depending on the circumstances while in Korea and Japan they are usually kept for five years and in Sweden for ten years.

INTERNAL CONTROL: A MANAGEMENT INSTRUMENT FOR IMPROVEMENT

Without an adequate internal control system, an environment is created in which assets are not protected against loss or misuse; good practices are not followed; goals and objectives may not be accomplished; and individuals are not deterred from engaging in dishonest, illegal, or unethical acts. It is particularly important to have **functioning internal controls in procurement, including financial control, internal audit and management control.**

It is the **responsibility of procurement authorities** to set up effective internal control systems that monitor the performance of procurement officials, assist compliance with laws and regulations and help ensure the reliability of internal and external reporting. This responsibility is even more important in a context of decentralised procurement. For instance, in Brazil, the Internal Control of the Federal Executive Branch is carried out by the General Controller's Office through the Federal Secretariat of Internal Control and decentralised units. Decentralised units play a fundamental role in implementing control efforts.

A clear chain of responsibility

An important condition of accountability is to clearly define the **delegated levels of authority** for approval of spending and sign off and approval of key stages. The level of authorities responsible for the approval process may vary according to:

- The value of the procurement, for which a chain of approval hierarchies should be in place. In Portugal, the procedure might have to go through the authorisation of the Ministerial Council in certain cases;
- The business needs of the organisation and the official's experience. In the United Kingdom, the maximum value that commercial officers are able to contractually commit is determined by their grade and the estimated budget required in their post.

Managers have a crucial role in ensuring proper supervision over procurement. Internal procedures in agencies often require senior-level review of key decision points in procurement. For example, in the United States, the definition of evaluation criteria, evaluations and contract award selections are usually subject to senior-level reviews. Furthermore, internal guidance through policies and guidelines can help define the level of responsibility and the obligations for reporting to different authorities - for instance in Mexico and the United Kingdom. In Mexico, the policies and guidelines must be published on the website of each government agency.

There might also be **additional controls**, for example by a team of people independent of the acquisition team such as the Gateway Reviews in the United Kingdom (see Box IV.3) or by the internal audit of the authority, for instance in Belgium and Finland. More formalised reviews are usually required for projects of high value. In Ireland, independent peer review is required for information and communication technologies' projects of over EUR 5 million in regard to business case and good project management, which also includes a post implementation review.

Box IV.3. Independent examination of acquisitions: The Gateway Review in the United Kingdom

A Gateway Review is an examination of an acquisition project carried out at key decision points by **a team of experienced people, who are independent of the acquisition team**. There are five types of Gateway Reviews designed by the Office of Government Commerce (OGC) during the lifecycle of a project:

- Up to and including contract award: Gateway Reviews one to three (business justification, procurement strategy, and investment decision);
- Post contract award: Gateway Reviews four to five (readiness for service, and benefits evaluation).

The review is conducted on a confidential basis for the person who takes personal responsibility for the successful outcome of the project (the Senior Responsible Owner). This approach promotes an open and honest exchange between the acquisition team and the review team. The Gateway reports are frankly written and deal with the strategic, business and personnel aspects of the project, including instances of good practice that may be transferable to other projects.

Acquisition programmes and procurement projects in central civil government may be subject to the OGC Gateway Process without any minimum financial limits. However, the financial value is one factor to consider when deciding on the level of risk faced by a project, and it is recognised within the Risk Potential Assessment (RPA), which must be completed for each procurement project. The composition of the review team reflects the assessed potential risk of the project, namely in case of:

- **High risk projects**, RPA Score 41 or more: The Gateway Review is undertaken by an independent Review Team Leader (RTL who is independent from the department that carried out the project) with an independent Operations Team;
- **Medium risk projects**, RPA Score 31-40: The Review Team Leader is still independent from the department but the team members are provided by the department (independent from the project);
- **Low risk programmes**, RPA Score less than 31: All the team and the leader are resourced from the sponsoring department but all are independent from the project.

Each review takes about three or four days. At the end of their investigations, the review team produces a report summarising their findings and recommendations, together with an assessment of the project's status as Red, Amber or Green.

- "Red" status means that remedial action must be taken immediately; but not necessarily stop the project.
- "Amber" status indicates that the project should go forward with recommendations for actions to be carried out.
- "Green" status shows that the project is on target to succeed but may benefit from the uptake of recommendations.

The Gateway Review Process provides assurance and support for Senior Responsible Owners in discharging their responsibilities to achieve their business aims by ensuring that the best available skills and experience are deployed on the projects; all stakeholders are covered by the project; and the project can progress to the next stage of development or implementation.

From 2001 to the end of 2004, OGC Gateway Teams conducted over 800 OGC Gateway Reviews covering over 500 projects. The feedback from Senior Responsible Owners has been very supportive.

Sources: - United Kingdom, response to the OECD Questionnaire.

In addition to strengthening controls, some countries have ensured **enforcement** through effective, proportional and timely sanctions. In the United States, there have been numerous investigations in the last five years by Inspectors General into individual procurements, which have resulted in criminal convictions, penalties and loss of employment for public officials and contractor employees. In Norway, a contracting authority that conducts direct illegal purchasing may be subject to an administrative fine of up to 15% of the contract value since January 2007.

EXTERNAL AUDIT: AN INDEPENDENT REVIEW

Countries have recognised the essential role of audit in **detecting and investigating** fraud and corruption in procurement as well as suggesting systemic improvements. If internal audit is used in some countries - such as Belgium, Finland, Switzerland and the United Kingdom - the vast majority of countries use external audits conducted mainly by supreme audit institutions with jurisdiction over the whole public service. For instance, in Finland and Switzerland, the State Audit Office carries out external financial audits and performance audits of procurement.

Possible **criteria for selecting public procurement cases for audit** include:

- Total value and complexity of the procurement;
- New acquisition rather than routine procurements;
- Order value per contractor and number of orders per contractor (whether specific contractors receive unusually often or unusually large orders); as well as
- General aspects – such as critical statements of external and internal supervision authorities (e.g. Ministry of Finance, internal auditors), handling in political committees, coverage in the media, complaints, legal proceedings or professional experience of auditors.

Performance audits help provide information on the actual benefits of procurements, which contributes to improving operations, facilitating decision making by parties with responsibility to initiate corrective action, and enhancing public accountability. In Austria, the Court of Audits plays a key role in conducting external audits and **making recommendations for the improvement of processes**, in particular for public procurement (see Box IV.4).

Box IV.4. Recommendations of the Austrian Court of Audit for improving procurement

The administration of public procurement and contracts is considered by the Austrian Court of Audit as a particularly vulnerable area to mismanagement and corruption. Procurement audits are among the most important and discussed reports of the Austrian Court of Audit. The recommendations of the Austrian Court of Audit for procurement audits cover all stages of the procurement process.

1. General procedure:

Organisation: Organisational units responsible for different procurement aspects (e.g. definition of needs, specification, awarding of a contract, financing) should be separated organisationally. Dependencies as well as parallel structures should be avoided.

Documentation: The documentation of procurement procedures should be in writing and covering all important aspects. Internal procurement regulations should be binding and notified to the employees concerned.

2. Planning and preparation of procurements:

Planning concept: Planning should be completed before conducting a specific procurement procedure and should be updated on time.

Financing: Procurement preparation should include a statement of the prospective total expenses of the project and a long-term planning. The required funds should be guaranteed on time.

Analysis of demand: Preparation of procurement should also include cost-benefit and make-or-buy considerations. Core duties should be performed by public authorities. External experts should only be consulted if special knowledge or specialised technologies are not available within the awarding authority or if they substantially increase the quality of a project and the probability of success.

Time frame: Procurement planning should contain realistic time targets.

3. Execution of procurement:

Completion of the preparations: Procurement procedures should only be initiated and conducted after all necessary prearrangements have been completed (e.g. purchase of property in connection with construction projects).

Choice of and justification for the procurement procedure. Special attention should be turned to the choice of procurement procedures as they are often reasoned or justified by unfounded circumstances (e.g. urgency, demand for special abilities or experiences).

Specifications: Specifications should be neutral, based upon completed planning and defined standardised products, if possible. Off-the-shelf products should be preferred. The relevant documentation should be complete, clear, understandable and calculable.

Bidding period: When defining the bidding period the complexity of the specific procurement should be taken into account.

Opening of bids: At the opening of bids all formal requirements must be fulfilled. This must be documented sufficiently.

4. Evaluation of bids:

Evaluation catalogue: The evaluation catalogue must be completed and approved before the opening of bids. The evaluation catalogue should concentrate, if possible, on a limited number of

key criteria. Award criteria, which must refer to the demanded product, should not be mixed with qualification or selection criteria, which must refer to the bidders.

Weighting of award criteria: If standardised products are purchased, the price component must be weighted sufficiently.

Comparative bids: The price adequacy of the offered or awarded products must be evaluated in any case, also when applying the negotiated procedure.

Supplementary amendments: After the opening of bids, price negotiations or supplementary amendments of the specifications or the weighting of the award criteria must be avoided (except for the negotiated procedure).

5. Conclusion of the contract:

Performance requirements: The specifications of the invitation for bids and the contract should correspond.

Model contracts: It has been recommended to develop model contracts.

6. Contract management and payment:

Supplementary amendments: Supplementary amendments and extensions of contracts should be avoided.

Acceptance: The management of contracts requires accurate and timely supervision. Defects must be rejected immediately in writing.

Payment: Payment should be made punctually; early payments should be avoided.

Logistics: Logistics has to include timely provision of all components that are necessary for the operation and maintenance of the procured goods (e.g. training, documentation, servicing, special tools, and spare parts).

Stock management: Over-stocking should be avoided.

Source: Austria, response to the OECD Questionnaire.

In order to keep the public informed, information on external audits is routinely published in two-thirds of countries. Procurement expenditures are also usually reported to Parliament. For instance, in Canada, reports on plans and priorities, which are individual expenditure plans for each department and agency, are reported to Parliament by the President of the Treasury Board. In Slovenia, reports of the Court of Accounts and the Ministry of Finance are addressed to the Committee for Control of Public Finance, which has also the right to invite parties for hearings.

Co-ordinating controls

Public procurement operations are subject to various controls: local controls, accounting controls, controls made by fiscal authorities, as well as external controls and audits. As public procurement has become more decentralised, a key concern is the **lack of co-ordination** between various controls, which has led to some loopholes and overlaps in controls over the

procurement process. Only a few countries have mechanisms to ensure co-ordination of control. For example, the Austrian Court of Audit co-ordinates its audits at an early stage with other external audit institutions and internal auditors of procurement authorities through the review of their audit plans and results and through regular reporting on its own activities.

A related difficulty is to **maximise the use of information produced by different controls**. Some countries have developed solutions to address it. For instance, in the United States, while information related to internal audits is generally not released to the public, both internal investigations conducted by Inspectors General in procuring agencies and external investigations conducted by the General Accountability Office are usually released to the public and the Congress. These investigations have resulted in Congressional hearings and enactment of laws, primarily the procurement integrity statutory provisions.

TAKING A RISK-BASED APPROACH

There is growing recognition across countries that a sound system of **internal and external controls** therefore depends on a thorough and regular evaluation of the nature and extent of the risks to which the organisation is exposed. A specific focus has been to identify **risks to integrity** in the procurement process resulting from a simple mistake in performing an administrative task to a deliberate transgression of relevant laws and related policies. In order to prevent and detect individual irregularities and systemic failures in procurement processes, governments have increasingly mapped out risk factors and vulnerabilities to the integrity of the public procurement process (e.g. in Belgium, Brazil, France, Korea and the Netherlands). In Korea, *ex-post* audits focus on specific corruption-prone work areas that are identified through an annual internal survey on the level of integrity. This has helped raise awareness among auditors and public officials of the areas most prone to irregularities and corruption. In Belgium, internal and external control mechanisms have helped identify risks to integrity at different points of the public process and provide recommendations for tackling vulnerable points (see Box IV.5).

Box IV.5. Identifying risks and providing recommendations in Belgium

With the help of internal and external control mechanisms, the Belgian Federal Public Procurement Service has identified potential risks to integrity at various points of the public procurement process, including:

- **Definition of specifications**: The definition of specifications of a concrete project is adjusted in order to favour a specific bidder.
- **Selection procedure**: When using restricted procedures, the selection of potential suppliers is not based on objective criteria, with the risk of limiting the number of participating bidders.
- **Bids submitted after the delay of submission**: Bids are accepted after the delay of submission, including during the official opening of the submitted bids.
- **Change in bid description**: Certain elements of the initial contract notice are changed during the selection and award process, which can positively influence the matter of a privileged bidder.
- **Award**: When selection criteria are defined in too general terms, the risk of a subjective evaluation that favours a specific bidder is more common.
- **Contracts with low monetary value**: Overestimated prices are used for purchases of low monetary value, resulting in significant mismanagement of public funds.
- **Contract management**: Contracts are invoiced but not completed.

In order to reduce identified risks, several **recommendations** were elaborated by the Consultancy and Policy Office on Federal Public Procurement, including:

- In order to avoid bias in the definition of specifications, the public official who is responsible for the definition of specifications must justify that these are based on the results of a market study about the needs. The definition of specifications must be clear and detailed.
- To avoid modifications of the bid during the process, it was recommended to use the four-eyes principle, with several persons signing the bid project.
- Effective accountability mechanisms are necessary to balance the discretionary power of the public official responsible for inviting suppliers in a restricted procedure.
- Several public agents should attend the official opening of the submitted bids.
- A database should be created containing information on past purchases to be used as a price reference system.

Source: Belgium, response to the OECD Questionnaire.

Other experiences include the development of a **risk mapping methodology together with civil society –** for example national chapters of Transparency International **–** to identify vulnerabilities, point out aspects that need to be controlled in each process to lessen risks, and improve

procurement processes. Box IV.6 illustrates the recent development in Brazil of a methodology to map out risks of corruption in key processes of public institutions, and its pilot application for public procurement. Experience with the risk mapping exercise in countries in Central and Latin America – such as Argentina, Brazil and Colombia – has highlighted a number of conditions for it to be effective:

- **Involvement of stakeholders**: The methodology should be developed jointly with the actors directly involved in the public procurement process and therefore subject to those risks;
- **Comprehensiveness**: The analysis should cover all potential risks, including aspects linked to political corruption;
- **Action oriented**: Based on the findings of the risk mapping, practical alternatives and ways to protect procurement officials against the risks identified should be worked out together with the main stakeholders.

Box IV.6. Methodology for risk mapping in Brazil

In Brazil, the General Controller's Office and *Transparencia Brasil* have recently developed a methodology for mapping out **risks of corruption in key processes** of public institutions. The methodology focuses on a combination of activities involving the transfer of financial resources that receive input information and produce outputs according to a pre-established logic.

The methodological framework has been applied as a pilot for public procurement processes. It has reviewed key decision steps in procurement:

- Starting with **input** information (e.g. is the necessary information included in procurement regulations, is the information available timely?);
- Through the **decision itself** (e.g. do decision makers have the necessary knowledge, is the decision oriented towards economic efficiency?);
- To **outputs** (e.g. is the final procurement in line with the decision, is there a systematic recording of the process?).

To gain a better understanding of the public procurement process, performance indicators have been used such as the average time to complete the process, the average value of procurements, the percentage of procurement processes completed and the degree of compliance with regulations. Against these indicators, the results of the risk mapping have helped to identify dysfunctions and irregularities in the public procurement process and define solutions together with stakeholders to address them and improve the overall efficiency.

The methodology will be applied not only in public procurement but also in other processes that are vulnerable to corruption, that is processes involving substantial resources transfer, or direct contact with the private sector (e.g. provision of certificates or licenses for companies) or with citizens (e.g. taxation).

Sources: - Brazil, response to the OECD Questionnaire.
- Case study provided by Transparencia Brasil for the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.

Some countries have also started to employ a "**probity auditor**" **for conducting external audits** of procurements that are at risk because of their complexity, high-value or sensitivity. A probity auditor is an independent person who verifies that processes followed by an agency are consistent with Government regulations and good practice principles in terms of fairness, transparency and openness in procurement (e.g. in Australia, Canada and New Zealand). The objective of engaging a probity auditor is to provide:

- A level of independent assurance about the conduct of a bid process, in particular its openness and fairness to all parties concerned;
- Additional oversight of the procurement process, especially in contracts that are vulnerable to mismanagement and potentially corruption.

To be effective, the circumstances in which a probity auditor may be required should be clearly defined. One potential pitfall is that probity audits are used by agencies as an 'insurance policy' to avoid accountability for decisions made. Box IV.7 illustrates the guidelines developed in Australia for determining circumstances in which a probity plan could be used, as well as the criteria for selecting the probity auditor.

Box IV.7. Probity auditors in Australia: Independent review of projects at risk

The probity auditor is an independent auditor who confirms if a government procurement process has been conducted fairly through monitoring, assessing and, where necessary, correcting a bidding process. In Australia, all probity auditors' reports are made available in full for scrutiny by the Parliament, the Auditor-General and anyone else with an interest.

The probity auditor is responsible for providing an independent view of the procurement process with the provision of opinions, conclusions and findings that are impartial and are viewed as impartial by knowledgeable third parties. The probity auditor should possess adequate professional proficiency for the tasks required, including technical procurement abilities and a good knowledge of the government's probity framework.

The probity auditor should only be used in specific circumstances to verify that processes followed by an agency are consistent with Government regulations and good practice principles, in particular when the project is politically sensitive and potentially controversial; very complex; or has a significant financial impact.

This has proved particularly useful for projects where the integrity of the process may be called into question or to avoid perception of favouritism. However, there is a risk that this might be used as an 'insurance policy' to avoid accountability for decisions made, or become a substitute for good management practices. To avoid this risk, the Independent Commission Against Corruption in New South Wales has developed guidelines and criteria to be used by public sector agencies in determining whether and how a probity auditor should be engaged.

Sources: - Australia, response to the OECD Questionnaire.
- *Memorandum No: 98-12 to all Ministers on the Use of Probity auditors by public sector agencies and Whole-of- Government Contract for Probity Auditors*, ICAC, New South Wales.

In order to help prevent and detect irregularities and corruption in public procurement and constantly improve the system, there is growing awareness of the need to provide **specialised training for both procurement officials as well as investigators**. The objectives of module training may vary accordingly:

- For procurement practitioners, to introduce preventive and effective internal control procedures. The training may take the form of an analysis of existing laws and regulations, a typology of risks as well as proposals for improving internal controls.

- For control and investigation officers in charge of verifying procurement procedures, to help them detect fraud and corruption. This may be done through a list of indicators of fraud making it possible to identify, demonstrate and prove fraudulent arrangements.

In particular, the Central Service of Corruption Prevention in France has developed specialised training material for procurement practitioners, as well as control and investigation officers (see Box IV.8).

Box IV.8. Specialised training for public procurement in France

This case study is an example of training material for public procurement developed by the Central Service of Corruption Prevention, an inter-ministerial body attached to the Ministry of Justice in France. It illustrates the challenges faced by various actors at different steps of the procedure, from the mayor's verifications through internal control to the investigation carried out by the Ministry of Justice. It also highlights the **difficulty of gathering evidence** on irregularities and possibly corruption in procurement.

Issue at stake

Following an open invitation to bid, an unsuccessful bidder complains to the mayor of a commune accusing the bidding panel of irregularities because his bid was lower than that submitted by the winning bidder. How should the mayor deal with the problem?

Stage one: Checking compliance with public procurement procedures

The firm making the complaint is well known and is not considered « litigious ». The mayor therefore gives its claim his attention and requests the internal audit service to check the conditions of award of contract, particularly whether the procedure was in compliance with the regulations (the lowest bidder is not necessarily the best bidder) and with the notices published in the official journal. The mayor learns from the report prepared by the bidding committee that although the procedure was in accordance with the regulations, the bid by the firm in question had been revised upwards by the technical service responsible for comparing the offers. Apparently the firm had omitted certain cost headings which were added on to its initial bid.

Stage two: Replying to the losing bidder

The mayor lets the losing bidder know exactly why its bid was unsuccessful. However, by return post, he receives a letter pointing out that no one had informed the company of the change made to its bid, which was in fact unjustified since the expenditure which had purportedly been omitted had in fact been included in the bid under another heading.

Stage three: Suspicions

The internal audit service confirms the unsuccessful bidder's claim and points out that nothing in the report helps to establish any grounds for the change made by the technical service. It also points out that it would be difficult for an official with any experience, however little, not to see that the expenses had been accounted for under another heading. The mayor now requests the audit service to find out whether the technical service is in the habit of making such changes, whether it has already processed bids from the winning bidder and if contracts were frequently awarded to the latter. He also requests that it check out the background of the officials concerned by the audit. Do they have experience? Have they been trained? Do they have links with the successful contractor? Could they have had links with them in their previous posts? What do their wives and children do? Examination of the personnel files of the officials and the shares of the company which won the contract fail to find anything conclusive: the only links between the officials or their families and the successful bidder are indirect.

Stage four: Handing the case over to authorities of the Ministry of Justice

Having suspicions, but no proof, the mayor hands over information so that investigations can begin. The investigators now have to find proof that a criminal offence (favouritism, corruption, undue advantage, etc.) has been committed and will exercise their powers to examine bank accounts, conduct hearings, surveillance, etc. The case has now moved out of the domain of public procurement regulations and into the domain of criminal proceedings.

Conclusion

Unable to gather any evidence and with no authority to conduct an in-depth investigation or question the parties concerned, the mayor takes the only decision that is within his power, which is to reorganise internally and change the duties of the two members of staff concerned. However, he must proceed cautiously when giving the reasons for his decision so as to avoid exposing innocent people to public condemnation or himself to accusations of defamation while the criminal investigation is in progress.

The mayor also decides that from then on the report by the technical services to the bidding committee should give a fuller explanation of its calculations and any changes it makes to the bids, as well as inform systematically bidders of any changes.

Source: Case study for specialised training, Jean-Pierre Bueb, Counsellor, Central Service for Corruption Prevention, France.

CHALLENGING PROCUREMENT DECISIONS: COMPLAINT AND RECOURSE MECHANISMS

A sound procurement system uses the participation of bidders, public officials and other stakeholders as part of the control system by establishing a clear regulated process for facilitating the exposure of wrongdoing in the administration, as well as enabling the fair and timely resolution of bidders' complaints.

Reporting mechanisms for officials

Whistleblowing can be defined as a means to promote accountability by encouraging the disclosure of information about misconduct and possibly corruption while protecting the whistleblower against retaliation. If two-thirds of countries have developed procedures for public officials to facilitate the exposure of wrongdoing in the administration (e.g. complaint desk, hotline, etc.), **few countries have developed whistleblowing protection** in the public service (e.g. Canada, Korea, the United Kingdom and the United States).

There is growing recognition of the potential of this mechanism for **detecting large-scale irregularities** and corrupt acts in the use of public funds, including in public procurement, which would not have been identified by other control mechanisms (see below the example of Canada and the Gomery report). Another famous example is a whistleblowing case that revealed in 2004 that government contractors in Irak were using offshore companies in countries commonly known as "tax havens" to fraudulently overcharge on contracts of the government in the United States.

However, the **number of cases** of breaches detected through whistleblowing is **still limited**. One of the main reasons is that whistleblowers are often the target of retaliations such as harassment, intimidation, demotion, and dismissal. Other frequent barriers in countries include the duty of loyalty and fidelity to the employer as well as a cultural resistance from employees stemming from the assimilation of whistleblowers with "informants" or "denunciators" in past history.

Box IV.9. Reporting wrongdoing in public procurement: Whistleblowing cases in Canada

In the last five years, whistleblowing cases in Canada have been linked mainly to the following categories of misconduct:

- Violation of laws or regulations;
- Mismanagement;
- Harassment, abuse of authority, interpersonal conflict;
- Misuse of public funds and assets.

The following chart highlights the cases related to the misuse of public funds.

Whistleblowing cases reported in the government of Canada involving the misuse of public funds and assets (2002-2005)

	2002-2003	2003-2004	2004-2005	Total
Public Service Integrity Officer (PSIO)	6 cases (1/3 related to procurement)	6 cases (none of them related to procurement)	6 cases (1/2 related to procurement	18 cases
Office of Public Service Values and Ethics (OPSVE)	3 cases	3 cases	Not available	6 cases

A significant example of a whistleblowing case is the Sponsorship Programme and Advertising Activities: Public Works and Government Services. It illustrates the potential of whistleblowing for revealing major corruption scandals. In 1995, an employee disclosed his concerns regarding contracting irregularities within the Sponsorship Programme. After investigations it was found that funds disbursed through the Sponsorship and Advertising Programmes that were intended for the promotion of national unity and the enhancement of the image of the Federal Government had been diverted from their intended proposes, in some cases towards political activities, and spent regardless of economy and probity.

Following this case, the Auditor General's and the Justice's recommendations touched on several areas from required improvements to contracting control and documentation to political governance. A number of individuals involved in the mismanagement of the Sponsorship Programme's funds have been criminally charged. The Federal Accountability Act introduced several measures to reinforce citizens' confidence in procurement (see Box III.2).

Considering that the number of reported whistleblowing cases is still limited, efforts have been initiated to ensure a better protection of whistle blowers against retaliation with the approval of the Public Servants' Disclosure Protection Act[23] in November 2005.

Source: Case study provided by Canada for the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.

23. The Public Servants Disclosure Protection Act in November 2005 defines "protected disclosure" as a disclosure that is made in good faith by a public servant: in accordance with the Act; in the course of a parliamentary proceeding; in the course of a procedure established under any other federal statute; or when lawfully required to do so.

Encouraging employees to blow the whistle and protecting them from reprisals are two interconnected issues: any increase in protection has the potential to encourage people to disclose wrongdoing. This may take the form of measures to prevent reprisals or on the contrary compensation schemes where reprisals occur. A number of countries - such as Canada, Korea and Norway - have recently initiated reforms to introduce or **strengthen the protection** for whistleblowers in the public service, through legal protection, anonymity or the setting up of a protection board.

In Australia, various disclosure systems are used for ensuring anonymity. This includes systems that operate on the basis of anonymously provided information (e.g. on-going communication through anonymous email exchanges, special phone line), exclude the identity of the whistleblower as a subject of investigation, or impose a duty upon the recipient of the disclosed information not to reveal the discloser's identity. In the United States, whistleblowers receive further protection from the financial impact that their disclosure may have on their lives as a result of reprisals (e.g. reinstatement, difference between what the employee was paid and the amount that should have been paid, litigation costs, and attorney fees). An emerging approach is to provide incentives to **encourage whistleblowing**, for example through financial rewards or advantage in career progress. For example, this was introduced in Korea in 2003, and was proposed by the Federal Accountability Act in Canada, sent to Parliament in 2006.

Recourse systems for challenging procurement decisions

Recourse systems, like audit systems, fundamentally serve a procurement oversight function. They provide a means of monitoring the activities of government procurement officials, enforcing their compliance with procurement laws and regulations, and correcting improper actions. Furthermore, they provide an opportunity for bidders and other stakeholders to contest the process and verify the integrity of the award. For instance, in the United States, any interested party – actual or potential bidder – can file a protest with the Government Accountability Office.

There is common recognition that effective recourse systems for challenging procurement decisions should provide timely access, independent review, efficient and timely resolution of complaints and adequate remedies. However, the practice varies significantly across countries.

Timely access to recourse mechanisms

Both the procurement and the recourse system itself must be organised in a manner that permits bidders to initiate recourse before the contract starts. Following the European Court of Justice case law Alcatel[24], several countries have recently introduced a **mandatory standstill period** between the contract award and the beginning of the contract to provide the bidder with a reasonable opportunity for the award to be set aside - for instance in the Netherlands, Norway and the United Kingdom. In Portugal, a report with the intention of award is sent to all bidders after evaluation by the committee so that suppliers may question the results (that is procedure, applicability and choice of solution for procurement) and challenge procurement actions accordingly in the following five days.

While countries generally provide a recourse mechanism after the award, bidders are also able in some countries to challenge procurement decisions at other stages of procurement, and even sometimes after the end of the contract. In Sweden, there is a possibility to make a complaint at **any stage of the procurement** process and even after one year through a claim for damage in civil court. The records for the procedure are made available not only for bidders but also for other interested parties.

Independence of complaint and review systems

In order to avoid litigation and provide an opportunity for contracting authorities to make the necessary adjustments, a vast majority of countries encourage and in some cases, for instance in Germany, make it mandatory for bidders to submit their complaints directly to the **procuring authority**.

A complaint to the contracting authority may offer clear advantages, especially in cases when a genuine or obvious mistake rather than a deliberate breach of public procurement law is the reason for the dispute or when the case involved "delicate" interpretations of the law. Furthermore, the bidder can **avoid confrontation** with the contracting authority as well as the costs involved when using quasi-judicial or judicial review.

On the other hand, time-consuming complaint proceedings can **prolong the overall review procedure** if it only the prelude to quasi-judicial or judicial review. Another concern is to ensure that the decision is not **biased** by the public official or the procuring agency's interests. For instance, in

24. In its Alcatel judgment (Case C-81/98), the Court of Justice stipulated that Member States were required to set up review procedures permitting a decision awarding a public procurement contract to be suspended and annulled at a stage where the infringement can still be rectified. For further details, see: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998J0081:EN:HTML.

Belgium, the heads of procuring agencies rather than contracting officers determine whether protests have merit in order to avoid individual conflict-of-interest situations. Furthermore, recourse is also available to Mediators that provide independent oversight over actions of the Belgian administration.

Efficient resolution of complaints

Several countries introduced a **specific public procurement mechanism** to improve the efficiency of the resolution of complaints (e.g. in Austria, Canada, Denmark, Germany, Hungary, Japan, Norway, Poland, the Slovak Republic and Slovenia). This contributes to reinforcing the legitimacy of decisions that are grounded on specific professional knowledge and reducing the time for resolving complaints. In Japan, members of the Government Procurement Review Board are scientists, scholars and other experts with relevant experience in government procurement (see Box IV.10).

Box IV.10. The Government Procurement Challenge System in Japan

In 1995, the Japanese Government established a complaint mechanism tailored to public procurement. This mechanism combines and strengthens the voluntary measures which Japan has previously taken. It is applied to all central government entities covered by the WTO Government Procurement Agreement (GPA).

The review mechanism of complaints is incumbent on two entities:

- First, the *Office of Government Procurement Review* that has adopted the "Complaint Review Procedures for Government Procurement". It details the process to be followed.
- Secondly, the *Government Procurement Review Board*, which receives and reviews the actual complaints. Any supplier may file a complaint with the Board, who believes that a government entity has behaved in an inappropriate manner, or was inconsistent with the GPA. The Board is composed of 23 members. The Board is responsible for reviewing complaints filed by suppliers with regard to procurements by central government entities and central-government-related entities. Members of the Board are scientists, scholars and other experts with relevant experience in government procurement.

The Board must prepare a written report on his findings within 90 days after the complaint has been filed. In this report, it must state whether or not the procurement was inconsistent with the GPA or the government entity has behaved in an inappropriate manner. In case of inconsistence or inappropriateness, the Board must recommend remedies. Furthermore, in its report, the Board is authorised to consider additional factors. These include the seriousness of deficiencies in the procurement process, the good faith of the complainant and the entity concerned, as well as the impact of the recommendations on the operations of the entity. Information on regulations and past

complaints is available in English on the website of the Office for Government Procurement Challenge System (http://www5.cao.go.jp/access/English/chans_about_e.html). If the entity does not comply with the recommendations, it must report its reasons to the Board.

Since the establishment of the Board in 1995, only six complaints have been filed, while other inquiries have been resolved through consultation.

Sources: - Japan, response to the OECD Questionnaire.
- J.H. Grier: An Overview of the Japanese Government Procurement System. *Public Procurement Law Review*, Issue 6.

In a growing number of countries – including Austria, Denmark, Luxembourg, Norway, Sweden, and Switzerland – there is a body for dispute resolution to encourage **informal problem solving.** Box IV.11 on the experience of the Public Procurement Board in Norway illustrates the potential advantages in terms of efficiency and lowering the costs compared to formal litigation. Other countries, such as Finland, Germany and the United Kingdom, have set up contact points that render advice and assist companies facing problems specifically in cross-border cases. The national ombudsman may also play a role in public procurement disputes between bidders and contracting authorities, for instance in Belgium, Luxembourg, and the Netherlands.

Box IV.11. Efficient and timely resolution of complaints: Informal problem solving in Norway

In Norway, dissatisfied suppliers in a public procurement procedure have had the choice to take a formal complaint to ordinary courts since 1994. This formal review has been available to secure correct and effective application of procurement rules, as required by the Remedies Directives of the European Commission. The courts have had the power to suspend procurement process before awarding the contract and also grant compensation for damages (e.g. loss of expenses, profit, etc). However, the courts have received only very few complaints in the past ten years.

In January 2003 an **advisory complaint board** – the Public Procurement Complaint Board (KOFA) – was created with the objectives to:

- Make the enforcement of the public procurement regulations more efficient;
- Solve disputes in a faster and more flexible way (e.g. lower the litigation costs); and
- Increase the level of competence on public procurement (e.g. through publishing the opinions and clarifying the interpretation of the rules and principles).

The Public Procurement Complaint Board is an independent advisory body that consists of ten highly qualified lawyers. Three members of the Board participate in the handling of each complaint. Although its decisions are not legally binding, due to the high quality of its recommendations, the Board's opinions are followed by the parties in nearly all cases. The Board's activity has led to a noticeable increase in knowledge of the application of public procurement rules.

The public procurement legislation grants involved bidders the right to complain after a contract has been awarded. The complaint must be submitted to the Complaint Board within six months after the contract has been signed.

When the complaint is submitted within the standstill period the Complaint Board asks the contracting authority to postpone the signing of the contract until the case is closed. Furthermore, the Board gives priority for reviewing those complaints where the contracts are not yet signed. By January 2006 the average time for decisions was:

- 51 days in case of contracts that had not been signed; while
- 224 days in case of already signed contracts.

The Board has handled approximately 850 cases since its creation in 2003.

The Norwegian administration has not experienced any major problems related to this public process of handling complains, which is also open to media oversight. The principle that all written information is recorded in public archives, also apply in this field. However, the Freedom of Information Act provides exceptions from this principle.

Furthermore, a procedure was set up in 2006 to handle cases when contracting authorities disregard the rules as a whole by not advertising competition. For direct illegal procurement, an **administrative fee** can be levied by the complaint board (up to 15% of the contract value), which is a legally enforceable decision.

An evaluation of the Public Procurement Complaint Board is under way by an external firm to assess whether the original objectives have been achieved or adjustments are necessary to accomplish them, for example in the Board's composition, competence, cost, and the capacity in the Board and its Secretariat.

Sources: - Norway, response to the OECD Questionnaire.
- Report concerning the Study on Pre-Contract Problem-Solving Systems, August 2002.

Other solutions include the possibility of a decision in a shorter period of time if the complaint is related to the award. For instance, in the Netherlands, in case of urgency (e.g. pending the procurement process), an action can be brought before the president of a district court in **a summary injunction procedure**, where the annulment of the award decision and the order of a new public procurement process for the public contract can be requested.

Adequate remedies

A core element of the integrity of a procurement system is the availability of remedies that can be awarded when an unsuccessful bidder considers that the process was conducted in an inappropriate manner or raises the possibility of violation of the procurement regulations. The recourse system must have the authority to define and enforce interim measures, as well as final remedies that correct inappropriate procuring agency actions and compensate bidders. In Ireland, a complainant may seek to have an award process suspended, an award decision rescinded or be awarded compensation for loss or damages. Box IV.12 illustrates the findings from a recent study of the Programme Support for Improvement in Governance and Management (SIGMA) that identified five main categories of available remedies in the European Union Member States.

Box IV.12. Remedy systems in European countries: Findings from a SIGMA study

The SIGMA Programme is a joint initiative of the OECD and the European Union (EU), principally financed by the EU, with the mission of providing support to partner countries in their efforts to modernise public governance systems. SIGMA carried out in 2006 a comprehensive study of the Public Procurement Review and Remedy Systems in the European Union. The study identified five main categories of available remedies:

Setting aside of public procurement decisions, including the award decision

This remedy is generally available in the EU as a decision prior to the conclusion of a specific contract. Individual award decisions to be set aside can concern an unlawful contract notice, discriminatory specifications or bid documents, an illegal qualification decision, illegal short listing decisions, and even the contract award decision itself. Moreover, review bodies may, for example, order the removal or amendment of specifications and other bid documents or the recommencement of the procurement procedure in total or from a specific point in time. The burden of proof is generally on the applicant.

Interim measures

In a limited number of Member States, filing a lawsuit has an automatic suspensive effect, interrupting the procurement procedure. In most countries bidders have to specifically request the review body to apply interim measures, for example the discontinuation of the procedure. The review body can then apply interim measures pending a final decision, taking into account the probable consequences of interim measures for all interests likely to be harmed, including the public interest, and decide against awarding such measures whenever their negative consequences would outweigh their benefits.

Annulment of a concluded contract

This remedy takes effect after the conclusion of the procurement contract and affirms its cessation. Without the possibility of annulment of an already concluded contract the only remedy remains the damages, so this remedy has particular importance. The annulment of a concluded contract is a widely available remedy in the majority of the EU Member States. However, in practice it is difficult to obtain the annulment of a concluded contract, if it is possible at all. To allow the setting aside of the contract award, many jurisdictions have introduced a standstill period of 7-30 days between the contract award decision and the conclusion of the contract, which is a period given to bidders to initiate review proceedings.

Damages

The requirements for the award of compensation for damages are usually the following: loss (pecuniary or otherwise) suffered by the claimant, a breach of the law by the contracting authority or entity, causality (that is that the loss must be caused by the breach of law). The bid costs are reimbursed in all EU Member States. Regarding damages for lost profits, it is very difficult in most Member States to provide the evidence required for damages for lost profits. Consequently, the number of requests for damages is relatively low in most countries, as are judgements in favour of the complainants.

Pecuniary penalties and periodic penalty payments

Payments are not available remedies for unsuccessful bidders, but form part of the public procurement remedy systems. They are applied in order to force contracting authorities and entities to comply with their judgments. Without acquitting the pecuniary penalties or the periodic penalty payments, the contacting authority cannot continue with the award procedure.

Sources: - Presentation at the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.
- *Public Procurement Review and Remedies Systems in the European Union*, SIGMA Paper N°41, 2007.

Some countries do not provide an **automatic suspension** of the procurement procedure in case of review, which leads in practice to the fact that damages after the conclusion of the contract are often the only available remedy. In Slovenia, the submission of a claim to the National Review Commission has an automatic suspension effect (see Box IV.13). In the United States, when a bidder files a timely protest, the procuring agency is required to put the procurement on hold until the protest is resolved, whether the protest is raised pre- or post-award to the agency or to the General Accountability Office. If the negative consequences of the automatic suspension outweigh its benefits, some countries provide the possibility that the contracting authority asks the review body for **permission to continue** the procurement procedure, except for the conclusion of the contract. They may even allow the possibility of entering into the contract during review proceedings, for instance in Germany.

Box IV.13. Automatic suspension effect of procurement reviews: The National Review Commission in Slovenia

The Public Procurement Act in Slovenia sets up a two-stage review process for procurement decisions. The first procedure consists of a complaint filed directly to the contracting authority, which is a rather formalised procedure with an appointed Review Expert from a list maintained by the Ministry of Finance.

In the second stage, the bidder may initiate proceedings before the National Review Commission in case the bidder does not agree with the decision of the contracting authority or if the contracting authority does not decide in due time (15 days). The National Review Commission is an **independent body under the Parliament**, which was established in 1999 and is responsible for the review of complaints in public procurement. In addition to disappointed bidders, the Public Procurement Office, the State Attorney's Office and the Office of Competition have the right to file a complaint to the Commission.

The submission of a review claim to the Commission has an **automatic suspension effect**. In case of violation of the basic principles of public procurement the Commission examines all the relevant information and decides authoritatively. The National Review Commission consists of five members, of whom one acts as President and one as Deputy-president; all members are appointed by the Parliament. Expert support to the work of members is done through twelve consultants. Two types of decisions can be adopted by the Commission: the claim can be rejected or sustained. In the second case the procedure in question will partially or entirely be invalidated.

The National Review Commission only has the competences of an appellate body to annul decisions of contracting authorities. But the Commission can advise a contracting authority on how to implement the procedure regarding the invalidated element. Such advice can be binding on the authority and in case of a breach the Commission can report to the supervisory body of the contracting authority or to the Government.

The Commission reviews about 300 cases per year. It is obliged to give its judgment within 15 days from receipt of the claim, which can be extended by a further 20 days in justified cases. The average time for handling the complaints is approximately 20 days.

Sources: - Slovenia, response to the OECD Questionnaire.
- *Public Procurement Review: Slovenia,* SIGMA, June 2003.

ENSURING PUBLIC SCRUTINY

There is an emerging trend in several countries to involve more and more stakeholders – not only private sector organisations but also end-users, civil society, the media and the public at large – in the procurement process. Interestingly, in recent years some countries have introduced direct social control mechanisms by involving stakeholders in scrutinising integrity in public procurement.

Independent oversight bodies

In order to ensure public scrutiny, it is common for the legislative branch to undertake reviews of procurement activities, either through a permanent committee or an *ad hoc* committee for investigating a specific issue. Several countries formed a **parliamentary committee** to review projects, conduct investigations and/or organise hearings on large-scale procurements, which hold important risks for public funds (e.g. in Greece, Mexico, the Netherlands, Slovenia and Turkey). Countries that have established a parliamentary committee for procurement usually aim at preventing mismanagement and corruption by:

- Making the link between the procedures for financial planning and control for major public procurement projects;
- Providing the Parliament with a formal position in the agenda setting process; and
- Empowering the Parliament's budget's right.

Box IV.14 illustrates the results of a recent Dutch parliamentary inquiry in big infrastructure projects and the role of the parliamentary committee in reinforcing political control over major projects.

Box IV.14. Strengthening parliamentary control in big infrastructure projects: Findings of the Dutch parliamentary inquiry

Large infrastructure investments contain particularly high risks because of their long planning horizons where the budget scheduling may not be adequate for reasons such as unplanned events or the change of scope of the project.

In order to verify the integrity of decisions made on high-valued public investments, the Netherlands established a Parliamentary Committee to review the realisation of large infrastructure projects, The Committee showed that in **nine cases out of ten decisions about large infrastructure projects are misinformed** about costs and benefits, cost overruns and benefit shortfalls being the most common pitfalls. This is illustrated by two cases that have been investigated by the Committee:

- *The Betuwe Route construction:* This route is a 160 km long railway line that enables the growing flow of goods from the international seaport of Rotterdam to be transported via the European hinterland. In this special case, the analysis of the Committee showed that the budget for the project had doubled between 1983 and 2005 due to price increases (34% of the total cost increase) and to the change of scope (42% of price increase).
- *Reconstruction of the High Speed Line South:* this route between the Netherlands and Belgium is a project that showed a 43% difference between the original bidding price and the current costs for the budget.

One recommendation of the investigation of the Parliamentary Committee was that earlier involvement of the Parliament would have been necessary. Political control could be reinforced on government procurements through an explicit parliamentary agreement on the need for the infrastructure project. Furthermore, the Parliament should have put more effort into controlling government purchases and spending.

These conclusions indicate a possible shift in balance of power between Parliament and the administration in procurement to promote a higher level of transparency and better information sharing. The Parliament should be able to check crucial information about major projects involving important risks for public funds.

Source: Parliamentary Committee on Infrastructure Projects, Keynote speech of the Netherlands at the OECD Expert Meeting on Integrity in Public Procurement, June 2005.

Another common form of independent oversight is the Ombudsman/Mediator, who may conduct investigations into procurement activities and resolve matters by conciliation (e.g. Australia, Belgium, Brazil, Luxembourg, New Zealand and the United Kingdom). Last but not least, Supreme Audit Institutions also contribute to scrutinising government actions, with the preparation of reports for Parliaments. For instance, in Poland, the award of the contract is subject to control from the Supreme Chamber of Control, a constitutional body independent from the government administration that reports to Parliament. This scrutiny keeps public servants accountable for their actions, ultimately, to the public.

The international community also plays a key role in monitoring progress in public procurement reforms, in particular in aid recipient countries. In particular, the OECD Development Assistance Committee (DAC) Joint Venture for Procurement is working together with multilateral and bilateral donor members and partner countries to assess the performance and quality of public procurement systems in developing countries (see Box IV.15).

Box IV.15. Assessments in developing countries: The OECD-DAC Joint Venture for Procurement

The OECD-DAC Joint Venture for Procurement is developing with donor members and partner countries a common, country-led approach to strengthening the quality and performance of public procurement systems.

The latest version of the **methodology** has been developed to be the first test version of this "mutually agreed framework" for procurement systems. It consists of several instruments, in particular:

- **The Baseline Indicators** are made up of four "pillars": I – Legislative and Regulatory Framework, II – Institutional Framework and Management Capacity, III – Procurement Operations and Market Practices and IV – Integrity and Transparency of the Public Procurement System (see Annex E for details on pillar IV).

- **The Compliance and Performance Indicators** help identify areas of weak compliance or performance. Indicators are associated with the Baseline Indicators but are not scored at this point in time. As there are no agreed standards of performance, analysis of available data and information can determine the degree of compliance of the system with the country's own policies and regulations. The use of indicators has to be determined on a country-by-country basis taking into consideration the specific capacities and available data and information.

A pilot exercise involving 22 pilot countries in Africa, Latin America and Asia is starting up in 2007 by means of a series of regional orientation workshops; these workshops aim at raising awareness about the structure and the application of the latest version of the common methodology for benchmarking and assessing public procurement systems. The workshops will also focus on the country-led teams of development partners that are to plan and manage the pilot exercise process, including the diagnosis/assessment phase and the development of procurement capacity development Action Plans.

Issues such as transparency, fairness and accountability (to donor and partner parliaments) will be given special consideration in discussions between pilot country and development partner representatives about the validation of assessment results. The roles and capacities of civil society and the private sector in monitoring and supporting transparency and accountability will be examined in the different country contexts during the pilot exercise.

Direct social control

An emerging practice is the use of direct social control by involving stakeholders in scrutinising integrity in public procurement. The **involvement of stakeholders** – private sector, end-users, civil society, the media or the public at large – aims at ensuring integrity in procurement, either through monitoring of the process, as a simple observer, or direct participation of stakeholders at key decision-making points.

Although a majority of countries have strong accountability mechanisms, more and more countries have involved representatives from NGOs, academics, end-users organisations and/or industries to **scrutinise the integrity of the procurement process**. In particular Integrity Pacts have been used in various regions of the world to bind both government officials and stakeholders to ethical conduct, using civil society as an independent eye in the process. They have two main objectives, namely to enable:

- **Companies** to abstain from corruption by providing assurance to them that the competitors will similarly refrain from corruption, and the government agencies are also committed to prevent corruption; and
- **Governments** to reduce the high costs and the distortion effect of corruption in public procurement.

Stakeholders may be involved in monitoring the whole process from the pre-bidding to the contract management and payment, for instance in Mexico, or at specific vulnerable points in the process (e.g. observation of the opening of bids, of the negotiations, contract management, etc.). It is usually organised on an ad hoc basis (e.g. signature of a specific agreement between the procuring authority and the bidders) but may take a more permanent institutionalised form. For instance, in Luxembourg, members of the Chamber of Commerce and of the Association of Professions are systematically invited to attend the opening of bids.

Direct social control mechanisms have a potential not only to promote the integrity of the public procurement process, but also to improve overall efficiency. This has proved particularly useful in the contract management to help ensure the efficiency of the contract, for example, through social auditing or citizens' oversight. Box IV.16 illustrates how stakeholders, 'Social Witnesses', testify the integrity of the process, as well as provide recommendations to improve procurement processes.

Box IV.16. Direct social control in procurement: Social Witness in Mexico

The social witness is a representative of civil society, who acts as an external observer in a specific public procurement process. In order to promote transparency, diminish the risk of corruption and improve overall efficiency of procurement, this practice has been used for several years on a voluntary basis by public organisations in Mexico, following *Transparencia Mexicana*'s recommendation. The social witness not only provides a public testimony on the procurement process but may also provide non-binding recommendations during and after the process.

The social witness must be a highly honourable, recognised and trusted public figure who is independent from the parties involved in the process. The social witness has full access to the information and documentation in the procedure and also has the right to participate in critical stages of the procurement process, in particular:

- Checking the basis of the bid and the bidding notice;
- Observing all the sessions that are held with possible bidders to clarify any doubts they may have;
- Receiving the unilateral integrity declarations from the parties;
- Witnessing the delivery of technical and economic proposals;
- Observing the session in which the awarding will be announced.

Since December 2004, a strict regulation specifies the criteria for participation of social witnesses in procurement. In order to obtain a registration, they should in particular:

- Prove that they are not public officials;
- Have no penal antecedents nor have been sanctioned or disqualified;
- Declare formally that they will not participate in a procurement that could lead to a conflict-of-interest situation (e.g. family or personal relationship, business interest, etc.);
- Have knowledge of legal regulations related to procurement (if not they will attend a training session provided by the government).

In case of disrespect of ethical standards or disclosure of information on the procedure, the social witness is liable to sanctions.

The use of social witness has proved successful for the procurement of the *Comision Federal de Electricidad* (Federal Electricity Commission). The recommendations of the social witness have led to significant improvements, including an increase by 50% of the number of suppliers that have submitted bids, the expansion of the time limit for the presentation of bids and the provision of more precise and clear answers to the questions of bidders. The government estimated that the involvement of the social witness has led to a saving of USD 26 million in the overall cost of this procurement of hereditary insurances.

The actual list of registered social witnesses in Mexico can be found on the website of the Ministry of Public Administration (http://www.funcionpublica.gob.mx/unaopspf/unaop1.htm).

Source: Mexico, response to the OECD Questionnaire.

Alternatively, stakeholders may be actively **participating in decision-making points** of the public procurement process. Active participation means that stakeholders take a role in the exchange on policy making, for

example by suggesting policy options. In Belgium an advisory commission is used for important projects. In some cases, decisions are made in co-operation and consent between authorities and representatives of stakeholders, for instance in Korea and the United States. This is an advanced two-way relation between government and stakeholders based on the principle of partnership.

Participation is usually carried out on an ad hoc basis. For example, the procuring team in the United States balances many competing interests in the acquisition process, by involving not only representatives of the technical, supply and procurement communities but also sometimes the customers they serve, and the contractors who provide the products and services. Furthermore, in some countries, the participation is integrated in the review of complaints raised in the procurement process. For instance, two of the members of the Public Procurement Board in Turkey, which is the regulatory and review procurement body, are selected by the Cabinet among persons who have necessary qualifications and are nominated by the Union of Chamber of Commerce and Trade and the Confederation of Turkish Businessman Union.

A concern has been to ensure that the process for selecting stakeholders is based on sound criteria for selection (e.g. personal integrity of stakeholder, relevant expertise) and that clear restrictions are defined to prevent conflict-of-interest situations (e.g. absence of a relationship with contracting parties, etc.). The stakeholders monitoring the procurement process may be paid by civil society directly or possibly by the authority that is being monitored provided that the contract is transparent. Furthermore, both officials and stakeholders should be **liable for their actions**. In Korea, the Memorandum of Integrity Pact for suppliers, that is included in contract terms and conditions, includes the possibility of cancellation of contract, forfeiture of bond, liquidated damages and debarment of suppliers in case of proven corruption. Similarly, all employees from the Public Procurement Service who submit integrity pledges based on the Integrity Pact are held liable for compensation when they, on purpose or by mistake, cause damage to assets of government organisations. Box IV.17 highlights some of the results that have been achieved by the government of Korea.

Box IV.17. Adopting Integrity Pacts in Korea

An Integrity Pact (IP) is a multilateral and **mutual pact** against corruption among government organisations and bidders to prevent corruption in public procurement which establishes mutual rights and obligations.

In Korea, the Seoul Metropolitan Government adopted the concept of the Integrity Pact in July 2000, followed by the Public Procurement Service of Korea that implemented the Pact in March 2001. For the monitoring and full implementation of the Integrity Pacts, an IP Ombudsman System with five Ombudsmen has been introduced that organises **public hearings** at critical stages of the process for major construction, supply or consultant contracts. Experience indicates good acceptance and recognition by bidders of the benefits. For example, a survey by TI Korea in 2004 shows that after the adoption of Integrity Pacts, 91.4% of private sector respondents noticed a positive change in the attitude of public sector officials in connection with corruption; and 72.2% of public sector officials noticed a positive change in the attitude of private sector actors.

Since their original conception, Integrity Pacts have been used in 16 countries worldwide. They have proved to be **adaptable to different legal and economic** contexts from Colombia through Korea to Germany (e.g. the international airport in Berlin-Schönefeld) and have also been used for very sensitive purchases such as defence.

Sources: - OECD Symposium Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement, November 2006.
- Transparency International Integrity Pact and Public Contracting Programme.

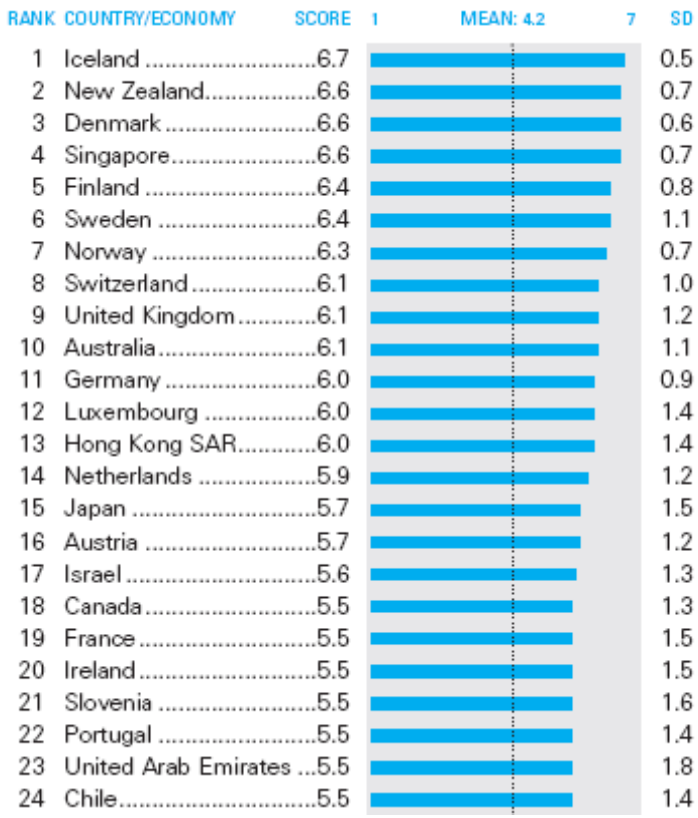
More generally, experience with Integrity Pacts in various countries shows that the conditions for successful implementation include:

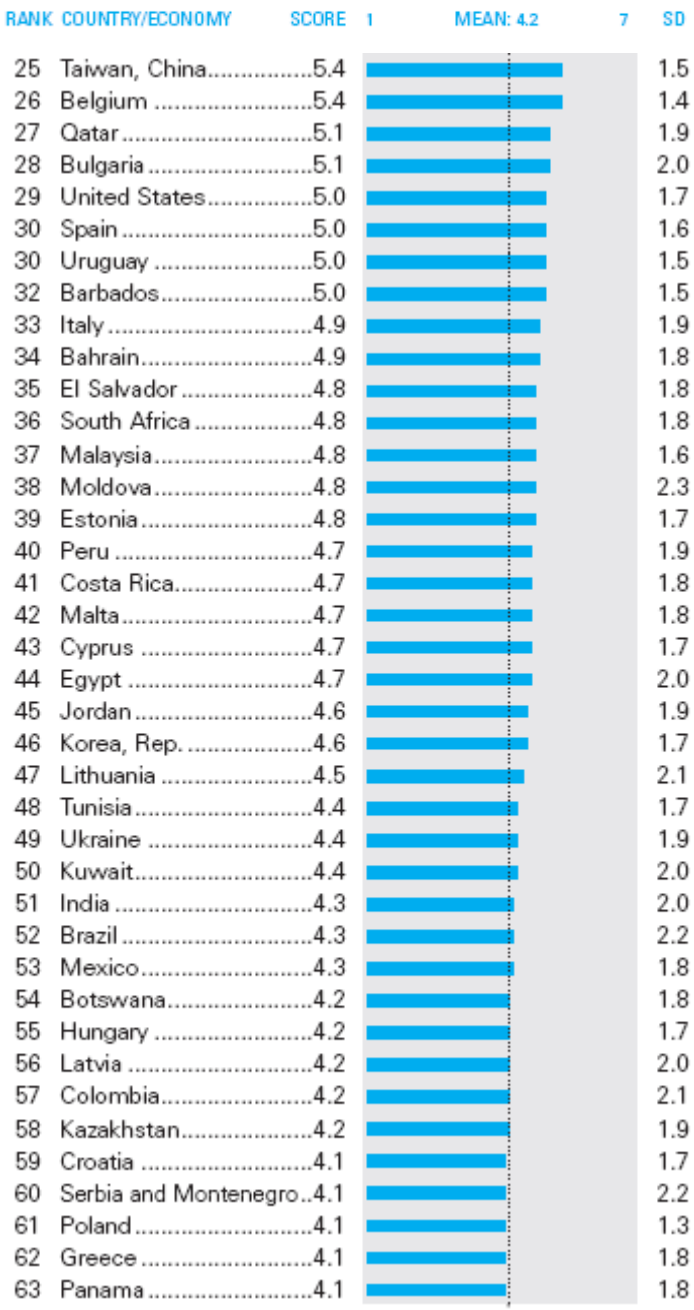
- Ensuring transparency at all steps of the process, from needs assessment to contract management and payment, through unrestricted access to all documents for the Monitor and for all activities, including when using consultants;
- Building a coalition of the main stakeholders with a strong commitment demonstrated by the public authority for the implementation of the Pact;
- Providing adequate incentives and sanctions for both the public authority and bidders;
- Ensuring independent monitoring of all phases of procurement that brings both policy and technical expertise to the project; and
- Helping provide the right conditions for detecting corruption, in particular through a whistleblowing system that both encourages and protects against potential retaliation.

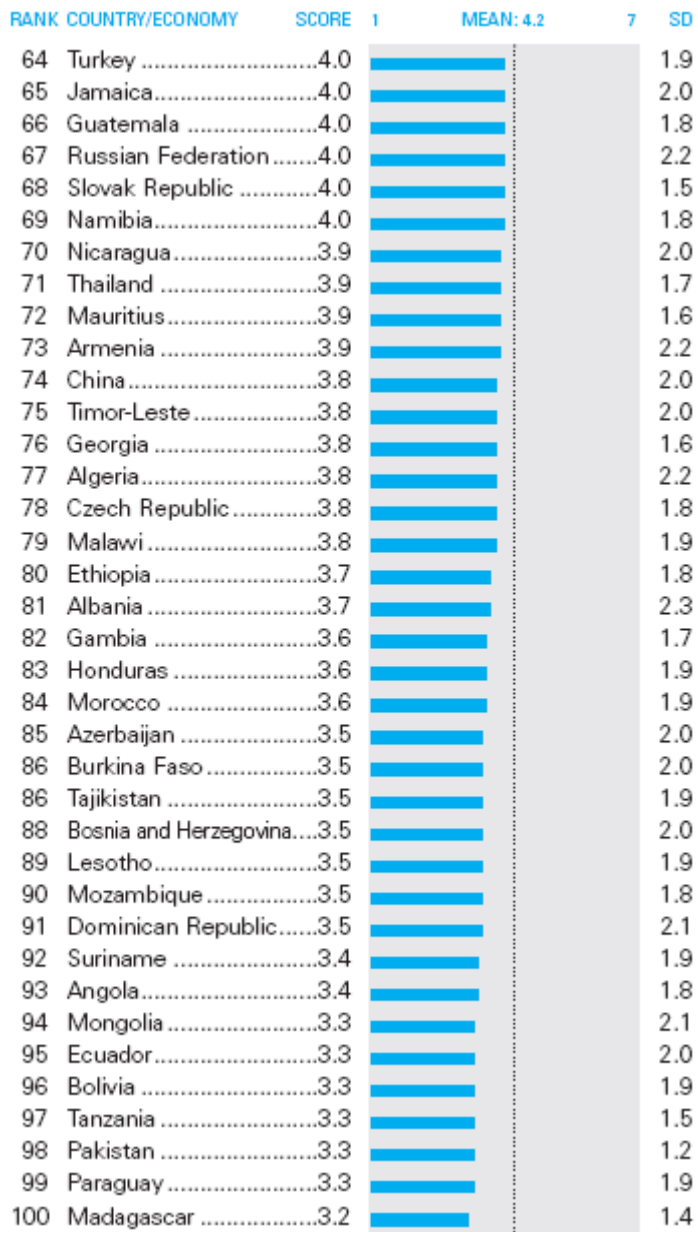
ANNEX A

IRREGULAR PAYMENTS IN PUBLIC CONTRACTS

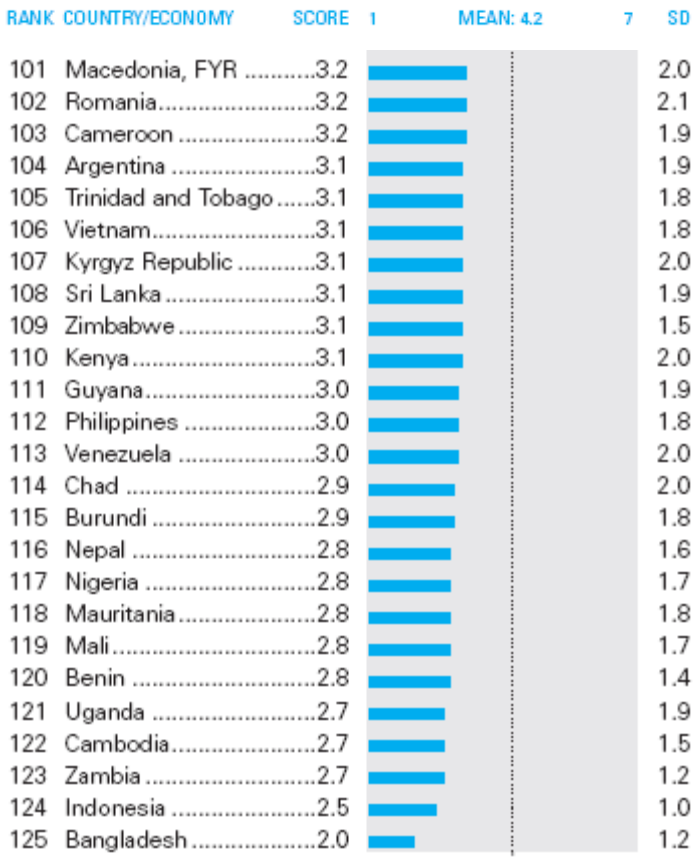
In your industry, how commonly would you estimate that firms make undocumented extra payments or bribes connected with awarding of public contracts (investment projects) (1 = common, 7 = never occur)?




RANK COUNTRY/ECONOMY SCORE 1 MEAN: 4.2 7 SD
25 Taiwan, China 5.4 1.5
26 Belgium 5.4 1.4
27 Qatar 5.1 1.9
28 Bulgaria 5.1 2.0
29 United States 5.0 1.7
30 Spain 5.0 1.6
30 Uruguay 5.0 1.5
32 Barbados 5.0 1.5
33 Italy 4.9 1.9
34 Bahrain 4.9 1.8
35 El Salvador 4.8 1.8
36 South Africa 4.8 1.8
37 Malaysia 4.8 1.6
38 Moldova 4.8 2.3
39 Estonia 4.8 1.7
40 Peru 4.7 1.9
41 Costa Rica 4.7 1.8
42 Malta 4.7 1.8
43 Cyprus 4.7 1.7
44 Egypt 4.7 2.0
45 Jordan 4.6 1.9
46 Korea, Rep. 4.6 1.7
47 Lithuania 4.5 2.1
48 Tunisia 4.4 1.7
49 Ukraine 4.4 1.9
50 Kuwait 4.4 2.0
51 India 4.3 2.0
52 Brazil 4.3 2.2
53 Mexico 4.3 1.8
54 Botswana 4.2 1.8
55 Hungary 4.2 1.7
56 Latvia 4.2 2.0
57 Colombia 4.2 2.1
58 Kazakhstan 4.2 1.9
59 Croatia 4.1 1.7
60 Serbia and Montenegro 4.1 2.2
61 Poland 4.1 1.3
62 Greece 4.1 1.8
63 Panama 4.1 1.8



RANK	COUNTRY/ECONOMY	SCORE	SD
64	Turkey	4.0	1.9
65	Jamaica	4.0	2.0
66	Guatemala	4.0	1.8
67	Russian Federation	4.0	2.2
68	Slovak Republic	4.0	1.5
69	Namibia	4.0	1.8
70	Nicaragua	3.9	2.0
71	Thailand	3.9	1.7
72	Mauritius	3.9	1.6
73	Armenia	3.9	2.2
74	China	3.8	2.0
75	Timor-Leste	3.8	2.0
76	Georgia	3.8	1.6
77	Algeria	3.8	2.2
78	Czech Republic	3.8	1.8
79	Malawi	3.8	1.9
80	Ethiopia	3.7	1.8
81	Albania	3.7	2.3
82	Gambia	3.6	1.7
83	Honduras	3.6	1.9
84	Morocco	3.6	1.9
85	Azerbaijan	3.5	2.0
86	Burkina Faso	3.5	2.0
86	Tajikistan	3.5	1.9
88	Bosnia and Herzegovina	3.5	2.0
89	Lesotho	3.5	1.9
90	Mozambique	3.5	1.8
91	Dominican Republic	3.5	2.1
92	Suriname	3.4	1.9
93	Angola	3.4	1.8
94	Mongolia	3.3	2.1
95	Ecuador	3.3	2.0
96	Bolivia	3.3	1.9
97	Tanzania	3.3	1.5
98	Pakistan	3.3	1.2
99	Paraguay	3.3	1.9
100	Madagascar	3.2	1.4



Source: World Economic Forum, Executive Opinion Survey 2006, The Global Competitiveness Report 2006-2007, Creating an Improved Business Environment (2006).

ANNEX B

SURVEY METHODOLOGY

In order to test the hypotheses put forward by participants at the 2004 Global Forum on Governance: Fighting Corruption and Promoting Integrity in Public Procurement, the OECD launched a survey collecting countries' experiences in promoting integrity in public procurement.

FOCUS OF THE SURVEY

The Expert Meeting on Integrity in Public Procurement on 20-21 June 2005 provided insights into countries' views on the relevant focus for launching the survey on integrity in public procurement**:**

- The survey focuses primarily on **practices** - but may also include relevant formal laws and institutions - for promoting integrity in public procurement at **all stages** of the procurement process. There is an increasing recognition that risks of corruption often lie before or after the bidding process, in the assessment of needs and the contract management.
- The Questionnaire aims at collecting information on OECD countries' experiences at the central level in **fostering transparency, integrity and accountability** in public procurement.

METHODOLOGY

Country experts have been nominated by the OECD Public Governance Committee delegates to take part in the survey. Nominated experts are primarily practitioners in charge of designing, supervising and managing procurement processes at the central level. In order to provide a full view of the public procurement cycle, auditors, members of competition authorities and anti-corruption specialists have also been involved in the survey.

The Questionnaire was developed and tested with an informal task force of volunteer experts of this network – from Canada, France, Germany, Korea, Mexico, Spain, Sweden, the United Kingdom and the United States.

It was then applied to 29 OECD countries and three observers, namely Brazil, Chile and Slovenia.

The findings and identified good practices were reviewed by nominated government procurement experts, as well as representatives from civil society and private sector at the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement on 29 and 30 November 2006.

Furthermore, participants at the Symposium and the back-to-back Global Forum on Governance: Sharing Lessons on Promoting Good Governance and Integrity in Public Procurement, on 30 November and 1 December 2006 called for the inclusion of selected good practices from non-OECD countries in the report. The good practices from non-OECD countries that have been included are based on discussions at the Global Forum, as well as on results of former work by the OECD-DAC Joint Venture on Procurement.

QUESTIONNAIRE

In accordance with the focus of the Report, the Questionnaire helped to collect OECD countries' experiences at the central level on three key aspects:

I. Government practices that help **provide a level playing field for bidders through an adequate level of transparency** at all stages of the public procurement process. The first part of the Questionnaire explores recent trends in the information disclosed to bidders, potentials and limits of procedures for providing equal and timely access to information, as well as limitations to transparency.

II. Preventative mechanisms that help **identify and address risks of mismanagement and corruption** in procurement. The second part of the Questionnaire focuses on risk management instruments and techniques that increase the predictability, transparency and integrity of procurement processes.

III. Mechanisms to **ensure control and accountability**, from the assessment of needs (e.g. planning, budgeting) to contract management (e.g. payment). The third part of the Questionnaire reviews traditional as well as emerging mechanisms to keep public officials and bidders/intermediaries/contractors accountable.

The Questionnaire comprises 10 main questions. In addition, guidance is provided to help experts fill in the answers by clarifying the type of expected information.

I. Providing a level playing field for bidders through an adequate level of transparency in public procurement: From policy to practice

- How is information made available in practice to bidders/intermediaries/contractors at the different stages of the procurement process?
- What specific instruments and procedures are used for providing equal, timely and consistent access to information for bidders, and in particular what is the role of information and communication technologies?
- Under what circumstances are exceptions made to the general public procurement rules? In these circumstances, what are the measures available for ensuring a level playing field for bidders/intermediaries/contractors?

II. Preventative mechanisms to identify and address risks of mismanagement and corruption in public procurement

- Where have the risks for mismanagement and corruption been identified in the procurement process, from the assessment of needs and planning to contract management (e.g. payment)?
- What are the internal instruments and techniques for ensuring that public funds are used in public procurement according to the purposes intended, for minimising risks of mismanagement, and for improving value for money?
- What specific anti-corruption and conflict-of-interest policies help promote integrity in public procurement?

III. Mechanisms for ensuring control and accountability in the public procurement process

- What have been the developments in your country in the last five years to balance the discretionary power of public officials (e.g. procurement officers, elected officials, etc.) with the need for accountability?
- How are public officials and bidders/intermediaries/contractors kept accountable at all stages of the public procurement process?
- Have stakeholders – in particular private sector, end-users, civil society or the public at large – been involved in the procurement process, if so how?
- How do you ensure fair and timely resolution of formal administrative complaints related to the procurement process?

Additional information

- Please take this opportunity to share the document(s) that include good practices related to procurement that might have been developed in your country (e.g. guidebook, audit report, etc.). Please indicate how these good practices have been identified and the conditions for their effective functioning.
- In addition, please provide a description in a few lines of the relevant legal and institutional frameworks, including the legislative framework for public procurement processes (e.g. reference to relevant laws and regulations), the central institutions for supervising and monitoring public procurement, the mechanism for handling complaints, and the institutions and procedures for internal and external control and audit.

GUIDANCE FOR COMPLETING THE QUESTIONNAIRE

The sub-questions are intended to **help you fill in the answers** by clarifying the type of expected information.

The primary aim of the Questionnaire is to collect **good practices** at the **central level**, to be included in the Report. In order to gain a better understanding of the conditions for ensuring integrity in public procurement, you might also provide examples of problems, highlighting the reasons and factors for failure.

In your answers, please focus on the measures used in **daily practice.** You may also include information on formal laws and institutions when relevant.

1. How information is made available in practice to bidders/ intermediaries/contractors at the different stages of the procurement process?

Please use the **table** below to summarise:

a) How is **information** made available in: (a) assessment of needs/specifications; (b) selection and award/criteria; (c) debriefing of award results; and (d) contract management/payment.

b) **Who** can have access to the information (e.g. supplier, unsuccessful bidders).

c) To what extent procurement regulations define specific **restrictions on release of privileged information** related to procurement.

	How information is made available in practice	**To whom** (supplier/bidders /intermediaries/contractors)	**Specific restrictions on release of privileged information**
Assessment of needs/ Specifications			
Selection and award/ Criteria			
Debriefing of award results			
Contract management/ Payment			

2. What specific instruments and procedures are used for providing equal, timely and consistent access to information for bidders, and in particular what is the role of information and communication technologies?

Please specify in particular:

a) The main features of the **procurement information system** and in particular the contribution of information and communication technologies in providing a level playing field for bidders (e.g. an e-procurement system that provides a one-shop service, avoids

personal contact, etc.). Please provide the web link to the e-procurement system.

b) What instruments are used for ensuring timely and **consistent disclosure** of information (e.g. model bid documentation including terms and conditions of the contract), how they are tailored to the type of goods and services, updated to reflect the needs of stakeholders and communicated to them.

c) In case of **change in information,** or **demand for clarification** of information, what are the procedures for ensuring that the same level of information is provided to each bidder (e.g. criteria for defining how to disclose additional information, contact points for enquiries, etc.)

3. Under what circumstances are exceptions made to the general public procurement rules? In these circumstances, what are the measures available for ensuring a level playing field for bidders/intermediaries/contractors?

Please describe the circumstances and specify what precautionary measures ensure a level playing field (e.g. transparency, additional guidance, monitoring, etc.) in these circumstances, such as:

a) **When the procedure cannot be fully completed** (e.g. none of the bids fulfil the technical requirements as defined in the call for bidding, requirements turn out to be unrealistic in the contract management).

b) When general public procurement rules do not apply, in particular the difference between procurement procedures used above and below the threshold as well as the procedures used in specific circumstances (e.g. national security, emergency, etc.).

d) When using pre-qualification (e.g. restricted bid, agreed vendors' list, framework agreement etc.).

e) When taking into account economic and social considerations in procurement (e.g. favouring bidders from economically disadvantaged areas).

4. Where have the risks for mismanagement and corruption been identified in the procurement process, from the assessment of needs and planning to contract management and final payment?

Please specify in particular:

a) **What risks** have been identified in the procurement system, to whom these findings have been disclosed, and whether these findings have resulted in **recommendations** (e.g. suggested modifications in laws, development of specific preventative instruments, etc.).

b) How the risks have been identified: the **mechanism** used (e.g. government-wide spending control and public finance management programme, internal management accountability framework, audit, etc.), and the **technique** (e.g. random sample testing of risks in procurement)

c) The **focus** of the review, such as contracts below thresholds (e.g. the number of contracts per year just below approval thresholds, aggregated value of procurement contracts over a year to prevent "contract splitting") or circumstances that require exceptions to public procurement procedures (criteria used under the threshold, justification for invoking emergency in procurement contract variations, etc.).

5. What are the internal instruments and techniques for ensuring that public funds are used in public procurement according to the purposes intended, for minimising risks of mismanagement, and for improving value for money?

Please specify in particular:

a) The management mechanisms to ensure that public funds for procurement are **used for the purposes intended** (e.g. procedure for approval and monitoring of funding by government and within departments in accordance with laws and budget documents, ability to report publicly on procurement expenditures, etc.)

b) The main instruments for improving **the planning and implementation process** in public organisations – particularly in the case of decentralised units (e.g. annual procurement plans,

internal control based on materiality[25] and risk, procedures for management approval of business cases to justify major contracts, model for risk sharing between government and bidder, etc.).

c) Whether there is a **system/database for collecting statistical information** on public procurement (e.g. national statistical office), the main **objective** of the system (e.g. procurement planning, benchmarking, detection of possible corrupt practices, etc.), and how it is used in **policy making** (type of data collected, integration of data in financial reporting, capacity to analyse patterns and trends in a department or at a government-wide level, data reported publicly and fed back into the system).

d) The accountability chain for **officials working in vulnerable positions** in relation to procurement (e.g. general managers such as budget holder, procurement officials, etc.) and what **capacity-building measures** are in place to ensure **integrity** (e.g. professional training that includes integrity issues) and to respond to a potential need or dilemma (e.g. advisory service).

6. What specific anti-corruption and conflict-of-interest policies help promote integrity in public procurement?

Please specify in particular:

a) The general requirements for officials/contractual staff involved in procurement to prevent corruption in the process (e.g. clear separation of duties and authorisations between the individuals/bodies, rotation of officials, four-eyes principle, disclosure requirements such as declarations of financial interests, etc.), and the exceptions to their application (e.g. discretionary power below threshold).

b) What ethical standards, prohibitions and restrictions apply to officials/contractual staff involved in procurement as well as bidders/intermediaries/contractors, in what form (e.g. anti-corruption clause, integrity pact, code of conduct, Business Integrity Management Systems, etc.) and how they are communicated and enforced (e.g. condition for entry into an awarding procedure).

25. Materiality can be defined as the magnitude of an omission or misstatement of accounting information that make it probable that the judgment of a reasonable person relying on the information would have been changed or influenced by the omission or misstatement. Therefore, risk is a measure of uncertainty, whereas materiality is a measure of magnitude or size.

c) Whether there are specific policies to establish or verify the integrity of bidders/ intermediaries/contractors (e.g. "white listing", assessment of integrity and/or financial competence, disclosure of commissions paid to individuals/firms for services provided in the procurement process) and whether they apply to all contracts.

7. What have been the developments in your country in the last five years to balance the discretionary power of public officials (including procurement officers, elected officials, etc.) with the need for accountability?

Please specify in particular:

a) In a context of delegated authority, how standards, incentives (e.g. staff performance evaluation process) as well as accountability mechanisms for procurement officers help find the right balance between flexibility (e.g. being rapid and responsive) and control (e.g. preventing and detecting corruption) in procurement.

b) How the integrity of public officials' decisions is verified at different stages of the procurement process (e.g. review of how criteria for the selection and evaluation of bids are determined, whether they are strictly applied in decisions, how selection requirements can be waived, whether specifications are defined in a non-discriminatory manner, reasons for delays in payment, etc.).

8. How are public officials as well as bidders/intermediaries/ contractors kept accountable at all stages of the public procurement process?

Please specify in particular:

a) The main accountability mechanisms for public officials and bidders/intermediaries/contractors, in particular in the contract management phase (e.g. policies for approving/monitoring/ recording/reporting contract variations, policies for ensuring due diligence in payment processes, etc.).

b) What internal control processes over individual transactions ensure the management of the procurement function, and how co-ordination is ensured between internal control and external audit of procurement processes.

c) Whether information is available on the number and type of breaches filed (for example, in 2005) and the sanctions applied for suppliers/intermediaries as well as public officials.

9. Have stakeholders – in particular private sector, end-users, civil society, the media or the public at large – been involved in the procurement process, if so how?

Please specify in particular:

a) Whether their role was rather advisory (e.g. consultation of private firms in the definition of needs through preparation of a study, etc.) or control-oriented (e.g. verifying the integrity of the process), and at what stage of the procurement process they were involved.

b) How you ensure that the process for integrating the views of stakeholders is not biased (e.g. criteria for selection, representative sample, identification of conflict-of-interest situations, etc.)

c) Whether independent watchdogs are also involved in monitoring the process (e.g. role of the legislative power in providing a framework for integrity in public procurement, for instance a Parliamentary Committee monitoring the management of large procurement projects).

10. How do you ensure fair and timely resolution of formal administrative complaints related to the procurement process?

Please specify in particular:

a) The internal and external complaint mechanisms, in particular whether a procedure to report mismanagement and corruption exists for procurement personnel, suppliers and other stakeholders.

b) What information is kept in the records, the protection available against retaliation when making a complaint, the precautionary measures to limit the number of unfounded complaints.

c) The institution(s) in charge of handling administrative complaints, the average time for resolution, and whether the procedure provides the possibility of challenging government actions prior to or after the award.

ANNEX C

PROBITY PLANNING CHECKLIST IN AUSTRALIA

The probity plan, in line with established probity guidelines and procedures, is mainly used in Australia when the procurement is of high value and in need of careful management, or if the procurement is likely to encounter ethical problems. Where utilised, probity plans carefully take into consideration the relevant characters of the procurement case, such as its size, complexity and risks. The following checklist of probity issues can be used in the construction of a probity plan:

PROBITY PLANNING	☑
Determine whether a probity auditor and/or adviser is needed	☐
Obtain conflict of interest declarations from team members	☐
Obtain confidentiality agreements from external participants	☐
Finalise the probity plan, if one is being used	☐
Consider confidentiality requirements	☐
Set up physical security procedures, such as the document register or data room	☐
Ensure team members are familiar with all relevant policies and documents	☐
Set up procedures so all potential suppliers have access to the same information	☐

PROCUREMENT PROCESS	☑
Review probity at the end of the bid preparation process	☐
Set up a process for receiving, recording and acknowledging submissions	☐
Set up a procedure for opening the bid box	☐
Document any changes that occur, and notify all potential suppliers	☐
Ensure evaluation of submissions is fair, consistent and competitive	☐
Review probity at the end of the evaluation process	☐
Notify the successful bidder as soon as possible	☐
Notify the unsuccessful bidders as soon as possible	☐
Debrief unsuccessful bidders	☐
Ensure all actions are documented, and the documents are stored appropriately	☐
Review probity at the end of the process	☐

Source: Australia, Guidance on Ethics and Probity in Government Procurement, Financial Management Guidance, N° 14, January 2005. (http://www.finance.gov.au/procurement/ep_appendices.html#ChecklistforProbityPlanning).

ANNEX D

Comparative Overview of Public Procurement Structures in EU Member States by SIGMA

Member State	Key Institutions	Number of Staff	Sub-ordination	Main Functions
1. Austria (Semi-centralised structure)	Section for Procurement Law	4	Federal Chancellor's Office	Drafting primary and secondary legislation; International co-ordination; Advisory functions; Monitoring and control; Information.
	Federal Procurement Ltd.	58	Ministry of Finance	Business development and co-ordination; Central purchasing.
2. Bulgaria (Centralised structure)	Public Procurement Agency	38	Ministry of Economy and Energy	Drafting primary and secondary legislation; Advisory and operations' support; International co-ordination; Monitoring and control; Publication and information; Professionalisation and capacity-strengthening.
3. Cyprus (Centralised structure)	Public Procurement Directorate	14	Treasury	Drafting primary and secondary legislation; Advisory and operations' support; International co-ordination; Monitoring and control; Professionalisation and capacity-strengthening.

4. Czech Republic (Centralised structure)	Public Investment Department	17	Ministry for Regional Development	Drafting primary and secondary legislation; Advisory functions; International co-ordination; Monitoring and control; Publication and information (partially).
5. Estonia (Centralised structure)	Public Procurement Office	19	Ministry of Finance	Advisory and operations' support; International co-ordination; Monitoring and control; Publication and information; Professionalisation and capacity-strengthening.
	State Aid and Public Procurement Unit, Public Governance Department	4	Ministry of Finance	Drafting primary and secondary legislation.
6. Finland (Decentralised structure)	Trade Department	4	Ministry of Trade and Industry	Drafting primary and secondary legislation; International co-ordination (shared); Advisory functions (shared). Monitoring and control; Information; Professionalisation and capacity-strengthening (shared).
	Budget Department	2	Ministry of Finance	Overall policy.
	Haus Ltd	2	Ministry of Finance	Professionalisation and capacity-strengthening (shared).
	Hansel Ltd	50	Ministry of Finance	Business development and co-ordination; Central purchasing.
7. France (Semi-centralised structure)	Public Procurement Department, Directorate for Legal Affairs	40	Ministry of Economy, Finance and Industry	Drafting primary and secondary legislation; Advisory and operations' support; International co-ordination; Monitoring and control; Information.

8. Germany (Semi-centralised structure)	BMWi	10	Federal Ministry of Economy and Technology	Drafting primary legislation; Drafting secondary legislation (shared); International co-ordination; Advisory functions; Monitoring and control; Information.
	Bundesverwaltungsamt (Federal office for administration)	9	Federal Ministry of Interior	Publication.
	Ministry of Transport, Building and Urban Affairs			Professionalisation and capacity-strengthening (shared with many).
9. Hungary (Centralised structure)	Public Procurement Council	35	Parliament	Advisory and operations' support; International co-ordination; Monitoring and control; Publication and information; Professionalisation and capacity-strengthening.
	Department of Civil Law, Codification and International Private Law	4	Ministry of Justice and Law Enforcement	Drafting primary and secondary (shared) legislation; International co-ordination.
10. Ireland (Semi-centralised structure)	National Public Procurement Policy Unit	12	Department of Finance	Drafting primary legislation; Advisory and operations' support; International co-ordination; Monitoring and control; Professionalisation and capacity-strengthening.
11. Italy (Semi-centralised structure)	Public Works Authority	237	Parliament	Monitoring and control.
	CONSIP (limited public company)	500	Ministry of Economy and Finance (owner)	Advisory and operations' support; Professionalisation and capacity-strengthening; Business development and co-ordination; Central purchasing.
	Council of Ministers			Drafting primary legislation.

12. Latvia (Centralised structure)	Procurement Monitoring Bureau	32	Ministry of Finance	Advisory and operations' support; International co-ordination; Monitoring and control; Publication and information; Professionalisation and capacity-strengthening; Complaints review and remedies.
	Ministry of Finance	3		Drafting primary and secondary legislation; International co-ordination.
13. Lithuania (Centralised structure)	Public Procurement Office	60	Office of the Prime Minister	Drafting secondary legislation; Advisory and operations' support; International co-ordination; Monitoring and control Publication and information'; Professionalisation and capacity-strengthening.
	Ministry of Economy	3		Drafting primary legislation; International co-ordination.
14. Luxembourg (Semi-centralised structure)	Ministry of Public Works	1		Drafting primary legislation; Advisory functions; International co-ordination; Monitoring; Information.
15. Malta (Centralised structure)	Department of Contracts	40	Ministry of Finance	Drafting primary and secondary legislation; Advisory and operations' support; International co-ordination; Monitoring and control; Publication and information; Professionalisation and capacity-strengthening; Business development and co-ordination; Central purchasing; Complaints review and remedies (Appeals Board).

16. Poland (Centralised structure)	Public Procurement Office	116	Office of the Prime Minister	Drafting primary and secondary legislation; Advisory and operations' support; International co-ordination; Monitoring and control; Publication and information. Professionalisation and capacity-strengthening; Complaints review and remedies (Bureau of Appeals) – PPO administers the system.
17. Portugal (Decentralised structure)	Directorate General for State Property; Directorate for European Affairs; Department for Public Procurement; Institute for Public Works	9	Council of Ministers	Policy functions and drafting primary legislation (government); International co-ordination; Business co-ordination; Central purchasing; Monitoring and control; Capacity-strengthening.
18. Romania (Centralised structure)	National Authority for Regulating and Monitoring Public Procurement	70	Office of the Prime Minister	Drafting primary and secondary legislation; Advisory and operations' support; International co-ordination; Monitoring and control; Information; Professionalisation and capacity-strengthening.
19. Slovak Republic (Centralised structure)	Office for Public Procurement	110	Council of Ministers	Drafting primary and secondary legislation; Advisory and operations' support; International co-ordination; Monitoring and control Publication and information'; Professionalisation and capacity- strengthening; Complaints review and remedies.

20. Slovenia (Semi-centralised structure)	Department for Public Procurement, Public Utilities and Concessions	8	Ministry of Finance	Drafting primary and secondary legislation; Advisory functions; International co-ordination; Monitoring and control; Information.
21. Sweden (Semi-centralised structure)	Board for Public Procurement	10	Ministry of Finance	Advisory functions; International co-ordination (shared); Monitoring; Information; Professionalisation and capacity-strengthening.
	Ministry of Finance	3		Drafting primary and secondary legislation; International co-ordination.
22. United Kingdom (Semi-centralised structure)	Office of Government Commerce	25 (500)	HM Treasury (Ministry of Finance)	Drafting secondary legislation; Advisory and operations' support; International co-ordination; Monitoring; Information; Professionalisation and capacity-strengthening (shared); Business development and co-ordination (shared)

ANNEX E

METHODOLOGY FOR ASSESSMENT: OECD-DAC JOINT VENTURE FOR PROCUREMENT

Pillar IV. Integrity and Transparency of the Public Procurement System

Pillar IV of the methodology developed by the OECD-DAC Joint Venture on Public Procurement covers four indicators that are considered necessary to provide for a system that operates with integrity, has appropriate controls that support the implementation of the system in accordance with the legal and regulatory framework and has appropriate measures in place to address the potential for corruption in the system. It also covers important aspects of the procurement system that include stakeholders as part of the control system. This Pillar takes aspects of the procurement system and governance environment and seeks to ensure that they are defined and structured to contribute to integrity and transparency.

Indicator 9. The country has effective control and audit systems

The objective of this indicator is to determine the quality, reliability and timeliness of the internal and external controls preferably based on risk assessment and mitigation. Equally, the effectiveness of controls needs to be reviewed in terms of expediency and thoroughness of the implementation of auditors' recommendations. The assessor should rely, in addition to their own findings, on the most current Country Financial Accountability Assessment (CFAA) or other analysis including PEFA/PFM assessment that may be available. This indicator has five sub-indicators (a-e) to be rated.

Sub-indicator 9(a) – A legal framework, organisation, policy, and procedures for internal and external control and audit of public procurement operations are in place to provide a functioning control framework.

National legislation normally establishes which agencies are responsible for oversight of the procurement function. Control and oversight normally start with the legislative bodies that must review and act on the findings of the national auditing agency and legal watch dog agencies (e.g. the comptroller general reports, attorney general reports, etc.).

There should also be provisions for the establishment of internal controls such as internal audit organisations that periodically produce recommendations to the authorities of the individual agencies based on their findings. Internal audit should be complemented by internal control and management procedures that provide for checks and balances within an agency for processing of procurement actions. Internal audit and internal control procedures can assist external auditors and enable performance audit techniques to be used that look at the effectiveness and application of internal control procedures instead of looking at individual procurement actions.

Even though no single model exists, it is important that the basic principles of oversight and control exist in the legal and regulatory framework of the country and that they are of universal application.

Scoring Criteria	**Score**
The system in the country provides for: (a) Adequate independent control and audit mechanisms and institutions to oversee the procurement function. (b) Implementation of internal control mechanisms in individual agencies with clearly defined procedures. (c) Proper balance between timely and efficient decision making and adequate risk mitigation. (d) Specific periodic risk assessment and controls tailored to risk management.	**3**
The system in the country meets a) plus two of the above.	**2**
The system meets a) but controls are unduly burdensome and time consuming hindering efficient decision making.	**1**
Controls are imprecise or lax and inadequate to the point that there is weak enforcement of the laws and regulations and ample risk for fraud and corruption.	**0**

Sub-indicator 9(b) – Enforcement and follow-up on findings and recommendations of the control framework provide an environment that fosters compliance.

The purpose of this indicator is to review the extent to which internal and external audit recommendations are implemented within a reasonable time. This may be expressed as a percentage of recommendations implemented within six months, a year, over a year or never implemented.

Scoring Criteria	Score
Internal or external audits are carried out at least annually and recommendations are responded to or implemented within six months of the submission of the auditors' report.	**3**
Audits are carried out annually but response to or implementation of the auditors' recommendations takes up to a year.	**2**
Audits are performed annually but recommendations are rarely responded to or implemented.	**1**
Audits are performed erratically and recommendations are not normally implemented.	**0**

Sub-indicator 9(c) – The internal control system provides timely information on compliance to enable management action.

The following key provisions should be provided:

(a) There are written standards for the internal control unit to convey issues to management depending on the urgency of the matter.

(b) There is established regular periodic reporting to management throughout the year.

(c) The established periodicity and written standards are complied with.

Scoring Criteria	Score
All requirements (a) through (c) listed above are met.	**3**
Requirement (a) plus one of the above are met.	**2**
Only requirement (a) is met.	**1**
There is no functioning internal control system.	**0**

Sub-indicator 9(d) – The internal control systems are sufficiently defined to allow performance audits to be conducted.

There are written internal control routines and procedures. Ideally there would an internal audit and control manual. Finally, there is sufficient

information retained to enable auditors to verify that the written internal control procedures are adhered to.

Scoring criteria	Score
There are internal control procedures including a manual that state the requirements for this activity which is widely available to all staff.	**3**
There are internal control procedures but there are omissions or practices that need some improvement.	**2**
There are procedures but adherence to them is uneven.	**1**
The internal control system is poorly defined or non-existent.	**0**

Sub-indicator 9(e) – Auditors are sufficiently informed about procurement requirements and control systems to conduct quality audits that contribute to compliance.

The objective of this indicator is to confirm that there is a system in place to ensure that auditors working on procurement audits receive adequate training or are selected following criteria that explicitly requires that they demonstrate sufficient knowledge of the subject. Auditors should normally receive formal training on procurement requirements, principles operations, laws and regulations and processes. Alternatively, they should have extensive experience in public procurement or be supported by procurement specialists or consultants.

Scoring Criteria	Score
There is an established programme to train internal and external auditors to ensure that they are well versed in procurement principles, operations, laws, and regulations and the selection of auditors requires that they have adequate knowledge of the subject as a condition for carrying out procurement audits.	**3**
If auditors lack procurement knowledge, they are routinely supported by procurement specialists or consultants.	**2**
There is a requirement that the auditors have general knowledge of procurement principles, operations, laws, and regulations but they are not supported generally by specialists in procurement.	**1**
There is no requirement for the auditors to have knowledge of procurement and there is no formal training programme and no technical support is provided to the auditors.	**0**

Indicator 10. Efficiency of appeals mechanism

The appeals mechanism was covered under Pillar I with regard to its creation and coverage by the legal regulatory framework. It is further assessed under this indicator for a range of specific issues regarding efficiency in contributing to the compliance environment in the country and the integrity of the public procurement system. There are five sub-indicators (a-e) to be scored.

Sub-indicator 10(a) – Decisions are deliberated on the basis of available information, and the final decision can be reviewed and ruled upon by a body (or authority) with enforcement capacity under the law.

This sub-indicator looks at the process that is defined for dealing with complaints or appeals and sets out some specific conditions that provide for fairness and due process.

(a) Decisions are rendered on the basis of available evidence submitted by the parties to a specified body that has the authority to issue a final decision that is binding unless referred to an appeals body.

(b) An appeals body exists which has the authority to review decisions of the specified complaints body and issue final enforceable decisions.

(c) There are times specified for the submission and review of complaints and issuing of decisions that do not unduly delay the procurement process.

Scoring Criteria	Score
The country has a system that meets the requirements of (a) through (c) above.	**3**
The country has a system that meets (a) and (b) above, but the process is not controlled with regard to (c).	**2**
The system only provides for (a) above with any appeals having to go through the judicial system requiring a lengthy process.	**1**
The system does not meet the conditions of (a) – (c) above, leaving only the courts.	**0**

Sub-indicator 10(b) – The complaint review system has the capacity to handle complaints efficiently and a means to enforce the remedy imposed.

This indicator deals specifically with the question of the efficiency and capacity of a complaints review system and its ability to enforce the remedy imposed. It is closely related to sub-indicator 10(a) which also refers to

enforcement. This indicator will focus primarily on the capacity and efficiency issues.

Scoring Criteria	Score
The complaint review system has precise and reasonable conditions and timeframes for decision by the complaint review system and clear enforcement authority and mechanisms.	**3**
There are terms and timeframes established for resolution of complaints but mechanisms and authority for enforcement are unclear or cumbersome.	**2**
Terms and timeframes for resolution of complaints or enforcement mechanisms and responsibilities are vague.	**1**
There are no stipulated terms and timeframes for resolution of complaints and responsibility for enforcement is not clear.	**0**

Sub-indicator 10 (c) – The system operates in a fair manner, with outcomes of decisions balanced and justified on the basis of available information.

The system needs to be seen as operating in a fair manner. The complaint review system must require that decisions be rendered only on relevant and verifiable information presented and that such decisions be unbiased, reflecting the consideration of the evidence presented and the applicable requirements in the legal/regulatory framework.

It is also important that the remedy imposed in the decision be consistent with the findings of the case and with the available remedies provided for in the legal/regulatory framework. Decisions of a complaints body should deal specifically with process issues and the remedies should focus on corrective actions needed to comply with process.

Scoring Criteria	Score
Procedures governing the decision making process of the review body provide that decisions are: a) based on information relevant to the case; b) balanced and unbiased in consideration of the relevant information; c) can be subject to higher level review; d) result in remedies that are relevant to correcting the implementation of the process or procedures.	**3**
Procedures comply with (a) plus two of the remaining conditions above.	**2**
Procedures comply with (a) above.	**1**
The system does not comply with any of the above.	**0**

Sub-indicator 10(d) – Decisions are published and made available to all interested parties and to the public.

Decisions are public by law and posted in easily accessible places (preferably posted at a dedicated government procurement website on the Internet). Publication of decisions enables interested parties to be better informed as to the consistency and fairness of the process.

Scoring Criteria	Score
All decisions are publicly posted in a government website or another easily accessible place	**3**
All decisions are posted in a somewhat restricted access media (e.g. the official gazette of limited circulation).	**2**
Publication is not mandatory and publication is left to the discretion of the review bodies making access difficult.	**1**
Decisions are not published and access is restricted.	**0**

Sub-indicator 10(e) – The system ensures that the complaint review body has full authority and independence for resolution of complaints.

This indicator assesses the degree of autonomy that the complaint decision body has from the rest of the system to ensure that its decisions are free from interference or conflict of interest. Due to the nature of this sub-indicator it is scored as either a 3 or a 0.

Scoring Criteria	Score
The complaint review body is independent and autonomous with regard to resolving complaints.	**3**
NA	
NA	
The complaint review body is not independent and autonomous with regard to resolving complaints.	**0**

Indicator 11. Degree of access to information

This indicator deals with the quality, relevance, ease of access and comprehensiveness of information on the public procurement system.

Sub-indicator 11(a) – Information is published and distributed through available media with support from information technology when feasible.

Public access to procurement information is essential to transparency and creates a basis for social audit by interested stakeholders. Public information should be easy to find, comprehensive and user friendly providing information of relevance. The assessor should be able to verify easy access and the content of information made available to the public.

The system should also include provisions to protect the disclosure of proprietary, commercial, personal or financial information of a confidential or sensitive nature.

Information should be consolidated into a single place and when the technology is available in the country, a dedicated website should be created for this purpose. Commitment, backed by requirements in the legal/regulatory framework should ensure that agencies duly post the information required on a timely basis.

Scoring Criteria	Score
Information on procurement is easily accessible in media of wide circulation and availability. The information provided is centralised at a common place. Information is relevant and complete. Information is helpful to interested parties to understand the procurement processes and requirements and to monitor outcomes, results and performance.	**3**
Information is posted in media not readily and widely accessible or not user friendly for the public at large OR is difficult to understand by the average user OR essential information is lacking.	**2**
Information is difficult to get and very limited in content and availability.	**1**
There is no public information system as such and it is generally up to the procuring entity to publish information.	**0**

Indicator 12. The country has ethics and anti-corruption measures in place

This indicator assesses the nature and scope of the anti-corruption provisions in the procurement system**.** There are seven sub-indicators (a-g) contributing to this indicator.

Sub-indicator 12(a) – The legal and regulatory framework for procurement, including bidding and contract documents, includes provisions addressing corruption, fraud, conflict of interest, and unethical behaviour and sets out (either directly or by reference to other laws) the actions that can be taken with regard to such behaviour.

This sub-indicator assesses the extent to which the law and the regulations compel procuring agencies to include fraud and corruption, conflict of interest and unethical behaviour references in the bidding documentation. This sub-indicator is related to sub-indicator 2 b) on content for model documents but is not directly addressed in that sub-indicator.

The assessment should verify the existence of the provisions and enforceability of such provision through the legal/regulatory framework. The provisions should include the definitions of what is considered fraud and corruption and the consequences of committing such acts.

Scoring Criteria	**Score**
The procurement law or the regulations specify this mandatory requirement and give precise instructions on how to incorporate the matter in bidding documents. Bid documents include adequate provisions on fraud and corruption.	**3**
The procurement law or the regulations specify this mandatory requirement but leaves no precise instruction on how to incorporate the matter in bidding documents leaving this up to the procuring agencies. Bid documents generally cover this but without consistency.	**2**
The legal/regulatory framework does not establish a clear requirement to include language in documents but makes fraud and corruption punishable acts under the law. Few bidding documents include appropriate language dealing with fraud and corruption.	**1**
The legal framework does not directly address fraud, corruption or unethical behaviour and its consequences. Bid documents generally do not cover the matter.	**0**

Sub-indicator 12(b) – The legal system defines responsibilities, accountabilities, and penalties for individuals and firms found to have engaged in fraudulent or corrupt practices.

This indicator assesses the existence of legal provisions that define fraudulent and corrupt practices and set out the responsibilities and sanctions for individuals or firms indulging in such practices. These provisions should address issues concerning conflict-of-interest and incompatibility situations. The law should prohibit the intervention of active public officials and former public officials for a reasonable period of time after leaving office in procurement matters in ways that benefit them, their relatives, and business or political associates financially or otherwise. There may be cases where there is a separate anti-corruption law (e.g. anti-corruption legislation) that contains the provisions. This arrangement is appropriate as far as the effects of the anti-corruption law are the same as if they were in the procurement law.

Scoring Criteria	Score
The legal/regulatory framework explicitly deals with the matter. It defines fraud and corruption in procurement and spells out the individual responsibilities and consequences for government employees and private firms or individuals found guilty of fraud or corruption in procurement, without prejudice of other provisions in the criminal law.	**3**
The legal/regulatory framework includes reference to other laws that specifically deal with the matter (e.g. anti-corruption legislation in general). The same treatment is given to the consequences.	**2**
The legal/regulatory framework has general anti-corruption and fraud provisions but does not detail the individual responsibilities and consequences which are left to the general relevant legislation of the country.	**1**
The legal/regulatory framework does not deal with the matter.	**0**

Sub-indicator 12(c) – Evidence of enforcement of rulings and penalties exists.

This indicator is about the enforcement of the law and the ability to demonstrate this by actions taken. Evidence of enforcement is necessary to demonstrate to the citizens and other stakeholders that the country is serious about fighting corruption. This is not an easy indicator to score, but the assessor should be able to obtain at least some evidence of prosecution and punishment for corrupt practices. The assessor should get figures on the number of cases of corruption reported through the system, and the number

of cases prosecuted. If the ratio of cases prosecuted to cases reported is low, the narrative should explain the possible reasons.

Scoring criteria	Score
There is ample evidence that the laws on corrupt practices are being enforced in the country by application of stated penalties.	**3**
There is evidence available on a few cases where laws on corrupt practices have been enforced.	**2**
Laws exist, but evidence of enforcement is weak.	**1**
There is no evidence of enforcement.	**0**

Sub-indicator 12(d) – Special measures exist to prevent and detect fraud and corruption in public procurement.

This sub-indicator looks to verify the existence of an anti-corruption programme and its extent and nature or other special measures which can help prevent and/or detect fraud and corruption specifically associated with public procurement.

A comprehensive anti-corruption programme normally includes all the stakeholders in the procurement system, assigns clear responsibilities to all of them, and assigns a high- level body or organisation with sufficient standing and authority to be responsible for co-ordinating and monitoring the programme. The procurement authorities are responsible for running and monitoring a transparent and efficient system and for providing public information to promote accountability and transparency. The control organisations (supreme audit authority) and the legislative oversight bodies (e.g. the Parliament or Congress), are responsible for detecting and denouncing irregularities or corruption. The civil society organisations are responsible for social audits and for monitoring of procurement to protect the public interest. These may include NGOs, the academia, the unions, the chambers of commerce and professional associations and the press. The judiciary also participates, often in the form of special anti-corruption courts and dedicated investigative bodies that are responsible for investigating and prosecuting cases of corruption. There are normally government public education and awareness campaigns as part of efforts to change social behaviour in respect to corrupt practices and tolerance. Anti-corruption strategies usually include as well the use of modern technology to promote e-procurement and e-government services to minimise the risk of facilitation payments.

The assessor should assess the extent to which all or some of these actions are organised as a co-ordinated effort with sufficient resources and commitment by the government and the public or the extent to which they

are mostly isolated and left to the initiative of individual agencies or organisations.

Scoring Criteria	Score
The government has in place a comprehensive anti-corruption programme to prevent, detect and penalise corruption in government that involves the appropriate agencies of government with a level of responsibility and capacity to enable its responsibilities to be carried out. Special measures are in place for detection and prevention of corruption associated with procurement,	**3**
The government has in place an anti-corruption programme but it requires better co-ordination or authority at a higher level to be effective. No special measures exist for public procurement.	**2**
The government has isolated anti-corruption activities not properly co-ordinated to be an effective integrated programme.	**1**
The government does not have an anti-corruption programme.	**0**

Sub-indicator 12(e) – Stakeholders (private sector, civil society, and ultimate beneficiaries of procurement/end-users) support the creation of a procurement market known for its integrity and ethical behaviour.

This indicator assesses the strength of the public in maintaining a sound procurement environment. This may manifest itself in the existence of respected and credible civil society groups that provide oversight and can exercise social control. The welcoming and respectful attitude of the government and the quality of the debate and the contributions of all interested stakeholders are an important part of creating an environment where integrity and ethical behaviour is expected and deviations are not tolerated.

Scoring Criteria	Score
(a) There are strong and credible civil society organisations that exercise social audit and control. (b) Organisations have government guarantees to function and co-operation for their operation and are generally promoted and respected by the public. (c) There is evidence that civil society contributes to shape and improve integrity of public procurement.	**3**
There are several civil society organisations working on the matter and the dialogue with the government is frequent but it has limited impact on improving the system.	**2**
There are only a few organisations involved in the matter, the dialogue with the government is difficult and the contributions from the public to promote improvements are taken in an insignificant way.	**1**
There is no evidence of public involvement in the system OR the government does not want to engage the public organisations in the matter.	**0**

Sub-criteria 12(f) – The country should have in place a secure mechanism for reporting fraudulent, corrupt, or unethical behaviour.

The country provides a system for reporting fraudulent, corrupt or unethical behaviour that provides for confidentiality. The system must be seen to react to reports as verified by subsequent actions taken to address the issues reported.

Scoring Criteria	Score
There is a secure, accessible and confidential system for the public reporting of cases of fraud, unethical behaviour and corruption.	**3**
There is a mechanism in place but accessibility and reliability of the system undermine and limit its use by the public.	**2**
There is a mechanism in place but security or confidentiality cannot be guaranteed	**1**
There is no secure mechanism for reporting fraud, unethical behaviour and corruption cases	**0**

Sub-criteria 12(g) – Existence of Codes of Conduct/Codes of Ethics for participants that are involved in aspects of the public financial management systems that also provide for disclosure for those in decision-making positions.

The country should have in place a Code of Conduct/Ethics that applies to all public officials. In addition, special provisions should be in place for those involved in public procurement. In particular, financial disclosure requirements have proven to be very useful in helping to prevent unethical or corrupt practices.

Scoring Criteria	**Score**
(a) There is a Code of Conduct or Ethics for government officials with particular provisions for those involved in public financial management, including procurement. (b) The Code defines accountabilities for decision making and subjects decision makers to specific financial disclosure requirements. (c) The Code is of obligatory compliance and consequences are administrative or criminal	**3**
The system meets requirements (a) and (b) but is only a recommended good practice code with no consequences for violations unless covered by criminal codes.	**2**
There is a Code of Conduct but determination of accountabilities is unclear.	**1**
There is no Code of Conduct.	**0**

ANNEX F

GLOSSARY

AUDIT TRAIL

A chronological record of procurement activities which enables the reconstruction, review and examination of the sequence of activities at each stage of the public procurement process.

DEBARMENT

Exclusion or ineligibility of a contractor from taking part in the process of competing for government or multilateral agency contracts for a definite or indefinite period of time, if, after enquiry or examination, the contractor is adjudged to have been involved in the use of corruption to secure past or current projects with a government agency.

DIRECT SOCIAL CONTROL

The involvement of stakeholders – not only private sector representatives but also end-users, civil society, the media or the public at large – in scrutinising the integrity of the public procurement process.

FOUR-EYES PRINCIPLE

A requirement that a process will be effectively conducted by at least two individuals.

INTEGRITY

Integrity in the context of public procurement implies that:

- Procurement procedures are transparent and promote fair and equal treatment for bidders.
- Public resources linked to public procurement are used in accordance with intended purposes.

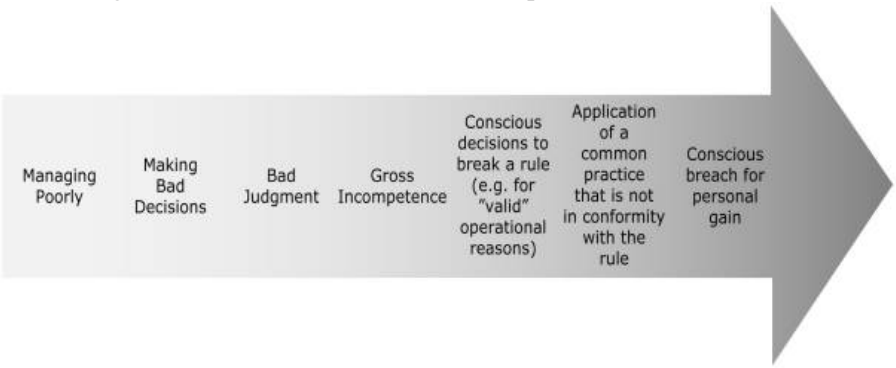
- Procurement officials' behaviour is in line with the public purposes of their organisation.
- Systems are in place to challenge procurement decisions, ensure accountability and promote public scrutiny.

INTEGRITY PACT

An agreement between a government or government department with all bidders for a public sector contract that neither side will pay, offer, demand, or accept bribes, or collude with competitors to obtain the contract or while carrying it out.

MISMANAGEMENT

Mismanagement could conceivably cover a range of actions from a simple mistake in performing an administrative task to a deliberate transgression of relevant laws and related policies[26].



PUBLIC PROCUREMENT

Public procurement is the purchase of goods and services by governments and state-owned enterprises. It encompasses a sequence of related activities starting with the assessment of needs through award to the contract management and final payment.

26. This definition has been extracted from the Canadian Financial Administration Act.

REVERSE AUCTION

In an auction there is a single seller and many potential buyers bidding for the item being sold. A reverse auction, used for e-purchasing and generally using the internet (an e-auction), involves on the contrary one buyer and many sellers. The general idea is that the buyer specifies what they want to purchase and offers it to many suppliers.

RISK-BASED APPROACH

The definition taken in this publication of a risk-based approach is rather restrictive. It is defined as an approach identifying potential weaknesses that individually or in aggregate could have an impact on the integrity of procurement-related activities, and then aligning to these risks controls that effectively mitigate the risk to integrity.

TRANSPARENCY

Transparency in the context of procurement refers to the ability of stakeholders to know and understand the actual means and processes by which contracts are defined, awarded and managed.

WHISTLEBLOWING

Whistleblowing can be defined as a means to promote accountability by encouraging the disclosure of information about misconduct and possibly corruption while protecting the whistleblower against retaliation.

ANNEX G

FOR FURTHER INFORMATION

This Annex provides web links for further information on public procurement and integrity. These cover OECD countries as well as non members in which elements of good practice have been identified.

The web links are listed accordingly:

- Information system(s) on public procurement (e.g. procurement portal, information on procurement opportunities);
- Organisation(s) in charge of public procurement (e.g. management of public procurement, design of procurement regulations) and/or related to the control and accountability of public procurement (e.g. complaint and review, audit);
- Guidance documents from governments for enhancing integrity in public procurement;
- Other relevant web links to enhance professionalism in public procurement (e.g. professional associations, research institutes, etc.).

AUSTRALIA	*The Australian Government Tender System:* All business opportunities with Australian Government agencies https://www.tenders.gov.au/federal/index.cfm *Government of Australia, Department of Finance and Administration* http://www.finance.gov.au/ *South Australia Tenders and Contracts:* Public procurement opportunities within South Australia http://www.tenders.sa.gov.au/index.do *Commonwealth Procurement Guidelines* http://www.finance.gov.au/ctc/commonwealth_procurement_guide.html *Mandatory Procurement Procedures: Financial Management Guidance* http://www.finance.gov.au/procurement/mandatory_procurement_procedures.html

	Guidance on Ethics and Probity in Government Procurement http://www.finance.gov.au/procurement/ethics_probity_govt.html *Guidance on Procurement Publishing Obligations* http://www.finance.gov.au/procurement/procurement_publishing_obligations html
AUSTRIA	Database of procurement opportunities http://www.auftrag.at/ *Federal Public Procurement Office* http://www.bva.gv.at/BVA/default.htm *Austrian Court of Audit* - provides recommendations for improving processes, including public procurement (see Box IV.4) http://www.rechnungshof.gv.at
BELGIUM	*Joint Electronic Public Procurement Portal: Federal Service e-Procurement portal* http://www.jepp.be/ *Bulletin des adjudications:* Procurement opportunities database http://www.ejustice.just.fgov.be/cgi_bul/bul.pl *European and Belgian Public Procurement* http://www.ebp.be
BRAZIL	*COMPRASNET:* Procurement Portal of the Federal Government http://www.comprasnet.gov.br *Office of the Comptroller General:* developed a methodology for mapping out risks of corruption (see Box IV.6) http://www.cgu.gov.br
CANADA	*The Government of Canada Electronic Tendering Service* http://www.merx.com/ *Public Disclosure of contracts above CAD 10,000* http://www.tbs-sct.gc.ca/pd-dp/dc/index_e.asp *Details on project spending on public works and government services* http://www.pwgsc.gc.ca/reports/text/rpp_2005-2006_sct3-e.html *Statement of Values, Procurement Community of the Government of Canada* http://www.tbs-sct.gc.ca/cmp/values/statementvalues_e.asp *Defence Ethics Program* http://www.dnd.ca/ethics/

CHILE	*ChileCompra:* E-marketplace www.chilecompra.cl
CZECH REPUBLIC	*Public Procurement and Concessions Portal* http://www.portal-vz.cz/index.php?lchan=1&lred=1 *Official Site of Public Contracts, Publishing Subsystem* http://www.isvzus.cz/usisvz/index.jsp?language=change *E-market places solutions for central administration* https://gem.b2bcentrum.cz/ http://www.allytrade.cz *Ministry for Regional Development* http://www.mmr.cz/ *Office for the Protection of Competition* http://www.compet.cz
DENMARK	*Gatetrade:* Electronic marketplace for business-to-government e-commerce https://www.oex.gatetrade.net/home.jsp *Danish Competition Authority:* Responsible for the implementation of the EU Directives on public procurement, handling of complaints and providing guidance in principal cases. http://www.ks.dk/ *The Complaints Board for Public Procurement* http://www.klfu.dk/ *Statistics Denmark:* Statistical data including on public procurement http://www.dst.dk/HomeUK.aspx *Anti-Corruption Portal for Small and Medium-Sized Enterprises:* Detailed information for investing in emerging markets, including on procurement http://www.business-anti-corruption.com
FINLAND	*Hansel:* the central procurement unit of the State of Finland (see Box III.4) http://www.hansel.fi/ *Ministry of Finance:* Public spending http://www.vm.fi/vm/en/09_national_finances/index.jsp *The Market Court:* Hearings of market law, competition and public procurement cases http://www.oikeus.fi/markkinaoikeus/

FRANCE	*Official Gazette for Public Procurement Bids (BOAMP)* http://www.journal-officiel.gouv.fr/jahia/Jahia/pid/1 http://djo.journal-officiel.gouv.fr/centre-editper12.htm *Legannonces:* Procurement bids in the regional press http://www.legannonces.com/ *Les Marchés publics.com:* Consultation on procurement opportunities http://www.les-marches-publics.com/ *Marchés Publics France:* Joint initiative for public procurement information with Luxembourg and the Netherlands http://www.marchepublicfrance.com *Ministry of Economy, Finance and Industry:* Public procurement regulations http://www.minefi.gouv.fr/themes/marches_publics/ *Observatory of Public Procurement* http://www.minefi.gouv.fr/colloc/ *Association for Public Purchasing* http://www.apasp.com/modules/movie/scenes/home/
GERMANY	*E-Vergabe:* E-procurement system at the Federal level http://www.evergabe-online.de/ *Federal Ministry of Economy and Technology:* in charge of procurement regulations http://www.bmwi.de/ *Procurement Agency of The Federal Ministry of The Interior:* manages purchasing for 26 federal authorities, foundations and research institutions under the responsibility of the Ministry of the Interior http://www.bescha.bund.de/enid/55.html
GREECE	*Ministry of Development* http://www.efpolis.gr/
HUNGARY	*Public Procurement Council:* Information system on public procurement http://www.kozbeszerzes.hu/
ICELAND	*Competition Authority* http://www.samkeppni.is/samkeppni/en/ *RIKISKAUP - The Icelandic State Trading Centre* http://www.rikiskaup.is

INDIA	*Central Vigilance Commission:* has used technologies for increasing transparency in vulnerable areas such as procurement (see Box II.8) http://www.cvc.nic.in/ *Guidelines for improvement in the procurement system* http://cvc.nic.in/vscvc/purguide.pdf
IRELAND	*Irish Government Public Sector Procurement Opportunities Portal* http://www.etenders.gov.ie *Government Supplies Agency:* Central procurement of goods, supplies and services on behalf of the Government http://www.opw.ie/services/gov_sup/fr_gov.htm *National Public Procurement Policy Unit* http://www.finance.gov.ie/ViewDoc.asp?fn=/documents/publications/publicprocurementindex.htm&CatID=49&m=c *Government Contracts Committee's Public Procurement Guidelines* (see Box III.9) http://www.etenders.gov.ie/xt_Docdownload.aspx?id=1324 *Ethics in Public Procurement:* Guidance document http://www.etenders.gov.ie/xt_Docdownload.aspx?id=1182
ITALY	*Consip:* Company in charge of implementation of e-procurement (see Box III.14) http://www.consip.it/scd/index.jsp *Public Procurement Portal* http://www.acquistinretepa.it/portal/page?_pageid=173,1&_dad=portal&_schema=PORTAL *The Monitor of Public Works* http://www.autoritalavoripubblici.it/
JAPAN	*Online database of Japanese government procurement notices* http://www.jetro.go.jp/en/matching/procurement/ *Office for Government Procurement Challenge System (CHANS)* http://www5.cao.go.jp/access/english/chans_main_e.html
KOREA	*Korea On-line Electronic Procurement System* http://www.pps.go.kr/english/ *Public Procurement Service of Korea* http://www.pps.go.kr/english/

LUXEMBOURG	*Public procurement portal of Luxembourg* http://www.marches.public.lu/ *CRTI-B:* Public procurement in the construction industry http://www.crtib.lu/index.jsp?section=FR *Ministry of Public Works* http://www.mtp.etat.lu/ *Information center for SMEs* http://www.eicluxembourg.lu/index.php
MEXICO	*COMPRANET:* Electronic system for government contracting http://www.compranet.gob.mx *Ministry of Public Administration:* Legal provisions on public procurement http://www.funcionpublica.gob.mx/unaopspf/unaop1.htm
NETHERLANDS	*TenderNed:* Public procurement portal http://www.tenderned.nl/boa.application/page.m?pageid=1 *Information on public procurement contracts above the EU threshold* http://www.aanbestedingskalender.nl *Act on Promotion of Integrity Assessment by the Public Administration (BIBOP)* http://www.justitie.nl/onderwerpen/criminaliteit/bibob/wat-is-bibob/ *Pianoo:* Knowledge center for public procurement http://www.ovia.nl/index.jsp
NEW ZEALAND	*Government Electronic Tenders Service:* Procurement opportunities http://www.gets.govt.nz/Default.aspx?show=HomePage *TenderLink:* Bid advertisements throughout Australia and New Zealand https://www.tenderlink.com/ *New Zealand Tenders Gazette Online* http://www.tenders-gazette.co.nz/ *Ministry of Economic Development:* Information on government procurement http://www.med.govt.nz/templates/StandardSummary____181.aspx *Controller and Auditor-General's reports on purchasing and contracting cases* http://www.oag.govt.nz/reports/by-subject/purchasing-contracting/

NORWAY	*Doffin.no: Announcements for procurement* http://www.doffin.no/ *Ministry of Government Administration and Reform, Department of Competition:* in charge of procurement policy http://www.regjeringen.no/en/ministries/fad.html?id=339 *National Public Procurement Complaint Board (KOFA)* http://www.kofa.no/index.php?id=4
PAKISTAN	*Public Procurement Regulatory Authority* http://www.ppra.org.pk/
POLAND	*National public procurement portal* http://www.portal.uzp.gov.pl/pl/site/ *The Polish Public Procurement Office* http://www.uzp.gov.pl/
PORTUGAL	*Compras:* Public procurement portal http://www.compras.gov.pt/Compras/
ROMANIA	*Public procurement portal* http://www.e-licitatie.ro/Public/Common/Content.aspx?f=PublicHomePage
SLOVAK REPUBLIC	*Public Procurement Office:* Information system on public procurement http://www.uvo.gov.sk/
SLOVENIA	*Official Gazette of the Republic of Slovenia* http://www.uradni-list.si/index.jsp *Ministry for Finance, Public Procurement, Public Utilities and Concessions Department* http://www.gov.si/mf/slov/javnar/javnar.htm *National Review Commission for public procurement* http://www.gov.si/dkom/?lng=eng
SOUTH AFRICA	*National Treasury* (see Box III.1) http://www.treasury.gov.za/ *The Institute of Procurement and Supply* http://www.ipsa.co.za/
SPAIN	*Public Administration Electronic Contracting Platform:* Public procurement portal http://www.pecap.org

	Journal of the Official Gazette http://www.boe.es/ *Ministry of Economy and Finance* http://www.meh.es/Portal?cultura=en-GB
SWEDEN	*AnbudsJournalen:* Procurement opportunities above thresholds http://www.ajour.se/ *National Board for Public Procurement (NOU)* http://www.nou.se/ *National Board of Trade:* Information on market mechanisms behind public procurement http://www.offentlig.kommers.se *The Swedish Association of Public Purchasers:* promotes the development of a professional procurement for the public sector http://www.soiorg.org/
SWITZERLAND	*Simap:* Public procurement portal https://www.simap.ch/ *GIMAP.CH:* Bidding opportunities at federal level http://www.gimap.admin.chf/index.htm
TURKEY	*Public Procurement Platform* https://www.ihale.gov.tr/ssl/ksp/ *The Public Procurement Authority* http://www.kik.gov.tr/index2.htm
UNITED KINGDOM	*Government Opportunities Public Procurement Portal* http://www.govopps.co.uk/ *OGC Buying Solutions* http://www.ogcbuyingsolutions.gov.uk/default.asp *E-Procurement Scotland:* the Scottish Executive's e-procurement service for the Scottish public sector http://www.eprocurementscotland.com/ *Buy 4 Wales:* Sourcing portal for the Welsh public sector https://www.buy4wales.co.uk/buy4wales.aspx *Office of Government Commerce:* Centre for sharing expertise (see Box III.7) http://www.ogc.gov.uk/index.asp?id=35 *Chartered Institute of Purchasing and Supply:* promotes good practices to the purchasing profession http://www.cips.org *Public Procurement Research Group* http://www.nottingham.ac.uk/law/pprg/index.htm

UNITED STATES	*Federal Acquisition Regulations System:* Single-point-of-entry for government procurement, with information on regulations, systems, resources, opportunities, and training http://www.acquisition.gov *FedBizOpps:* Federal government procurement opportunities over USD 25,000 http://www.fbo.gov/ *Federal Procurement Data System* https://www.fpds.gov *Central Contractor Registration* http://www.ccr.gov/ *Excluded Parties List System from Federal contracts and subcontracts* http://www.epls.gov *Federal Technical Data Solutions* https://www.fedteds.gov/ *Office of Management and Budget, Office of Federal Procurement Policy* http://www.whitehouse.gov/omb/procurement/mission.html *Bid Protest Regulations: Government Accountability Office* http://www.gao.gov/decisions/bidpro/bid/bibreg.html *Defence Contract Management Agency* http://www.dcma.mil
INTERNATIONAL ORGANISATIONS	INTER-GOVERNMENTAL ORGANISATIONS *OECD Public Governance and Territorial Development Directorate: Ethics and Corruption in the Public Sector* http://www.oecd.org/department/0,2688,en_2649_34135_1_1_1_1_1,00.html *SIGMA: Support for Improvement in Governance and Management* http://www.sigmaweb.org/pages/0,2966,en_33638100_33638151_1_1_1_1_1,00.html *OECD Development Cooperation Directorate, Aid Effectiveness: Procurement* http://www.oecd.org/department/0,2688,en_2649_19101395_1_1_1_1_1,00.html *OECD Directorate for Financial and Enterprise Affairs: Corruption* http://www.oecd.org/topic/0,2686,en_2649_37447_1_1_1_1_37447,00.html *ADB-OECD Anti-Corruption Initiative for Asia and the Pacific* http://www.oecd.org/document/39/0,2340,en_34982156_34982431_35028199_1_1_1_1,00.html

Asia-Pacific Economic Cooperation (APEC): Government Procurement Expert Group
http://www.apec.org/apec/apec_groups/committees/committee_on_trade/government_procurement.html

Group of States against Corruption in the Council of Europe (GRECO)
http://www.coe.int/t/dg1/greco/evaluations/index_en.asp

European Commission: Public Procurement
http://ec.europa.eu/internal_market/publicprocurement/index_en.htm

Public Procurement Network in Europe
http://www.publicprocurementnetwork.org/

United Nations Procurement Service
http://www.un.org/Depts/ptd/

United Nations Office of Project Services: Procurement Services
http://www.unops.org/UNOPS/Procurement/Overview/

United Nations Commission on International Trade Law
http://www.uncitral.org/uncitral/en/index.html

World Trade Organisation: Transparency in Government Procurement
http://www.wto.org/english/tratop_e/gproc_e/gptran_e.htm

MULTILATERAL DEVELOPMENT BANKS

World Bank: Procurement
http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,menuPK:51355691

African Development Bank
http://www.afdb.org/portal/page?_pageid=473,1&_dad=portal&_schema=PORTAL

Asian Development Bank: Procurement Guidelines
http://www.adb.org/Documents/Guidelines/Procurement/default.asp?p=prcrmnt

European Bank for Reconstruction and Development (EBRD): Procurement
http://www.ebrd.com/oppor/procure/index.htm

Inter-American Development Bank: Procurement Policies
http://www.iadb.org/exr/english/BUSINESS_OPP/bus_opp_procurem_procedurs.htm

Multilateral Development Banks e-Government Procurement Website
http://www.mdb-egp.org/ui/english/pages/home.aspx

	INTERNATIONAL PRIVATE SECTOR ORGANISATIONS *Business and Industry Advisory Committee to the OECD* http://www.biac.org/ *International Chamber of Commerce* http://www.iccwbo.org/ *International Federation of Consulting Engineers (FIDIC)* http://www1.fidic.org/about/ethics.asp INTERNATIONAL NON-GOVERNMENTAL ORGANISATIONS *Transparency International: Contracting* http://www.transparency.org/tools/contracting

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Integrity in Public Procurement

GOOD PRACTICE FROM A TO Z

Of all government activities, public procurement is most vulnerable to corruption. Just one example: in OECD countries, bribery by international firms is more pervasive in public procurement than in utilities, taxation, or judiciary. As public procurement is a key economic activity of governments – estimated at around 15% of GDP, this has a major impact on how taxpayers' money is spent.

Although it is widely agreed that all public procurement reforms should follow good governance principles, international efforts have focused exclusively on the bidding process. But this is only the tip of the iceberg. Recent corruption scandals have spotlighted grey areas throughout the whole public procurement cycle, including in needs assessment and contract management. Reform efforts have also often neglected exceptions to competitive procedures such as emergency contracting and defence procurement.

This publication goes beyond the general statement that good governance and corruption prevention matter in public procurement. It offers practical insights into how the profession of procurement is evolving to cope with the growing demand for integrity, drawing on the experience of procurement practitioners as well as audit, competition and anti-corruption specialists.

The book provides, for the first time, a comparative overview of practices meant to enhance integrity throughout the whole procurement cycle, from needs assessment to contract management. It also includes numerous "elements of good practice" identified not only in OECD countries but also in Brazil, Chile, Dubai, India, Pakistan, Romania, Slovenia and South Africa.

ALSO AVAILABLE

Fighting Corruption and Promoting Integrity in Public Procurement (2005).
Bribery in Public Procurement: Methods, Actors and Counter-Measures (2007).

www.oecd.org

ISBN 978-92-64-02750-3
42 2007 13 1 P

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MODULE G

PUBLIC PROCUREMENT TRAINING FOR IPA BENEFICIARIES

Contract management

MODULE G

Contract management

PART 1

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this module are to make participants aware of:

1. A definition of contract management
2. The process of contract management
3. The issues and consequences around contract variations
4. The sources of contract variations
5. Processes for handling variations
6. Appropriate action to ensure that payment can be authorised and made in line with the contract
7. A review of the steps necessary to close out a contract

1.2 IMPORTANT ISSUES

When a contracting authority has awarded a contract, it must monitor whether the goods, service or works being delivered is delivered to specification by the economic operator. This means being able to check two things:

- That it does what it is required to do – that is, the goods are as described, the service to be performed is being delivered well and to the agreed quality standards and price, and that the works are erected as they were intended to be erected
- The costs of the requirement are no higher than expected

Clarification

For policy, legal, good practice or other reasons it is recognised that the procurement officer who conducts the procurement may not be the person who manages the contract. To avoid the cumbersome use of multiple terms, the text below refers to the role of the procurement officer as the person who is managing the contract on behalf of the contracting authority, irrespective of their title.

1.3 LINKS

Links to other modules appear throughout the text of this document. This module does however contain major links to modules:

- Module B2 on the procurement cycle
- Module B3 on the role of the procurement officer
- Module B4 on the role of stakeholders
- Module C4 on procurement procedures and techniques
- Module G3/B6 on measuring performance
- Module G2 on alternative dispute resolution
- Module E1 on preparing specifications

1.4 RELEVANCE

Procurement officers need to understand that contracts and the relationships with economic operators must be managed throughout the delivery of the requirement to the contracting authority.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

A description of the ECJ case: Pressetext

pressetexte Nachtrichtenagentur v Republik Osterreich – Bund C-454/06

SECTION 2
NARRATIVE

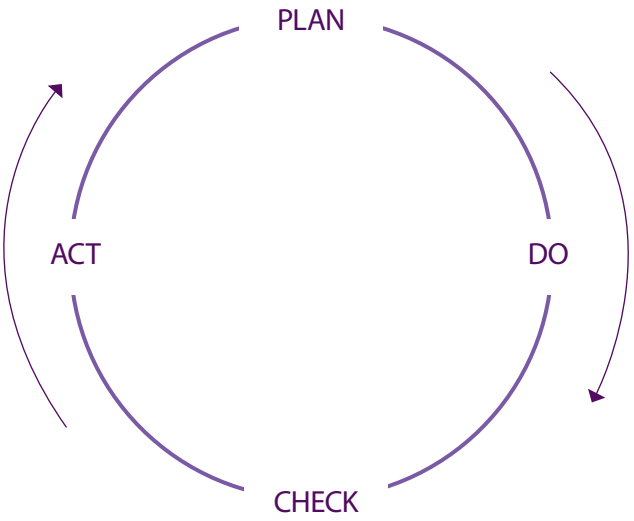
2.1 INTRODUCTION

Contract management can be defined as:

> The steps that enable both the contracting authority and the economic operator to meet their obligations within the contract in order to deliver the objectives set by the contract

When a contracting authority agrees a contract with an economic operator, the arrangement cannot just be left to run itself – it must be managed. Contracts are frequently complex and they may involve many people, may take or last a long time, and may consume many resources. It is therefore vital that they are properly managed.

Key to the process of successful contract management is the recognition that procurement officers must plan, do, check and act. The plan, do, check and act cycle (PDCA) was originated by the 1950s American theorist Edward Deming, who spent considerable time advising Japanese industry on total quality management. The diagram below summarises the concept.



In terms of the procurement process, the 'plan' stage of Deming's cycle refers to the phases prior to the award of the contract and the 'do' stage refers to the activity of the economic operator throughout the life of the contract. Many procurement officers are very careful during 'plan' but they then let the economic operator 'do' and they forget to 'check' and 'act'. In the procurement context, 'check' refers to the checks and controls that are introduced to monitor performance, and 'act' refers to the activities necessary to ensure that any performance that has moved out of line is brought back within the required parameters.

Where economic operators recognise that people from the contracting authority are not monitoring their progress, they may get careless and delivery will be less than acceptable, or they may create and demand variations for items that are already within the contract, thus incurring additional costs for the contracting authority.

Good practice note – effective contract management

Effective contract management is vital to the success of a contract. It involves the procurement officer and other stakeholders in the contracting authority working proactively with people from the economic operator to deliver in accordance with the agreed specification.

Contracts without actively practiced PDCA have much less of a chance of being delivered successfully.

2.2 THE PROCESS OF CONTRACT MANAGEMENT

Contract management activities can be broadly grouped into three areas, which span the do, check and act stages of PDCA. They are:

- Service delivery management
- Relationship management
- Contract administration

Service delivery management ensures that the service is being delivered at the required level of performance and quality, as stated in the contract. Service delivery management considers performance and manages risk through the 'do', 'check' and 'act' stages of PDCA. It involves setting controls and service-level agreements.

Relationship management seeks to keep the relationship between the economic operator and the contracting authority open and constructive, aimed at resolving or easing tensions and identifying potential problems at an early stage, whilst also identifying opportunities for improvement. Relationships must be wholly professional throughout the 'do' stage of PDCA, and they must also include a professional approach to managing issues and to dispute resolution.

Contract administration handles the formal governance of the contract and changes to documentation during the life of the contract. These areas of contract management ensure that the everyday aspects of making the contract run effectively and efficiently are taken care of. They may form activities relating to each stage of PDCA.

2.2.1 The inaugural or initial meeting

For any major contract it is good practice to hold a formal inaugural or initial meeting soon after the contract has officially been awarded. At this meeting people from both the economic operator and the contracting authority will come together for the first time in the context of the agreed contract. They may have met before, but this will have been whilst the parties were going through the procurement process. At this meeting it is vital that both sides (economic operator and contracting authority) move from a competitive to a co-operative approach – they will be working together for the life of the contract and both will want a successful outcome.

Everyone who is to be closely involved in the operation of the contract should be present at the meeting and ideally sitting around the same table. The objectives of the meeting include:

- Understanding the roles and responsibilities of everyone present
- Discussing the implementation and/or project plan
- Discussing issues that impact on the operation of the contract
- Discussing control mechanisms

A sample detailed agenda for an inaugural meeting is provided in section 3.2 below.

Other matters can become apparent at an inaugural meeting. These include:

- A perception by people from the contracting authority of the truth and credibility of certain statements and promises made by the economic operator prior to the award of the contract
- An understanding of the keenness of the economic operator for the contract
- Whether the economic operator has fully understood the requirement
- Specific capabilities of the people working for the economic operator
- The extent of flexibility that both sides are prepared to demonstrate within permitted parameters
- The extent to which the economic operator may seek extras or variations
- The extent to which people can work together

Whilst accommodating minor suggestions from both sides, care must be taken to avoid corrupt practices, such as changing the scope of work or becoming too familiar with each other.

Finally, this initial meeting is an important opportunity for the procurement officer managing this contract to establish personal credibility in the eyes of the people from the economic operator. His/her approach should be neither too soft nor too severe:

- An approach that is too soft may be interpreted as weakness, signalling to the economic operator that the procurement officer may be easily exploited. Giving this impression could lead to many contractual claims and requests for variations throughout the life of the contract
- An approach that is too severe could alienate the people from the economic operator and hinder the development of a constructive working relationship. Giving this impression could lead to people from the economic operator not being prepared to give and take in the spirit of the contract.

The meeting should be conducted in a serious, firm and polite manner. Remember - you don't get a second chance to make a first impression!

2.2.2 Ongoing contract management

The economic operator will perform the contract within the agreed scope. This may include the delivery of goods and materials or the provision of services or works to the contracting authority. A vital part of the check stage of PDCA is that people in both organisations raise concerns and issues as soon as they identify them and that people on the other side of the relationship treat the issues seriously and promptly. There is nothing worse than an issue that festers between people from two organisations that are supposed to be working together. Ongoing contract management involves the administration of a range of activities, which include:

- Contract maintenance and change control
- Charges and cost monitoring
- Ordering or call-off procedures
- Receipt and acceptance procedures
- Payment procedures
- Budget procedures
- Resource management and planning
- Operational and management reporting
- Asset management
- Progress meetings

2.2.3 Issues log

An issues log is one mechanism for managing issues. It records them as they arise along with the actions taken to attempt to resolve them. A sample issues log is provided in section 3.3 below.

The aim of the issues log is to record the issue and the action taken to resolve it. An escalation procedure must be provided in the contract for issues that cannot be resolved. This procedure will involve people at more senior levels of the organisation in an attempt to resolve the issue. A final use of alternative dispute resolution or court action may be appropriate if the escalation procedure fails (see modules F1 and G2).

2.2.4 Review meetings

Review meetings are another practical means of keeping control of a contract, particularly when it is complex or runs over several years. A typical agenda for a contract review meeting is shown below:

1. Introduction
2. Apologies
3. Minutes of last meeting
4. Actions outstanding from last meeting
5. Progress – planned and actual
6. Performance levels achieved
7. Review of issues log
8. Corrective actions required
9. Summary of actions
10. Date of next meeting
11. Circulation of minutes

In some contracts a monthly operational meeting may be part of the contract management process, together with a quarterly management or steering group meeting involving people of a high level in each organisation. These meetings need to be well-run and brief and provide a means of reporting, encouraging and rewarding progress towards the final goal.

In these ways it is possible to successfully manage the do, check and act stages of the contract. The subject of contract controls is discussed in section 2.3 below.

Good practice note – meetings

Review meetings are a productive means of communication during an ongoing contract and not having them can have negative consequences. They must be well-run and not too time-consuming. In one case, an economic operator arrived for a meeting with a senior procurement person only to be told that the person was too busy to attend the meeting as they normally did. Consider the signals that this incident sent to the people from the economic operator.

2.2.5 Managing the relationship

Contractual arrangements may commit the contracting authority to one economic operator or a small number of economic operators to a greater or lesser degree, and for some time. Inevitably this relationship involves a degree of dependency. The costs involved in changing economic operator are likely to be high and, in any case, contractual realities may make it highly unattractive. It is therefore in the contracting authority's own interests to make the relationship work. The three key factors for success are:

- Mutual trust and understanding
- Openness and excellent communication
- A joint approach to managing delivery

There must be mutual trust between the people working in both organisations if the relationship is to work and if the contract is to be delivered successfully. The factors that help to establish the relationship and achieve the right benefits include the following:

- The economic operator gains greater insight into the contracting authority's business and management style, and therefore more often pre-empts changed requirements and/or makes proactive suggestions/contributions with the expectation that this may improve the service and/or provide other sources of mutual benefit. In addition, the economic operator may become more efficient and, therefore, more cost-effective at delivering this type of service.
- The economic operator feels more confident in investing for the longer term – for example, in a more flexible infrastructure, with better systems or staff training.
- The contracting authority gains from knowing the economic operator's strengths and weaknesses and focuses contract and contract management efforts on those areas where they will bring the greatest returns.

Good practice note – Communication

Good communication can be a make or break aspect in managing a relationship. Many cases of mistrust or concern over poor performance in a service relationship result from a failure to communicate.

2.3 CONTRACT MANAGEMENT CONTROLS

2.3.1 The need to be able to measure

In the very first line of his book, *The Fallacies of Software Engineering,* Robert Glass uses the quotation, "You can't control what you can't measure", and the rest of the text, building on that statement, argues that we need metrics to rein in the chaos of software development.

Software is an intangible service and presents its own problems in the area of controls. One government department had 200 controls over its IT systems. This sounds horrendous until it is realised that there are 200 separate systems to control.

Control is vital, and it is true that you cannot control what you cannot measure. Measurement is discussed in modules B7 and G3. Controls are also discussed in modules B2 and B3.

2.3.2 Risk and risk management

Risk is defined as the uncertainty of outcome, whether it be a positive opportunity or a negative threat. In the area of contract management, the phrase 'management of risk' incorporates all of the activities required to identify and control risks that may have an impact on a contract being fulfilled. It is important to note that it is the contracting authority's responsibility to maintain the service wherever possible.

Many risks involved in contract management relate to the economic operator being unable to deliver or not delivering at the right level of quality. These risks could include:

- Lack of capacity
- The economic operator's key staff being redeployed elsewhere, eroding the quality of the service provided
- The economic operator's business focus moving to other areas after the contract award, reducing the added-value for the contracting authority in the arrangement
- The economic operator's financial standing deteriorating after the contract award, eventually endangering its ability to maintain the agreed levels of service
- Demand for the service is much greater than expected and the economic operator is unable to cope
- Demand for the service is too low, meaning that economies of scale are lost and operational costs are disproportionately high
- Staff in the contracting authority with a knowledge of the contract transferring to another department or moving to another organisation, thereby weakening the relationship
- The contracting authority being obliged to make demands that cannot be met, perhaps in response to changes in legislation
- *Force majeure:* factors beyond the economic operator's control disrupting delivery – for example, premises inaccessible due to a natural disaster
- Fundamental changes in the contracting authority's requirements, perhaps as a result of changes in policy, making the arrangement a higher or lower priority or changing the level of demand for the service
- The contracting authority's inability to meet its obligations under the contract

Where risks are perceived or anticipated, the contracting authority and the economic operator must work together to decide who is responsible for the risk, how it can be minimised and how it will be managed should the circumstance occur. Ideally, these issues should have been tackled in advance in the contract documents. The contracting authority will aim for continuity of activity in all possible circumstances, although it is unlikely to be a cost-effective aim. Questions to consider for each individual risk include:

- Who is best able to control the events that may lead to the risk occurring?
- Who can control the risk if the situation occurs?
- Is it preferable for the contracting authority to be involved in the control of the risk?
- Who should be responsible for a risk if it cannot be controlled?
- If the risk is transferred to the economic operator:
  - Is the total cost to the contracting authority likely to be reduced?
  - Will the economic operator be able to bear the full consequences if the risk occurs?
  - Could it lead to different risks being transferred back to the contracting authority?

A key point is that in most cases the ultimate responsibility for the service that the contracting authority provides to its own customers and stakeholders (patients in a hospital, passengers of a bus service, or children in a school) cannot be transferred to the economic operator.

> Although the economic operator may be under severe financial pressure for non-fulfilment of its obligations, this pressure will not compensate the contracting authority for its own failure to fulfil its obligations and deliver key outcomes. For example, a critical service or building may fail, endangering the lives of citizens.
>
> Although the economic operator may fail to deliver, the ultimate responsibility remains with the contracting authority. Prudent procurement officials are aware of this responsibility and keep it in mind during specification, economic operator selection and contract management.
>
> It is essential to consider the whole supply chain when analysing the risks to a contract and to examine the organisations supplying an economic operator whenever a major risk is involved.

One factor that can assist the procurement officer when things may start to go wrong is the relationship that the contracting authority people have with the people from the economic operator. Where the relationship is good, open, fair and honest, an early warning of the impending risk becoming a reality may be provided through the normal working relationships and control mechanisms. Where the relationship is poor, people working for an economic operator will attempt to hide the problem, which then normally materialises as an even greater risk.

See module A4 for further discussion of risk allocation in contracts.

2.3.3 The need for wisdom when selecting a control mechanism

Control must be tempered with wisdom. The wisdom in setting contract controls starts with the performance measures against which the specification was checked and weighted before the Invitation to Tender (ITT) was issued and against which the tenders were scored. Contract management controls must be:

- highly relevant to the essence of the contract
- understood and accepted by people from the economic operator and from the contracting authority
- capable of measurement
- robust in their operation
- able to provide more value than the cost of the activity related to their collection
- able to reflect soft and hard measures
- useful as an information source

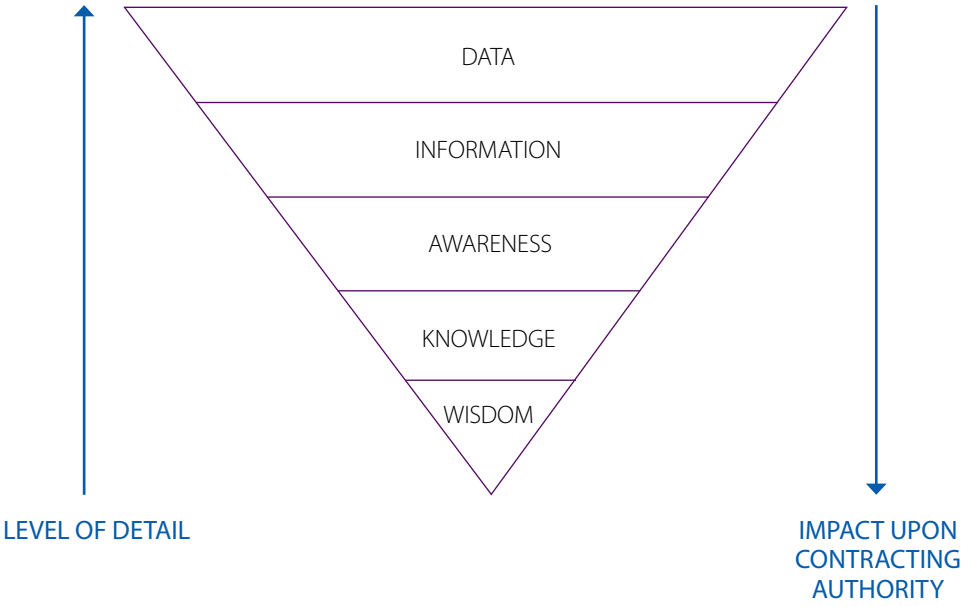
Timely high-level/summary level reporting is much more effective than accurate late information. It is essential for the information obtained to be useful, either intrinsically or because it can be processed to provide knowledge on which to base decisions and activity.

Procurement officers are advised to have a small number of effective controls rather than a huge number of controls that are used just because the information can be obtained and reported. In the following diagram, the level of detail in a control is considered against the business impact that it makes.

Raw data needs to be transformed into meaningful information that will make people aware of situations and give them the knowledge to make wise decisions.

Raw data that overwhelms people by its volume will not provide the information that will enable them to make an informed decision.

Raw data that is incomplete, late or incomprehensible will also not enable people to make informed decisions.



2.3.4 Areas where controls are necessary

Between the award of a contract and close-out, controls are necessary at the following steps of the procurement process. The nature of these controls will be discussed in modules B7 and G3. They are only noted here:

Step 27	Acknowledgement – to ensure that the contract terms and conditions are not changed by the later document Localisation on legal system
Step 28	Control to ensure on-time delivery
Step 29	Control to test the quality of the work in progress/delivery
Step 31	Control to count receipts
Step 32	Control to ascertain acceptance of delivery
Step 34	Control to ensure that only permitted people withdraw items from stock
Step 35	Control to make sure that what has been accepted is paid for
Step 37	Control to make sure that lessons are learned from this procurement for the future
Step 38	Control to ensure that disposal gives value-for-money and is environment-friendly
Step 39	Control to close the contract in accordance with good practice

Module B2 describes the full procurement cycle.

2.3.5 Service-level agreements

Service-level agreements are one excellent way of ensuring control of a contract. There should be a detailed agreement concerning the required service levels and thus concerning the expected performance and quality of service to be delivered. These service-level agreements are incorporated as part of the contract, often in the form of schedules in the contract. Frequently these agreements are comprised of key performance measures (KPIs). Modules B7 and G3 will discuss this issue in more detail. The contract should define the service levels and terms under which a service or a package of services is provided. It should state mutual and individual responsibilities.

By clearly stating the required and agreed quality of services, both the contracting authority and the economic operator know and understand what targets have to be met in the delivery and support of services.

Both parties should pre-agree on the compensation for the contracting authority if agreed service levels are not achieved. Similarly, the contracting authority may receive a benefit if the economic operator exceeds the agreed service levels and it could agree on a regime of bonus payments as a means of incentivising the economic operator.

Service levels and incentivisation must relate to the key criteria on which the specification was based, the ITT weighted, and the contracting authority's tender judged. In that way it can be seen that those issues, which originated in the formative steps of the procurement cycle, are carried through to delivery.

See module A4 for further discussion on measuring service levels.

2.4 VARIATIONS

LOCALISATION WILL BE REQUIRED HERE – local examples should be inserted.

2.4.1 What is a contract variation?

A contract variation can be defined as a change in the original scope of work, which has been agreed by both parties.

Ideally, if contracts are well founded, they should run without variations. The original specification and invitation to tender should provide – or request economic operators to provide – mechanisms to cope with changes during the life of the contract, in line with the agreed contract terms and conditions. Currency fluctuation clauses and cost/price adjustment clauses are common examples of such measures, where the need to make a change can be foreseen and accommodated within the contractual terms.

In more complex contracts, the contracting authority may consider including in the original contract a cost variation mechanism to allow for flexibility and change to be reflected within the scope of the contract. This flexibility could be achieved, for example, by specifying in the contract that additional services may be required from time to time, clearly identifying those additional services and asking economic operators to propose costs to deliver those services within their original tender. Those agreed costs are then incorporated into a contract schedule.

> For example, in a catering contract, this may mean that the caterer is asked to quote for providing 'staff and food for evening events'. Such a condition would be acceptable as all potential economic operators could bid on this basis, and the precise frequency of the evening events may not be known at the start of the contract. In this scenario, however, it would not be within the scope of the contract if the economic operator and the contracting authority agreed that the catering staff would paint the offices in the evening. Such a change would clearly be a material difference.

The specification of additional services must not be used as an attempt to avoid transparency and competition.

Warning note

Contracting authorities must be very careful when considering the possibility of introducing variations in an agreed contract, particularly outside a pre-agreed and transparent contractual cost-variation mechanism. There is a significant danger that the variation of a contract could result in the award of a new contract for the purposes of the Directive, unless one of the limited exceptions applies. If the changes do amount to the award of a new contract, then this new award must be in compliance with the Directive. The failure to comply with the provisions of the Directive where the changes amount to the award of a new contract would be considered as an illegal direct award.

See module C4 for information on where and what variations to a contract may be permitted. See also the comments below on the Pressetext case.

The following discussion is based on the assumption that any proposed variations are permissible under the EU *acquis*.

2.4.2 When is a contract variation necessary?

A variation to the contract may be necessary in the following circumstances:

- When the scope of work changes to become greater or lesser
- Where there is a change in the resources or facilities required
- When the rates charged under the contract change
- Where there is an extension of the duration of the contract
- Where terms and conditions of the contract change
- Where national laws make a change that impacts on the contract

2.4.3 Behind the need for a variation

Behind the need for a variation are circumstances where:

- there has been inadequate upstream planning;
- there has been inadequate assessment and evaluation of economic operators' tenders;
- there is obsolescence;
- poor contract management occurs;
- genuine unforeseeable circumstances occur;
- there are legislative changes.

Inadequate upstream planning

Inadequate upstream planning is a major cause of variations. They occur when the people carrying out the procurement process do not devote enough time to upstream activities, such as involving stakeholders, specification, setting performance criteria, and considering terms and conditions. Therefore the specification and the ITT may not contain enough information or the correct information to enable economic operators to make their tender.

Inadequate tender assessment

Variations may originate from an insufficient analysis of economic operators and of the tenders that they submit to the contracting authority, which results in a different understanding by the economic operator and the contracting authority of vital aspects of the services, works or goods to be provided.

Human beings can be devious (meaning that they deviate from a correct, accepted or common course) and even deceitful. People working for economic operators assess a need, prepare a tender and sign the contract. They may then 'discover' that an extra, but essential, piece of work needs to be done before the main work can start. The procurement officer may have assumed that this work was included, but the wording of the economic operator's tender may clearly exclude the extra work, even though common sense would dictate that such work was necessary.

Good practice note – variations

Economic operators will sometimes bid low in the tender in an attempt to secure the contract and then afterwards generate increased profits through variations. If the low-price tender looks too good to be true, then it probably is too good to be true!

Obsolescence

Here the supply market may have moved on and the equipment as specified may now be obsolete and unobtainable. Computer hardware and software are classic examples. However, the specification should be forward-looking and anticipate a development roadmap. In this type of situation a framework agreement with mini-competitions may be a better approach so as to reflect the changing needs.

Poor contract management

Naïve procurement officers and other stakeholders can be subjected to arguments from people working for the economic operator that a particular part of the service is not within the contract and that a variation is therefore necessary. Care needs to be taken not to pay additionally for items that are already included in the contract.

The wording of the contract may be ambiguous, despite all of the previous attempts at clarity, and a variation may have to be agreed. These cases must be fed back into the learning from this contract in order to avoid such issues in future contracts.

Genuine unforeseeable circumstances

With the wide variety of contracts established with contracting authorities, it is inevitable that some contracts will require variation, either to meet changing requirements or to meet a reasonable request from the economic operator.

Legislative changes

Changes in legislation may entail contract variations.

2.4.4 Helpful case law relating to variations

Variations cannot be used as a mechanism to re-let, lengthen, amend or develop a contract between a contracting authority and an economic operator. Variations must by nature be of a relatively minor nature in the context of the overall contract size and scope. One public sector procurement manager commented that "increasing the work by 50,000 GBP on 5,000,000 GBP is a variation but perhaps not materially different, whereas increasing the work by 50,000 GBP on 100,000 GBP is a major material difference". This comment assumes that the increase is also within the scope of the original contract. Even where there is a small change in cost, this may shift the risk between the parties and could as such be regarded as a 'material' change.

The 2008 "Pressetexte" case (Pressetexte Nachtrichtenagentur v Republik Osterreich Bund C-454/06) considered the circumstances where a variation to a contract would constitute the award of a new contract, which should be the subject of further competition. The court emphasised the importance of how "material" the changes are to the original contract:

> "In order to ensure transparency of procedures and equal treatment of tenderers, amendments to provisions of a public contract during the currency of the contract constitute a new award of a contract ... when they are materially different in character from the original contract and, therefore, are such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract."

The Court provided guidelines on when a variation to a contract may be regarded as 'material'. It will be material where:

- it introduces conditions that, 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;
- it extends the scope of the contract considerably to encompass services not initially covered;
- it changes the economic balance of the contract in favour of the contractor in a manner that was not provided for in the terms of the initial contract.

2.4.5 The impact of variations

Variations can have direct and indirect impacts. Direct impacts can include:

- Increased/decreased cost of the contract
- Contract over/under budget
- Delays and extension of time for supply or works projects

Indirect impacts can include:

- Wasted design work
- Additional design work
- Wasted or unnecessary activity
- Changes to or cancellation of orders that the economic operator may have placed with its own supply base

- Placement of additional orders by the economic operator and its supply base
- Increased/decreased time and delays
- Unproductive labour costs
- Reprogramming of the contract to mitigate the effects of increased/decreased time and costs
- Additional head office time and money spent by the economic operator, which may seek to recover its fixed costs

2.4.6 Managing variations – minimising the number of variations

Variations have been described as a disease. The best remedy to the disease is one of prevention – by trying to minimise the likelihood of variations arising in the first place.

Stated policy should be to avoid variations wherever possible, and this should be made clear at the inaugural meeting. Another policy must be that only thoroughly investigated variations, *i.e.* those that are permissible under the EU *acquis,* will be agreed and then only in writing by the authorised procurement officer.

The inaugural meeting should also be used to advise the economic operator of the variations procedure (see the sample agenda in 3.2 below).

When an economic operator submits a request for a variation, procurement officers must ask themselves and other stakeholders a number of searching questions:

- Is this request clearly within the scope of work that was agreed and understood?
- Is the request a misinterpretation of the existing specification or of the terms and conditions? Would clarification mean that the need for the variation would disappear?
- Is this variation really needed, or is it a "nice to have"? Work out the direct and indirect implications.
- Is there another way of proceeding that might be more cost-effective?
- Is the variation really a modification to the current contract or is it new work requiring a new contract?
- Will the variation breach national procurement regulations or conflict with any policy on competitive tendering?

2.4.7 Managing variations – minimising the impact of variations that cannot be avoided

If a variation really is necessary and is permissible, the contract should contain a change control provision. The change control procedure should ensure that an authorised person, and only that authorised person, has responsibility for agreeing to a variation. Some contracting authorities invoke a high-level committee to review the need for variations and to search for alternatives.

To minimise the impact of a variation:

- Use the same diligence in agreeing to a variation as you would in awarding a contract.
- Always obtain a firm quotation for the price of the variation. Remember that economic operators will try to use variations to maximise the profit of the contract and may very well price high (it is effectively a direct award without competition), so always challenge the price.
- Understand the concept of marginal costing: the economic operator will have built fixed costs into the base contract price, but these costs may not be relevant for extras and should be excluded from the costing of variations.
- Do not agree to a variation to the contract until both you (as procurement officer) and the person from the economic operator agree in writing to the total consequences of the variation in terms of time and cost (including any secondary effects on other parts of the procurement).
- Do not hesitate to issue a variation for a reduction in price. All too often it is thought that variations only result in increased cost. Sometimes you may decide to delete something from the work scope, which could result in a reduction in price. Again beware of the possible secondary effects.
- Make sure that full records are kept from the start of the contract. It is a good idea to record in a contract logbook any incidents that could result in variations.
- Do not be tempted to use an economic operator to get extra work done just because it is already present on your site.
- Keep all relevant stakeholders involved in the consideration of any variations; these stakeholders may include procurement, contracts, legal, finance, end-users and/or the budget-holder.
- In an emergency, instruct the economic operator orally, but confirm in writing without delay, the same day if possible.

2.4.8 A simple change control procedure

A single change control procedure should apply to all changes in the contract. The various parts of the contract should not have different change control mechanisms. However, flexibility needs to be built into this procedure to make it possible to deal with urgent issues, such as emergencies. A change control procedure should provide a clear set of steps and clearly allocated responsibilities covering:

- Request for change
- Assessment of impact
- Prioritisation and authorisation
- Agreement with economic operator
- Control of implementation
- Documentation of change assessments and orders

Responsibility for authorising different types of changes may rest with different people in the contracting authority, and documented internal procedures will need to reflect this shared responsibility. In particular, changes in the overall contract, such as changes in prices that are outside the scope of agreed price variation mechanisms, must have senior management approval. In many cases, however, it will be possible to delegate limited powers to procurement officers to authorise minor changes that affect particular services or service-level agreements using agreed processes. Localisation.

There should be an agreed procedure for placing additional demands on the economic operator, including the specification of the requirement, contractual implications, charges for the additional goods/works/services, and delivery time frames. This procedure should be used in consultation with those responsible for monitoring the provision of goods/works/services, and where it fits within internal legal guidelines it must be treated as a new purchase. Localisation. **This requirement must be genuine and not an attempt by people working for the economic operator or the contracting authority to circumvent procurement legislation.**

Appropriate structures need to be established, with representatives of the management of both the contracting authority and the economic operator, to review and authorise change requests. These structures may fit in with existing management committees, or new change advisory roles may be required.

2.5 PAYMENT

Payment of economic operators is a control in itself, but the power that contracting authorities have at this stage of the procurement process must not be used to unjustly delay or withhold payment from economic operators that have completed work. To do so would damage the relationship between the economic operator and the contracting authority. There are three stages to the payment process:

1. Receipt of request for payment
2. Authorisation and matching
3. Transfer of funds

This process is discussed in module B2 (step 35 of the procurement process).

2.6 PERFORMANCE REVIEW AND CONTINUOUS IMPROVEMENT

Performance review (step 37 of the procurement process) reflects a comparison by the contracting authority of the performance of the goods, works and services against the quoted, specified and agreed criteria. Modules A4, B7 and G3 include more details on performance measurement, and important activities must also be undertaken in close-out, which is covered in step 39 of the procurement process (see also 2.7 below).

Measurement is a vital part of the procurement process, but it is sometimes forgotten when procurement officers are concentrating on a subsequent project. With a large procurement, a post-implementation review is an appropriate tool.

Continuous improvement (step 37 of the procurement process) involves looking at the procurement process and the goods, works and services bought and identifying areas for improvement that can be applied when carrying out future procurement.

The purpose of a post-implementation review is to assess whether the procurement has delivered the benefits for which it was first conceived. It is also an opportunity to record lessons learned, to capitalise on best practices, and to record the performance of the economic operator and the whole of the project management team for future reference when another similar project may be undertaken.

2.7 CLOSE-OUT

The objective of the close-out phase is to ensure that the contracting authority is satisfied with the delivery of the goods, works and services it has purchased. Close-out will frequently review the whole procurement process from step one onwards, and it may involve both the person who ran the procurement and the person who managed the contract – both may have lessons to learn.

It also provides the opportunity to identify how well the procurement officer and other members of the stakeholder team have performed on the project as well as to review what lessons have been learned for the future as part of the continuous improvement of the procurement process.

A contract may not be considered as concluded when the actual physical work has been completed or the goods delivered. The true end of the contract is the end of a warranty, retention or defects liability period. However, there are several stages to undergo until that point is reached. Not all of these stages will be necessary for every procurement exercise, and procurement officers must select the process that meets the requirement itself and the risk inherent in the procurement.

Localisation: there may be different names in different industries for these stages in different countries. Amendment of this generic text may be required.

Good practice note – close-out

Close-out is the final opportunity for people working for the contracting authority to indicate that they consider something in the procurement process to be unacceptable.

2.7.1 Joint inspection of the completed requirement

Once the economic operator declares that all of the work (whether it be installation, construction or delivery) has been completed, the first task will be to undertake a comprehensive check to confirm completion. This task may be that of the procurement officer or of a technical specialist stakeholder.

It is always advisable to ensure that a thorough inspection of the work completed is jointly undertaken with the economic operator. This inspection will ensure that nothing has been overlooked and that there is a common understanding (without disagreement) of the state of the finished delivery, with an itemised list of any omissions or defects found. This inspection can be carried out by the procurement officer and a technical specialist stakeholder from the contracting authority together with the project manager or contract manager from the economic operator. Any defects agreed with the economic operator as a result of this inspection should be rectified as soon as possible.

2.7.2 Snagging list

During the inspection the group will draw up a snagging list (sometimes referred to as a 'punch list'). Snags are minor deficiencies that do not constitute incomplete work or have a major impact on the functionality of the finished requirement. The snagging list should be transmitted to the economic operator and realistic dates agreed for the repair of the snags. These repairs are then checked by the technical specialist stakeholder on behalf of the contracting authority. Items on a snagging list could include:

- Typographical errors on documents provided by economic operators
- Windows that do not close on a building
- A list of improvements from participants in a pilot training programme
- Software screens that do not clear properly and present new data

2.7.3 Final 'as built' documents completed and stored

With any procurement, but particularly for works contracts, it is vital to keep complete records of all diagrams, specifications, lists, data files, drawings and documents describing the finished specification of the requirement that is now in situ. There are two reasons for this record-keeping:

Firstly, the economic operator must be able to manage any actions necessary under the warranty, retention or defects liability period.

Secondly, the contracting authority must have a full set of information about the detailed design and specification to ensure that the requirement is maintained properly. If any modifications are subsequently required, full information is available on which to base the amended design.

In some industries there may be statutory requirements to maintain detailed records for the lifetime of the plant until final decommissioning, which in these cases may be more than 100 years from the original construction date.

2.7.4 Commissioning and testing completed

Where necessary, commissioning and testing should form an integral part of the process of transferring ownership of the works (building or bridge), goods/equipment (vehicle, computer system or photocopier), or service (vehicle or aircraft service) to the contracting authority. The purpose of this process is to eliminate initial problems in the operation of the requirement so that it is fit for the purpose for which it was originally specified.

On complex projects, sometimes an independent commissioning engineer may be engaged to undertake this process with both parties.

2.7.5 Handover/contracting authority acceptance

This is a formal procedure for accepting the finished requirement from the economic operator, and documentation should include all testing and commissioning data, operation and maintenance manuals, and drawings.

On some major high-profile public contracts, a handover ceremony is sometimes held to mark the change of ownership and the start of the use of the requirement by the contracting authority or its customers or stakeholders.

2.7.6 Warranty, retention or defects liability period

The terms and conditions of the contract include a provision for a warranty, retention or defects liability period. This period will vary with the requirement and with the specification issued by the contracting authority, but the warranty will include the replacement of faulty parts or corrective action, as specified in the contractual document.

A distinction must be made between corrective action, which will be taken in accordance with the terms of the agreement, and maintenance and development, which unless specified will normally fall outside the terms of the agreement.

Localisation required.

See also module C2 on contract terms.

2.7.7 Issue of final certificate

Where appropriate, a final certificate may be issued. A typical contract condition describing the issuing of a final certificate might state:

> "The final certificate to be issued by the contracting authority at the end of the defects liability period shall be binding on both parties and shall provide conclusive evidence that the work has been completed to the satisfaction of the contracting authority and in accordance with the contract."

This certificate confirms the final completion of the project.

2.7.8 Final accounts agreed and payments made

Once the final certificate has been issued, there should be no outstanding payments and the procurement officer should check to ascertain that the final accounts have been agreed and that all payments have been made. The contracting authority may wish to check that the economic operator has paid its own economic operators.

2.7.9 Release of any performance bonds, retention monies or other forms of security

Localisation required

Once the warranty, retention or defects liability period has been satisfactorily completed and the final accounts have been agreed, there is no need for holding any retention monies, performance bonds or other forms of security, and so these may be released. See module C3 for further information on bonds and other forms of security.

2.7.10 Formal end of contract

Localisation required

The end of the warranty, retention or defects liability period is considered to be the 'end of the contract'. From this point on, the only legal recourse the contracting authority has if the product fails to live up to expectations is to sue for damages in the courts. It is extremely important therefore that a full and final check is carried out to satisfy the contracting authority that the requirement is fully fit for purpose before issuing the final certificate.

NARRATIVE APPENDIX
SAMPLE DOCUMENTS

INTRODUCTION

This section contains a sample agenda for the inaugural meeting, a sample issues list and a close out checklist.

1. SAMPLE AGENDA FOR THE INAUGURAL MEETING

A sample agenda for an inaugural meeting is shown below:

Inaugural Meeting

1. Object of Meeting and Introductions

2. Management Organisation

2.1 Contracting authority roles and responsibilities
2.2 Economic operator roles and responsibilities
2.3 Sub economic operator's involvement

3. Performance and Administration

3.1 Variation procedures
3.2 Invoicing processes
3.3 Performance levels required
3.4 Performance linked payment arrangements
3.5 Joint inspections
3.6 Audit arrangements
3.7 Authority to stop work
3.8 Environmental questionnaire
3.9 Operational and management review meetings
3.10 Safety management
3.11 Escalation procedures
3.12 Processes for raising and handling issues

4. Security

4.1 Economic operators ID cards
4.2 Proof of identity/security checks required
4.3 Withdrawal of access to site

5. Site amenities

5.1 Use and location of site amenities
5.2 Restrictions applied to economic operator's staff
5.3 Use of utility supplies
5.4 Economic operator's accommodation
5.5 Use of economic operator's equipment

6. Any other business

7. Date and venue of next meeting

2. SAMPLE ISSUES LOG

The issues log shown below is best reproduced in a landscape format. Some organisations use common IT systems to share the issues log between them.

Issue No.	Date	Raised by	Description	Resolution agreed	Action taken by	Date issue closed

3. CLOSE OUT CHECKLIST

This checklist is taken from the office of administration for information technology at the state of Pennsylvania USA. http://www.oit.state.pa.us This site contains a number of useful templates.

Access	
Have all security badges been secured?	**Y/N**
Have outlook access accounts been disabled?	**Y/N**
Has access to applications been disabled or modified?	**Y/N**

Deliverables	
Have all deliverables been completed and signed off on?	**Y/N**
Have all deliverables and related financial records been placed in a centralized repository for easy access?	**Y/N**
Have source files been obtained for all deliverables (No PDF documents)?	**Y/N**

Knowledge Transfer	
Has appropriate knowledge transfer occurred on key components of the project?	**Y/N**
Have all key administrators of the system been identified and trained?	**Y/N**
Does the maintenance team have access to all the artefacts that could help them maintain the project's deliverables?	**Y/N**

Transition	
Has communication been issued indicating that the project (or project phase) is ending?	**Y/N**
Have all project staff been released or re-allocated?	**Y/N**
Have all invoices and financial obligations been resolved?	**Y/N**

SECTION 3
EXERCISES

EXERCISE 1
CONTRACT MANAGEMENT

In a previous module we defined contract management as one of the four texts below. Can you remember which one it is? We have been quite subtle here: there are elements of the appropriate approach in all of the definitions, but one is the preferred one.

1. Is working closely with people from the economic operator to ensure that they stick to the letter of the contract and meet the needs of the contracting authority, while giving as little away as possible to ensure that the procurement is delivered at lowest overall cost
2. Is about keeping the economic operator happy, to ensure that they complete the procurement on time and within budget
3. The steps that enable both the contracting authority and the economic operator to meet their obligations within the contract in order to deliver the objectives required from the contract
4. The steps that relate to organising delivery of the contract once the documents have been signed by both parties so that the economic operator can deliver the goods and services required.

EXERCISE 2
10 QUESTIONS

The ten questions below require true or false answers. Read them carefully and then decide whether the statement is true or false. We have changed the words from the text you have seen to make it more difficult in some cases.

	Question	True	False
1	There is no pressure for the inaugural meeting to take place		
2	Activities in the contract management process include service delivery management, relationship management and contract administration		
3	It is appropriate to take a hard approach at the inaugural meeting		
4	Review meetings are a necessary evil, where we treat economic operators in a hard way		
5	The three key factors for success in managing relationships are: ■ A common understanding of the economic climate ■ Openness and excellent communication ■ A joint approach to managing delivery		
6	In a good relationship, an economic operator will feel more confident in investing for the longer term – for example, in more flexible infrastructure, better systems or staff training		
7	Issues logs are where we record economic operators' moans and groans		
8	It is better to reschedule a review meeting than for the senior person from the contracting authority not to attend at short notice		
9	During a contract, the contracting authority will gain an insight into the economic operator's strengths		
10	During the inaugural meeting perceptions can be gained by people from the contracting authority about the truth and credibility of given statements and promises made by the economic operator prior to the award of the contract		

EXERCISE 3: MINIMISING THE NUMBER OF VARIATIONS AND THEIR IMPACT WHEN THEY OCCUR

This document contains a table of fifteen statements/questions to be asked about variations. In their context all of the statements are true, but from the information you have it is not clear whether the statements can be said to:

- minimise the number of variations, or
- minimise the impact of the variations on the contracting authority when it occurs

Your task is to determine which of the two options each statement refers to. Each statement can only go one way, left or right. To help you, the second one has been answered correctly.

Minimise the number of variations	Statement	Minimise the impact of the variation
	1. Is this request clearly within the scope of work agreed and understood?	
	2. Use the same diligence in agreeing a variation as you would in letting a contract.	
	3. Always obtain a firm quotation for the price of the variation. Remember that economic operators will try to use variations to maximise profit in the contract and may well price high – it is effectively direct award without competition action – so always challenge the price.	
	4. Understand the concept of marginal costing – the economic operator will have built fixed costs into the base contract price, but these may not be relevant for extras and should be excluded from variations.	
	5. Is this really needed, or is it a "nice to have"? Work out the direct and indirect implications.	
	6. Is there another way of doing it, which may be more c ost-effective?	
	7. Do not agree a variation to the contract until both you (as procurement officer) and the person from the economic operator agree in writing the total consequences in time and cost of the variation (including any knock-on effects to other parts of the procurement).	

Minimise the number of variations	Statement	Minimise the impact of the variation
	8. Is it really a modification to the current contract or is it new work needing a new contract?	
	9. Will the variation breach the national procurement regulations or conflict with any policy on competitive tendering?	
	10. Make sure that full records are kept from the start of the contract. A contract logbook to record any happenings that could result in variations is a good idea.	
	11. Do not be tempted to use an economic operator to get extra work done just because they are already on your site.	
	12. Is it a misinterpretation of the existing specification or of the terms and conditions? Would clarification mean that the need for the variation disappears?	
	13. Keep all relevant stakeholders involved in any variations being considered. This may include procurement, contracts, legal, finance, end users and/or the budget holder.	
	14. In an emergency, instruct the economic operator orally, but complete the written confirmation as soon as possible – the same day if possible.	

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. What does PDCA stand for, and why is it relevant in contract management?
2. Contract management activities can be broadly grouped into three areas that span the do, check and act of PDCA. What are they?
3. There is pressure for the inaugural meeting to take place as soon as possible once the contract is signed. True or false?
4. What are the objectives of the inaugural meeting?
5. Complete the gaps in the text below:

   The aim of the issues log is to record the issue and _____ to resolve it.

   An _____ must be provided within the contract for issues that cannot be resolved.

6. Lack of capacity, fundamental changes and *force majeure* were three of the risks involved with contract management. Can you remember three more risks?
7. Contract management controls must be highly relevant to the essence of the contract. This was one of the six key factors about contract controls. Is it true that the following statements are also key factors? Contract controls must be:
   - Capable of measurement
   - Robust in their operation
   - Able to provide more value than the cost of the activity related to their collection
8. Complete the gaps in these sentences:

   Service level _____ are one excellent way of _____ within a contract.

   There should be a detailed agreement of the required service levels and thus the _____ expected of service to be delivered.

9. Are variations ***normally*** good news for the contracting authority or the economic operator?
10. What are the possible circumstances behind the need for a permitted variation?

MODULE G

Dispute settlement in contract management

PART 2

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this module are to make participants aware of:

1. The importance of maintaining working relations with economic operators whenever possible
2. The need to draft suitable contract provisions addressing dispute resolution, including negotiation and escalation clauses
3. The precise meaning of a range of alternative dispute resolution procedures, namely: mediation, conciliation, adjudication, arbitration and litigation
4. The basic procedures involved in using these alternatives
5. The respective advantages and disadvantages of the above procedures
6. The role of various bodies concerned with international dispute resolution
7. Recent developments across the European Union relating to dispute resolution

1.2 IMPORTANT ISSUES

- The commercial impact of disputes and how best to minimise their costs/ negative impact to the procurement organisation
- Attempts by the European Union and individual countries to improve the processes for dispute resolution through legislative measures and voluntary arrangements, e.g. codes of practice

1.3 LINKS

Links to other modules appear throughout the text of this document. There are, however, major links to modules:

Module B2 on procurement processes

Module B3 on the role of the procurement officer

Module G1 on contract management

Module G3 on measuring performance in public procurement

1.4 RELEVANCE

Disputes are time-consuming and costly activities for procurement officers; they need to be handled effectively and efficiently. Procurement officers need to understand what a dispute resolution process may involve, so that they are able to assist in the most effective way in that process.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

This section will link to other areas referring more closely to legal information.

LOCALISATION WILL NEED TO REFER TO SPECIFIC LEGAL DOCUMENTS AND DISPUTE RESOLUTION PROCESSES USED LOCALLY

SECTION 2
NARRATIVE

2.1 OVERVIEW

This narrative considers the importance of maintaining working relations with economic operators and then investigates what is meant by ADR (Alternative Dispute Resolution), mediation, conciliation, adjudication, arbitration and litigation. A description is provided of what happens in each of these cases and then the advantages of each ADR option are considered. The narrative then examines the arrangements that have been made for international arbitration and recent developments to encourage greater use of mediation, before describing EU initiatives and other initiatives that are currently underway relating to ADR. Finally, specific examples are provided of contractual clauses for ADR.

The narrative will include discussion of the following topics:

- Examples of the types of issues that can lead to conflict and disputes with suppliers (inappropriate specification, etc.)
- Definitions of mediation, conciliation, adjudication, arbitration and litigation
- Comparison of the processes involved
- Evaluation of the respective pros and cons of each of the above procedures
- International arbitration, especially the role of the London Court of International Arbitration
- Recent developments around the world to encourage mediation prior to compulsory dispute resolution
- European Union and UK initiatives related to alternative dispute resolution currently underway
- Contractual clauses and mediation agreements to address potential disputes
- National and international enforcement mechanisms related to awards

Materials referred to in the narrative include:

- EU Directive on Alternative Dispute Resolution (2008)
- EU Green Paper on ADR 2002 (arguments in favour leading to the new Directive)
- Model ADR clauses from the Centre for Dispute Resolution (UK-based organisation encouraging the use of mediation)
- CEDR Model Mediation Agreement 10th Edition (2008)
- UK Ministry of Justice Report on ADR within UK central government departments – examples and statistics (2008)
- Examples of mediation and arbitration disputes and their outcomes

Throughout the training manual, use of the above materials will be encouraged, especially the model ADR clauses and the model mediation agreement. Wherever appropriate, statistical information will be included to suggest trends and relative significance. Practical examples of ADR procedures will be provided.

Clearly, there will be considerable differences in the procedures adopted between the various member states of the European Union, e.g. regarding litigation processes. Localisation of the material, where appropriate, will be an important requirement in this element of the module.

2.2 APPROACH

Section 2 contains the following sub-sections:

2.2.1 Why is it important to maintain working relations with economic operators?

2.2.2 What is meant by:

- ADR?
- Mediation?
- Conciliation?
- Adjudication?
- Arbitration?
- Litigation?

2.2.3 What happens in each of the above processes?

2.2.4 What are the advantages of mediation/conciliation?

2.2.5 What are the advantages of adjudication?

2.2.6 What are the advantages of arbitration?

2.2.7 What are the advantages of litigation?

2.2.8 What arrangements have been made for international arbitration?

2.2.9 What recent developments have taken place to encourage greater use of mediation?

2.2.10 What EU and UK initiatives related to ADR are currently underway?

2.2.11 What types of contractual clauses for ADR should be considered for inclusion in a commercial contract with an economic operator?

2.2.12 Summary

Appendix 1 EU Directive 2008/52/EC

Appendix 2 CEDR Model Mediation Agreement

2.2.1 Why is it important to maintain working relations with economic operators?

As you will have already seen in module B2 (Procurement Processes), it is important to adopt many upstream activities in order to avoid later problems when managing the contract downstream.

For that reason, it is important to adhere to the basic principles and procedures already indicated in module B2. Failure to do so would increase the risk of encountering serious problems with economic operators and could easily lead to costly disputes.

However, even with suitable upstream processes in place, there are occasions when disputes will take place and these disputes will have to be resolved.

Such disputes can arise for a variety of reasons. There could be a change in government policy that has significant consequences on contract performance requirements. Budgets may be reduced, which again could have implications for future contractual relations. Government reorganisation can result in contracts being transferred to another, newly formed contracting authority – and sometimes to more than one. Transitional arrangements may not run as smoothly as would be desired. New regulations and legislation (either from domestic legislation or as a result of EU directives and treaties) can require substantial modifications to existing contractual arrangements. All of the above can place major stresses on the relations between the contracting authority and the economic operators with which it has commercial contracts. Sometimes these stresses produce disagreements – disputes. Appropriate procedures should be in place to provide a mechanism for resolving these disputes.

The following narrative will show you a range of alternatives for dealing with the problem.

The narrative will identify these alternative dispute procedures, define each one, compare and contrast their strengths and weaknesses, and describe some recent developments taking place within the European Union and elsewhere.

Localisation: Throughout this module, there will be frequent occasions where local laws and procedures will vary from the standard text. Consequently, there will be a need to alter the material to fit the needs of the various audiences, depending on which country is involved.

2.2.2 What is meant by alternative dispute resolution (ADR)?

Dispute resolution, in its widest sense, includes any process that can bring about the conclusion of a dispute. Dispute resolution techniques can be seen as a spectrum ranging from the most informal negotiations between the parties themselves, through increasing formality and more directive intervention from external sources, to a full court hearing with strict rules of procedure.

Alternative Dispute Resolution (ADR) is a commonly used term that includes a range of processes involving the use of an external third party and that can be regarded as an alternative to litigation (there is some debate as to whether arbitration is or is not a form of ADR). Dispute resolution techniques include:

Negotiation - the most common form of dispute resolution, where the parties themselves attempt to resolve the dispute.

Mediation - a private and structured form of negotiation assisted by a third party that is initially non-binding. If settlement is reached, it can become a legally binding contract.

Conciliation – the same as mediation, but a conciliator can propose a solution.

Adjudication - an expert is instructed to rule on a technical issue – for instance, as used in the UK for construction disputes, as set out in the Housing Grants, Construction and Regeneration Act 1996, where awards are binding on the parties at least on an interim basis, *i.e.* until a further process is invoked.

Arbitration - a formal, private and binding process where the dispute is resolved by the decision of a nominated third party, the arbitrator or arbitrators.

Litigation - the formal process whereby claims are taken through the civil courts and conducted in public. The judgments are binding on the parties, subject to rights of appeal.

Below some more information is provided on each method, including an indication of each method's advantages.

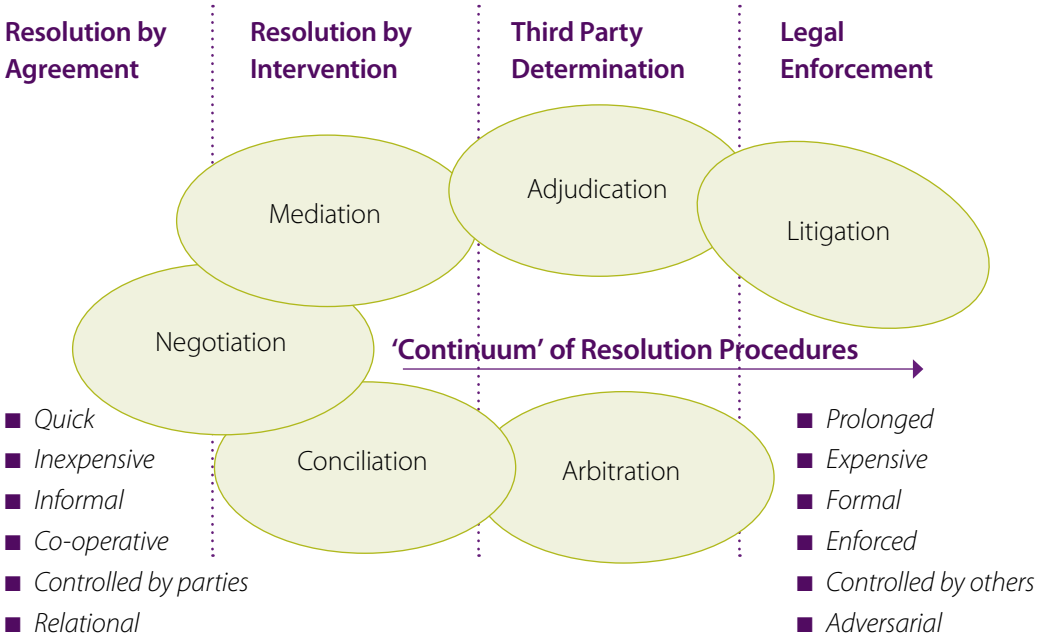
2.2.2.1 ADR (All forms)

Its advantages are:

- speed
- cost savings
- confidentiality
- preservation of relationships
- range of possible solutions
- control of process and outcome

If you are unable to achieve a settlement through negotiation, you will need to consider what other method or methods of dispute resolution would be suitable. Remember that it may still be possible or even necessary to continue negotiating as part of or alongside other forms of dispute resolution. However, in some jurisdictions, for example, once formal court proceedings have started, other forms of dispute resolution can no longer be used. Localisation required.

Here is a diagram showing the different types of alternative dispute resolution and how they relate to each other.



2.2.2.2 What is meant by mediation?

Mediation is negotiation with the assistance of a neutral third party. The mediation process is somewhat like shuttle diplomacy – the parties meet in joint and separate meetings, the mediator moving between them, attempting to find points of common ground and build on them. It has to be treated as an entirely voluntary exercise, and either side can withdraw at any stage.

Mediation does not require pre-agreed contractual terms for it to be adopted, but if such a provision has been drafted into the contract (e.g. an alternative dispute resolution clause) it can oblige the parties to use the process, even though one or both may have changed their minds.

Although a settlement is initially not legally binding on the parties, it is usual for it to be documented and signed as a contractually enforceable agreement.

Example

Mediation is now being used extensively for commercial cases in the UK (including cases involving government departments), frequently for multi-party and high-value disputes. Over 75% of commercial mediations result in a settlement, either at the time of the mediation or within a short time thereafter.

In the UK, mediation is being encouraged through the court system. Since 1999, new court procedures state that:

"Active case management includes … encouraging the parties to use an ADR procedure if the court considers that appropriate".

A number of UK courts, including the Commercial Court, frequently make ADR orders, even in the face of objections from one or more of the parties.

Local information relating to the use of mediation and its success rate will be appropriate to cover the above section.

2.2.2.3 What is meant by conciliation?

This means something very similar to mediation, with one difference. Apart from acting as a facilitator encouraging the two parties to settle their dispute, a conciliator will be able to make a recommendation as to the outcome of the dispute. The recommendation is not binding and the parties may choose to ignore it. However, the process will tend to take a bit longer than mediation because the conciliator will need to become more familiar with the arguments and issues in order to arrive at a suitable recommendation.

2.2.2.4 What is meant by adjudication?

Example

The term "adjudication" is used almost exclusively in the UK for dispute resolution involving building and construction contracts. Under the Housing Grants, Construction and Regeneration Act 1996, construction contracts must include a provision for adjudication, with the adjudicator giving a decision within 28 days of referral. The adjudicator's decision is binding until a final determination is reached by agreement, arbitration or litigation, or until the parties take the adjudicator's decision as final. For this reason, adjudication is different in kind from other forms of ADR, which are optional and less tied to a single subject area. Like litigation and arbitration, adjudication is an adversarial process.

Local information relating to the use of adjudication will be appropriate to cover the above section.

Adjudication and arbitration have much in common - the parties agree on who is to play the 'judicial' role, present their cases, and receive a judgment. There are nevertheless significant differences in approach, although there remains widespread confusion in business as to their respective meanings. In fact, the terminology used in the contract is not conclusive as to which process would apply in the event of a dispute. For example, the contract may specify that 'adjudication' will be used. If the contract goes on to describe procedures that are essentially similar to arbitration, the courts may insist on arbitration being used.

Localisation required to reflect the approach adopted by local courts.

2.2.2.5 What is meant by arbitration?

Arbitration is a process by which the parties agree that an independent third party is to be brought in to make a decision that is binding on the parties. The power (jurisdiction) of the arbitrator may be derived from the mutual consent of the parties, from a court order or from a statute that clearly indicates the use of arbitration. The choice of arbitrator will be for the parties to decide, or according to a method to which they have consented. The arbitrator must act impartially and fairly, applying the principles of natural justice to the proceedings (see below).

2.2.2.6 Some differences between arbitration and adjudication

Bearing the above points in mind, some clear differences can be identified between arbitration and adjudication. The adjudicator makes a decision that is non-binding (unless specifically agreed otherwise). He/she examines the evidence and makes appropriate enquiries. As an expert, his/her own skills and judgment are used to formulate a decision.

An arbitrator, conversely, makes a decision that is final and binding, after receiving the presentations of both parties according to the principles of natural justice. The 'judge' must be impartial (e.g. by having no personal interest in the dispute or connection with the parties) and he/she provides both parties with a fair opportunity to present their cases. This requirement has implications for ensuring adequate time for preparation and the right to legal representation when presenting the case. Arbitration is therefore more thorough and time-consuming.

2.2.2.7 Why has adjudication emerged in recent years?

The introduction of adjudication was a reaction to some of the growing failings of arbitration. Originally, arbitration was established to provide a more informal, quicker and cheaper method of resolving disputes than proceeding to the courts. By the early 1990's, however, opinion viewed arbitration as increasingly formal, slow and expensive, partly as a result of increased lawyer involvement. Among other criticisms it was argued that the procedure imitated court actions, which made hearings as lengthy as litigation and could cost even more. It was also relatively easy to appeal against the decision of the arbitrator, and the subsequent appeal case could take years in the courts to reach a decision.

It was argued that, although there are some occasions where disputes are so important and/or complex to justify elaborate arbitration proceedings, there are many others that do not require such thoroughness. What is more important is a speedy resolution to the dispute, even if it is achieved at the expense of detailed scrutiny. Adjudication provided this alternative, albeit more superficial, approach. Because adjudication it is a quicker and cheaper approach, it would not be appropriate to make the decision final and binding. However, the parties can elect to make it so by agreement.

Localisation: the above paragraphs describe the situation in the UK and so localisation may be required or this section could be left as an illustration.

2.2.3 What happens in mediation and conciliation

Format - Mediation is essentially a flexible process with no fixed procedures, but the format tends to be along the following lines. At an opening joint meeting each party briefly sets out its position. This is followed by a series of private confidential meetings between the mediator and each of the teams present at the mediation. This may lead to joint meetings between some or all members of each of the teams. If a settlement is reached, its terms should be written down and signed.

Timing - Most commercial mediations last one day, with very few running for more than three days. A considerable number take place within a month of being initiated, and this period can be shortened to days where necessary.

The mediator - The mediator's role is to facilitate the negotiations. The mediator will not express views on any party's position, although he/she may question the parties on their positions to ensure that they are being as objective as possible about the strengths and weaknesses of their own and the other party's(ies') legal and commercial arguments. The mediator will try to get the parties to focus on looking to the future and their commercial needs rather than analysing past events and trying to establish their legal rights. It is essential for the mediator to have had mediation training; it is not essential for the mediator to have experience, or even knowledge, of the subject matter of the dispute.

Participants - The team attending the mediation should be kept as small as possible but must include somebody ('the lead negotiator'), preferably a senior executive or official from each participating organisation, with full authority to settle the dispute on the day of the mediation, without having to revert to others not involved in the mediation. The lead negotiator should ideally not have been closely involved in the events relating to the dispute.

Where it really is not possible for the lead negotiator to have full authority to settle, the person attending must be of sufficient seniority that his/her recommendation on settlement is likely to be followed by whatever person or body makes the final decision. The fact that a binding settlement agreement cannot be reached on the day of the mediation and the reason for this should be made clear to the other parties in good time before the mediation. Most mediation teams include a lawyer, but a large legal representation on the team is rarely useful or necessary.

Preparation - Each party usually prepares a brief summary of its position (not just its legal case) for the mediator and the other party, together with the key supporting documents. These documents are exchanged between the parties, and sent to the mediator, at least a week before the mediation. The parties should enter into a mediation agreement once the details of the mediation (e.g. place, time, name of mediator) have been agreed.

There is considerable similarity between mediation and conciliation. Conciliation is entirely voluntary and is undertaken on a confidential basis. The parties prepare statements of their view on the disputed issue to send to the conciliator, who starts an investigation by interviewing the parties. Unlike an arbitrator, he/she does not have to observe the principles of natural justice (see above). The conciliator adopts an inquisitorial method, controlling the collection of evidence and questioning the parties involved. A meeting is then arranged at which the conciliator begins to form an opinion (possibly with an 'expert' present to assist and advise on technical issues). He/she will express his/her views on the strengths and weaknesses of the parties' cases and offer an opinion as to how an arbitrator might view the dispute. This is partly done to encourage a possible settlement between the parties. Failing this, the conciliator will issue his/her own recommendation.

Good practice note

The following points can be made about the conciliator's recommendation:

- It is only the opinion of the conciliator.
- It is not justified with reasons (unless specifically requested).
- It is not binding ('without prejudice').
- It is a practical solution, not necessarily in strict accord with the relevant law.
- The process may take about three months to complete.

2.2.4 Advantages of mediation/conciliation

- Speed (for mediation just a few days; for conciliation not exceeding two to three months)
- Inexpensive (sometimes less than 1% of disputed amount)
- Confidential
- Non-binding
- Parties able to agree on settlement
- Flexible outcomes (commercial trade-offs, etc.)
- Encourages future trade relations with the other party

Mediation or conciliation should always be considered in cases where:

- the cost of litigation is expected to be disproportionate to the claim;
- the parties are deadlocked in settlement negotiations;
- complexities of law, facts or relations are likely to lengthen proceedings and to probably result in an appeal of any judgment;
- there are multi-actions involving several parties;
- the issues are highly complex and involve several parties;
- the issues involved are sensitive or require the disclosure of sensitive information;
- the parties do not wish to have any publicity.

However, not suitable for mediation or conciliation is a small group of cases where:

- a legal, commercial or other precedent needs to be set;
- a summary judgment is available quickly and efficiently;
- parties require emergency court intervention for protective relief;
- publicity is actively sought;
- there is no real interest in settlement.

2.2.5 What are the advantages of adjudication?

- Rapid: fixed 28-day time frame in UK Localisation
- Less expensive (than arbitration or litigation)
- Adjudicator acts as an expert rather than an arbitrator (rules of evidence are less demanding on an adjudicator)
- Decision of adjudicator based on skill and experience as well as evidence
- Non-binding, unless otherwise agreed as a contractual term

Some disadvantages of adjudication compared with arbitration:

- Less thorough process, with fewer opportunities for the parties to present all of the evidence
- Temporary decision, unless made binding by agreement between the parties
- No legal representation permitted (in UK) - Localisation

As can be seen above, the main reason for the development of adjudication was to overcome some of the problems faced by arbitration during the last 30 years of the 20th century. What was needed was a process that would be relatively rapid and, inexpensive, free of the time-consuming thoroughness and rigour of arbitration rules and requirements.

2.2.6 What are the advantages of arbitration over litigation?

- Can be cheaper
- Frequently quicker
- Less damaging to business reputation (private)
- Easier to continue doing business with the other party (less confrontational)
- Less risk of disclosing confidential information (private)
- Business expertise of the arbitrator
- Greater discretion (more ability to produce a pragmatic decision)

2.2.7 What are the advantages of formal litigation?

The advantages of litigation are:

- Thorough examination of the evidence and arguments
- Decisive, final and binding
- Ideal if dispute is over a point of law
- Speed of procedure can be forced by court rules (unlike arbitration)
- Legal aid (financial support) is available if litigant is poor (in the UK)

Remember, however, that in the great majority of cases, the disadvantages of litigation seriously outweigh the benefits (see advantages of arbitration compared with litigation).

Example:

An extreme example of the negative aspects of litigation occurred recently in the UK.[1] A High Court case between ***Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd (2008)*** was decided in a dispute involving the building of the new Wembley Football Stadium, England's national football ground. After several years of litigation between the two construction companies, a judgment was finally made. The judge criticised the two companies for their failure to attempt to settle the dispute at several stages during pre-trial and trial. As a result, legal costs had been increasing rapidly. These costs included photocopying of the trial papers (550 ring files) costing nearly 1 million GBP. Each side had employed a team of experts, senior lawyers and large numbers of support personnel. In total, the two parties had spent 22 million GBP in legal fees – far greater than the losses they were claiming against each other. According to the judge, huge sums of money and a large amount of management time had been spent for no useful purpose.

Local examples of the problems of using litigation should be used by way of illustration.

2.2.8 What arrangements have been made for International arbitration?

Several international bodies have been established to provide arbitration services for parties based in different countries. These bodies include the International Court of Arbitration of the International Chamber of Commerce, the international branch of American Arbitration Association, the London Court of International Arbitration (LCIA), the Hong Kong International Arbitration Centre, and the Singapore International Arbitration Centre (SIAC).

The following information provides a description of the work of the London Court of Arbitration. The other international arbitration bodies listed above provide similar services and have similar strengths.

2.2.8.1 Casework

Many major international businesses entrust their disputes to the London Court of Arbitration (LCIA). Many cases are technically and legally complex and sums disputed can run into billions of US dollars. Parties come from a very large number of jurisdictions and from both civil law and common law traditions.

The subject matter of contracts in dispute is wide and varied, and includes all aspects of international commerce, including telecommunications, insurance, oil and gas exploration, construction, shipping, aviation, pharmaceuticals, shareholders' agreements, IT, finance and banking.

2.2.8.2 Arbitrators

The LCIA maintains an extensive database of arbitrators with a range of professional qualifications and expertise (legal and non-legal).

The database is not a closed list, however, and parties are free to nominate arbitrators who are not in the database. Similarly, the LCIA will look for arbitrators outside its own database when necessary.

2.2.8.3 Charges

The LCIA's charges, and the fees charged by the tribunals it appoints, are not based on the sums at issue. Costs are based on time actually spent by the administrator and arbitrators alike.

2.2.8.4 Enforcement of Awards

For the many parties for whom a final and binding settlement is paramount, the enforcement argument is perhaps the most persuasive and enduring.

The rules of the major international arbitration institutions, including the LCIA, expressly provide that any award will be final and binding and will be complied with without delay. By agreeing to be bound by such rules, the parties usually also exclude any right of appeal on the merits to a national court that may have jurisdiction to hear such an appeal.

The ability to resolve disputes in a neutral forum and the enforceability of binding decisions are often cited as the main advantages of international arbitration over the resolution of disputes in domestic courts. There is solid legal support for this view. An international award originating in a country that is a party to the New York Convention of 1958 may be enforced in any other country that is also a signatory as if it had been decided by a domestic court. Here is an example of this important concept: assume that parties from countries A and B have agreed to resolve their disputes in country C, and all three countries are parties to the New York Convention. This will mean that even though the arbitration will take place in country C, the resulting award can be enforced in country A (or country B) as if it were a court decision rendered in a domestic court of that country. (By contrast, there is no equivalent treaty for the international recognition of court decisions.)

Thus parties to international contracts can decide to set the site for the arbitration of their dispute in a third, neutral country, knowing that the eventual award can be easily enforced in any country that is a signatory to the New York Convention. The large majority of free-market nations have ratified the convention.

2.2.8.5 Neutrality

Parties to international agreements may be concerned that the national courts of the party with which they are contracting may have an instinctive, or even a manifest, bias towards a party of the same nationality. Whether or not such concerns are well-founded, international tribunals and the administration of a recognised arbitral institution may be seen as offering greater neutrality than the courts.

This section on international arbitration will need to be adapted to local needs, depending on which international body tends to be used for such disputes.

2.2.9 What recent developments have been taking place inside the European Union and elsewhere to encourage greater use of mediation?

In Appendix 3, there is an article showing some of the main developments related to mediation taking place around the world. It also highlights the reasons for these initiatives, which are varied.

2.2.10 What EU and UK initiatives are currently taking place relating to Alternative Dispute Resolution (ADR)?

The European Union has shown increasing interest in alternative dispute resolution (ADR) over the past decade. In April 2002 the European Commission published a Green Paper (discussion document) on alternative dispute resolution. In July 2004 the Commission organised the launch of a Code of Conduct for Mediators, which was approved and adopted by a large number of mediation experts, and in October 2004 the Commission adopted and submitted to the European Parliament and to the European Council a proposal for the preparation of a directive focusing on certain aspects of mediation in civil and commercial matters. The Directive was adopted on 21 May 2008.

The Green Paper, the Code of Conduct and the Directive on mediation all form part of the European Union's current work on establishing an area of freedom, security and justice, and particularly on improving access to justice. It is the Commission's view that "encouraging the use of Mediation and other forms of ADR assists in the resolution of disputes and helps to avoid the worry, time and cost associated with court-based litigation and so assists citizens and businesses in a real way to secure their legal rights".

2.2.10.1 Code of Conduct for Mediators

The Code of Conduct for Mediators sets out a series of norms that can be applied to the practice of mediation and that can be observed by mediation organisations. It was drafted in co-operation with a large number of organisations and individuals, including skilled mediators and others interested in seeing mediation develop in the European Union. The Code was adopted by a meeting involving these experts in July 2004, and the Commission *"was very pleased to be involved in and to have the opportunity to assist this process"*.

2.2.10.2 Directive on Alternative Dispute Resolution (Directive 2008/52/EC)

The Directive on Alternative Dispute Resolution continues this process of encouraging the use of mediation (or ADR) as part of its goal of increasing access to justice. It only strictly applies to ***cross-border disputes*** (where the organisations in dispute are based in separate countries). However, the Commission has made it clear that EU Member States could adopt the Directive on a wider basis so as to include disputes that are within a single country.

According to the Directive, member states should authorise the courts to *suggest mediation to the litigants,* without compelling them to use it. Although the settlement agreements reached through mediation are generally more likely to be implemented voluntarily, the Directive requires all member states to establish a procedure whereby an agreement may, at the request of the parties, be confirmed in a judgment, decision or other instrument by a court or public authority. This would allow mutual recognition and enforcement of settlement agreements throughout the EU under the same conditions as those for court judgments and decisions.

To encourage the more effective use of mediation, member states must ensure that the parties are not later prevented from starting judicial proceedings or arbitration in relation to the dispute due to the expiry of limitation periods during the mediation process.

Again, to encourage the use of mediation, neither mediators nor those involved in the mediation process are compelled to give evidence in judicial proceedings regarding information obtained during the mediation process.

Although the Directive was adopted in 2008, EU Member States will not be required to implement it until May 2011. As with all EU Directives, there is a period of delay, allowing member states the opportunity to consider how best to implement the requirements, given their existing laws and procedures.

2.2.10.3 Centre for Effective Dispute Resolution (CEDR)

The following text can be used to illustrate how mediation has been making rapid progress in one EU Member State. Additional local examples of significant progress could be used to supplement the illustrations in the manual.

In the UK, there has been considerable progress in the use of mediation in both the public and private sectors.

The Centre for Effective Dispute Resolution (CEDR) is a London-based mediation and alternative dispute resolution body. It was founded as a non-profit organisation in 1990, with the support of the Confederation of British Industry (CBI) and a number of British businesses and law firms, to encourage the development and use of Alternative Dispute Resolution (ADR) and mediation in commercial disputes.

Initially, CEDR's focus was by necessity focused on the UK, where in the early 1990s mediation was not well established in business disputes. Through its campaigning and training work, CEDR helped influence the civil justice system. In 1996 the then Lord Chief Justice of England, Lord Harry Woolf, published his 'Access To Civil Justice Report', which encouraged the use of ADR, followed by the Civil Procedure Rules in 1999, which enabled judges to impose cost sanctions on either party when ADR was refused or ignored. These guidelines saw the growth of the use of ADR, and in particular mediation, in the UK. Parallel to this was a growth in demand for CEDR's services in dispute resolution and training. From the mid-1990s onwards, CEDR's focus became international, to begin with by encouraging mediation in other European countries and working on international cases and then by establishing the MEDAL international mediation service provider alliance (2005) and creating the first international mediation centre in China with the China Council for the Promotion of International Trade (CCPIT).

CEDR Solve is the dispute-resolution service arm of CEDR. Any business or law firm facing a dispute can call a case adviser, who will provide advice and be able to recommend an accredited mediator or neutral person to resolve its dispute. A number of the world's top mediators are only available via this service, but CEDR Solve indicates that it has over 130 accredited mediators on its panel of experts, including 50 mediators directly available (including Lord Woolf). The service has advised on over 13,000 disputes to date and mediates approximately 700 disputes per year.

In 2007 CEDR set up a Commission on International Arbitration, chaired by Lord Woolf and Professor Kaufmann-Kohler, to investigate settlements in international arbitration and to make recommendations on how arbitral institutions and tribunals can give parties greater assistance. The Commission is composed of 75 experts from the field and is consulting 45 organisations from various jurisdictions.

The CEDR has been training mediators for over 15 years, and its 'Mediator Training Skills' programme is widely thought to be the best in the world. With a faculty of 30 experienced mediators, the CEDR has trained to date more than 3,000 mediators from different countries.

Within the UK central government, there has been considerable encouragement of mediation in commercial disputes with economic operators. In a **Ministry of Justice Progress Report (April 2009),** the UK Government was able to show evidence of the increased use of mediation involving central government departments and agencies.

2.2.10.4 **Actual cases using ADR**

During the latest reporting period (2007/08), ADR has been used in 374 cases, with 271 leading to settlement, saving costs estimated at 26.3 million GBP.

Compared to the previous year's returns (2006/7), ADR was attempted in more cases (374 as against 311, with a slightly higher settlement rate of 72%, as against 68%).

Here are some examples of actual disputes:

Her Majesty's Revenue and Customs (HMRC)

A legal partnership had a dispute with HMRC about income tax liabilities going back over many years. A mediation took place using the county court mediation scheme, employing the services of an accountant as the mediator. A settlement was reached, which reflected the evidential weaknesses on both sides, saving both parties the considerable time and cost that would have been incurred by a two or three-day county court trial.

Department for Environment, Food and Rural Affairs (Defra)

In September 2007, Defra mediated a dispute with a company in the business of collecting and selling bovine semen under a licence granted by Defra in accordance with the Artificial Insemination Regulations. The mediation related to one issued claim and a number of potential claims between Defra and the company. The company had two separate claims against Defra for negligence arising from the testing of bulls for disease infection. Errors had been made in carrying out the necessary health checks on bulls and in the recording of the results. These errors had led to significant disruption of the quarantine processes that the animals were required to undergo before semen was collected, with consequent losses to the claimant's business. Defra also had a number of debt claims against this company for unpaid fees, which it was hoping to set off against any damages claimed in the litigation.

A barrister mediator in chambers in Manchester conducted the mediation, and a favourable settlement was achieved, which reflected the litigation and reputational risk to Defra.

Department for Works and Pensions / Department for Health (DWP/DH)

DWP/DH Legal Services, acting on behalf of Jobcentre Plus (JCP), successfully mediated the settlement of a disputed claim to a share of the proceeds from the sale of the property of a sheltered workshop. JCP claimed that it was entitled to 75% of the proceeds from the sale of the property. However, neither the claimant nor the defendant could produce a signed copy of the agreement, and therefore neither could legally prove their claim.

The building in question was sold for over 1 million GBP, but there were other creditors. DWP/DH Legal Services negotiated a settlement with the defendant's solicitors, after ensuring that payments to all other creditors had been met. The settlement avoided the cost that would have been associated with a potentially protracted court case.

DWP/DH Legal Services successfully acted on behalf of Jobcentre Plus (JCP) to reach an agreement with a training provider over disputed training service payments. JCP alleged that the documentation did not support the outcome payments that they had claimed. The dispute was mediated whereby the defendant agreed to repay 60,000 GBP to JCP.

Just a couple of examples of small claims involving private citizens, who were helped by mediation in their disputes with economic operators:

The 'wonky' tattoo

The claimant was dissatisfied with his tattoo because it appeared 'wonky' (*i.e.* it was not straight) and took out a claim for 2,500 GBP against the owner of the tattoo parlour to cover the cost of removing it. The owner said that the claim should have been made against the specific 'artist' because all of the artists were self-employed. Nevertheless, the mediation took place, the tattoo was shown, and the tattoo parlour owner agreed that it was indeed crooked. The owner said that he would dispense with the services of the artist concerned due to the poor standard of his work. However, the claimant did not want the responsibility of having someone lose his livelihood. Instead, the defendant therefore offered to correct the work by covering the offending tattoo with a design that could incorporate the existing work. A design was agreed between the parties and the matter was settled with no money changing hands.

The wedding dress

A claim for 1,950 GBP was issued against a shop for the full refund of a wedding dress. The claimant had tried on a dress of the same design, paid a deposit, and when the dress arrived, she had her first fitting and paid the balance. However, she insisted that the design was not the same as the sample she had tried on when she had placed the order. She alleged that the stress that this incident had caused her had led to the postponement of her wedding, and that she had bought another dress instead. The defendants said that they had first known of this issue when her boyfriend had contacted them to say that she had had to buy another dress as she was disappointed with the one they had sold her. The mediation resulted in an agreed settlement to the effect that the defendants would sell the dress on behalf of the claimant on a commission-free basis as a sale item in their shop at a starting price of 900 GBP.

2.2.11 What types of dispute resolution contractual clause should be considered for inclusion in a commercial contract with an economic operator?

Including in a contract a clause requiring the parties to attempt to settle any dispute arising out of the contract by some form of ADR should increase the chances of settling such a dispute before the parties went to court or used arbitration.

Inserting a mediation clause in a contract has the advantage of:

- prompting the parties to consider a process that, unlike negotiation, may not necessarily occur to them;
- introducing a specific process that gives the parties a clear framework for exploring settlement;
- involving a neutral third party who is trained to work facilitate communication between parties that is geared towards an agreed durable settlement;
- changing the focus of the parties away from the events of the past and towards the reality of the present and the needs of the future;
- potentially achieving a binding solution, as over 70% of mediations reach an agreed and binding solution, despite an earlier impasse;
- keeping and/or moving the negotiation process out of the public arena;
- reaching an early and successful conclusion to the dispute, thereby providing substantial savings in legal and management costs and freeing up the business for more productive endeavours.

Examples of Mediation Clauses

Localisation – the following examples could be retained and local examples added.

Mediation clauses (often called 'ADR' clauses) can be simple in content, like the following example:

> "If any dispute arises in connection with this agreement, the parties will attempt to settle it by mediation in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed between the parties, the mediator will be nominated by CEDR." LOCALISATION

The mediation clause can be more detailed and specific in requirement. Here is an example:

> "If any dispute arises in connection with this agreement, the parties will attempt to settle it by mediation in accordance with the LOCALISATION CEDR Model Mediation Procedure. Unless otherwise agreed between the parties, the mediator will be nominated by CEDR. To initiate the mediation, a party must give notice in writing ('ADR notice') to the other party [ies] to the dispute, requesting mediation. A copy of the request should be sent to CEDR. The mediation will start not later than [ ] days after the date of the ADR notice. No party may commence any court proceedings/arbitration in relation to any dispute arising out of this agreement until it has attempted to settle the dispute by mediation and either the mediation has terminated or the other party has failed to participate in the mediation, provided that the right to issue proceedings is not prejudiced by a delay."

The following clause can be adopted for international contracts where the parties are based in different countries:

> "If any dispute arises in connection with this agreement, the parties will attempt to settle it by mediation in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed between the parties, the mediator will be nominated by CEDR. The mediation will take place in [city / country of neither / none of the parties] and the language of the mediation will be [ ]. The Mediation Agreement referred to in the Model Procedure shall be governed by, construed and take effect in accordance with the substantive law of [England and Wales]. The courts of [England] shall have exclusive jurisdiction to settle any claim, dispute or matter of difference that may arise out of, or in connection with, the mediation. If the dispute is not settled by mediation within [ ] days of the commencement of the mediation or within such further period as the parties may agree in writing, the dispute shall be referred to and finally resolved by arbitration. CEDR shall be the appointing body and administer the arbitration. CEDR shall apply the UNCITRAL rules in force at the time arbitration is initiated. In any arbitration commenced pursuant to this clause, the number of arbitrators shall be [1 – 3] and the seat or legal place of arbitration shall be [London, England]."

Before any mediation procedure is adopted, it is advisable to encourage negotiation to achieve the necessary settlement. A clause explicitly requiring the parties to enter into voluntary negotiations would be a useful provision. This clause could include a dispute escalation requirement, specifying that, if initial negotiations are unsuccessful, the matter will be transferred to a higher level of management within the two organisations (specified by job title). The senior managers will then be given a time frame within which to attempt a settlement. If this fails, the above ADR provision could become operational.

Here is an example of the type of provision involved, often called a 'dispute escalation clause':

Dispute Resolution

1. **Escalation Procedure**

   If any dispute arises out of the Contract the parties will attempt to settle it by negotiation. In the event of any dispute, difference or question of interpretation arising between the parties, neither shall take recourse to any other resolution (whether by reference to mediation as set out in this Clause #, or by litigation), until the escalation procedure included in Schedule [...] has been fully exercised.

2. **Mediation**

   If the parties are unable to settle any dispute in accordance with Clause #.1 within 21 days, the parties will attempt to settle it by mediation in accordance with the Centre for Dispute Resolution (CEDR) Model Mediation Procedure ('the Model Procedure').

3. **Initiating the mediation**

   To initiate a mediation a party by its Authorised Officer must give notice in writing ('ADR notice') to the other party (addressed to its Authorised Officer) requesting a mediation in accordance with Clause #.2. A copy of the request should be sent to CEDR.

4. **Disagreements on mediation**

   If there is any point on the conduct of the mediation (including as to the nomination of the mediator) upon which the parties cannot agree within 14 days from the date of the ADR notice, CEDR will, at the request of any party, decide that point for the parties, having consulted with them.

5. **Timing of mediation**

   The mediation will start not later than 28 days after the date of the ADR notice.

6. **Mediation in parallel**

   Any party that commences court proceedings or an arbitration must institute a mediation or serve an ADR notice on the other party to the court proceedings or arbitration within 21 days.

7. **Mediation before litigation**

   No party may commence any court proceeding or arbitration in relation to any dispute arising out of the Contract until they have attempted to settle it by mediation and that mediation has terminated.

SECTION 3
EXERCISES

EXERCISE 1

1. Identify the main upstream stages to be carried out prior to awarding the contract
2. Identify potential problems that could occur if the above stages are not observed correctly

EXERCISE 2

Complete the following diagram by identifying each of the different types of dispute resolution procedure:

Description	Type
A formal, private and binding process where the dispute is resolved by the decision of a nominated third party	
A private and structured form of negotiation assisted by a third party that is initially non-binding. If settlement is reached it can become a legally binding contract.	
The most common form of dispute resolution, where the parties themselves attempt to resolve the dispute	
The formal process whereby claims are taken through the civil courts and conducted in public. The judgments are binding on parties subject to rights of appeal.	
An expert is instructed to rule on a technical issue – primarily used in the United Kingdom for construction disputes as set out in the Housing Grants, Construction and Regeneration Act 1996, where awards are binding on the parties at least on an interim basis – *i.e.* until a further process is invoked	
A private and structured form of negotiation assisted by a third party that is initially non-binding, but the third party can make a recommendation as to the outcome	

EXERCISE 3

Identify which type of dispute resolution most closely matches the following statements. In one or two cases, more than one procedure may be correct:

Statement	Procedures
1. It is something like shuttle diplomacy	
2. This process is ideal if the dispute is over a point of law	
3. This process is usually completed in one day, but may take up to three days	
4. The decision is binding until a final determination is reached	
5. The rules of natural justice must be observed	
6. He adopts an inquisitorial method, controlling the collection of evidence and questioning the parties involved	
7. In the United Kingdom, the process has to be completed inside 28 days	
8. It is not binding but a practical solution, not necessarily in strict accord with the relevant law	

EXERCISE 4
ARBITRATION V. LITIGATION?

1. How many advantages of arbitration over litigation can you identify?

Advantages of arbitration over litigation
1.
2.
3.
4.
5.
6.
7.
8.
9.

2. Give a short explanation for each of the above points, showing in what way they are advantageous compared to litigation.

EXERCISE 5

Complete the following boxes, with suitable responses. It only requires you to provide answers that are relative to the other forms of dispute resolution. Take, for example, *Speed to establish:* for Negotiation, the answer is "quick"; for Litigation, the answer could be "can take years".

	Negotiation	Mediation	Conciliation
Speed to establish			
Speed to resolve			
Expense			
Confidentiality			
Effect on business relations			

	Adjudication	Arbitration	Litigation
Speed to establish			
Speed to resolve			
Expense			
Confidentiality			
Effect on business relations			

EXERCISE 6

Please read the article on the next few pages and then answer the following question:

Identify where mediation (or ADR) is being developed across the world and establish the reasons why this development is happening.

Lessons from Recent Experiences

By James South, Director of Training, CEDR
Published in the IBA Mediation Committee Newsletter, September 2008

A quick look at CEDR's recent work pattern highlights the increase in interest globally in the use of mediation for civil and commercial disputes. In 2005, 90% of training and consultancy work was UK-based, in 2008 50% of our training and consultancy is international and 15% of CEDR cases involve international parties. These figures illustrate that the increased interest in mediation internationally in the last two years has been dramatic and where training leads, mediation services follows: and the converse is true: as the use of mediation spreads we begin to learn lessons about best practice.

Mediation is now a well-known antidote to civil disputes, and a number of civil justice projects have been set up. As these projects involve learning how mediation can work in particular countries, one can distil key learning points about developing civil mediation that we can take to different jurisdictions.

There is never just one motivating reason or force for the adoption of mediation in a particular location. Normally there are a number of reasons for mediation being considered, and this article seeks to examine some of the reasons and illustrate them with some specific examples and from these, distil some lessons we can all learn about developing this field.

Without delay

Reducing the delay to litigants in resolving their disputes and subsequently decreasing case backlogs in the courts is, unsurprisingly, one of the key motivators for jurisdictions around the world to consider mediation. Delay and backlog are uncommon problems, yet in some jurisdictions they can be acute.

An example is India, where its civil justice system has relatively low costs for litigants, an almost unrestricted right of appeal and a less than efficient system of case management in the courts. Consequently it is not unusual to hear instances of well over five years for cases to come to trial (and that is before any appeal). As a result of this India is interested in mediation as one of the methods to alleviate this problem. A number of court-based mediation programmes have been started, for example a form of mandatory mediation in the lower courts in Delhi. CEDR is currently working in India on a project funded by the World Bank, advising a state funded ADR body, on how to stimulate growth in mediation as well as training mediators so that the judiciary can have confidence in referring cases to competent mediators.

The business case

If the costs of pursuing an action are high, delays long, and enforcement of contracts difficult, this will increase the costs to domestic business in increasingly competitive markets. This is especially so for Small and Medium Enterprises (SMEs) where costs of enforcing contracts are often disproportionate to the amount in dispute. In turn this can impact on the international business, as investors will be discouraged if they cannot enforce contracts effectively. Accordingly an ADR system which minimises these issues is seen as a way of improving the business environment.

In the instance of Pakistan, the World Bank's 'Doing Business' report showed that, at a conservative estimate, in Karachi, the commercial capital of Pakistan, it takes 880 days to enforce a contract with 47 procedures required. In addition, 90% of cases initiated in the courts actually go to trial. Compare this to around 10% in the UK. It was these statistics that prompted the International Finance Corporation (IFC), to fund a $1 million+ project to establish mediation in the Karachi Courts.

CEDR has been working with the IFC on this project since 2006. The project has established the Karachi Centre for Dispute Resolution (opened February 2007), and trained 56 mediators to provide quality mediation services to the centre. In turn this has given the Karachi Court confidence to refer cases to mediation in an attempt to reduce back-log and improve the business environment, with 65 commercial cases mediated in the first year.

In a similar fashion to the way in which parties in litigation can extend or hide behind the process to suit their own ends, the same is possible in a mediation. With the first mediations in Karachi, there was a danger of parties using the process as another low cost system, where frequent adjournments and delays are possible. Because lawyers and parties were used to this way of resolving disputes it was a natural pattern to fall into and therefore mediators had (and still have) to work hard to change behaviour by anticipating problems (such as the need for authority), signalling it as a different process and working hard to keep parties at the table and resisting calls to adjourn.

Style and substance

Mediation can also be seen as a part of wider Civil Justice Reform. In England and Wales this started with the Woolf Reforms, leading to the Civil Procedure Rules introduced in 1999, allowing a stay of proceedings for mediation, as well as costs penalties for unreasonably refusing mediation. These rules, and the court's willingness to use them, have had a well-documented impact on the use of mediation in the UK.

Hong Kong has undergone a similar review with new civil procedure rules due to be published this year which will likely see mediation heavily encouraged for civil cases. This has led to both the Hong Kong Bar and Law Society of Hong Kong to work with CEDR to train mediators in order to anticipate the likely increases in demand for mediation services.

Mediation can also be attractive as a means of signalling wider social reforms. China, for example, in moving towards a more market-based economy has recognised the importance of its use to resolve international trade disputes. Accordingly the Government's conciliation service, CCPIT, in partnership with CEDR, has formed an Anglo-Chinese Dispute Resolution Centre and we have been working with them to establish a mediation centre.

The best example of mediation contributing to wider social reform is in the development of mediation in a number of Eastern European states. As these Post-communist societies, twenty years on, move to market-based approaches, the way the state interacts with its citizens is being transformed – from protection of individuals' rights to individual empowerment. Combined with this is a focus on improving the reputation of the State through increased efficiency and less corruption. Mediation is seen as a process that reinforces these messages.

In Croatia I have just finished working on a two-year project to establish a mediation pilot programme in the Commercial Court of Zagreb. Apart from requiring considerable work integrating mediation into the court's processes, it also required thinking 'outside the box'. In this programme sitting judges were acting as mediators, something we initially, with our common law experience found unusual. However the pilot has worked well with over 200 cases referred to mediation in the first year and the court has now been held out as a model for providing a wider service to the citizens of Croatia.

Another example is Bosnia and Herzegovina, which since the cessation of hostilities has undergone massive social reforms at all levels. It also has the most comprehensive mediation system for Civil Disputes in the region. The IFC has funded a project to establish two court-based programmes in Sarajevo and Banja Luka, and there is a Mediators Association which now has state authority to licence mediators. Over 1500 mediations have taken place in the last three years, resulting in €9.3million of tied up funds being released. Mediation is now a central part of the justice strategy for Bosnia and Herzegovina. CEDR has been engaged this year by the Ministry of Justice, to draft the mediation action plan for the next four years, which details the steps to be taken to continue to develop mediation.

Global neighbourhood

Interestingly I have noticed that there is an emerging trend of supra-national motivations for countries to consider mediation as indicator of ambitions to join and interact in the proverbial 'global village'. This trend is one which I think we should watch in years to come, as it will begin to play increasing importance.

Europe presents good examples of these trends. *Firstly there are the former member states of Yugoslavia, now interested in acceding to the European Union. Effectiveness of local civil justice is a criterion looked at for accession and therefore the adoption of 'modern' justice processes, such as mediation, are considered an indicator of suitability in this field.*

Secondly the acceptance this year of the EU Directive on cross-border mediation by the European Parliament means that all member states will encourage parties to use mediation to resolve international disputes.

The EU directive has wider implications, for as business in Europe gets used to mediating cross-border disputes they will also look at doing the same in other parts of the world where problems of contract enforcement, delay and poor business environments exist. Ultimately if the demand for mediation is there, in a desire to become part of global villages, countries which have not developed mediation will begin to take it more seriously.

[Another example of global development of mediation is found in Ukraine. In 2008, a programme for training mediators had been established at the Mediation Centre in Kyiv, encouraging mediation of corporate governance disputes and a cheaper alternative to litigation].

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. What are the advantages of mediation/conciliation over the other forms of dispute resolution (adjudication, arbitration, litigation)?
2. When would it be appropriate to use mediation or conciliation to resolve a dispute with an economic operator?
3. When would it not be appropriate to use mediation or conciliation to resolve a dispute with an economic operator?
4. What are the main advantages of litigation?
5. What are the main advantages of using international arbitration procedures in comparison to domestic courts when in dispute with a foreign economic operator?
6. How has the European Commission been encouraging the adoption of mediation in commercial disputes since the year 2000?
7. In what ways does the European Directive on Mediation (2008) attempt to encourage mediation in international disputes between companies based in different countries?
8. What are the reasons (or advantages) for inserting a mediation clause into the contract when negotiating with economic operators?
9. What dispute resolution stages would be appropriate to progress through when attempting to settle a dispute with an economic operator?

OTHER RESOURCES

The following websites have information on ADR:

Localisation

European Union: (Directive on ADR, Code of Conduct for Mediators, Green Paper on ADR)	http://eur-lex.europa.eu
Centre for Dispute Resolution: (CEDR Model Mediation Agreement)	www.cedr.co.uk

International Arbitration Bodies:

ICC International Court of Arbitration:	www.iccbo.org
London Court of International Arbitration:	www.lcia-arbitration.com
International branch of American Arbitration Association:	http://adr.org
Hong Kong International Arbitration Centre:	www.hkiac.org
Singapore International Arbitration Centre:	www.siac.org
New York Convention: (enforcement of international arbitration awards)	www.uncitral.org
English Court System:	www.hmcourts-service.gov.uk

Directive 2008/52/EC of the European Parliament and of the Council

of 21 May 2008

on certain aspects of mediation in civil and commercial matters

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. To that end, the Community has to adopt, inter alia, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.

(2) The principle of access to justice is fundamental and, with a view to facilitating better access to justice, the European Council at its meeting in Tampere on 15 and 16 October 1999 called for alternative, extra-judicial procedures to be created by the Member States.

(3) In May 2000 the Council adopted Conclusions on alternative methods of settling disputes under civil and commercial law, stating that the establishment of basic principles in this area is an essential step towards enabling the appropriate development and operation of extrajudicial procedures for the settlement of disputes in civil and commercial matters so as to simplify and improve access to justice.

(4) In April 2002 the Commission presented a Green Paper on alternative dispute resolution in civil and commercial law, taking stock of the existing situation as concerns alternative dispute resolution methods in the European Union and initiating widespread consultations with Member States and interested parties on possible measures to promote the use of mediation.

(5) The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods. This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services.

(6) Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.

(7) In order to promote further the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework, it is necessary to introduce framework legislation addressing, in particular, key aspects of civil procedure.

(8) The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes.

(9) This Directive should not in any way prevent the use of modern communication technologies in the mediation process.

(10) This Directive should apply to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a

mediator. It should apply in civil and commercial matters. However, it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law.

(11) This Directive should not apply to pre-contractual negotiations or to processes of an adjudicatory nature such as certain judicial conciliation schemes, consumer complaint schemes, arbitration and expert determination or to processes administered by persons or bodies issuing a formal recommendation, whether or not it be legally binding as to the resolution of the dispute.

(12) This Directive should apply to cases where a court refers parties to mediation or in which national law prescribes mediation. Furthermore, in so far as a judge may act as a mediator under national law, this Directive should also apply to mediation conducted by a judge who is not responsible for any judicial proceedings relating to the matter or matters in dispute. This Directive should not, however, extend to attempts made by the court or judge seised to settle a dispute in the context of judicial proceedings concerning the dispute in question or to cases in which the court or judge seised requests assistance or advice from a competent person.

(13) The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. However, it should be possible under national law for the courts to set time-limits for a mediation process. Moreover, the courts should be able to draw the parties' attention to the possibility of mediation whenever this is appropriate.

(14) Nothing in this Directive should prejudice national legislation making the use of mediation compulsory or subject to incentives or sanctions provided that such legislation does not prevent parties from exercising their right of access to the judicial system. Nor should anything in this Directive prejudice existing self-regulating mediation systems in so far as these deal with aspects which are not covered by this Directive.

(15) In order to provide legal certainty, this Directive should indicate which date should be relevant for determining whether or not a dispute which the parties attempt to settle through mediation is a cross-border dispute. In the absence of a written agreement, the parties should be deemed to agree to use mediation at the point in time when they take specific action to start the mediation process.

(16) To ensure the necessary mutual trust with respect to confidentiality, effect on limitation and prescription periods, and recognition and enforcement of agreements resulting from mediation, Member States should encourage, by any means they consider appropriate, the training of mediators and the introduction of effective quality control mechanisms concerning the provision of mediation services.

(17) Member States should define such mechanisms, which may include having recourse to market-based solutions, and should not be required to provide any funding in that respect. The mechanisms should aim at preserving the flexibility of the mediation process and the autonomy of the parties, and at ensuring that mediation is conducted in an effective, impartial and competent way. Mediators should be made aware of the existence of the European Code of Conduct for Mediators which should also be made available to the general public on the Internet.

(18) In the field of consumer protection, the Commission has adopted a Recommendation [3] establishing minimum quality criteria which out-of-court bodies involved in the consensual resolution of consumer disputes should offer to their users. Any mediators or organisations coming within the scope of that Recommendation should be encouraged to respect its principles. In order to facilitate the dissemination of information concerning such bodies, the Commission should set up a database of out-of-court schemes which Member States consider as respecting the principles of that Recommendation.

(19) Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable. It should only be possible for a Member State to refuse to make an agreement enforceable if the content is contrary to its law, including its private international law, or if its law does not provide for the enforceability of the content of the specific agreement. This could be the case if the obligation specified in the agreement was by its nature unenforceable.

(20) The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community or national law. This could, for example, be on the basis of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [4] or Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [5].

(21) Regulation (EC) No 2201/2003 specifically provides that, in order to be enforceable in another Member State, agreements between the parties have to be enforceable in the Member State in which they were concluded. Consequently, if the content of an agreement resulting from mediation in a family law matter is not enforceable in the Member State where the agreement was concluded and where the request for enforceability is made, this Directive should not encourage the parties to circumvent the law of that Member State by having their agreement made enforceable in another Member State.

(22) This Directive should not affect the rules in the Member States concerning enforcement of agreements resulting from mediation.

(23) Confidentiality in the mediation process is important and this Directive should therefore provide for a minimum degree of compatibility of civil procedural rules with regard to how to protect the confidentiality of mediation in any subsequent civil and commercial judicial proceedings or arbitration.

(24) In order to encourage the parties to use mediation, Member States should ensure that their rules on limitation and prescription periods do not prevent the parties from going to court or to arbitration if their mediation attempt fails. Member States should make sure that this result is achieved even though this Directive does not harmonise national rules on limitation and prescription periods. Provisions on limitation and prescription periods in international agreements as implemented in the Member States, for instance in the area of transport law, should not be affected by this Directive.

(25) Member States should encourage the provision of information to the general public on how to contact mediators and organisations providing mediation services. They should also encourage legal practitioners to inform their clients of the possibility of mediation.

(26) In accordance with point 34 of the Interinstitutional agreement on better law-making [6], Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.

(27) This Directive seeks to promote the fundamental rights, and takes into account the principles, recognised in particular by the Charter of Fundamental Rights of the European Union.

(28) Since the objective of this Directive cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(29) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland have given notice of their wish to take part in the adoption and application of this Directive.

(30) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive and is not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Objective and scope

1. The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.

2. This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).

3. In this Directive, the term "Member State" shall mean Member States with the exception of Denmark.

Article 2

Cross-border disputes

1. For the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:

(a) the parties agree to use mediation after the dispute has arisen;

(b) mediation is ordered by a court;

(c) an obligation to use mediation arises under national law; or

(d) for the purposes of Article 5 an invitation is made to the parties.

2. Notwithstanding paragraph 1, for the purposes of Articles 7 and 8 a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraphs 1 and 2, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001.

Article 3

Definitions

For the purposes of this Directive the following definitions shall apply:

(a) "Mediation" means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.

(b) "Mediator" means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

Article 4

Ensuring the quality of mediation

1. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.

2. Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.

Article 5

Recourse to mediation

1. A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.

2. This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

Article 6

Enforceability of agreements resulting from mediation

1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.

2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

3. Member States shall inform the Commission of the courts or other authorities competent to receive requests in accordance with paragraphs 1 and 2.

4. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1.

Article 7

Confidentiality of mediation

1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.

Article 8

Effect of mediation on limitation and prescription periods

1. Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.

2. Paragraph 1 shall be without prejudice to provisions on limitation or prescription periods in international agreements to which Member States are party.

Article 9

Information for the general public

Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services.

Article 10

Information on competent courts and authorities

The Commission shall make publicly available, by any appropriate means, information on the competent courts or authorities communicated by the Member States pursuant to Article 6(3).

Article 11

Review

Not later than 21 May 2016, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive. The report shall consider the development of mediation throughout the European Union and the impact of this Directive in the Member States. If necessary, the report shall be accompanied by proposals to adapt this Directive.

Article 12

Transposition

1. Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before 21 May 2011, with the exception of Article 10, for which the date of compliance shall be 21 November 2010 at the latest. They shall forthwith inform the Commission thereof.

When they are adopted by Member States, these measures shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 13

Entry into force

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Article 14

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 21 May 2008.

For the European Parliament

CEDR Centre for Effective Dispute Resolution

Model Mediation Agreement

CEDR Model Mediation Agreement

THIS AGREEMENT dated **IS MADE BETWEEN**

Party A

..... *of* .....

Party B

..... *of* .....
(together referred to as "**the Parties**")

The Mediator
..... *of* .....

(a term which includes any agreed **Assistant Mediator**)

and

CEDR Solve of IDRC, 70 Fleet Street, London EC4Y 1EU

in relation to a mediation to be held

on .....
at .....
(**"the Mediation"**)

concerning a dispute between the Parties in relation to

.....
.....
.....

(**"the Dispute"**)

IT IS AGREED by those signing this Agreement THAT:

The Mediation

1 The Parties agree to attempt in good faith to settle the Dispute at the Mediation. All signing this Agreement agree that the Mediation will be

conducted in accordance with its terms and consistent with the CEDR Solve Model Mediation Procedure and the CEDR Code of Conduct for Mediators current at the date of this Agreement.

Authority and status

2 The person signing this Agreement on behalf of each Party warrants having authority to bind that Party and all other persons present on that Party's behalf at the Mediation to observe the terms of this Agreement, and also having authority to bind that Party to the terms of any settlement.

3 The Mediator is an independent contractor and not an agent of CEDR Solve, and neither the Mediator nor CEDR Solve is an agent for any of the Parties in relation to the Dispute or this Agreement.

4 Neither the Mediator nor CEDR Solve shall be liable to the Parties for any act or omission in relation to the Mediation unless the act or omission is proved to have been fraudulent or involved wilful misconduct.

Confidentiality and without prejudice status

5 Every person involved in the Mediation:

> will keep confidential all information arising out of or in connection with the Mediation, including the fact and terms of any settlement, but not including the fact that the Mediation is to take place or has taken place or where disclosure is required by law to implement or to enforce terms of settlement; and

5.2 acknowledges that all such information passing between the Parties, the Mediator and CEDR Solve, however communicated, is agreed to be without prejudice to any Party's legal position and may not be produced as evidence or disclosed to any judge, arbitrator or other decision-maker in any legal or other formal process, except where otherwise disclosable in law.

6 Where a Party privately discloses to the Mediator any information in confidence before, during or after the Mediation, the Mediator will not disclose that information to any other Party or person without the consent of the Party disclosing it, unless required by law to make disclosure.

7 The Parties will not call the Mediator or any employee or consultant of CEDR Solve as a witness, nor require them to produce in evidence any records or notes relating to the Mediation, in any litigation, arbitration or other formal process arising from or in connection with the Dispute and the Mediation; nor will the Mediator nor any CEDR Solve employee or consultant act or agree to act as a witness, expert, arbitrator or consultant in any such process.

8 No verbatim recording or transcript of the Mediation will be made in any form.

Settlement formalities

9 No terms of settlement reached at the Mediation will be legally binding until set out in writing and signed by or on behalf of each of the Parties.

Fees and costs of the Mediation

10 The Parties will be responsible for the fees and expenses of CEDR Solve and the Mediator **("the Mediation Fees")** in accordance with CEDR Solve's Terms and Conditions of Business current at the date of this Agreement.

11 Unless otherwise agreed by the Parties and CEDR Solve in writing, each Party agrees to share the Mediation Fees equally and also to bear its own legal and other costs and expenses of preparing for and attending the Mediation **("each Party's Legal Costs")** prior to the Mediation. However, each Party further agrees that any court or tribunal may treat both the Mediation Fees and each Party's Legal Costs as costs in the case in relation to any litigation or arbitration where that court or tribunal has power to assess or make orders as to costs, whether or not the Mediation results in settlement of the Dispute.

Legal status and effect of the Mediation

12 Any contemplated or existing litigation or arbitration in relation to the Dispute may be started or continued despite the Mediation, unless the Parties agree or a Court orders otherwise.

13 This Agreement is governed by the law of [England and Wales] and the courts of [England and Wales] shall have exclusive jurisdiction to decide any matters arising out of or in connection with this Agreement and the Mediation.

14 The referral of the dispute to the Mediation does not affect any rights that exist under Article 6 of the European Convention of Human Rights, and if the Dispute does not settle through the Mediation, the Parties' right to a fair trial remains unaffected.

Changes to this Agreement

15 *All agreed changes to this Agreement and/or the Model Procedure are set out as follows:*

Signed

Party A _____

Party B _____

Mediator _____

CEDR Solve _____

APPENDIX 3
INTERNATIONAL DEVELOPMENTS IN MEDIATION

Lessons from recent experiences

By James South, Director of Training, CEDR

Published in the IBA Mediation Committee Newsletter, September 2008

A quick look at CEDR's recent work pattern highlights the increased in interest globally in the use of mediation for civil and commercial disputes. In 2005, 90% of training and consultancy work was UK-based, in 2008 50% of our training and consultancy is international and 15% of CEDR cases involve international parties. These figures illustrate that the increased interest in mediation internationally in the last two years has been dramatic and where training leads, mediation services follows: and the converse is true: as the use of mediation spreads we begin to learn lessons about best practice.

Mediation is now a well-known antidote to civil disputes, and a number of civil justice projects have been set up. As these projects involve learning how mediation can work in particular countries, one can distil key learning points about developing civil mediation that we can take to different jurisdictions.

There is never just one motivating reason or force for the adoption of mediation in a particular location. Normally there are a number of reasons for mediation being considered, and this article seeks to examine some of the reasons and illustrate them with some specific examples and from these, distil some lessons we can all learn about developing this field.

Without delay

Reducing the delay to litigants in resolving their disputes and subsequently decreasing case backlogs in the courts is, unsurprisingly, one of the key motivators for jurisdictions around the world to consider mediation. Delay and backlog uncommon problems, yet in some jurisdictions they can be acute.

An example is India, where its civil justice system has relatively low costs for litigants, an almost unrestricted right of appeal and a less than efficient system of case management in the courts. Consequently it is not unusual to hear instances of well over five years for cases to come to trial (and that is before any appeal). As a result of this India is interested in mediation as one of the methods to alleviate this problem. A number of court-based mediation programmes have been started, for example a form of mandatory mediation in the lower courts in Delhi. CEDR is currently working in India on a project funded by the World Bank, advising a state funded ADR body,

on how to stimulate growth in mediation as well as training mediators so that the judiciary can have confidence in referring cases to competent mediators.

The business case

If the costs of pursuing an action are high, delays long, and enforcement of contracts difficult, this will increase the costs to domestic business in increasingly competitive markets. This is especially so for Small and Medium Enterprises (SMEs) where costs of enforcing contracts are often disproportionate to the amount in dispute. In turn this can impact on the international business, as investors will be discouraged if they cannot enforce contracts effectively. Accordingly an ADR system which minimises these issues is seen as a way of improving the business environment.

In the instance of Pakistan, the World Bank's 'Doing Business' report showed that, at a conservative estimate, in Karachi, the commercial capital of Pakistan, it takes 880 days to enforce a contract with 47 procedures required. In addition, 90% of cases initiated in the courts actually go to trial. Compare this to around 10% in the UK. It was these statistics that prompted the International Finance Corporation (IFC), to fund a $1 million+ project to establish mediation in the Karachi Courts.

CEDR has been working with the IFC on this project since 2006. The project has established the Karachi Centre for Dispute Resolution (opened February 2007), trained 56 mediators to provide quality mediation services to the centre. In turn this has given the Karachi Court confidence to refer cases to mediation in an attempt to reduce back-log and improve the business environment, with 65 commercial cases mediated in the first year.

In a similar fashion to the way in which parties in litigation can extend or hide behind the process to suit their own ends, the same is possible in a mediation. With the first mediations in Karachi, there was a danger of parties using the process as another low cost system, where frequent adjournments and delays are possible. Because lawyers and parties were used to this way of resolving disputes it was a natural pattern to fall into and therefore mediators had (and still have) to work hard to change behaviour by anticipating problems (such as the need for authority), signalling it as a different process and working hard to keep parties at the table and resisting calls to adjourn.

Style and substance

Mediation can also be seen as a part of wider Civil Justice Reform. In England and Wales this started with the Woolf Reforms, leading to the Civil Procedure Rules introduced in 1999, allowing a stay of proceedings for mediation, as well as costs penalties for unreasonably refusing mediation. These rules, and the court's willingness to use them, have had a well-documented impact on the use of mediation in the UK.

Hong Kong has undergone a similar review with new civil procedure rules due to be published this year which will likely see mediation heavily encouraged for civil cases.

This has led to both the Hong Kong Bar and Law Society of Hong Kong to work with CEDR to train mediators in order to anticipate the likely increases in demand for mediation services.

Mediation can also be attractive as a means of signalling wider social reforms. China, for example, in moving towards a more market-based economy has recognised the importance of its use to resolve international trade disputes. Accordingly the Government's conciliation service, CCPIT, in partnership with CEDR, has formed an Anglo-Chinese Dispute Resolution Centre and we have been working with them to establish a mediation centre.

The best example of mediation contributing to wider social reform is in the development of mediation in a number of Eastern European states. As these Post-communist societies, twenty years on, move to market-based approaches, the way the state interacts with its citizens is being transformed - from protection of individual's rights to individual empowerment. Combined with this is a focus on improving the reputation of the State through increased efficiency and less corruption. Mediation is seen as a process that reinforces these messages.

In Croatia I have just finished working on a two-year project to establish a mediation pilot programme in the Commercial Court of Zagreb. Apart from requiring considerable work integrating mediation into the court's processes, it also required thinking 'outside the box'. In this programme sitting judges were acting as mediators, something we initially, with our common law experience found unusual. However the pilot has worked well with over 200 cases referred to mediation in the first year and the court has now been held out as a model for providing a wider service to the citizens of Croatia.

Another example is Bosnia and Herzegovina, which since the cessation of hostilities has undergone massive social reforms at all levels. It also has the most comprehensive mediation system for Civil Disputes in the region. The IFC has funded a project to establish two court-based programmes in Sarajevo and Banja Luka, and there is a Mediators Association which now has state authority to licence mediators. Over 1500 mediations have taken place in the last three years, resulting in €9.3million of tied up funds being released. Mediation is now a central part of the justice strategy for Bosnia and Herzegovina. CEDR has been engaged this year by the Ministry of Justice, to draft the mediation action plan for the next four years, which details the steps to be taken to continue to develop mediation.

Global neighbourhood

Interestingly I have noticed that there is an emerging trend of supra-national motivations for countries to consider mediation as indicator of ambitions to join and

interact in the proverbial 'global village'. This trend is one which I think we should watch in years to come, as it will begin to play increasing importance.

Europe presents good examples of these trends. *Firstly there are the former member states of Yugoslavia, now interested in acceding to the European Union. Effectiveness of local civil justice is a criterion looked at for accession and therefore the adoption of 'modern' justice processes, such as mediation, are considered an indicator of suitability in this field**. Secondly the acceptance this year of the EU Directive on cross-border mediation by the European Parliament means that all member states will encourage parties to use mediation to resolve international disputes.

The EU directive has wider implications, for as business in Europe gets used to mediating cross-border disputes they will also look at doing the same in other parts of the world where problems of contract enforcement, delay and poor business environments exist. Ultimately if the demand for mediation is there, in a desire to become part of global villages, countries which have not developed mediation will begin to take it more seriously.

[Another example of global development of mediation is found in Ukraine. In 2008, a programme for training mediators had been established at the Mediation Centre in Kyiv, encouraging mediation of corporate governance disputes and a cheaper alternative to litigation].

***** italics added

Contract management

MODULE G

Contract performance measurement

PART 3

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter/section are to explore, explain and understand:

1. Why performance measurement of contract implementation is an important and necessary activity
2. How performance measurement methodologies can be used to gauge the performance of contracts for services, goods and works
3. The preconditions for creating and implementing a supporting environment for performance measurement

1.2 IMPORTANT ISSUES

The most important issues are understanding:

- That performance measurement is a key factor for ensuring that contract objectives and targets are met and for ensuring that the rights and obligations of the parties to the contract (purchaser/provider) are correctly fulfilled
- The need for a systematic approach to the design and implementation of the performance measures
- That the elaboration of a performance measurement methodology should be an integral part of the preparation of tender and contract documentation, as well as understood and agreed by all parties when entering into the contract

1.3 LINKS

There is a particularly strong link between this chapter and:

- Module B6 on performance measurement of procuring organisations
- Module B2 on responsibilities of the contracting authority
- Module C2 on contract terms
- Module E1 on preparing tender documents
- Module G1 on contract management

1.4. RELEVANCE

This module is important for all professionals involved in public procurement, including policy makers, procurement specialists, contract managers, technical specialists, auditors, and (not least) economic operators.

1.5. LEGAL INFORMATION HELPFUL TO HAVE TO HAND

This module is not governed by any specific legal requirement except the possible implications of national contract law concerning performance measurement of contract execution. However, indirectly, the principles and objectives laid down in the EC Directives and the Treaty for the role and conduct of public procurement provide strong arguments for making performance measurement a priority area.

SECTION 2
NARRATIVE

2.1 OVERVIEW

This section will deal with contract performance in an individual contract and not with the performance of the contracting authority in general. The issue of measuring the performance of the contracting authority is covered in module B6.

In this section we will look at a number of performance measurement issues that are common to all types of contracts, and then highlight some specific issues that arise in measuring performance under services, supplies and works contracts.

This section is closely linked to the module G1 on contract management and also to modules A2 and A4, which cover different types of contracts.

2.2 INTRODUCTION

Correct and accurate measurement of contract performance and its linkage with payments can incentivise better and higher-quality delivery of contract requirements. It also provides the ultimate answer to the question of whether a particular contract – but also, a public procurement system, at all levels and in all its parts – works efficiently and delivers "value-for-money".

Performance measurement and the contract

The main purpose of the written contract between the contracting authority and the economic operator is to clearly and comprehensively set out the rights and obligations of the parties towards each other and other third parties concerned. In terms of performance measurement, key elements of the contract include:

- The specification, which should set out clearly the requirements of the contracting authority – including what will be delivered, when, how, and to what standards. The increased use of performance-based specifications and incentive contracts accentuates the importance of performance measurement (see module A4 for a discussion of incentive contracts).
- General conditions, which include:
  - Generic performance requirements such as compliance with legislation and common standards for all contracts;
  - Special performance requirements applying to the particular contract;
  - The basis for determining the price to be paid;
  - How the economic operator is to enforce payment for orderly performance in accordance with the required standards;
  - A performance schedule that sets out the contract-specific performance measures and the consequences of failure to perform to the required standard, including the sanctions that can be applied.

Benefits of measuring contract performance

A number of benefits arise from measuring contract performance:

- Performance measurement, both during the performance of the contract and after completion of a contract, provides hard evidence regarding the achievement of efficiency and effectiveness (value-for-money) in response to the objectives, goals and requirements set up for the individual procurement operation.
- It also provides information and guidance on the quality, capacity and capability of the public procurement system at both the national and contracting authority levels.
- The contracting authority will receive valuable feedback and confirmation of the extent to which the procurement process has been efficiently planned and managed, in particular with regard to the design of the technical specifications or terms of reference; the choice of contracting strategy and contract model; the choice of procurement procedure; the setting of selection and award criteria; and the conduct of the tender evaluation and the award of the contract.
- The continuous process of "lessons learned", resulting from an effective system for performance measurement through which strengths and weaknesses can be identified, will generate good arguments and incentives for change and improvements of the procurement process in all its parts, and in the internal and external relationships;
- Where benchmarking is used as a performance measure (see below), a contracting authority will be in a position to compare its own performance and results with the contracting authorities responsible for similar types of operations.

Common features for setting and measuring contract performance

There are a number of common features for setting and measuring performance in most contracts, whether they are for works, supplies or services. It is important that for all contract performance measures there is clarity and certainty on:

- the specific performance areas and indicators
- the baseline under respective performance areas
- the performance target
- the specific performance measure to be applied

Performance requirements and measurement will typically be set out in the agreed specification (the tender specifications together with the technical proposal by the winning economic operator and any modifications to those specifications that might have been agreed as part of a permitted clarification process); the performance standards set out the required service levels and the performance measurement scheme. These should be incorporated as a schedule or schedules to the contract.

The performance requirements that are common to most contracts for works, supplies and services are:

- time
- benefits/costs
- quality (applied in a wide meaning)

Time

Almost all contracts fix the time (or times) by which the economic operator is expected to perform their obligations under the contract, regardless of whether those obligations relate to the completion of works, the delivery of supplies, or the completion of services. For smaller contracts, particularly those that have a short life span, this contractual deadline and the economic operator's success or failure to respect the deadline may be sufficient for measuring contract performance, but on larger contracts and particularly those that have a longer life span, it is important to have an accurate means of monitoring progress towards achieving the final deadline. This would be the case for example for a contract for works (other than very minor works), a contract for supplies involving more than one delivery or a long fabrication/delivery period, or a contract for services to be provided in stages.

The baselines that can be used in order to monitor this progress may consist of one or more of the following:

- a schedule of key dates
- a programme (which can range from very simple to very detailed)
- a cash flow forecast
- a manpower curve

The schedule of key dates provides clear targets for the economic operator to meet, and their failure or success in meeting these key dates will give an immediate indication of their performance. However, it should be borne in mind that many contracts entitle the economic operator to more time in which to perform if they are delayed by the contracting authority or by certain circumstances not under their control. Any measure of the economic operator's performance with respect to time must take account of their entitlement (if any) to additional time. In other words, before deciding whether or not the economic operator has succeeded or failed to meet the key dates, it is necessary to consider whether the key dates must be adjusted to take account of any additional time to which they are entitled.

As stated above, for a contract with a long life span, it is important to be able to monitor progress throughout the life of the contract and not merely at key dates. This is because important decisions may have to be made that depend upon that progress *(e.g.* allocation of budgets, allocation of staff, award of related contracts). Furthermore, a record of actual progress will be a useful source of information for "lessons learned" and for comparison with other projects.

The record of progress can be established by recording actual start and finish dates of activities shown on an agreed programme against the planned dates. However, programmes must be adapted to take account of circumstances that arise such as may be necessary to overcome delay in order to respect key dates. Therefore, it is important to update the programme regularly and to record progress against the updated programme.

Progress can also be monitored by recording the actual cash flow against the forecast. This is normally done by producing a graph showing the total amount forecast to be invoiced and the total amount actually invoiced by the economic operator at any time during the period of the contract. Such a graph normally shows two curves in the form of the letter S. If the economic operator is performing well, the two curves will be very close together. If progress is weak, the curve of actual progress will be flatter than the forecast.

A third indicator of progress can be the level of manpower deployed. By comparing actual manpower with the forecast of manpower needs, variations in progress can be anticipated since, in most cases, output will be proportional to the means utilised.

A failure to achieve forecast rates of progress is not usually a failure to perform in the contractual sense (although in severe cases it can be), but such a failure is usually an advance warning that the key dates will not be met.

Benefits/Costs

Whereas almost all contracts fix the time by which the economic operator is required to perform their obligations, it is certain that they all indicate the price that the EO is to be paid. This price may be fixed or it may be subject to adjustment under defined circumstances. The price that the economic operator is paid represents the cost to the contracting authority. When the price paid to the economic operator is subject to adjustment, it is of fundamental importance for the contracting authority to compare the actual cost against a budget.

In most cases, this comparison will be a measure of the contracting authority's own performance rather than a measure of the performance of the economic operator. It is only a measure of the performance of the economic operator when the contract provides for the economic operator to be paid on the basis of "actual cost + fee", or when the contract requires the economic operator to achieve certain performance criteria that have an impact on the contracting authority's operating costs – for example, the energy consumption of a machine or of a building.

As for the monitoring of time, for small contracts this monitoring can consist of a simple comparison between the contract price and the amount finally paid to the economic operator. For more complex contracts however – particularly those with a long life span or which provide for adjustments to the contract price – the contracting authority will wish to monitor costs throughout the contract period (and perhaps, in the case of works or machinery, during the operating life of the finished product), in order to forecast any budget overrun and to take corrective action. It will also want to check that the benefits achieved correspond well to the cost incurred – in other words, that it obtains good value-for-money.

The starting point for monitoring costs must be a well-prepared budget. At regular intervals, actual costs incurred to date and an estimate of the costs to completion must be compared against this budget. Variances between actual costs and budgeted costs must be investigated so that corrective measures can be taken, and to serve in relation to future contracts. For example, on a works contract, the cost increase may be the result of changes in design requested by the contracting authority due to poor preparation for the project, which can be avoided for future projects. Or, it may be due to underground conditions that no one could have foreseen and which are limited to the area of this particular project.

Where necessary, adjustments will have to be made to the budget, but these must be explained and justified.

In addition to monitoring the final cost of the contract, the contracting authority will need to monitor cash flow – that is, its need for funds at any point in time. The contracting authority must ensure that funds are available to pay the economic operator at the required time, particularly when the contract amount is substantial and payments must be made at intervals over a long period. To do this, it will need a cash flow forecast against which to compare actual cash flow (similar to that used for the monitoring of progress – see above). Historical cash flow data can be used to check whether the contracting authority accurately forecast its needs at the outset. It can be also very useful for establishing cash flow forecasts for future projects of the same nature.

As stated above, the contracting authority will usually want to determine whether it has obtained "good value-for-money". One way of doing this is by means of ratios established at the outset and then recalculated when the works, supplies or services are put to use. These recalculated ratios can be used as the basis for a comparison with similar contracts. For example:

- the cost/km for the construction of a road, or
- the cost/bed for the construction and running of a hospital, or
- the cost/inhabitant for refuse collection

Quality (applied in a wider meaning)

The subject of "good value-for-money" is very closely related to the subject of quality. The contracting authority must verify that the end product that results from the contract (whether supplies, works or services) meets expectations. The authority will want to ensure that it was free from defects when accepted from the economic operator and will do so by means of inspection, testing or review processes that are specified in the contract. The authority will also wish to verify that the product remains usable for the required life span subject to normal maintenance, and that it continues to satisfy performance criteria. This can be done by comparing operation and maintenance costs to a budget, or by means of ratios (as outlined above), or by means of user satisfaction surveys.

Thus, in relation to a new hospital the contracting authority will wish to have records to show that the required tests and inspections were properly carried out during construction and upon completion. It will wish to monitor the extent and ensure the proper execution of repair work by the economic operator during the guarantee period. It will wish to monitor repair costs against a budget over a period of, say, 10 years after the guarantee period. It will want to monitor the number of days when operating theatres or other facilities cannot be used because of a defect. It will wish to monitor the consumption of energy and of water. It should seek staff feedback at regular intervals to determine whether the functionality meets their needs. It should also survey patients to determine whether they are satisfied. For example, elderly or disabled people may find that the distances they have to walk within the hospital are excessive. They may be dissatisfied with the number of seats available in waiting rooms, or with the availability of toilets.

In monitoring quality, the contracting authority should also check whether social and environmental criteria are/were satisfied by the economic operator. How many jobs were created? Were handicapped persons employed? How much training was given? How many safety incidents occurred? How many complaints were received from the local community about noise, dust or pollution emanating from the site of works?

For use in relation to future contracts, the contracting authority should compile information with respect to the responsiveness and attitude of the economic operator and relations between the economic operator and the contracting authority. Such information can cover, for example, the respect of procedures (invoicing, quality assurance, reporting), the accuracy of information given by the economic operator, the number of "complaint letters" or non-compliance notices issued to the economic operator (or the converse), and the rate of failure of tests and/or inspections.

Performance measures in service contracts

As mentioned above, the key documents for measuring performance in service contracts are the agreed specification (tender specifications together with the technical proposal by the winning economic operator and any modifications to those that might have been agreed as part of a permitted clarification process), and the performance standards setting out required service levels and performance measurement scheme. They should be incorporated as schedules to the contract.

These documents should be harmonised and consistent as concerns objectives, tasks and activities, outputs and deliverables and time schedule, including milestones and possible incentive mechanisms. When a contracting authority has awarded a service contract, it must monitor whether the service is being delivered well and to the agreed standards and timetable, and verify that the costs of the service are no higher than expected. It is the responsibility of the contracting authority to monitor the quality of the service to ensure that it is satisfactory and to put into place appropriate measures to rectify poor performance, as well as determining the performance measures.

Managing service performance involves more than simply determining whether services are being delivered to agreed levels or volumes, or within agreed timescales. The quality of the service being delivered must also be assessed.

Measuring service quality means creating and using quality metrics – measurements that allow the quality of a service to be measured. Some aspects of service quality that could be assessed are completeness, availability, capacity, reliability, timeliness, responsiveness, security, standards, usability, accuracy, auditability and satisfaction.

Some service aspects are measurable numerically; they can be counted and measured in a simple, mathematical way, such as transaction volumes. Other service aspects are more difficult to measure and would need a subjective assessment, such as customer satisfaction.

It is common to set a baseline for service performance or service quality. This could be the level at which the service is delivered under an existing contract, although the tendering out of a new contract provides an ideal opportunity to review the current service performance and service quality standards, and revise them if that is appropriate.

The baseline is normally incorporated as part of the contract in the schedules – either in the specification or in a specific schedule. Performance and quality measures, and any improvements in performance or quality, are tracked against the baseline. It is important to set the baseline accurately in order to gauge how well the service performs, and how much value the new service is providing compared with previous arrangements. Since the economic operator's targets and performance will be calculated relative to the baseline, they will take a keen interest in this.

Some aspects of a service will be hard to measure because they involve subjectivity. However, it is still important to agree what is to be measured and how the information will be acquired –interviews, user surveys and documentation reviews are examples. Subjective aspects should not be neglected simply because mathematical techniques cannot be applied to them; it is a question of gathering information and analysing it with as much objectivity as possible. Often it is the subjective aspects of a service that are gauged over the longest term, and where hindsight will offer the clearest perspectives. They are also likely to be the aspects that offer the most pertinent lessons to be taken forward to the procurement of future services. Module A4 contains further discussion on measuring this type of performance.

Benchmarking may involve measuring the economic operator that is providing the service against the best in their industry, making comparisons between similar processes and/or comparing prices for similar services. Benchmarking economic operators that are providing services helps to offset the risk, in a long-term service arrangement, of underlying pricing and tariffs getting progressively out of line with market or industry norms (if a price mechanism is included in the contract). It also helps to identify and prioritise areas for improvement.

Benchmarking can moreover be used to assess the extent to which different arrangements are achieving their desired returns on investment, outcomes or impacts. This will be primarily about learning from other organisations' successes and translating those lessons into programmes of action or better ways of working.

Performance measures in supply contracts

The methodologies for measuring performance in connection with supply contracts are the same as those discussed in the context of service contracts; they revolve around the three basic factors of time, benefits/costs and quality.

The main governing documents linked to the contract for performance measurement here are the same as those applying to service contracts: the agreed specification (tender specifications together with the technical proposal by the winning economic operator and any modifications to those that might have been agreed as part of a permitted clarification process) and the performance standards setting out required service levels and performance measurement scheme. These should be incorporated as schedules to the contract.

A further important influencing factor is the nature of the products and associated services (where relevant), and the complexity and size of the contract. These factors affect the choice of contract model. The type of contract and performance measures used can differ considerably between, for example, a one-off procurement contract for the supply for highly sophisticated equipment, and a time-based four-year framework contract for the supply of food and meals to hospitals in a large city.

As with service contracts, the increasing tendency to use performance-based technical specifications and incentivised contracts, and the stronger emphasis on the way a contract is managed in terms of *(e.g.)* logistics, administration, serviceability and environmentally friendliness, together add to the complexity of both contract delivery and designing performance measures that allow for a proper and productive measuring of contract performance.

The basic performance measuring functions may include the following verification *actions:*

- Delivery dates and schedules in accordance with the contract, and imposition of sanctions if those schedules are exceeded (liquidated damages);
- Proper quality and quantity of supplies;
- The satisfactory provision of all associated services such as installation, training, after-sales service and maintenance;
- The proper quality and efficiency in the processing of documentation *(e.g.* invoices and payments);
- The quality of communication with the contracting authority *(e.g.* review progress of the project);
- Costs in accordance with the contract and acceptable cost adjustments and extensions where allowed.

The performance measuring exercise may include a user satisfaction survey. Benchmarking also may be a useful tool for measuring performance under supply contracts.

Performance measures in works contracts

Introduction

A number of important decisions have to be taken at an early stage of the project cycle – among them, the choice of method for carrying out the works and the corresponding form of contract. The performance measures to be used depend greatly on the nature, size and complexity of the works to be carried out; the chosen contracting strategy; the contract arrangements decided; and the performance targets and measures agreed. Projects based on performance and output specifications, including possible incentive schemes, require much stronger monitoring and a clearer assessment methodology compared with more traditional works contracts.

Comment

The fact that performance measuring should be a key activity in all contracts, but particularly in large works contracts, is confirmed by a performance study that was undertaken on behalf of the UK government in 1999. The study revealed a real need of improvements: of 66 central government departments' construction projects with a total value of GBP 500 million, three-quarters of the projects exceeded their budgets by up to 50%, and two-thirds had exceeded their original completion date by an average of 63%.

Performance assessment methodologies

The performance measuring will basically follow the same route as described earlier in this module by defining performance areas, performance targets and baselines, indicators, measures, information gathering and analyses. However, works contracts, and particularly large infrastructure projects, normally require the design of a more complex performance measurement system than is needed for service and supply contracts. The technical, economics and time-related dimensions under such a contract require a well-prepared assessment framework and management review organisation. Since the prerequisites and conditions vary from project to project; there is a need to customise the performance methodology with respect to the nature of the individual contract.

Generally speaking, performance measurement required in the implementation of larger works contracts is the activity of checking actual performance against targets throughout the life of the project, during construction and, in principle, through the operational life of the completed facility. It includes the establishment of a framework for performance measurement covering measures such as:

- Satisfaction surveys
- Defects
- Construction time and cost
- Productivity
- Profitability
- Impact on the environment
- Waste

In addition to the use of the performance methodology described above, the performance of large works contracts is further monitored by other means. Below there follows a brief introduction to those methods.

Gateway reviews and project evaluation

Gateway review is a method designed and practised in the United Kingdom. In simple terms, it is a review of a project carried out at a number of key decision points by a team of experienced people independent of the contracting authority. The purpose is to ensure that the project is justified and that the proposed procurement approach is likely to achieve value-for-money. The gateway process should consider the project at critical points in its development, known as gates. There are five such gates during the life cycle of a project: three before contract award and the other two at contract implementation and confirmation of the operational benefits. A "gate" cannot be passed through unless full acceptance of the process in this phase is reached. The review team prepares reports with its findings and recommendations for actions.

Project evaluation is an ongoing check of how well the project is performing, and should be the responsibility of the contracting authority irrespective a gateway review process. These reviews include assessments of how well the facility is performing in terms of realising identified benefits, progress against quality, cost and time and the purchaser's capability, seeking opportunities to improve over time.

Post-project review

A post project review is carried out after construction is completed, and focuses on how well the project was managed. It considers how well the construction project performed against the performance targets and indicators, such as cost and time predictability, safety, defects and contracting authority satisfaction. It also considers lessons learned; these lessons should be documented in a "Lessons Learned Report" and feed back into the contracting authority's standards for managing projects.

Post-implementation review

A post implementation review should be carried out when the facility has been in use sufficiently long to determine whether the benefits have been achieved (typically, twelve months after completion and while the change is still recent enough for users to be aware of the impact of the change). This review establishes:

- whether the expected operational benefits have been achieved from the investment in the facility, as justified in the feasibility review and project documents (business case);
- if lessons learned from the project will lead to recommendations for improvements in performance on future projects.

As a minimum this review will assess:

- the achievement of objectives to date;
- whole life costs and benefits to date against those forecast, and other benefits realised and expected;
- the effectiveness of improved operations (which may include functions, processes and staff numbers);
- ways of maximising benefits and minimising whole life cost and risk;
- the sensitivity of the service to expected operational change;
- user satisfaction.

There should be regular post implementation reviews over the operational life of the facility.

Benchmarking

As discussed above, benchmarking is an additional important management tool that can help contracting entities understand how their performance measures up in relation to their peers. It helps them compare their own internal processes with those of similar projects managed by contracting entities of verified excellence, in order to identify priorities for improvement.

SECTION 3
EXERCISES

EXERCISE 1

The management of the contracting authority has been strongly criticised in media and by the politicians over the past years for a number of projects showing poor performance in terms of delays and huge cost overruns. Something needs to be done urgently in order to remedy the situation.

Working in a group, please undertake the following tasks.

Task 1

Using Table 1, prepare a list of the most common areas and reasons for poor performance in the delivery of works, supply and services contracts.

Task 2

Using the list you have prepared in Table 1, draft a short action plan/guidelines for the contracting authority for improving performance in the problem areas you have identified.

Table 1. What are the main reasons for poor performance?	
Reasons for poor performance – contracting authority side	Reasons for poor performance – contractor side

Please use more space if you need it.

EXERCISE 2

What basic performance measurement verification actions could you use for the following contract?

A two-year contract for the supply of medical dressings and bandages to a hospital. The contract requires weekly deliveries plus "top-up deliveries" where additional supplies are required due to emergencies or other unforeseen circumstances.

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

1. State the main reasons why performance measuring of contracts is such an important and necessary activity.
2. Give examples of measuring performance related to time.
3. Give examples of measuring performance related to benefits/costs.
4. Give examples of measuring performance related to quality.
5. Give examples of measuring performance in service contracts.
6. Give examples of measuring performance in supply contracts
7. Give examples of measuring performance in works contracts.
8. What is a gateway review process?
9. What is a post project review process?

MODULE H

PUBLIC PROCUREMENT TRAINING FOR IPA BENEFICIARIES

Public procurement for economic operators

Public procurement
for economic operators

MODULE H

Essential features of the EU procurement rules

PART 1

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. How the EU procurement rules affect your position as tenderers at home and abroad within the EU
2. How public procurement is regulated within the European Union
3. Which specific and general rules apply
4. Why national procurement rules are dependent on EU rules
5. How the European Court of Justice (ECJ) gets involved in the process
6. How national procurement law has developed
7. How various other national laws apply to the procurement process

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- The effect of the different sources of the rules
- The basic principles that apply to public procurement
- How national law must be adapted to the European rules [this presupposes accession and must be adapted to the local situation]
- How to apply national and European rules in parallel

This means that it is critical to understand fully:

- The different levels of rules, where they come from and how they interact to provide a comprehensive system of regulation
- The role of the ECJ in interpreting the rules
- The role of the national law in completing the rules

1.3 LINKS

Module H sets out basic information for economic operators.

Further information on issues addressed in module H is set out in modules A to G. The intended users of modules A to G are the contracting entities, but users of module H wanting to know more about a particular issue are referred to modules A to G.

There is a particularly strong link between this chapter and the following:

- Module A1 on the legislative framework and basic principles of public procurement
- Module A2 on the European institutional framework
- Module A3 on public procurement – historical context

1.4 RELEVANCE

Compliance by contracting entities with the basic principles applying to public procurement in the EU context is a requirement that flows through the whole procurement process, from the design of the technical specifications through the choice of award procedure and selection of tenderers to the award of the contract. The rules are intended to protect tenderers, and the failure of contracting entities to respect these fundamental principles can provide you with a means of challenges the actions of contracting entities in the EU [this last phrase again presupposes accession and must be adapted to the local situation].

This information is important because it provides tenderers with an understanding of the rules and principles that must be followed by all contracting entities in the EU. These represent a basic system of protection so that, whatever form the national legislation takes, these conditions must be respected. You need to know this to understand your rights when you feel that you have been unfairly excluded from a contract award procedure.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

In addition to looking at some of the provisions of the Directives and national law, consideration of the basic principles that apply to public procurement in an EU context also implies knowledge of the EC Treaty, as amended. In particular, it will be helpful to be aware of the following articles of the Treaty:

- Article 12 on the prohibition against discrimination on grounds of nationality
- Article 28 on the free movement of goods and the prohibition of quantitative restrictions on imports and exports and measures having equivalent effect
- Article 43 on the freedom of establishment
- Article 49 on the freedom to provide services

In **Directive 2004/18/EC,** you should consider in particular recital 2 and article 2.

In national law, please look at:

To be adapted to national law

SECTION 2
NARRATIVE

2.1 INTRODUCTION

The purpose of this training is to assist tenderers in preparing and submitting tenders for procurement contracts to be awarded both in [localise:XXX] and in other member states of the European Union. In this Module, we will first look at the applicable legal framework within the European Union and [localise:XXX] in order to understand what rules apply.

It is important to understand both of these elements because, although the EU rules are intended to provide tenderers from one member state rights to tender in other member states, they also give tenderers rights in their own countries; these are often rights which they did not have before. It should be noted that the majority of disputes on procurement are raised by tenderers against contracting entities (public purchasers) in their own countries and not against those from other countries. Even where the applicable rules are drafted as national rules, they will often be the result of EU rules which have been transposed (incorporated) into national law.

It is important to bear in mind that the EU directives described in this Module set out the common rules which must be applied in the member states in order to provide minimum guarantees of equal treatment, transparency and non-discrimination. These common rules must be respected in all member states and any national rules applying to procurement must be adapted so that they are compatible with the provisions of the directives. Even if, therefore, the national rules look different or are drafted in a different way, they must always respect the EU rules. As a result, knowledge of the EU rules is a very useful way of understanding what your rights are in any member states of the EU. You may be familiar with the procurement rules that apply in your country but you may not be familiar with the rules that apply in all other member states.

As we will see in H3, member states may also supplement the EU rules with their own national provisions which deal mostly with such practical issues as the methods of submitting tenders so the rules of the different member states will almost always be a little bit different. This is why, as we will see in H4, it is important for you, as tenderers to prepare yourself fully for the tendering procedures of the country in which you submit the tender. However, your basic rights and essential protection flows from the EU rules. It is important that you understand them if you are to benefit from the opportunities opened up by EU tendering procedures.

The main procurement rules are contained in a series of European Directives on procurement. However, these directives are themselves based on some more fundamental principles which guide them. Where these were not explicit in earlier versions of the directives, the ECJ (one of the main institutions which will be discussed later) has made it clear that they apply even if the directives do not say so in detail. These principles are important because they also apply where the directives do not, for example, for lower value contracts. It is also important, therefore, to be familiar with these principles because, if they are breached by a contracting entity, you will probably be able to do something about it even if the national procurement rules or maybe the directives do not mention them.

2.2 EU PUBLIC PROCUREMENT LEGISLATIVE FRAMEWORK

In the case of public procurement, it is necessary to look not only at the procurement directives themselves but also at the context within which they have been adopted. Even with the directives in place, more general provisions contained in the Treaty of Rome will apply as well as more general principles of law which will guide the interpretation of the directives

2.2.1 The Treaty of Rome

The Treaties of the EU (their *'constitution'*) do not include any explicit provisions relating to public procurement. They do, however, establish a number of fundamental principles which underpin the European Union. These principles apply equally to the field of public procurement. Of these fundamental principles, the most relevant in terms of public procurement are:

- the prohibition against discrimination on grounds of nationality (Article 12 of EC Treaty);

  This principle means that a tenderer from one member state must be treated in the same way as a tenderer from the contracting authority's member state. This is not the same as the principle of equal treatment which does not rely on the concept of nationality.

  This Article applies only to Community nationals, individuals and legal persons who are resident in any of the member states of the Community. Nationals from third countries are excluded from the protection because they are 'not within the scope of application' of the Treaties.

- the free movement of goods and the prohibition of quantitative restrictions on imports and exports and measures having equivalent effect (Articles 28 *et seq.*);

  The objective of this principle is to prevent member states, through their contracting authorities, from buying only national products ('buy national' campaigns). It applies both to distinctly applicable measures which are clearly intended to discriminate against foreign goods (such as local content clauses) as well as to indistinctly applicable measures which apply equally to local and foreign goods but which, nevertheless, discriminate indirectly against foreign goods in that their effect is to make market access more difficult for imported products than local ones.

  The provisions relating to the free movement of goods apply both to products originating in member states and to products coming from third countries which are in free circulation in member states. Products coming from third countries are considered to be in free circulation in member states if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that member state.

- the freedom of establishment (Articles 43 *et seq.*);

  In effect, this means that a tenderer from a member state will be permitted to carry out a business in another member state through the establishment of a local entity.

- the freedom to provide services (Articles 49 *et seq.*);

  In effect, this means that a tenderer based in one member state will be entitled to submit a tender in another member state without the need to set up a local entity or representative.

2.2.2 General Principles of Law

In addition to these fundamental principles in the Treaty, some general principles of law have emerged from the case law of the European Court of Justice. As general principles, these will also be applied in the context of public procurement and a number have, in fact, been applied by the ECJ in cases concerned with public procurement disputes. They are important because they will often be used by the ECJ to fill in gaps in the legislation and to provide solutions of principle to situations which are often very complex.

The most important of these general principles of law in the current context are

- equality of treatment,

  This principle requires that identical situations be treated in the same way or that different situations will not be treated in the same way. It does not depend on nationality (as with the principle of non-discrimination) but is based on the idea of fairness to individuals. Thus, treating two tenderers from the same country differently could be unequal treatment but, since they are of the same nationality, there would be no discrimination (on grounds of nationality). The Danish Bridge case provides a good example of the difference.

The European Court of Justice: Danish Bridge case

In this case, there were two alleged breaches of procurement law at issue. First, a clause which required the use of local goods and labour. Second, the way in which the employer had given one of the tenderers the chance of putting forward a variation to the specifications contrary to the instructions set out in the tender documents. The first breach was clearly discriminatory and thus gave rise to unequal treatment between those tenderers who could fulfil the nationality condition and those who could not, even though they could meet the output specifications. The second breach was not discriminatory because it did not distinguish between national and non-national tenderers. It merely treated one tenderer differently from the others. This is unequal treatment but is not necessarily discriminatory it could also (coincidentally) be discriminatory if it were applied to different nationalities.

Case C-234/89 *Commission v Denmark* [1993] ECR I-3353

- transparency,

  This principle imposes an obligation of transparency on the contracting authority which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

The ECJ: Coname case

Where the Directives do not apply to the contract in question (either because it is outside the Directives or below the thresholds), the principle of transparency will apply to require some form of advertising of the proposed contract. That will be the case whenever the contract in question may be of interest to an undertaking located in another member state. This is not required, however, where the lack of advertising can be justified by 'objective' or 'special' circumstances such as where there is only a very modest economic interest at stake.

Case C-231/03 *Consorzio Aziende Metano ('Coname') v Padania Acque SpA ('Coname')* [2005] ECR I-7287

Guidance on how the transparency objective might be achieved can be found in the Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (24.07.2006)

- mutual recognition, and

  In practice, this means that the Member State in which the service is provided must accept the technical specifications, checks, diplomas, certificates and qualifications required in another Member State if they are recognised as equivalent to those required by the Member State in which the service is provided.

- proportionality.

  The principle of proportionality requires that any measure chosen should be both necessary and appropriate in the light of the objectives sought. In the case of contracting entities, for example,it could be said that when selecting candidates and tenderers, contracting entities should not impose technical, professional or financial conditions which are excessive and disproportionate to the subject of the contract.

These general principles of law are enunciated, for the most part, by the European Court of Justice. These principles are unwritten rules, not contained in the Treaty but inspired by those common general principles of law recognised in the national legal systems of the Member States.

Note on general principles: It is important to remember that these general principles apply independently of the directives so that, even if the directives do not apply, the principles may. Thus, contracts below the EU thresholds, for example, are not covered by the directives but are subject to the general principles.

2.2.3 The EU Directives

General principles of law are difficult to apply in specific situations and tend to be negative in substance, *i.e.* they tend to proscribe incompatible behaviour but do not, at the same time, provide positive guidance on how they may be applied in the concrete situations to which they apply. It was necessary therefore to introduce procedural conformity to achieve non-discriminatory access to public procurement markets. The Community therefore adopted a series of Procurement Directives, setting out how these general principles apply in the specific context of public procurement.

2.2.3.1 The Main Directives

There have been a number of directives. Before 2004, in the public sector, there were three main directives covering works, supplies and services and they were amended many times. These did not include contracts awarded by entities operating in the utility sectors of water, energy, transport and telecommunications which, from 1990, were covered by a different series of directives for the utilities sector.

Since 2004, however, there has been a single directive which now applies to the public sector and another which applies to the utilities sector:

- The Public Sector Directive is **Directive 2004/18/EC**.
- The Utilities Sector Directive is **Directive 2004/17/EC**.

These directives cover only the procedural rules. There are two other directives which apply to complaints and review (*i.e.* to the enforcement of the directives). These are known as the Remedies Directives.

- In the Public Sector, remedies are governed by **Directive 89/665/EC**.
- In the Utilities Sector, remedies are governed by **Directive 92/13/EC**.

These have been both been significantly amended by a new Directive: **Directive 2007/66/EC**. The deadline for implementation was 20 December 2009.

In addition there is now a new Directive which applies a more flexible and confidential regime to the procurement of military supplies and related works and services: this is **Directive 2009/81**.

It should be added that these procedural and remedial Directives are supplemented by further legislation which deals with different aspects of the procurement process. These include, in particular:

- Commission **Directive 2001/78/EC** on the use of standard forms in the publication of public contract notices
- Commission **Regulation 1564/2005** establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC

2.2.3.2 The Scope of the Procedural Directives

The Directives are intended to coordinate national contract award procedures by introducing a minimum body of common procedural rules which reflect the basic Treaty principles rather than to achieve the harmonization of all national rules on public procurement. The Directives do not seek to impose a new common regulatory regime on the member states in the field of procurement and member states can continue to apply their national procedures adapted to the Directives.

As a result, the member states remain free to regulate a number of issues, mainly practical matters. Thus, member states may, for example, provide for the application of specific standard form tender and contract documents; they may require adherence to specific tender opening procedures or tender submission procedures; they may require the submission of appropriate tender or performance guarantees and can impose specific contractual obligations to public contracts which result from public procurement.

Good practice note: for economic operators seeking to tender for contracts in other member states, it will be important to have regard not only to the provisions of the Directives themselves but also to the applicable national rules and practices which remain unaffected (other than by reason of compatibility) by the Directives. These national rules and practices will often contain practical requirements which are not mentioned in the Directives.

Localisation: In XXX, for example, the [Procurement Law] applies the following requirements:

- xxx
- xxx

You can find information about local requirements at [insert information available locally such as public procurement office website]

In essence, the common rules of the directives consist of applying the basic principles referred to above, notably non-discrimination, equal treatment and transparency in the:

- publicity of proposed procurement contracts;
- design of technical specifications
- choice of procurement procedure;
- qualification and selection of tenderers;
- award of contracts.

The Directives, however, apply only to proposed procurement contracts above a given threshold financial value. Rather than seek to regulate with precision all public procurement contracts within the EU, the Community legislator chose to regulate in the Directives only those contracts which were most clearly capable of affecting trade between Member States. Those which fall within this broad definition include

(i) contracts which are of a sufficiently high value to attract tenderers from other Member States (*i.e.* where the potential benefits of winning the contract outweigh the extra costs of providing the goods, works or services from a greater distance); and/or

(ii) those contracts whose objects are amenable to cross-border trade.

This may require localisation: This does not mean that such contracts are not subject to competition. They are, in XXX, subject to the [Procurement Law] and, as indicated previously, to the fundamental principles of the Treaty and general principles of law.

2.2.3.3 The 'Legal Effect' of the Directives

Member states are required to take all appropriate measures to ensure the fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions of the Community. The Procurement Directives do not apply automatically: in order to produce their effects within the member states, they need to be implemented or 'transposed' into national law. The member states are, therefore, required to take the measures necessary to give full effect to the provisions of the directives in national law and to ensure that no other national provisions undermine their applicability. This normally takes the form of a transposition of the Directives into national law and the abrogation of all contrary legislative provisions.

The directives are binding only as the result to be achieved but leave to the national authorities the choice of form and methods. Thus, it is not necessary for the member states to produce an exact copy of the Directives in their national legislation, although some member states have done precisely that, by reference to the Directives themselves. Include localisation where relevant: In XXX, the method chosen is to...

Failure to implement the Directives correctly or on time does not mean, however, that the directives have no effect. Member states are not entitled to deprive the subjects of those Directives (*e.g.* tenderers) of the rights they are intended to enjoy under the Directives. Under the ECJ's doctrine of 'direct effect', the rights conferred by the directives may be enforced by individuals in their national courts where the appropriate conditions are satisfied. This will happen when the member state has failed to implement/transpose the directive into national law by the due date (each directive include a date by which it must be transposed) or when it has transposed the directive but done so incorrectly.

The conditions necessary to give rise to the direct effect of a particular directive are that:

- the obligation imposed on member states is clear and precise,
- unconditional and,
- in the event of implementing measures, the member states or Community institutions are not given any margin of discretion.

Note on direct effect: It is important to remember that tenderers may be able to rely on the provisions of the procurement directives even if they have not been transposed into national law, provided the direct effect conditions are met.

2.3 THE NATIONAL PUBLIC PROCUREMENT LEGISLATIVE FRAMEWORK

This requires extensive localisation and should cover the following:

2.3.1 Primary public procurement law

- History
- Structure
- Scope of regulation

2.3.2 Secondary public procurement legislation

2.3.3 Other relevant legislation

- Administrative law
- Contract law
- Criminal law
- Budget law
- Other special laws

2.4 THE INSTITUTIONS INVOLVED

It is also important to have an idea of the institutions that are involved in procurement. For practical purposes, the institutional framework operates at two levels: the European level and the national level.

Contracting entities, which may also be considered as 'institutions', are bound by the provisions of the Directives and the national provisions which transpose them. They are answerable both to the Commission as emanations of a Member State and to individual economic operators who may rely on the Remedies Directive to challenge infringements by them.

2.4.1 The European Institutional Framework

A number of different organisations are implicated in procurement at the European level. These are:

2.4.1.1 The Community Legislator

Though the Treaty uses different terminology, the Community legislator is, in effect, the Council of the European Communities either alone or acting in co-operation with the European Parliament. All recent Procurement Directives are adopted by these two institutions acting together using the "co-decision" procedure.

Crucially, however, the Council does not have the right of initiative. It can only enact legislation that has been proposed by the Commission. Work on new legislation starts with the Commission and this is who issues new drafts which will be open for public discussion.

2.4.1.2 The Role of the Member States

For the purposes of the EU, the Member States are bound to take all appropriate measures to ensure the fulfilment of the obligations arising out of the Treaties or resulting from action taken by the institutions of the Community. They are also required to facilitate the achievement of the Community's tasks and must abstain from any measure which could jeopardise the attainment of the objectives of the Treaties.

In terms of the Directives, the Member States are therefore required to take the measures necessary to give full effect to their provisions in national law and to ensure that no other national provisions undermine their applicability. This normally takes the form of a transposition of the Directives into national law and the abrogation of all contrary legislative provisions.

As noted above, although the Directives are directly effective (where specific conditions are met) in that they can convey rights even if not implemented, they are not directly applicable, *i.e.* they need to be transposed into national law.

They are binding only as the result to be achieved but leave to the national authorities the choice of form and methods. Thus, it is not necessary for the Member States to produce an exact copy of the Directives in their national legislation.

Provided they achieve the same results, the national authorities can reproduce the provisions of the Directives in identical fashion, by amending existing legislation, or by creating new legislation or codes etc.

Localisation required: In XXX, the relevant provisions of the Directives are, for example, transposed by the [XXX] (where that is the process chosen).

2.4.1.3 The Role of the European Commission

In addition to acting as the proposer of legislation, the Commission has also been given by the Treaty the role of its guardian. It is given the explicit task of ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant to it are applied.

Thus, in addition to having acted as the primary policy maker in the field of procurement, the Commission is also responsible for the application and general enforcement of the Directives. In the case of procurement, the responsible directorate general is DG Markt.

Implementation measures taken by DG Markt include the adoption of secondary legislation to provide, for example, for the use of standard forms, the CPV, interpretative guidelines and communications and general guidelines.

Whilst enforcement in the national courts/review bodies against contracting entities in breach of their obligations is at the suit of interested economic operators, infringements by those public authorities, as emanations of the Member State will simultaneously amount to a failure of the Member State to fulfil its obligations under the Treaty.

Such a failure may be challenged directly by the Commission before the ECJ through infringement proceedings brought under Article 226 of the Treaty. This process is described in detail in H5.

2.4.1.4 The Role of the European Court of Justice

There are two Community level courts each with its own jurisdiction: the Court of First Instance (CFI) and the European Court of Justice ("ECJ"). In most cases related to procurement, it is the ECJ that is of most interest.

The ECJ ensures the observance of the law in the interpretation and application of the Treaty and its implementing rules. To this end, a number of powers have been expressly conferred on the ECJ. These are mainly intended to enable the ECJ to judge the acts and omissions of the Institutions and the Member States in accordance with Community law and to ensure uniformity in interpretation of Community law in the application of this law by the national courts.

There are three areas of the ECJ's work which are important in the case of procurement:

- **Dispute Resolution**

  Under Article 226 of the Treaty, the ECJ has jurisdiction to hear disputes between the Commission, acting as guardian of the Treaty, and Member States in respect of a Member State's failure to fulfil its obligations under the Treaty. These are often referred to as the Commission's infringement proceedings.

  Thus, the Commission will bring infringement cases against Member States before the ECJ. Such actions may result from a failure to transpose the Directives correctly into national law or from a failure of a contracting entity properly to apply the Directives, the national provisions transposing them or other enforceable Community law such as the Treaty itself.

- **Preliminary Rulings**

  A critical power conferred on the ECJ is the power, granted by Article 234 of the Treaty, to pronounce by way of preliminary ruling on the *interpretation* of the Treaty and on the *validity* and *interpretation* of acts of the institutions of the Community if a question on this subject is raised before a national court or tribunal.

  Thus in disputes between Member States and private persons or between private persons themselves, questions relating to the interpretation, application and validity of Community law which arise in the context of national proceedings may be referred to the ECJ. Where such questions arise in the context of a procurement dispute which has been brought in a national court/review body under the Remedies Directive, for example, the national courts may refer them for interpretation to the ECJ. Under this procedure, the national court/review body will establish the facts of the case and formulate questions of interpretation for the ECJ, the answers to which are necessary for the resolution of the case.

- **General Principles of Law**

  In the exercise of its jurisdiction the ECJ has cause to apply and interpret Community law and, in so doing, has often sought to fill *lacunae* in Community law by reference to general principles of law. These are unwritten rules, not contained in the Treaty but inspired by those common general principles of law recognised in the national legal systems of the Member States.

  Where decisions by the Commission impact on economic operators they may brought before the Court of First Instance.

2.4.2 The National Institutional Framework

Implementation and enforcement of the procurement rules takes place mostly at national level. In the case of XXX, the following institutions have been set up to carry out these tasks.

Localisation required:

2.4.2.1 Public Procurement Office/Agency

2.4.2.2 Procurement Review Body

2.4.2.3 Organisation at level of contracting entities – procurement departments/units; (certified) procurement officers.

2.4.2.4 Centralised Procurement - central purchasing agency

Public procurement
for economic operators

MODULE H

Which purchasers
are covered by the
EU procurement rules?

PART 2

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to identify:

1. The bodies that must apply the public procurement rules in the award of their works, supplies and services contracts
2. Those bodies that are part of the state, at the executive, legislative and judicial levels of government
3. Those bodies that do not fall within the general definition of state but that nonetheless must follow the procurement rules since they are covered by the definition of "utilities"
4. The mechanisms used to bring bodies other than "contracting authorities" within the scope of the Utilities Directive (**Directive 2004/17**)
5. The reasons for bringing such bodies within the scope of the Directive
6. The different utility activities ("relevant activities") that fall within the definition of the "utilities sector"

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- That the procurement rules apply to "public" procurement and that this is defined widely to cover purchases of all public authorities
- That the Court defines the concept of public authorities independently of any national definition, and makes that definition a functional one
- The way that each type of public authority is defined
- The conditions that apply to the different types of public authority before they are covered by the public procurement rules
- The possibility that the ability of a body to meet those conditions may change over time
- That the procurement rules also apply to the procurement of utilities, even where they are private companies
- The extent to which the rules apply in each of the defined utility sectors
- The central role played by the definition of "relevant activities"
- That the logic of including these sectors within the rules also gives way, in appropriate circumstances, to their exemption from the Utilities Directive

This means that it is critical to understand fully:

- The definitions of the Directives in respect of the state and other public authorities
- The definition of the Directives in respect of "bodies governed by public law"
- The interpretation given to these definitions by the Court

- The conditions that apply to a body before it may become a "body governed by public law"
- The definitions of the Utilities Directive in respect of "public undertakings" and "entities operating on the basis of special or exclusive rights"
- The mechanism used to bring these sectors within the system
- The definitions of the covered entities
- The definition of "relevant activities"
- The specific and general exemption mechanisms

1.3 LINKS

Module H sets out basic information for economic operators.

Further information on issues addressed in module H is set out in modules A to G. The intended users of modules A to G are the contracting entities, but users of module H wanting to know more about a particular issue are referred to modules A to G.

There is a particularly strong link between this chapter and the following:

- Module D1 on contracting authorities (classical sector)
- Module D2 on contracting entities in the utilities sector

1.4 RELEVANCE

This information will be of particular relevance in identifying the purchasers in different member states that will be obliged to follow the EU public procurement rules; those rules thus provide opportunities for tenderers from other member states to compete on an equal footing with national tenderers. Where tenderers are concerned as to whether they have been treated unfairly, they will be able to satisfy themselves that the purchasers at issue are indeed within these definitions and they will then be in a position to identify the potential breaches committed.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

In Directive 2004/18, please look at article 1(9).

In national law, please look at:

SECTION 2
NARRATIVE

2.1 INTRODUCTION

As tenderers, you will be seeking to tender both in your own country and in other member states. You may already have identified your main purchasers, *i.e.* procuring entities. You may, however, be looking to identify other potential purchasers. The EU procurement rules define those procuring entities which are subject to the rules. If they fall within the relevant definitions, then they will be obliged to follow the EU procurement and the national rules that implement into the national applies that applies to them. They must, therefore, offer the protection given by the EU rules to tenderers coming from other EU member states. In some cases, they will also be obliged to extend the same protection to tenderers coming from countries with which the EU has entered into bilateral agreements which also concern procurement. [Localisation may be necessary where the country involved is not yet an EU member but benefits from a bilateral or multilateral agreement with the EU on procurement.]

In H2, we will be looking at the definition of procuring entities so that you will be able to recognise, in all member states, which procuring entities must allow you to submit tenders and which must treat you in the same way as they treat tenderers from their own countries.

2.2 PUBLIC AND UTILITIES SECTORS

The first big distinction is between purchasers which operate in the public sector and those which operate in the utilities sector. From your perspective, it may not matter who buys your products. However, slightly different rules apply to the purchasers in these two sectors so this will have an effect on the way you can tender and on the procedures that will be applied. To make sure you know how best to tender, you will also need to be aware of the differences between the purchasers.

- Purchasers that operate in the public sector are covered by the Public Sector Directive.
- Purchasers that operate in the utilities sector are covered by the Utilities Directive.

Note: In the case of the public or 'classical' sector, the preferred term is 'contracting authorities' because the bodies involved are public 'authorities' in the sense that they are, formally or informally, part of the State apparatus. In the utilities sector, on the other hand, the preferred term is 'contracting entities' since, whilst some of them may be public authorities, they can also be private sector companies who happen to operate in the utilities sector under privileged conditions.

2.3 CONTRACTING AUTHORITIES IN THE PUBLIC SECTOR

Another major distinction which must be made is between the two main categories of public or contracting authority defined in Directive 2004/18 (the Directive), namely:

- the State, regional or local authorities ('public authorities')
- bodies governed by public law

Contracting authorities may also be made up of associations formed by one or several of such authorities or one or several of such bodies governed by public law.

The importance of understanding these definitions is that they affect the applicability of the procurement rules which form the subject-matter of this training. These rules only apply if a body falls within one of the definitions of the Directive. If the body in question does not fall within those definitions, its procurement will not be subject to the Directive. The Directive either applies or it does not; there is no 'in between'.

Further, once a body falls within the definition of 'contracting authority', all of its purchases of goods, works and services will be subject to the procedural requirements of the Directive even if they are made for the purposes of tasks not, or even mostly not, in the general interest.

Especially in the case of a body governed by public law, the status of a contracting authority can change over time as a result of a change of its functions or a change in its legal status. The financing of the contracting entity may also change over time. These all have an effect on the inclusion of the body within the definition of the directive so that it may not be possible to say, once and for all whether a body is covered or not covered by the Directive. The situation may require review.

2.3.1 Public Authorities

Public authorities are defined as `the State, regional or local authorities'. This definition covers all State entities and not only the executive authority of the State, *i.e.* the administrations of State and regional or local authorities. The term `the State' also encompasses all the bodies which exercise legislative, executive and judicial powers. The same applies to bodies which, in a federal state, exercise those powers at federal level.

The definition of the State is broad and the European Court of Justice (ECJ) has taken a particularly functional approach. It thus looks more at the actual function of the entity concerned than the formal categorisation it is given by internal law.

Case note: *The term `contracting authority' will be defined according to the functions of the body in question. (Case 31/87 Gebroeders Beentjes BV v Netherlands ('Beentjes') [1988] ECR 4635)*

In the famous *Beentjes* case, the awarding authority was a body with no legal personality of its own whose functions and composition were governed by legislation and its members appointed by the provincial executive of the province concerned. It was bound to apply rules laid down by a central committee established by royal decree, whose members were appointed by the Crown. The state ensured observance of the obligations arising out of measures of the committee and financed the public works contract awarded by the local committee in question.

The ECJ held that the term `State' must be interpreted in functional terms. As a result, a body such as the awarding authority whose composition and functions are laid down by legislation and which depends on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public works contracts which it is its task to award, was held to fall within the notion of the State, even though it is not part of the state administration in formal terms.

The state, regional or local authorities (the 'public authorities') are, by definition, contracting authorities for the purposes of the Directive. All contracts awarded by a public authority will be covered by the Directive whatever their character.

[Localisation required: In [xxx], the concept of 'public authorities' would include...]

An 'association' of contracting authorities is not different from a contracting authority; it is merely a term used to describe the mechanism where public contracts are awarded by 'entities' which do not have their own legal personality or identity but which are based on cooperation between public law bodies subject to the Directive such as purchasing consortia between territorial public bodies. It means a group of contracting authorities.

2.3.2 Bodies Governed by Public Law

A 'body governed by public law' does not have a simple definition. It depends rather on whether it has certain characteristics. These are expressed as conditions which need to be met in order for the body in question to be considered as one which is governed by public law. It is similar in approach to the functional test adopted by the ECJ in respect of the definition of public authorities.

The main question centres around the three *cumulative* conditions required by the Directive to indicate the existence of a body governed by public law. The ECJ has consistently held that a body must satisfy all three of these conditions to fall within the definition. These conditions are that a body governed by public law is a body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and
- having legal personality, and
- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

Annex III of the Directive includes a list of entities in each member state which are considered to fall within the definition of 'body governed by public law', so this is the first place you should look to see if your potential purchaser is covered. The lists are intended to be as comprehensive as possible and will contain the names of those bodies that the member state considers to fall within the definition at the time of adoption of the Directive. They are not, however, exhaustive. Even if it is not listed, a body will nonetheless be covered if it meets the three conditions referred to above.

[Possible localisation: where [XXX] becomes a member, insert: 'For [XXX] the list of such bodies includes OR is contained in [xxx]']

Condition 1: Defining Needs in the General Interest

There are two main issues which are relevant and these include the definition of (i) needs in the general interest, and (ii) general interest needs not having an industrial or commercial character.

- **Needs in the General Interest**

  'Needs in the general interest, not having an industrial or commercial character' are *generally* needs which are satisfied otherwise than by the availability of goods and services in the marketplace and which, for reasons associated with the general interest, the State chooses to provide itself or over which it wishes to retain a decisive influence. In general, the ECJ has looked towards State requirements with regard to the specific tasks to be achieved; the explicit reservation of certain activities to the public authorities; the obligation on the State to cover the costs associated with the activities in question; the control of prices to be charged for the services, the degree of monitoring or security required; as well as to 'public interest'.

  There have been several examples:

  - One example is of an entity established to produce, on an exclusive basis, official administrative documents, some of which required secrecy or security measures, such as passports, driving licences and identity cards, whilst others were intended for the dissemination of legislative, regulatory and administrative documents of the State. The prices were fixed by the public authorities and a State control service was responsible for monitoring the security measures where necessary. The documents were closely linked to public order and required guaranteed supply and production conditions which ensured that standards of confidentiality and security are observed. The body was established for the specific purpose of meeting those needs in the general interest (C-44/96 *Mannesmann* [1998] ECR I-73).
  - An entity which was a public limited company set up by two municipalities which was specifically entrusted with a series of tasks defined by law in the field of waste collection and the cleaning of the municipal road network carried out a need in the general interest (Case C-360/96 *Gemeente Arnhem* [1998] ECR I-6821).

- The activities of funeral undertakers could be regarded as meeting a need in the general interest, especially since the exercise of the activity was subject to the issue of prior authority and that the public authorities could fix the maximum prices for funeral services (Case C-373/00 *Adolf Truley* [2003] ECR I-1931).
- In other examples, it was found that regional development agencies and other more specialised undertakings which are designed to attract investment to a particular location could fall within the definition of general interest since, by bringing together manufacturers and traders in one geographical location, they are not acting solely in the individual interest of those manufacturers and traders, but also providing consumers who attend the events with information that enables them to make choices in optimum conditions. The resulting stimulus to trade was considered to fall within the general interest (Cases C-223/99 and C-260/99 *Agorà* [2001] ECR 3605; case C-18/01 *Korhonen* [2003] ECR I-5321).

As you see, many entities which carry out 'commercial' type activities will be covered by the rules so that you will have the benefit of competing for contracts awarded by them as well.

General Interest needs not having an industrial or commercial character

The additional criterion for the purposes of this definition is that the general interest needs should not have an industrial or commercial character. These are generally activities which are carried out for profit in competitive markets. The ECJ (Case C-360/96 *Gemeente Arnhem* [1998] ECR I-6821) has held that

(i) the absence of an industrial or commercial character is a criterion intended to clarify and not limit the meaning of the term `needs in the general interest',

(ii) the term creates, within the category of needs in the general interest, a sub-category of needs which are not of an industrial or commercial character and

(iii) the legislature drew a distinction between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character.

A body governed by public law may carry out both activities. In the *Mannesmann* case, for example, the entity involved had the task of providing the public authorities with official documents (a need in the general interest) but was also in the business of acting as a commercial printing company.

However, once an entity falls within the definition of a body governed by public law, its contracts are to be considered to be public contracts within the meaning of the Directive and covered by the Directive. Even the fact that meeting needs in the general interest constitutes only a relatively small proportion of the activities actually pursued is irrelevant, provided that it continues to attend to the needs which it is specifically required to meet.

On the other hand, if a body governed by public law carries out other activities and these are provided in a competitive market, this may, in fact, indicate the absence of a need in the general interest, not having an industrial or commercial character. If an entity falls into this category, then the Directive will not apply.

This is a conceptually difficult distinction but the problem is solved essentially by looking at the nature of the entity concerned rather than the activity it carries out. The question becomes one of whether the entity is operating in an industrial or commercial manner. Thus, in the Korhonen case, the ECJ held that if the body:

(i) operates in normal market conditions,

(ii) aims to make a profit, and

(iii) bears the losses associated with the exercise of its activity,

it is unlikely that the needs it aims to meet are not of an industrial or commercial nature.

The relevant legal and factual circumstances will have to be taken into account in each case, especially those prevailing when the body concerned was formed and the conditions in which it carries on its activity, including, the level of competition on the market, whether its primary aim is or is not the making of profits, the question of whether or not it bears the risks associated with the activity, and any public financing of the activity in question. It is not always easy, therefore, to be sure that a particular purchaser is governed by the rules or not.

Condition 2: Legal Personality

The existence of legal personality is generally the clearest distinction between bodies which form part of the State, regional or local authorities and those which will be considered to be bodies governed by public law. Most government Ministries, departments and divisions do not have separate legal personality. If a separate body is created as a company or enterprise, then it will have legal personality separate from the State and is likely to be seen as a body governed by public law if the other two conditions are also met.

It does not matter whether the body in question is subject to public or private law. The only issue is whether it has legal personality.

Condition 3: Dependency on the State

This third condition is satisfied where the body is question is financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

This condition is used primarily to determine the degree of dependency of the body in question on the State. This dependency may, alternatively, be

- financial
- managerial or
- supervisory

This condition is satisfied where only *one* of these three criteria is met.

(i) Financial Dependency

The term "financed for the most part" means financed by "more than half", but the term "financed" is not as clear as it seems. The question concerns the actual degree of State dependency implied by the level of State financing. Not all payments made by a contracting authority have the effect of creating or reinforcing a specific relationship of subordination or dependency between that authority and another body. Only payments which go to finance or support the activities of the body concerned without any specific consideration therefor may be described as public financing.

Example from case law:

In the case of a university, payments in the form of awards or grants for the support of research work that go to the institution as a whole may be regarded as financing by a contracting authority. Similarly, the payment of student grants in respect of tuition fees collected by the universities may also be classified as public financing.

On the other hand, the position is quite different in the case of payments made, in the form of consideration, by one or more contracting authorities for the supply of services comprising research work or for the supply of other services, such as consultancy or the organisation of conferences. These 'sources of financing' are, in fact, sums paid by one or more contracting authorities as consideration for contractual services provided by the university and it does not matter either that those activities of a commercial nature happen to coincide with the teaching and research activities of the university.

Case C-380/98 *The Queen v HM Treasury, ex parte The University of Cambridge* [2000] ECR 8035.

If the degree of dependency varies according to the sources of funding, so a change in the source of funding will affect the degree of dependency. Accordingly, the decision as to whether a body is a contracting authority must be made annually and the budgetary year during which the procurement procedure is commenced is the appropriate period for calculating how that body is financed. So, if at the beginning of the budgetary year in question, more than half of the body's funding will be public financing, procurement for that year will be covered by the Directive.

(ii) Managerial Dependency

This condition relates in effect to the direct participation of public authorities and officials in the management of the entity in question. The condition will be fulfilled, for example, where a body is established by a Government Minister, where its memorandum and articles and any amendments must be approved by him, where the chairman and other directors are appointed and their remuneration determined by him, where the appointment of the company's auditors must be approved by the Minister and where the company is to comply with State policy and any ministerial directives with regard to the remuneration, allowances and conditions of employment of its employees.

(iii) Supervisory Dependency

This condition goes further than mere general supervision of an administrative or financial nature and it must give rise to dependence on the public authorities, enabling the public authorities to influence their decisions in relation to public contracts.

Where the supervision of the activities of the body in question exceeds that of a mere review, the condition may be fulfilled. That could be the case, for example, where the public authorities supervise not only the annual accounts of the body concerned but also its conduct from the point of view of proper accounting, regularity, economy, efficiency and expediency and where those public authorities are authorised to inspect the business premises and facilities of that body and to report the results of those inspections to a public authority which holds all the shares in the body in question.

2.3.3 Central and Joint Purchasing

The Directive has now formalised the practice current in a number of states in respect of centralised procurement. Public purchasers have recognised that they can benefit from economies of scale by buying their requirements in bulk. Even where the procurement needs of a single procuring entity are relatively modest in respect of a given product or service, the combined needs of a number of such government purchasers may be significant. Government departments operating in similar sectors or in neighbouring locations have often found it beneficial to group together jointly to purchase specific items. This is most likely to be the case of products used on a day to day basis where the various purchasers do not have any entity-specific or differential technical requirements. In some cases, it could also be used as a means of purchasing more specialised equipment, where technical compatibility is needed. In some cases, the task of making such bulk purchases may be entrusted to a single purchaser, with either one of the group of purchasers acting as agent for the others or to a specially created entity established with that function in mind: a central purchasing body.

From the tenderers' point of view, access to a central or joint purchasing body will have the effect of potentially increasing the volume of sales possible. Succeeding in a tender at this level will open the possibility of selling to a number of contracting authorities.

For the purposes of the Directive, a central purchasing body is a "contracting authority" which "acquires supplies and/or services intended for contracting entities" or "awards public contracts or concludes framework agreements for works, supplies or services intended for contracting entities".

Example: Office of Government Commerce

In the United Kingdom, for example, the Office of Government Commerce operates a centralized procurement system to particular common use goods and services. It does so through its commercial arm, known as 'Buying Solutions'. This service offers a range of products and services, often available on the basis of a framework arrangement, which have been procured in accordance with the procedures of the Directive. Information on how this system operates can be downloaded from: www.buyingsolutions.gov.uk

Localised Example?: XXX

…Information on how this system operates can be downloaded from:

It is also possible that a number of contracting authorities will simply choose to aggregate their requirements and jointly conduct a contract award procedure (including framework agreements). This form of joint purchasing could be done in the name of each of the contracting entities or in the name of a lead entity acting on behalf of the others. To the extent that these entities simply act jointly, without the benefit of a special purpose vehicle or without nominating one of their number as agent for the others, then they will be acting as an association of contracting authorities.

Example: Eastern Shires Purchasing Organisation

Again in the UK, ESPO is a joint Committee of regional Local Authorities. It acts as a purchasing agent for its member authorities and other customers and provides a procurement and supply service (offering goods and services) to its members to a value of around £700 million per annum. Information on how this system operates can be downloaded from: www.espo.org

Localised Example?: XXX

…Information on how this system operates can be downloaded from:

2.4 CONTRACTING ENTITIES IN THE UTILITIES SECTOR

As the name of the EU Directives suggests, the procurement directives were originally intended to cover *public* procurement, that is, contracts awarded by *public* authorities or other *public* bodies. As a result, the current Directive 2004/18 (as well as all of the previous Directives which applied to the public sector – hereafter 'the Public Sector Directive or Directives') specifically excludes from its scope of application all public contracts which, under the Utilities Directive, are awarded by contracting authorities exercising one or more of the defined activities in the utilities sector (in the field of water, energy, transport and postal services) and are awarded for the pursuit of those activities.

This exclusion was not made because the Community authorities did not want to cover public authorities operating in these sectors (they did) but because the bodies awarding such contracts were not always 'public entities'. Indeed, they were and are often wholly private undertakings even though, in many member states, activities in these sectors are entrusted to government agencies or a combination of both private and public entities.

By 1990, however, the Community regulator had come up with a means of applying the procurement rules to the utilities sector. It did so in a separate Utilities Directive where it was made clear that not only are 'public' entities bound to follow Community rules with regard to their procurement of goods, works and services but so are those private undertakings which operate on the basis of special or exclusive rights. The paramount consideration in both public and private sectors is the extent to which the contracting entities are subject to state influence whether this influence is exercised through direct control or indirect influence (*e.g.* the state's power to control the grant and operation of special or exclusive rights to private undertakings).

The rules were adopted in a separate directive because the provisions are more flexible than in the classical sectors. It was recognised that the entities in these sectors were operating in a more commercial market so that, although the main principles of the public procurement rules needed to be respected, it was also necessary to provide some flexibility in order to take account of the reality of the environment in which their activities took place.

The entities in the utilities covered by the Community procurement rules fall within two broad categories.

- The first category consists of entities over which the state may exercise direct control. These are public authorities and bodies governed by public law and the definitions are the same as for those authorities covered by the Public Sector Directive.
- The second category, referred to, for the sake of convenience consists of defined *public* bodies and those *private* entities which operate in their relevant sectors on the basis of special or exclusive rights granted by a member state of the Community.

It is important to remember that, unlike in the case of the Public Sector Directive where contracting authorities once caught by the definition must carry out all their procurement according to that Directive, public authorities, bodies governed by public law and other entities covered by the Utilities Directive are covered only to the extent that they carry out a relevant activity defined in the Utilities Directive. To fall within the scope of application of the Utilities Directive, they must (i) fall within the definition of an entity operating in a utility sector and (ii) carry out a relevant activity (only or as one among many relevant and/or non-relevant activities).

Important note:

Entities operating in the utilities sector as defined in the Utilities Directive are covered by the Directive only to the extent that they carry out a relevant activity defined in the Utilities Directive.

There are types of defined entity: (i) contracting 'authorities', (ii) public undertakings and (iii) entities (usually privately owned) which operate on the basis of special or exclusive rights.

2.4.1 Contracting 'authorities'

The definition of 'contracting *authority*' is the same in both Public Sector and Utilities Directives. There are two main types of contracting authority and the case law on this issue has resulted in a flexible definition. The two types are: 'public authorities' and 'bodies governed by public law'.

These are discussed in section 2.3 above.

2.4.2 Public undertakings

These are defined as any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

- hold the major part of the undertaking's subscribed capital, or
- control the majority of the votes attaching to shares issued by the undertaking, or
- can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

The distinction between public authorities and public undertakings flows from the recognition that the state may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services in the market. In order to make such a distinction, it is necessary, in each case, to consider the activities exercised by the state and to determine the category to which those activities belong. In this respect, the ECJ also takes a functional approach to the definition.

Example from case law:

The concepts of 'bodies governed by public law' and 'public undertakings' are not mutually exclusive. The objective of the Utilities Directive is to extend the procurement rules to utilities not covered by the public sector directives and thus ensure that all the contracting entities operating in the utilities sectors are included within its scope, regardless of their legal form and the rules under which they were formed.

Case 283/00 *Commission v Spain* [2003] ECR I-11697

[Localisation possible: In (XXX), this might/will include entities such as (xxx)…]

2.4.3 Entities operating on the basis of special or exclusive rights

A critical reason for the exclusion of certain sectors from the scope of the earlier Public Sector Directives (on works, supplies and service, respectively) was that the contracting entities involved in that sector could not simply be classified as `public' entities. Indeed, their legal status ranges from purely government-owned undertakings to private companies holding exclusive concessions. The task of the Community regulator was, therefore, to find a way of avoiding the public/private distinction and to adopt a definition which recognises the privileged position which might encourage private utilities to engage in unfair (nationalistic) procurement practices..

For tenderers, the task remains one of identifying those utilities which are covered by the EU rules and those which are not. For this, the Utilities Directive provides a definition which consists in the identification of those situations in the relevant sectors in which, whatever the public or private status of the entities concerned, the objective conditions leading to nationalistic purchasing practices can be identified. It did so by relying on the concept of special or exclusive rights.

Article 2 of the Utilities Directive thus identifies the contracting entities which are covered by the proposals and groups the contracting entities in two categories, namely public authorities and public undertakings (as above) and undertakings which operate on the basis of special or exclusive rights.

Article 2(2)(b) provides that the provisions of the Utilities Directive shall apply to

- contracting entities when they are not contracting authorities or public undertakings,
- have as *one* of their activities any of those referred to in Articles 3 to 7 (discussed below) or any combination thereof
- and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

Note: Covered Utilities

The Directive also provides, in annexes I-X, an illustrative (and non-exhaustive) list of entities in each of the member states which are considered to fulfil the criteria explained here. [Localisation possible: In (XXX), this might/will include entities such as (xxx)]

Article 2(3) of the Utilities Directive states that, for the purpose of the Directive, special or exclusive rights shall mean rights deriving from authorisations granted by a competent authority of the Member State concerned, by way of any legal, regulatory or administrative provision, the effect of which is to limit the exercise of activities defined in Articles 3 to 7 to one or more entities and which substantially affects the ability of other entities to carry out such activity.

No `special or exclusive rights' exist where they have been conferred upon the undertaking as a member of a class of undertakings carrying on an economic activity which is open to anyone. Indeed, exclusive or special rights must generally be taken to be rights which are granted by the authorities of a Member State to an undertaking or a limited number of undertakings otherwise than according to objective, proportional and non-discriminatory criteria, and which substantially affect the ability of other undertakings to provide the same services in the same geographical area under substantially equivalent conditions.

For further explanation, see the Commission's 'Explanatory note – Utilities Directive definition of exclusive or special rights' (Document CC/2004/33 of 18.6.2004).

2.5 THE DEFINITION OF RELEVANT ACTIVITIES

Unless exempted under Article 30 (see section 2.5.6) , the contracting entities which fall within the above definitions are covered by the Utilities Directive only to the extent that they carry out a relevant activity and only in relation to contracts let for the purpose of carrying out that activity. The relevant activities are the following.

Note: New definitions of 'relevant activities' – changes from the earlier directives

Previously, **telecommunications** was a relevant activity but this has now been removed because, following the success of the Community's telecommunications liberalisation initiative in introducing effective competition into the sector, the Commission no longer considers it necessary to regulate purchases by entities operating in this sector.

Now, **postal services** are also included as a relevant activity and so subject to the Utilities regulations. They were previously subject to the public sector directive.

2.5.1 Water

The relevant activity consists in the provision or operation of a fixed network intended to provide a service to the public in connection with the production, transport or distribution of drinking water.

In the case of a contracting 'authority', the supply of drinking water to networks which provide a service to the public is also a relevant activity for the purposes of the Utilities Directive. In the case of the other contracting entities, the supply of drinking water to such networks will be covered where that is one of their principal activities.

It is not a principal activity and the supply of drinking water will not be covered where

- its production takes place because it is necessary for carrying out an activity other than a relevant activity; and
- where such supply depends only on the entity's own consumption of drinking water and has not exceeded 30 per cent of the entity's total production of drinking water, having regard to the average for the preceding three years, including the current year.

In addition, the Utilities Directive will also cover the award of contracts connected with hydraulic engineering, irrigation or land drainage, as well as to the disposal or treatment of sewage. It will apply in the context of hydraulic engineering, irrigation or land drainage provided that the volume of water intended for the supply of drinking water represents more than 20 per cent of the total volume of water made available by these projects or irrigation or drainage installations.

Exclusion:

Contracts for the purchase of water awarded by entities listed in Annex I to the Utilities Directive (production, transport or distribution of drinking water) are not covered since procurement rules such are inappropriate for purchases of water given the need to procure water from sources near the area where it will be used.

2.5.2 Energy

This activity concerns

- the provision of electricity, gas or heat and
- the exploitation of a geographical area for the purpose of exploring for and extracting oil, gas, coal or other solid fuels

2.5.2.1 Electricity, gas or heat

This consists of the provision or operation of a fixed network intended to provide a service to the public in connection with the production, transport or distribution of electricity, gas or heat.

In the case of a public authority, the supply of electricity, gas or heat to networks which provide a service to the public is also a relevant activity for the purposes of the Utilities Directive.

As with water, above, in the case of the other contracting entities, the supply of electricity, gas or heat to such networks will be covered only where that is one of their principal activities. However, this condition applies differently to, on the one hand, electricity and, on the other, gas or heat.

In the case of the other contracting entities who supply electricity, the supply of electricity to such networks will not be covered, as in the case of water supplies (above) where:

- production takes place because it is necessary for carrying out an activity other than a relevant activity; and
- where such supply depends only on the entity's own consumption of electricity and has not exceeded 30 per cent of the entity's total production of energy, having regard to the average for the preceding three years, including the current year.

In the case of the other contracting entities who supply gas or heat, that supply of gas or heat to such networks will not be covered where:

- production is the unavoidable consequence of carrying on an activity other than a relevant activity; and
- supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20 per cent of the entity's turnover having regard to the average for the preceding three years, including the current year.

Exclusion:

The Utilities Directive does not apply to contracts awarded for the supply of energy or of fuels for the production of energy. This exemption was included because of the lack of liberalisation in the Community energy market which meant that energy could effectively not be traded across EU borders. The exemption refers to the purchase of fuels for the production of energy: it does not exclude the purchase of fuels for other purposes such as transport.

2.5.2.2 Exploitation of a geographical area

The Utilities Directive applies to contracting entities which exploit a geographical area for the purpose of exploring for and extracting oil, gas, coal or other solid fuels.

In addition, a specific exemption was provided for in the previous Utilities Directive for the activities and exploration and extraction of hydrocarbons. This exemption has not been retained in the latest Directive and no new exemption will be granted under this procedure, although the exemptions already granted under the procedure remain valid. Exemption will now be considered under the new general exemption mechanism of Article 30 (see 2.5.6 below).

Exclusion:

As with the energy sector in general, the Utilities Directive does not apply to contracts which the contracting entities award for the supply of energy or of fuels for the production of energy.

2.5.3 Transport Services

The provisions apply not only to the operation of transport networks but also to the operation of transport terminal facilities.

2.5.3.1 Transport networks

This activity consists in the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

A transport network is taken to exist where the service is provided under operating conditions laid down by a competent authority of a member state, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

Previously, the provision of bus services was not covered, however, where other entities were free to provide those services, either in general or in a particular geographical area, under the same conditions as the contracting entities. In practice, this means that other contracting entities must not only be authorized to operate in the market for the services in question, without any legal barriers to entry to the provision of those services, but must also be in a position actually to provide those services under the same conditions as the contracting entity.

The transport sector is now also subject to the general exemption procedure under Article 30. Bus transport services not already subject to an exemption will be required to seek an explicit exemption under Article 30 (see 2.5.6 below).

2.5.3.2 Terminal facilities

The exploitation of a geographical area for the purpose of providing airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway is also a relevant activity.

However, it is only the operators of the terminal facilities which are covered by the Utilities Directive. Carriers using such facilities will not be covered.

On the other hand, contracts awarded by carriers, which are also contracting authorities for the purposes of the Public Sector Directive will be subject to the provisions of that Directive.

2.5.4 Postal Services

Before the adoption of Directive 2004/17, contracts awarded for postal services to the public fell within the scope of the Public Sector Directives to the extent that the entities in question were contracting "authorities" for the purposes of those directives.

The difference now is that these entities will be subject to the more flexible regime of the Utilities Directive and will also be in a position to benefit from the general exemption procedure of Article 30 which could apply where postal services are provided in a competitive market.

The Directive applies to:

- activities relating to the provision of postal services, and

  these are services consisting of the clearance, sorting, routing and delivery of postal items
- "other services than postal services".

  these are mail service management services (services both preceding and subsequent to despatch, such as "mailroom management services"); added value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic mail); services concerning postal items not included in the main definition.

This second category of services is covered only to the extent that the entity in question also provides "postal services" *and* the conditions provided for in the general exemption of Article 30 are not satisfied in respect of those "postal services". As a result, the Utilities Directive applies only where the services are not provided on a competitive basis

2.5.5 The scope and necessity of 'relevant activities'

A utility is covered only where it carries out a 'relevant activity' defined above.

Exclusion:

The Directive does not apply to the pursuit of such relevant activities *in a third country*, in conditions not involving the physical use of a network or geographical area within the Community. Such activities must be notified to the Commission for information purposes.

What happens when an entity carries out a number of activities and awards a contract for a non-relevant activity?

Article 9 of the Utilities Directive provides a mechanism for distinguishing between various situations. There are essentially three tests set out in each of the three paragraphs of Article 9:

- a contract which is intended to cover several activities is subject to the rules applicable to the activity for which it is *principally intended*;
- if one of the activities for which the contract is intended is subject to the Utilities Directive and the other to the Public Sector Directive and if it is objectively impossible to determine which activity the contract is principally intended for, the contract shall be awarded in accordance with the latter Directive;

- if one of the activities for which the contract is intended is subject to the Utilities Directive and the other is not subject to either this Directive or the Public Sector Directive, and if it is objectively impossible to determine which activity the contract is principally intended for, the contract shall be awarded in accordance with the Utilities Directive.

Article 9(1) also includes an anti-avoidance provision. It provides that the choice between awarding a single contract and awarding a number of separate contracts may not be carried out with the objective of excluding it from the scope of this Directive or, where applicable, the Public Sector Directive. This is clearly based on the intention of the contracting entity and would prevent a contracting entity from bundling together all contracts under the pretence that they are for the purposes of non-relevant activities when, in fact, only some are for the purposes of non-relevant activities.

For further explanation, see the Commission's 'Explanatory note – Utilities Directive contracts involving more than one activity' (Document CC/2004/34 of 18.6.2004)

2.5.6 The General Exemption of Article 30

As indicated above, the previous Utilities Directive included a series of exemptions in specific sectors where the entities concerned supplied services in competitive markets either because that was the reality of the market in question or because competition had been introduced through the introduction of Community market liberalisation.

Given the degree of liberalisation in various sectors, the new Utilities Directive has now introduced a more general exemption provision which will grant an exemption from the provisions of the Directive to those contracting entities who carry out an activity which, in the Member State in which it is performed, is

- directly exposed to competition
- on markets to which access is not restricted.

The test of whether markets are competitive will necessarily have to take account of both the legal and factual situation in the member state in question and will necessarily have to be addressed on a case by case basis. It will take account of the nature and quality of the supply market so the input of relevant tenderers would be important.

2.5.6.1 The Existence of Competitive Markets

When looking at the question of whether an activity is directly exposed to competition, the assessment will be made on the basis of criteria that are in conformity with the Treaty provisions on competition, such as the characteristics of the goods or services concerned, the existence of alternative goods or services, the prices and the actual or potential presence of more than one supplier of the goods or services in question. This indicates very clearly that the tests to be applied are the same applied in making the market analyses required by Articles 81 and 82, as well as 86, of the Treaty.

Further Details:

Commission Decision 2005/15 sets out the more detailed requirements for applications under Article 30. Annex I of the Decision sets out all the information that would be necessary for the market analysis to be conducted, not all of which will be relevant to each specific situation.

Consideration is given to both legal and *de facto* barriers to entry. Since the liberalisation directives in the various sectors are designed to remove any remaining legal barriers to entry, the actual removal of those barriers through compliance with the different directives will be sufficient to demonstrate the absence of any legal restrictions on access to the market for the activities in question. Access to a market will, therefore, be deemed not to be restricted if the Member State has implemented and applied the provisions of Community legislation mentioned in Annex XI which contains a list of Community legislation designed to liberalise various utility sectors.

Currently the list refers to legislation in the following sectors: transport or distribution of gas or heat (Directive 98/30); production, transmission or distribution of electricity (Directive 96/92); contracting entities in the field of postal services (Directive 97/67); and exploration for and extraction of oil or gas (Directive 94/22/EC).

No liberalisation legislation is currently listed for the production, transport or distribution of drinking water; contracting entities in the field of rail services; contracting entities in the field of urban railway, tramway, trolleybus or motor bus services; exploration for and extraction of coal or other solid fuels; contracting entities in the field of seaport or inland port or other terminal equipment; contracting entities in the field of airport installations.

2.5.6.2 Exemption Procedure

The exemption is granted by way of a Decision by the Commission which will be prompted by an application by the member state, a contracting entity or the Commission itself, at its own initiative. The procedure of Article 30 is supplemented by Decision 2005/15 ('the Decision') which covers such things as publication requirements, extensions and the procedures for forwarding decisions.

The procedure also allows for the position adopted by an independent national authority that is competent in the activity concerned to be taken into account. Such a body would need to assess the market circumstances and it might be expected to canvass the views of economic operators in the relevant market.

Public procurement
for economic operators

MODULE H

Which contracts are covered?

PART 3

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. The different types of contract that are covered by the rules
2. The contracts not covered by the procurement rules
3. The means of distinguishing between the different types of contract
4. Why some contracts are exempted and others not
5. The mechanisms for determining when contracts are exempted
6. The connection between the exemption and type of contract at issue

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- The essential characteristics of a procurement contract
- The nature of the contracts covered
- The scope of the contracts covered
- The effect of combining contract types
- The reasons for excluding some contracts
- The scope and extent of the exclusions
- The specific nature of the exclusions

This means that it is critical to understand fully:

- The elements of a contract
- The characteristics of arrangements that do not constitute contracts
- The aim or purpose of a contract
- The primary purposes of the procurement rules underpinning the inclusion and/or exclusion of contracts
- The limits of exclusion
- The effects of particular exclusions

1.3 LINKS

Module H sets out basic information for economic operators.

Further information on issues addressed in module H is set out in modules A to G. The intended users of modules A to G are the contracting entities, but users of module H wanting to know more about a particular issue are referred to modules A to G.

There are particularly strong links with the following modules:

- Module D3 on contracts covered
- Module D4 on exemptions

1.4 RELEVANCE

This information will be of particular relevance in identifying the contracts that will be subject to tender under the procurement rules.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

In addition to the provisions of the Directives, it may also be useful to have to hand:

- [Localise: the (national law relating to concessions)]
- [The section of the applicable local law that applies to services contracts]
- [Localise: the provisions of national law relating to exemptions]
- If applicable, reference to any national law that applies to defence procurement]

SECTION 2
NARRATIVE

2.1 INTRODUCTION

As tenderers, you will be familiar with the products and services you sell to the public sector and the Directives, as you would expect, cover all three main types of contract:

- works,
- supplies and
- services (other than works), including design contests.

There is, however, no separate category of consultancy services. These are dealt with essentially in the same way as other services.

Some contracts will often contain elements of one or more of the above types of contract. A contract to construct a building might, for example, include design services and certain necessary supplies. Similarly, a supply contract may include siting and installation services. The Directives contain specific rules used to classify these 'mixed contracts'. These are important provisions, not least because they may have an effect on the value of the overall contract and since value, as we will see below, determines when the rules apply, this could have a significant effect on the contracts available.

A number of contracts are entirely excluded from the scope of the Directives (but not necessarily of the Treaty provisions – see H1) either because of their nature (*i.e.* where it would be inappropriate to apply the provisions of the Directives) or because they are the subject of different systems of regulation or administration. Some contracts, the new 'reserved contracts', receive special treatment as a result of the identity of those who supply the goods, works or services under them. These are subject to specific eligibility requirements.

Even if not excluded, contracts will only be subject to the provisions of the Directives where their value exceeds the relevant monetary value set out in the Directives. These thresholds reflect the level at which it was assumed by the legislator that cross-border trade was likely (though it is possible that, depending on the circumstances, tenderers may be interested in below threshold contracts in other Member States – it is to be recalled that the general principles apply to the award of these contracts in any event). In order to prevent creative methods of calculating the value of the contracts to be let, the Directives also apply rules and methods of calculation as well as prohibitions on methods designed to circumvent the Directives by splitting, aggregating or packaging contracts in such a way that contracts do not properly fall within the appropriate provisions.

One important distinction made by the Directives is between 'contracts' and 'concessions' and the latter are treated differently from contracts. Special rules apply to the award of works concessions in the Public Sector Directive, while services concessions are excluded from the scope of both Directives.

Finally, it should be mentioned that the latest Public Sector Directive also resolves the previous uncertainty over the position of framework agreements which, although they may still be contracts for works, supplies or services (or treated as such) and therefore no different in nature by reason of their method of award, require separate treatment.

2.2 'PROCUREMENT' CONTRACTS

The Directives apply to contracts for pecuniary interest concluded in writing between an economic operator and contracting entity [Localisation may be required if the definitions in the local law are different]. Thus:

- The contract must be for pecuniary interest, *i.e.* for money or money's worth. There must be financial consideration, however that is paid.
- The contract must be in writing. In the very unlikely event that a contract which falls within the Directives is not in writing, it will be subject to the general application of the rules contained in the Treaty and discussed in H1.
- The contract must be between two parties: the economic operator and the contracting entity. There are situations in the public sector, however, where agreements are not made between two separate and distinct parties so that there is no contract under this definition. Arrangements made between departments of the same organisation, for example, would not ordinarily be covered by the procurement rules. This is because there will normally be no contractual relationship between different departments of a single organisation.

Note: Contracts may, in practive, be between more than two parties where, for example there are two contracting authorities working together who sign the same contract with a single contractor: Localisation required

- Practical note: Contracts may be between more than two parties where, for example there are two contracting authorities working together who sign the same contract with a single contractor: Localisation required

2.2.1 Internal Arrangements within the Contracting Entity

Where there is a purely internal arrangement between departments of the same public sector organisation, there will generally be no contract and private sector tenderers may not be invited to bid.

Public sector organisations can make use of private sector structures such as companies to carry out public services. These structures/companies can also be used to provide services directly to the public organisation which controls them. Where they are part of the same legal structure, these arrangements are not 'contracts' for the purposes of the Public Sector Directive. As soon as they become separate legal entities, however, any arrangement between them becomes a 'contract' between two parties, one a contracting entity, the other an economic operator.

When this happens, the procurement of goods, works and services between the 'parent' contracting entity and the 'owned' economic operator becomes a procurement contract between those parties. This means that the contract must be awarded using the provisions of the Public Sector Directive so that the contracting entity may not make a direct award of a contract to its own company.

This situation has been explicitly recognised in the utilities sector where it is often the case that a contracting entity owns a number of subsidiaries. Under the Utilities Directive, there is an explicit 'affiliated undertakings' exemption. The effect of this exemption is to exclude the intra-group (*i.e.* between the parent and subsidiary or between the different subsidiaries) provision of goods, works and services from the scope of the Utilities Directive, subject to certain conditions. There is no equivalent provision in the Public Sector Directive.

This situation has been confirmed by the European Court of Justice (ECJ). The ECJ also provides an exemption, however. In the important case of *Teckal*, the ECJ held that it was sufficient to bring the arrangements within the Directive "if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority". It then went on to say, however, that the situation would be different if, in effect, the contracting entity controlled the company as if it were one of its departments. This would take the arrangement outside the scope of the Public Sector Directive.

The ECJ confirmed that an arrangement would be outside the scope of the Public Sector Directive where

"……the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities."

Case C-107/98 *Teckal Srl v Comune di Viano and AGAC di Reggio Emilia* [1999] ECR I-8121

If the private company (economic operator) at issue is only partly owned by a public authority, the exemption will not apply.

The ECJ:

"The participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant *excludes in any event* the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments."

Case C-26/03 *Stadt Halle* [2005] ECR I-1.

2.2.2 When does a contract arise?

When a new contract is awarded, there is normally little difficulty in identifying it. Sometimes, however, this is not obvious. For example, an existing contract might be amended or renewed. A contract may also be amended during its execution. All of these situations give rise to new obligations between the parties and may change the terms of the original contract.

If the result of the changes is so extensive that the contract is fundamentally different from the original contract, then it may be the case that there is a new contract. If there is a new contract and if all the elements of a contract are present then that is a contract that should be subject to the procurement rules, *i.e.* it must be awarded according to the provisions of the Directives. That means that a simple extension, renewal or even amendment might not be permitted if it is made without competition. This is important for tenderers to bear in mind during the execution of existing contracts. If any variations made are too extensive, the whole contract may need to be put out to tender again.

The practical difficulty will be in determining when a change in the contract will give rise to a new contract, thus creating an obligation to apply the Directives, and when it will not. The Directives are silent on the question and there is very little case law.

In some cases, the Directives do provide a solution. Options can be included in contracts and these might include an extension or renewal of the contract following satisfactory performance, for example. If the value of the option or the renewal is taken into account in the calculation of the estimated price of the original contract, it will be covered by the original competition and there would be no need to apply the Directives again. As tenderers, you should check whether this is the case at the outset.

Similarly, some contracts can be renewed automatically until terminated by one or other party or by mutual agreement or may simply be concluded for an indefinite period of time. These are 'indefinite' contracts and the Directives provide a mechanism for calculating the value of such contracts for the purposes of the applicable thresholds.

The case of contract variations (*i.e.* where the contract needs to be varied/amended during its execution) is less clear. Even where variations are anticipated, as is often the case with works contracts, there will still be a question of whether those variations are acceptable as part of the original contract or whether they go beyond the terms of the original contract and become, in effect, a new contract.

The issue came before the ECJ in the case of *Pressetext* (Case C-454/06 Pressetext v Austria [2008] ECR I-4401). The ECJ provided a number of indicators:

- amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract when they are *materially different* in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract;
- such an amendment may be regarded as being material when it 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;
- an amendment may also be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered;
- an amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.

2.2.3 Contracts and Concessions

A concession is a contract of the same type as the contracts defined in the Directives except that the consideration for the works or services to be carried out, for example, consists either solely in the right to exploit the work or service or this right together with payment.

A concessionaire often accepts the operational and financial risk of providing a public service, in the broadest sense, in return for the chance of making a profit through the exploitation of the 'service'. A contractor looks to make his profit through the fixed payment received for the execution of the contract. Public Private Partnerships will sometimes include the award of a concession.

Concessions are used, for example to carry out and finance major infrastructure projects notably in respect of road network as well as for bridges and tunnels where the concessionaire is remunerated by way of tolls charged to users. They are also used, however, simply to provide for the operation and maintenance (rather than construction) of facilities by concessionaires such as where an operator is given the concession to operate an existing railway or underground railway infrastructure. The former are examples of works concessions; the latter of a services concession.

Only public works concessions are dealt with comprehensively in the Public Sector Directive which sets out a specific publication requirement with appropriate time limits. Article 17 of the Public Sector Directive now explicitly excludes coverage of public services concessions. The general principles of the Treaty continue to apply, however.

General Note:

The general Treaty principles, including the principles of non-discrimination and transparency must be applied to the award of public services concessions.

Case C-275/98 *Unitron* [1999] ECR I-8291.

If you are a concessionaire, however, you will also be obliged to follow certain basic provisions of the Directives. A distinction is made between the obligations that apply to concessionaires depending on whether or not they are themselves contracting authorities.

Where contracts are awarded by concessionaires who are themselves contracting authorities, they are bound to comply with the provisions of the Directive in respect of public works contracts.

Where contracts are awarded by concessionaires who are not contracting authorities, a more limited set of provisions apply. Member states must take measures to ensure that, in respect of *works* (but not supplies or services) contracts they intend to award to third parties, they publicise their intentions by way of an appropriate notice. The condition applies when the value of the contract exceeds the threshold value for works contracts. Advertising is not required, however, in the same circumstances as those which justify the use of a negotiated procedure without a call for competition.

In those cases where a number of economic operators have grouped together in order to obtain the concession, then they or undertakings related to them are not to be considered third parties, so that contracts awarded to such affiliated undertakings will not be subject to award under the provisions of the Directive.

2.2.4 Framework Agreements and Contracts

Under Article 1(5), a framework agreement is an agreement between a contracting entity and one or more suppliers, contractors or service providers the purpose of which is to establish the terms, in particular with regard to prices and, where appropriate, the quantity envisaged, governing the contracts to be awarded during a given period. Such agreements are used frequently in practice where a purchaser has a continuing or recurring need to purchase the same or similar products or services and wishes to avoid the costs associated with awarding a new contract each and every time it needs further supplies. Like centralised purchasing, the existence of framework agreements may offer larger volumes to tebnderers.

The difficulty raised by the definition of framework agreement is that it may or may not be a 'contract' for the purposes of the Directives. What the Directives do is to effectively enable a non-binding framework agreement to be treated in the same way as a binding framework contract. Thus, if the contracting entity chooses to award the framework agreement under the provisions of the Directives as if it were a binding contract, then the subsequent call-off 'contracts' may be awarded without competition.

Where the non-binding framework agreement has not been awarded pursuant to the provisions of the Directives, however, each contract above the threshold value will be treated as a contract falling within the terms of the Directives and will be subject to their procedures.

The Directives further provide that contracting entities may not misuse framework agreements in order to hinder, limit or distort competition although they do not refer to any particular cases of misuse and the duration of framework agreements is limited to 4 years save in exceptional circumstances justified by the subject of the framework agreement.

2.3 WORKS CONTRACTS

Works contracts are defined as those contracts which:

- have as their object either the execution or both the execution and design of works related to one of the activities referred to in Annex I, or
- a work or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting entity.

The inclusion of the possibility of including design works into a works contract means that 'design and build' contracts may fall within the definition. This could include, for example, contracts covering the planning and financing of a project as well as its execution. Where design and construction are awarded separately, the design services would be a priority service (category 12) or could, alternatively, be awarded by way of a design contest.

2.3.1 Building and Civil Engineering Activities in Annex 1

Annex I of the Public Sector Directive (Annex XII of the Utilities Directive) gives a list of professional activities as set out in the general industrial classification of economic activities within the European Communities (NACE). This list contained in the Annexes covers building and civil engineering. In summary, this includes:

- general building and civil engineering work and demolition work;
- construction of flats, office blocks, hospitals and other buildings, both residential and non-residential (to include such things as roofing, construction of chimneys, waterproofing, restoration and maintenance of outside walls…);

- civil engineering: construction of roads, bridges, railways, etc ... (to include such things as earth-moving, hydraulic engineering, irrigation, sewage disposal ...);
- installation (fittings and fixtures) (to include such things as gas fitting and plumbing, installation of heating and ventilating apparatus, electrical fittings ...);
- building completion works (to include such things as plastering, joinery, painting, tiling).

The CPV is often recommended for use in the contract award notices and the Annexes provide for each NACE code a corresponding reference to the relevant CPV code, even though the CPV is not binding. Article 1(14) of the Public Sector Directive explicitly provides that, in the event of any difference of interpretation between the CPV and the NACE, the NACE nomenclature will apply.

2.3.2 The Realisation of a Work by Whatever Means

A works contract would also fall within the definition of the Directives where the party signing the agreement is not, in fact, the contracting entity itself, but a company acting on its behalf, as agent. This would apply, for example, where in the construction industry an engineering and construction company is taken on as managing contractor provide engineering design, procurement, construction and project management services to the contracting entity. The management contractor will be obliged to follow the procurement rules when awarding contracts for works since it will be providing a work corresponding to the requirements specified by the contracting authority and the contracting entity will obtain such a work 'by whatever means'.

This provision concerning the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority also catches other arrangements common among developers under which a developer or builder constructs buildings on its own land and subsequently transfers or agrees to transfer the land together with the buildings to the contracting entity. This might, at first sight, appear to be a contract for the acquisition of land (a type of contract excluded from the Directives) but the fact that the building is often constructed according to the contracting entity's specifications would bring the arrangement within this definition of works contract.

2.3.4 Subsidised Works or Services Contracts

The Directive makes special provision for two types of contract, first, in respect of those works or services contracts which are subsidised by contracting authorities as to more than 50% and, second, in respect of design and construction contracts concluded in the context of a public housing scheme.

2.3.4.1 Subsidised Contracts and Housing Schemes

Where a private entity does not fall within the definition of body governed by public law, it may still in certain circumstances be treated as if it were such a contracting authority where it awards a contract with a 'public dimension' which is subsidised by public authorities by more than 50%. Those are defined as works and connected services for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes.

In such cases, member states are required to take the measures necessary to ensure that the contracting authorities awarding such subsidies comply with the Directive where that contract is awarded by one or more entities other than themselves.

In cases of public contracts relating to the design and construction of a subsidised housing scheme, a special award procedure can be adopted for selecting the contractor most suitable for integration into the team but the contracting authorities are required to follow a set of basic procedures and must, in any event, treat economic operators equally, without discrimination and transparently.

No particular procedure is mandated but the contracting authorities are required to advertise the scheme in accordance with the Directive's rules on advertising and transparency

2.4 SUPPLIES CONTRACTS

The definition of supplies is rather more straightforward than that of works or services. 'Public supply contracts' are defined in Article 1(2)(d) as contracts, other than works, involving the purchase, lease, rental or hire purchase, with or without option to buy, of products. In addition, the delivery of such products may include siting and installation operations.

The range of products covered by the Directives can be seen in the various nomenclatures used to describe products for the purposes of advertising. See, for example, the Common Procurement Vocabulary.

2.5 SERVICES CONTRACTS

The term 'service contracts' essentially refers to contracts other than works or supply contracts having as their object the provision of services referred to in Annex II of the Public Sector Directive (Annex XVII of the Utilities Directive). A number of services are specifically excluded, mainly because they are not amenable to purchase through the rules provided by the Directives.

However, further distinction is made in the relevant Annexes between what may be called priority services (Annex IIA) and non-priority services, respectively (Annex IIB).

2.5.1 The Two-Tier Approach

The Directives make a distinction between priority and non-priority services. This distinction is not made on the basis of the nature of the particular activity but rather on the potential which exists for the provision of the services concerned across national borders and which are most clearly capable of affecting trade between member states.

This becomes most readily apparent in the case of services where those listed in Part B as non-priority, whilst capable of attracting localised competition, are less amenable to international competition either because of the nature of the services (*e.g.* legal and administrative services which are based on familiarity with national laws and jurisdiction) or because of the location in which they need to be provided (*e.g.* hotel and restaurant services).

This does not mean that competition for such contracts is not possible, certainly at local or national level, or even that international competition for them is inconceivable, only that the nature of the services or their value is such that this is less likely. [Localisation required if appropriate: "For example, in XXX, competitive procedures are also applied for the purchase of [xxx] and [xxx] which, under the Directives, are non-priority services. Within XXX, competition is both possible and desirable for these services]

The priority services are subject to the detailed award procedures and other provisions of the Directives.

The non-priority services are subject only to a basic transparency regime which requires adherence to the Directives' rules on non-discriminatory technical specifications and the obligation to publish the results of the award.

2.5.2 Priority services

These are listed in Annex IIA of the Public Sector Directive. They are:

1. Maintenance and repair services (CPC: 6112, 6122, 633, 886);
2. Land transport services[1], including armoured car services, and courier services, except transport of mail (CPC: 712 (except 71235) 7512, 87304);
3. Air transport services of passengers and freight, except transport of mail (CPC: 73 (except 7321));
4. Transport of mail by land[2] and by air (CPC: 71235, 7321);
5. Telecommunications services (CPC: 752);
6. Financial services: (a) insurance services and (b)banking and investment services[3] (CPC: ex 81, 812, 814);
7. Computer services and related services (CPC: 84);
8. Research and development services[4] (CPC: 85);
9. Accounting, auditing and bookkeeping services (CPC: 862);
10. Market research and public opinion polling services (CPC: 864);
11. Management consulting services[5] and related services (CPC: 865, 866);
12. Architectural services; engineering services and integrated engineering services; urban planning and landscape engineering services; related scientific and technical consulting services; technical testing and analysis services (CPC: 867);

[1] Except for rail transport services covered by category 18.
[2] Except for rail transport services covered by category 18.
[3] Except financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services. Also excluded: services involving the acquisition or rental, by whatever financial procedures, of land, existing buildings or other immovable property or concerning rights thereon; nevertheless, financial service contracts concluded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive.
[4] Except research and development services other than those where the benefits accrue exclusively to the contracting entity for its use in the conduct of its own affairs on condition that the service provided is wholly remunerated by the contracting authority.
[5] Except arbitration and conciliation services.

13. Advertising services (CPC: 871);
14. Building-cleaning services and property management services (CPC: 874, 82201 to 82206);
15. Publishing and printing services on a fee or contract basis (CPC: 88442);
16. Sewage and refuse disposal services; sanitation and similar services (CPC: 94);

2.5.3 Non priority services

These are listed in Annex I1B of the Directive. They are:

17. Hotel and restaurant services (CPC: 64);
18. Transport services by rail (CPC: 711);
19. Water transport services (CPC: 72);
20. Supporting and auxiliary transport services (CPC: 74);
21. Legal services (CPC: 861);
22. Personnel placement and supply services[6] (CPC: 872);
23. Investigation and security services, except armoured car services (CPC: 873 (except 87304));
24. Education and vocational education services (CPC: 92);
25. Health and social services (CPC: 93);
26. Recreational, cultural and sporting services (CPC: 98);
27. Other services[7].

2.5.4 Mixed Priority and Non-Priority Services Contracts

The Directives apply an explicit value test to services contracts which contain both priority and non-priority services.

Where the value of the priority services contained in the contract is greater than the value of the non-priority services then the contract will be for priority services, and vice versa.

There is no obligation to separate out the priority and non-priority services and to award them as separate contracts. This could lead to the result that a contract for largely non-priority services, even if it contained a large proportion (say 49%) of priority services would be awarded as one for non-priority services. The facts could also turn out in the opposite way so that the value of priority services is greater than the value of non-priority services. The result would be the application of the procedures of the Directives even to the non-priority services.

This cannot be used, however, to avoid the application of the Directives.

6 Except employment contracts.
7 Except contracts for the acquisition, development, pro

ECJ:

A contracting authority may not *"artificially* group in one contract both priority and non-priority services *without there being any link arising from a joint purpose or operation,* with the sole purpose of increasing the proportion of non-priority services and thus avoiding the full application of the Directives."

Case C-411/00 *Felix Swoboda* [2002] ECR-567

So, in assessing whether priority and non-priority services have been correctly packaged together or split up, regard will be had to the artificiality of the exercise as well as to the intention of the contracting entity. If the services naturally combine to achieve a single purpose, then splitting them up would be artificial. In other cases, where the services do not naturally combine to achieve a single purpose, then can be no objection to awarding them separately.

2.6 DESIGN CONTESTS

Design contests are those national procedures which provide the contracting entity with a plan or design which is selected by a jury on the basis of a competition, with or without the award of prizes.

Such contests are held mainly in the fields of area or town planning (with regard particularly to the public sector), architecture and civil engineering or data processing. They are used often in the case of the construction of notable public buildings and are being used more and more frequently for the design of such things as IT infrastructure projects.

These contests may be part of a procedure which leads to the award of a service contract or may be held independently under a separate procedure since there is nothing inevitable about realising the results of a design contest.

The rules only apply where the total amount of contest prizes and payments to participants meets the appropriate threshold.

On the other band, where the contests form part of a procedure for the award of other contracts, the threshold value will consist of both the value of contest prizes and payments *and* the value of the services contract which might be awarded to the winner where the rules of the competition provide that the resulting services must be awarded to one or the other of the winners of the design contest. The resulting services must be a 'direct functional link' between the contest and the contract concerned so that a mere connection in terms of the subject matter of the contract is not enough. Further, this provision applies only where, under the rules of the competition provide that the resulting services must be awarded to one or the other of the winners of the design contest.

2.7 MIXED CONTRACTS

The Directives contain provisions on how to categorise a contract containing elements of works and/or supplies and/or services.

The distinctions are relevant in the case of mixed supplies and services contracts, notably where the services included are non priority services. If the contract can be categorised as non-priority services contract, then it would remain largely unregulated even if it also contains supplies.

It is an issue also in the case of works contracts which contain elements of supplies or services given the much higher thresholds that apply to works contracts. The way in which mixed contracts are categorised depends on the mix.

- **Supplies/Services**

  Essentially, contracts containing elements of both supplies and services will be treated as one or the other type of contract depending on the value represented by each element.

  The contract will be considered to be a services contract where the value of the services performed is greater than the value of the products supplied.

  Where the value is equal, it will be a supplies contract.

  The definition makes no distinction between priority and non priority services with the effect that, where the value of non-priority services in a mixed contract is greater than the value of supplies, the whole contract will be treated as a contract for non-priority services

  Supplies contracts which also cover, as an incidental matter, siting and installation operations, will be defined as supplies contracts.

- **Works/Services**

  In the case of works and services, the Directives do not take a value test, as above, but include a test based on the principal object of the contract as opposed to what is merely incidental to that object.

  A contract having as its object services (either priority or non-priority) and including activities within the definition of 'works' that are only incidental to the principal object of the contract shall be considered to be a service contract.

- **Works/Supplies**

  Under the Directives, supplies contracts which also cover, as an incidental matter, siting and installation operations, will be defined as supplies contracts For example, in the case of the purchase of a crane to be installed on a dockside, the object of the contract is the *supply* of the crane, and not the works required to site it, even if those works are considerable.

  This 'principal object' test which mirrors the way in which works and services contracts are to be distinguished, would appear to apply even if the value of siting or installation services is greater than the value of the supplies itself since it is a test based on the object of the contract and not the value based test applied to distinguish between supplies and services.

2.8 EXEMPTED CONTRACTS

Even where contracts fall within the general definition of a public contract, some of these contracts will be excluded from the scope of the Directives for a number of reasons. Some are excluded because they are not, by their nature, amenable to competition. Some are excluded because Governments wish to exclude them from competition for specific reasons. Some of the exclusions apply only to contracts of a specific type. There is also a category of 'reserved' contracts which, although not excluded, do benefit from preferential treatment.

2.8.1 Exemptions by reason of choice

These exemptions concern the Public Sector Directive.

- **Defence procurement**

  Defence procurement was never excluded because of the identity of the contracting authority, *e.g.* Ministry of Defence. The partial exemption which has existed until recently has applied to *products* which are of a military nature.

  Until 2009, certain military products were explicitly exempted from the provisions of the Public Sector Directive and not subjected to any alternative provisions. Since 2009, however, those exempted products and related services are now covered by Directive 2009/81 which applies a more flexible and confidential regime to the procurement of military supplies and related works and services (although Member States have until August 2011 to transpose this Directive).

Important Note

The procurement of certain military supplies and related works and services is now covered by Directive 2009/81. All other public contracts awarded in the fields of defence and security remain covered by the Public Sector Directive.

The partial exemption continues to apply (and Directive 2009/81 now applies) to contracts awarded by contracting authorities in the field of defence where the products are subject to the provisions of Article 296(1)(b) (formerly Article 223(l)(b)) of the Treaty. This sets up a clear distinction between purely military equipment and equipment which, although used in the context of defence, is not specifically 'military' *i.e.* dual use products (*i.e.* those which may have both civil and defence applications, *e.g.* computers, clothing, blankets, food, medicine).

The provision does not apply to works or services, although probably applies to such things as repair and maintenance services *connected with* the procurement in question, and only to those products which are specifically subject to Article 296(1)(b). A list of such products was included in a Council Decision of 15 April 1958 and, although this was not published, is readily available. Whilst Directive 2009/81 also makes explicit reference to this list, it does not reproduce the list either. Products which, despite appearing in the list, are not intended for specifically military purposes and all other products not covered by the list are subject to the procurement rules.

Directive 2009/81 extends the exemption of both that Directive and the Public Sector Directive to contracts awarded in a third country, with local economic operators, for the deployment of military forces, or to conduct or support a military operation outside the territory of the European Union.

■ **Contracts requiring secrecy measures**

The Directive does not apply to public contracts which are (i) declared secret, or (ii) the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the member state concerned or (iii) when the protection of the essential interests of that state's security so requires.

■ **Contracts governed by other rules**

The Directive does not apply to contracts which are governed by different procedural rules and awarded:

- pursuant to an international agreement concluded in conformity with the EEC Treaty between a member state and one or more third countries and covering works, supplies or services intended for the joint implementation or exploitation of a project by the signatory states;
- to undertakings in a member state or a third country in pursuance of an international agreement relating to the stationing of troops;
- pursuant to the particular procedure of an international organisation.

In the case of defence procurement, the public contracts otherwise subject to Directive 2009/81 now benefit from this exemption by virtue of Article 8 of that Directive.

2.8.2 Exemptions due to the nature of the contract

■ **Contracts for the Acquisition of Land**

The Directives exclude contracts for the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon.

The contracts are excluded because they relate to immoveable property which is naturally dependent on geographic location. Such contracts take place essentially in local markets and their objects generally rule out any real prospect for cross-frontier competition. The exclusion concerns only contracts concerning the purchase of land or buildings, however.

Financial services contracts concluded at the same time as, before or after the contract of acquisition or rental, in whatever form, are subject to the Directive. The Directive would also cover other associated services such as contracts for the sale of land or property on a fee basis (estate agency contracts) covered by the priority service category 14.

In the case of defence procurement, the public contracts otherwise subject to Directive 2009/81 now benefit from this exemption by virtue of Article 9(a) of that Directive.

Services Contracts provided on the basis of Exclusive Rights

The Directives do not apply to services contracts awarded to contracting authorities or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.

Broadcasting Material and Time

The Public Sector Directive (it is not relevant in the utilities sector) excludes contracts for the acquisition, development, production or co-production of programme material by broadcasters and contracts for broadcasting time. This covers the production of audio-visual works such as films, videos and sound recording, including advertising and will include the purchase of services for the purchase, development, production or co-production of off-the-shelf programmes and other preparatory services such as those relating to scripts or artistic performances necessary for the production of the programmes.

It also covers broadcasting time (transmission by air, satellite or cable and now defined as any transmission and distribution using any form of electronic network). In principle, the contracting out of audio-visual production for such things as information, training or advertising purposes would be covered but are given an exemption *in so far* as they are connected with broadcasting activities of broadcasting organisations which are public authorities.

Arbitration and Conciliation Services

The recitals of the Directives state that it is inappropriate to include the procurement of contracts for arbitration and conciliation services in the Directives because competitive bidding for such services would interfere with the joint selection of arbitrators and conciliators by the parties to a dispute. These would, in any event, want to select arbitrators and conciliators on the basis of their competence and experience within relatively short time frames.

Certain Financial Services

The Directives exclude contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services. This refers to contracts which constitute transactions concerning government bonds, for example, and activities related to public debt management.

It will also include within the derogation contracts awarded to financial intermediaries to arrange such transactions because these are specifically excluded from the scope of investment services (Category 6 of the list of priority services).

- **Employment Contracts**

  The Directives do not cover employment contracts, only contracts for the provisi0on of services .

- **Research and Development Contracts**

  The Directives exclude research and development service contracts other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is mostly remunerated by the contracting authority.

  The exclusion would not apply where the benefits accrue to itself. To avoid an interpretation which would lead to abuse of this provision, the Council and Commission adopted, in the context of the former Services Directive, an interpretative declaration stating that *any* fictitious sharing of the results of research and development or *any* symbolic participation in the remuneration of the service provided will not prevent the application of the Directive.

  This provision does not extend to quantity production to establish commercial viability or to recover research and development costs.

2.8.3 Exemptions specific to the utilities sector

The Utilities Directive provides for sector specific exemptions in a number of utility sectors based essentially on the degree of competition in these markets. Such exemptions apply in respect of the purchase of fuel and energy for the production of energy; purchases of water; bus transport services and the exemption in respect of upstream oil and gas exploration and exploitation. The Utilities Directive has also introduced a new general exemption mechanism for activities exposed to competition on markets to which access is not restricted. These exemptions are discussed in H2.

The Utilities Directive also contains a series of other exemptions specific to the utilities sector:

- **Activities outside the Community**

  The Directive does not apply to contracts which the contracting entities award for purposes other than the pursuit of their relevant activities or for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the Community.

  The contracting entities must notify the Commission at its request of any activities which they regard as excluded under this provision and the Commission may periodically publish for information purposes, lists of the categories of activities which it considers to be covered by this exclusion and will respect any sensitive commercial aspects that the contracting entities may point out when forwarding this information.

- **Affiliated Undertakings Exemption**

  Where 'undertakings' are made up of a number of mutually owned or mutually dependant companies, the Utilities Directive provides a specific exemption for purchases made between them under certain conditions. They are treated like 'in-house' contracts known as intra-group transactions. Since the amendment to the Utilities Directive in 2004, the exemption now covers works and supplies contracts in addition to services contracts.

  The contracts excluded are those which are awarded to an affiliate whose essential purpose is to act as a central service-provider to the group to which it belongs, rather than sell its services commercially on the open market.

The Utilities Directive excludes two categories of contracts. They are contracts awarded:

- by a contracting entity to an affiliated undertaking, or
- by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out relevant activities, to [one of those contracting entities] or an undertaking which is affiliated with one of these contracting entities.

This provision relates to, for example, the provision of common services such as accounting, recruitment and management; the provision of specialised services embodying the know how of the group; and the provision of a specialised service to a joint venture.

The exclusion from the provisions of the Utilities Directive is subject, however, to two conditions:

(i) *the economic operator must be an undertaking affiliated to the contracting entity:* an affiliated undertaking, for the purposes of Article 23(1) of the Utilities Directive, is one the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the seventh company law Directive. In the case of contracting entities not subject to that Directive, an affiliated undertaking will be any undertaking over which the contracting entity may exercise, directly or indirectly, a dominant influence in the same way as a public authority may exercise a dominant influence over a public undertaking. This will also be the position where it is the undertaking which may exercise a dominant influence over the contracting authority or where both the undertaking and the contracting entity are subject to the dominant influence of a third undertaking.

(ii) *the economic operator must exist essentially to provide services to the group and not to sell them on the open market:* since a number of such economic operators do, in fact, have their own marginal commercial activities, the Directive lays down criteria by which the acceptability of such commercial activities may be gauged. The exclusion will only apply if at least 80 per cent of the average turnover of the affiliated undertaking arising within the Community for the preceding three years derives from the provision of the works, supplies or services to undertakings with which it is affiliated. The 'average turnover' relates to that turnover which results from the works, supplies or services provided and not from the general or total turnover of the undertaking. Where more than one undertaking affiliated with the contracting entity provides the same or similar services, supplies or works, the above percentages are calculated taking into account the total turnover deriving respectively from the provision of services, supplies or works by those affiliated undertakings.

- **Purchases for Re-sale or Hire**

  The Directive excludes from its scope of application contracts awarded for purposes of re-sale or hire to third parties. This is intended to include contracts for goods where the contracting entity intends to sell or hire the equipment purchased in a competitive market.

  These contracts will only be included if the contracting entity enjoys no special or exclusive right to sell or hire the subject of such contracts and other entities are free to sell or hire it under the same conditions as the contracting entity.

2.9 RESERVED CONTRACTS

The Directives have introduced a new category of 'reserved' contracts which, although not excluded from the scope of the Directive, will impose specific conditions of eligibility on the participants.

Member states may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.

2.10 THRESHOLDS

The Directives apply only to contracts above a specific threshold value. Those threshold values have been set at levels which are intended to reflect those contracts which are likely to attract bidders from other member states. It is assumed that contracts falling below these thresholds are likely to attract local competition only so that it is inappropriate to apply the EC level procurement rules, even if such contracts remain subject to the Treaty and are otherwise subject to national rules.

The threshold values for each of the different sectors and for each of the types of contract involved are shown in the following Table. The threshold values are revised in January every two years and the table shows the key current threshold values [Requires updating].

See Module D5 for further detail.

Type of contract	Type of contracting authority		
	Public sector Central government	Public sector Other authorities	Utilities
Works	EUR 4 845 000	EUR 4 845 000	EUR 387 000
Supplies	EUR 125 000 (with some exceptions for defence purchasers)	EUR 193 000 (and defence purchasers for certain supplies)	EUR 387 000
Services (for nearly all priority services)	EUR 125 000	EUR 193 000	EUR 387 000
Services (non priority and specified priority services)	EUR 125 000	EUR 193 000	EUR 387 000

The award procedures apply where the *estimated* value (net of VAT) is not less than the threshold values set out above and both Directives provide for methods of calculation of these values. For example, the value of options or renewals of the contract should be taken into account; the value of any supplies (or services in the case of the utilities sector) necessary for the execution of the works that a contracting entity makes available to the contractor; and the value of any prizes or payments to candidates or tenderers made as part of the procedure.

Specific methods of calculation apply to various situations where it is not always possible to identify a specific value, for example, in the case of contracts for the lease, rental or hire purchase of products. depending on whether the contract is for a fixed or an indefinite term.

In calculating the value of a services contract, the contracting authority must include the estimated total remuneration of the service-provider and not necessarily the value of the service, *e.g.* in the case of an insurance contract, the cost of purchasing the insurance, not the value of the insurance payout.

In the case of services contracts which do not specify a total price, the basis for calculating the estimated contract value is either the total value of the contract for the duration where that is less than 48 months and, where the duration exceeds 48 months, the monthly value multiplied by 48.

None of the contracts subject to the Community procurement regime may be split up with the intention of circumventing the application of the rules set out in the Directives and the specific methods of calculations provided by the Directives and described above are intended to prevent the use of any special or unusual methods of calculation which would serve the intention of circumventing the Directives by, for example, splitting up large contracts or requirements into smaller packages so that the value of each or some of the smaller packages fall below the relevant threshold levels and, therefore, outside the scope of the Directives.

The Directives do foresee, however, a specific procedure for the legitimate splitting up of contracts where a single requirement is split up into a series of lots. This may be done, for example, for technical reasons (given different specializations needed for the component elements) or from a desire to include the participation of small and medium sized enterprises by offering a series of lower value contracts. However, in calculating the value of such a contract, it is the aggregate value of the lots that is relevant.

Public procurement
for economic operators

MODULE H

Achieving fair and equal participation

PART 4

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. The mechanisms for guaranteeing the fair and equal participation of all economic operators
2. The qualitative selection criteria that can be applied
3. The rules applicable to technical specifications
4. The award criteria that may be applied

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- The ways in which the principles of objectivity and non-discrimination are applied in practice
- The means of demonstrating compliance with the selection criteria
- The various means of setting and meeting technical specifications
- The application of the award criteria

This means that it is critical to understand fully:

- The different types of selection criteria
- The evidence used to establish compliance
- The choices to be made by the contracting entities based on the contracts at issue
- The way in which technical specifications can be prepared
- The means of meeting those requirements
- The detailed content of the permitted award criteria

1.3 LINKS

Module H sets out basic information for economic operators.

Further information on issues addressed in module H is set out in modules A to G. The intended users of modules A to G are the contracting entities, but users of module H wanting to know more about a particular issue are referred to modules A to G.

There are particularly strong links with the following modules:

- Module E3 on selection
- Module E4 on setting contract award criteria in tender documents
- Module E5 on contract evaluation and contract award
- Module C5 on social and environmental considerations

1.4 RELEVANCE

This information will be of particular relevance in enabling tenderers to prepare for participation in tender procedures and to identify those cases where they may be unfairly excluded from participation.

SECTION 2
NARRATIVE

2.1 INTRODUCTION

Part 1 described the general principles that must be respected and which guarantee your rights. To be effective, these need to be translated into concrete actions which can be implemented by contracting entities and enforced by economic operators. One of the most critical pillars of the EU Directives is the emphasis they place on the fair and equal treatment of economic operators from all member states as a means of guaranteeing their participation in EU procurement procedures without any bias or favour. The key words are "objectivity" and "non-discrimination", ensuring that nothing in the procurement process unfairly favours particular economic operators (nationals or other 'favourites' of the contracting entities) or discriminates against foreign economic operators.

The mechanism adopted by the Directives is to impose the obligation on contracting entities to apply objective and non-discriminatory criteria

- in the selection of economic operators,
- in the setting of technical specifications and
- in the award of contracts.

These must be the same for all economic operators and provide them with equal opportunities for tendering. You need to know these to make sure that you are not unfairly excluded from any contract award procedure.

2.2 THE SELECTION CRITERIA

The EU public procurement system is based on the idea that there should be no discrimination between economic operators of different nationalities and that they should all be given an equal chance to compete for contracts to be awarded throughout the Community. The Directives require that procurement take place on the basis of objective criteria. It is not open, therefore, for contracting entities to eliminate any economic operators from the award procedure on arbitrary grounds, particularly those linked to nationality. The Directive thus lays down detailed criteria of suitability and qualification which may be used in order to exclude economic operators from the procedures in the event that the criteria are not met. The Directives also apply conditions with regard to the evidence which may be required to verify these criteria.

On terminology, it should be noted that the term 'economic operator' is used to designate the three broad categories of economic operator distinguished by reference to the contracts for which they tender: 'contractors' in the case of works contracts; 'suppliers' in the case of supply contracts and 'service providers' in the case of contracts for services. There are few requirements in the directives, other than those regarding their suitability, relating to economic operators.

2.2.1 Who may tender?

An economic operator can be any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services. Economic operators who are entitled to provide the relevant work, service or supply under the law of the member state in which they are established, cannot be rejected solely on the ground that, under the law of the member state in which the contract is awarded, they would be required to be either natural or legal persons.

Where the economic operator in question is a legal person, then it may be required to indicate in the tender or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question. The contracting authority may also require economic operators to prove that they hold any particular authorisation or membership of a professional organisation, insofar as candidates or economic operators are required to possess that particular authorisation or to be members of a particular organisation in order to be able to perform the service concerned in their country of origin. Membership of a professional organisation is frequently a condition imposed on individuals wishing to carry out a specific profession and, where the economic operator is a legal person, may be required to demonstrate the relevant membership of its staff.

The definition of economic operator contained in the Directive includes 'a group of natural or legal persons and/or bodies'. Contracting authorities may not require these groups to assume a specific legal form in order to submit a tender or a request to participate. However, the successful group may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.

Groups of companies may rely on each others qualifications in the selection process. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect. Proof of the availability of resources may be furnished by the production of an undertaking by the entities possessing the relevant resources that they will be made available to the economic operator in question.

2.2.2 The Permitted Selection Criteria

The Directives require mandatory exclusion of economic operators where they have been involved in certain specified criminal activities but, otherwise, qualitative selection is based on the economic operator's general suitability, economic and financial standing and technical and/or professional ability.

2.2.2.1 Grounds for Mandatory Exclusion

These grounds were introduced for the first time in 2004 and are a response to the growing concern over the effects of organised crime and terrorism on public procurement both as a means of subverting the normal competitive process and as a mechanism for laundering money. It also includes provisions relating to issue of corruption in procurement.

The Directives effectively impose a policy requirement which considers economic operators who have participated in certain activities as unsuitable for participation in contract award procedures, regardless of their ability to perform the contracts, and requires their exclusion from those procedures. The prohibited activities are:

(a) *participation in a criminal organisation*, as defined in Article 2(1) of Council Joint Action 98/733/JHA;

(b) *corruption*, as defined in Article 3 of the Council Act of 26 May 1997 and Article 3(1) of Council Joint Action 98/742/JHA respectively;

(c) *fraud* within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities;

(d) *money laundering*, as defined in Article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering.

It is for the member states to specify, in accordance with their national law and having regard for Community law, the implementing conditions for these provisions. This preserves the flexibility in the measures that member states may take in respect of such activities and requires them to set out the conditions for application. [Localisation: where national rules have implemented this provision, they should be included here]

2.2.2.2 Optional Grounds for Exclusion

The Public Sector Directive sets out the grounds in which a contracting authority may exclude an economic operator from participation. The Utilities Directive refers to these criteria as illustrative – utilities may take a more flexible approach and include other selection criteria provided these are set out in advance and comply with the general requirements of objectivity and non-discrimination.

- **General Suitability**

  An economic operator *may* be excluded from participation in a contract where that economic operator:

  (a) is bankrupt or is being wound up, where his affairs are being administered by the court, where he has entered into an arrangement with creditors, where he has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;

  (b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or of an arrangement with creditors or of any other similar proceedings under national laws and regulations;

  (c) has been convicted by a judgment which has the force of res judicata in accordance with the legal provisions of the country of any offence concerning his professional conduct;

  (d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(g) is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information.

Contracting authorities must accept certain documents as sufficient evidence of the above criteria. In the case of the criteria mentioned under rubrics (a), (b) and (c) above, sufficient evidence will be the production of an extract from the 'judicial record' of the economic operator. Where the member state does not have a system of providing such records, it will be sufficient to produce an equivalent document issued by a competent judicial or administrative authority in the country of origin or in the country from which the contractor comes which shows that these requirements have been met. In the case of (e) and (f) above, it will be sufficient to produce a certificate issued by the competent authority designated by the member state concerned. As already explained, no specific forms of evidence are prescribed in cases of misrepresentation foreseen in (g) above.

Where the member state concerned does not issue such documents or certificates, they may be replaced by a declaration on oath (or in member states where there is no provision for declarations on oath, by a solemn declaration) made by the person concerned before a judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or in the country from which the person comes. The member states are under an obligation to designate the authorities and bodies competent to issue these documents, certificates or declarations and, without prejudice to data protection law, to inform the Commission of their identity.

In order to prove their general fitness and commercial standing, economic operators may be requested to prove their enrolment in the relevant professional or trade register in their member state of residence as required under the laws of that State. [Localisation: where these exist in XXX, they should be mentioned by name and sources of information given]

Economic and Financial Standing

Evidence of suitable standing may, as a general rule, be provided by one or more of:

(a) appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;

(b) the presentation of balance-sheets or extracts from the balance-sheets, where publication of the balance-sheet is required under the law of the country in which the economic operator is established;

(c) a statement of the undertaking's overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, as far as the information on these turnovers is available.

The entities awarding the contracts must specify in the contract notice or invitation to tender which of these references they have chosen `and what references other than those mentioned under (a), (b) or (c) are to be produced. It is for the contracting entities, however, to determine the substantive level of financial and economic standing required.

- **Technical and/or Professional Ability**

  The Directive sets out the means by which the technical and/or professional abilities of the economic operators are to be assessed and examined. The listed references only set out the evidence to be furnished; it is for the contracting authority to determine the levels of technical and/or professional ability required of the economic operators.

  Evidence of the economic operators' technical abilities *may* be furnished by one or more of the listed means *according* to the nature, quantity or importance, and use of the works, supplies or services. The contracting authority must specify, in the notice or in the invitation to tender, which references it wishes to receive. The references enumerated in the Directive are:

In the case of works only:

- a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where appropriate, the competent authority shall submit these certificates to the contracting authority direct.

In the case of works and services:

- the educational and professional qualifications of the service provider or contractor and/or those of the undertaking's managerial staff and, in particular, those of the person or persons responsible for providing the services or managing the work.
- for public works contracts and public services contracts, and only in appropriate cases, an indication of the environmental management measures that the economic operator will be able to apply when performing the contract.
- a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last three years.
- a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract.
- an indication of the proportion of the contract which the services provider intends possibly to subcontract.

In the case of supplies and services:

- a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, whether public or private, involved. Evidence of delivery and services provided shall be given:
  - where the recipient was a contracting authority, in the form of certificates issued or countersigned by the competent authority,
  - where the recipient was a private purchaser, by the purchaser's certification or, failing this, simply by a declaration by the economic operator.
- a description of the technical facilities and measures used by the supplier or service provider for ensuring quality and the undertaking's study and research facilities.
- where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authorities or on their behalf by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, on the production capacities of the supplier or the technical capacity of the service provider and, if necessary, on the means of study and research which are available to it and the quality control measures it will operate.

In the case of the products to be supplied:

- samples, descriptions and/or photographs, the authenticity of which must be certified if the contracting authority so requests.
- certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to specifications or standards.

In the case of all contracts:

- an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work.

In the case of siting and installation services:

- in procedures for awarding public contracts having as their object supplies requiring siting or installation work, the provision of services and/or the execution of works, the ability of economic operators to provide the service or to execute the installation or the work may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

2.2.2.3 Official Lists and Registered Economic Operators

Many countries and contracting authorities maintain official lists or, more commonly, registration systems. The Public Sector Directive provides that member states may introduce either official lists of approved contractors, suppliers or service providers or certification by certification bodies established in public or private law and that, where they do, they are obliged to inform the Commission and the other member states of the address of the body to which applications should be sent.

Failure to register on a list is not, in itself a stated or legitimate ground for exclusion. Contracting authorities are always required to recognise equivalent certificates from bodies established in other member states and must also accept other equivalent means of proof. The Directive permits registration on official lists in the economic operator's member state of origin to be used to provide a presumption of suitability in the host member state, in respect of those suitability criteria they have in common.

Member states who introduce and maintain official lists of recognised contractors (suppliers or service-providers) are required to adapt them to the provisions of the Directive, that is in respect of certain of the criteria relating to economic and financial standing and to the capability of the economic operator must be the same as those described here. In order to ensure that these lists are not closed or do not create an obstacle to participation in contract award procedures, economic operators may ask at any time to be registered in an official list or for a certificate to be issued. They must be informed within a reasonably short period of time of the decision of the authority drawing up the list or of the competent certification body.

When bidding for contracts, economic operators appearing on such lists or in possession of an appropriate certificate may submit a certificate of registration issued by the competent authority or certificate issued by the competent certification body to the contracting authority issuing the invitation to tender in satisfaction of the qualification criteria, at least where those criteria have been taken into account in the registration process. That certificate will operate to create a presumption of suitability in respect of economic operators established in the member state holding the official list. This certified registration in an official list of a member state or a certificate issued by the certification body constitutes, for contracting authorities of other member states, a presumption of suitability corresponding to the contractor, supplier or service-provider's registration classification *only* for certain of the criteria described in this chapter.

2.2.2.4 Qualification System (utilities only)

The Utilities Directive explicitly allows contracting entities to establish and operate a system of qualification of economic operators which may also include a classification so that the qualified economic operators may be divided into categories according to the type of contract for which the qualification is valid.

One of the crucial features of the qualification system envisaged by the Directive is that it may itself be used as a call for competition. The purpose and benefit of this is that it enables the contracting entity to dispense with the normal advertising rules and select directly from its list of qualified economic operators, those candidates it wished to invite to tender under a restricted or negotiated procedure.

The qualification system must be operated on the basis of objective criteria and specific rules for qualification to be established by the contracting entity and these criteria and rules for qualification must be made available to economic operators on request. When they are updated, the updated criteria and rules must be communicated to interested economic operators.

2.3 TECHNICAL SPECIFICATIONS

The technical specifications consist in a definition of what it is the purchaser wishes to buy. The contracting entity has the freedom to choose what it wishes to procure, provided that decision is not based on subjective or unjustified grounds which distort competition. The role of the Directives is to ensure that when that decision has been made, the procurement is not made in a way which distorts the market. Technical specifications and contract conditions are particularly susceptible to manipulation. The Directives seek to prevent an initial definition of the purchaser's requirements that have been specifically designed to favour one or more product or economic operator where that is done for reasons which are not objective.

The Directives make it explicit that technical specifications must afford equal access for economic operators and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

The technical specifications to be applied must be set out in the contract documentation, such as contract notices, contract documents or additional documents and the contract notices must also contain the contact details of the service from which contract documents and additional documents can be requested. These may also be maintained and transmitted in electronic format.

2.3.1 Permitted Specifications

To ensure such equal treatment, the Directive sets out a series of options for the use of technical specifications by contracting entities. These options are, however, without prejudice to mandatory national technical rules, to the extent that they are compatible with Community law. [Possible localisation where there are specific national technical rules].

Contracting entities are free to specify their requirements by way of output requirements, namely those which refer to the performance or functional characteristics of the products or services to be provided.

Subject to any EC-compatible mandatory national technical rules, the technical specifications must be formulated in one of two main ways:

- by reference to certain specifications or
- by reference to performance or functional requirements.

The possibility of combining these methods gives rise to four ways of expressing the technical requirements of the contract:

(a) by reference to specified technical specifications in order of preference: to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or - when these do not exist - to national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference must be accompanied by the words 'or equivalent'; or

(b) in terms of performance or functional requirements; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow economic operators to determine the subject-matter of the contract and to allow contracting authorities to award the contract; or

(c) in terms of performance or functional requirements as mentioned in subparagraph (b), with reference to the specifications mentioned in subparagraph (a) as a means of presuming conformity with such performance or functional requirements; or

(d) by referring to the specifications mentioned in subparagraph (a) for certain characteristics, and by referring to the performance or functional requirements mentioned in subparagraph (b) for other characteristics.

The final sentence of (a) above is important. The Directives provide explicitly that where a contracting authority makes use of the option of referring to the listed specifications, it cannot reject a tender on the grounds that the products and services tendered for do not comply with the specifications to which it has referred, once the economic operator proves in his tender to the satisfaction of the contracting authority, by whatever appropriate means, that the solutions which he proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

2.3.2 Prohibited References

Unless justified by the subject-matter of the contract, the Directive prohibits references in the technical specifications to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production. As well as prohibiting the identification of specific products, this will also prevent the requirement to use certain processes, especially where those are not otherwise protected by intellectual property rights.

In all cases, such references will be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract, either by reference to the listed standards and specifications or by means of performance or functional characteristics is not possible. Whenever any specific and justified reference to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production is used, it must be accompanied by the words 'or equivalent'.

2.3.4 Social and Environmental Requirements

For the first time, the new Directive explicitly provide for social and environmental considerations to be taken into account in the procurement process. It does so, *inter alia*, in respect of technical specifications and there are several possibilities for setting requirements with a view to attaining a level of green or socially responsible procurement. Critically, the Directive allows environmental considerations to be taken into account at the production rather than only at the consumption stage. In addition, the Directives make explicit reference to the use of eco-labels.

2.3.4 Technical Dialogue

The setting of technical specifications is often a difficult exercise, especially in the case of a public contracting entities which are largely insulated from the private sector. To make sure that it makes the optimum decision in terms of the technology specified, the contracting entity needs to have access to information on those technologies and will sometimes need to communicate with potential economic operators. Doing so in the context of a competitive bidding procedure may be a breach of the rules because discussions are generally not permitted with the economic operators during the procedure.

The Directive include a provision (in the recitals) which allows the possibility of discussing technical specifications with potential economic operators in advance of any contract award procedure. It is referred to as technical 'dialogue'. With the crucial proviso that any discussions should not have the effect of precluding competition, the recital provides that 'before launching a procedure for the award of a contract, contracting authorities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications…' The definition of technical dialogue means that such discussions are *prima facie* permitted. They must not, of course, have the effect of precluding competition and so should not provide any potential economic operator with an unfair competitive advantage by, for example, setting the technical specifications by reference to those met by one economic operator, national or otherwise.

2.3.4 Variants

Tenders which do not comply with the technical requirements of the purchaser will be non-compliant and would ordinarily be rejected. Indeed, it is arguable that they must be rejected because to accept a non-compliant bid would infringe the principle of equal treatment: to accept a tender which is non-compliant distorts the level playing field and disadvantages those economic operators who have sought to meet the stated requirements. Nevertheless, there will be circumstances where it is beneficial to accept tenders based on alternative means of meeting the stated requirements. These are called variants but are not always acceptable to the contracting entity.

The Directives require the contracting entities to state in the contract notice *whether* or not variants are permitted. Variants will not be authorised without such an indication. Variants are only authorised where the criterion for award is that of the most economically advantageous tender and, where the contracting entities do authorise variants, they must state in the contract documents the minimum requirements to be met by the variants and any specific requirements for their presentation. Only variants meeting the minimum requirements laid down by these contracting authorities may be taken into consideration.

2.4 THE AWARD CRITERIA

In awarding contracts, contracting entities have a choice between two award criteria:

- the lowest price; or
- the most economically advantageous tender.

If no explicit choice is made, the criterion that will be applied will be the lowest price.

The choice of what is the most economically advantageous tender is to be made on the basis of a series of criteria linked to the subject matter of the contract chosen by the contracting entities. The Directives offer a non-exhaustive list of examples of the type of criteria which may be used. These include

- quality,
- price,
- technical merit,
- aesthetic and functional characteristics,
- environmental characteristics (introduced by the new Directives, thus allowing non-economic criteria to be used),
- running costs,
- cost effectiveness,
- after-sales service and technical assistance,
- delivery or completion date,
- commitments with regard to parts and
- security of supply.

When basing the award on the most economically advantageous tender, the contracting entity must specify in the contract notice or in the contract documents the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender. Those weightings can be expressed by providing for a range with an appropriate maximum spread. Where, in the opinion of the contracting entity, weighting is not possible for demonstrable reasons, the contracting entity must indicate the criteria in descending order of importance.

Where a particular tender appears abnormally low, the contracting entity may reject it but only after it has requested, in writing, details of the constituent elements of the tender which it considers relevant. It must verify those elements and take into account the explanations received.

2.4.1 Community 'Preferences' in the Utilities Sector

The Utilities Directive (only) provides that any tender made for the award of a supply contract may be rejected by the contracting entity where the proportion of the products originating in third countries, which do not provide comparable and effective access for Community undertakings, exceeds 50 per cent of the total value of the products constituting the tender.

This is a test relating to the origin of goods, and does not refer to the nationality of the economic operator. The origin of the product is to be determined in accordance with Council Regulation 2913/92 on the common definition of the origin of goods. Where a Community offer is equivalent to an acceptable *offer* which includes more than 50 per cent of non-EC products (equivalent here means that the price difference is no more than 3 per cent) the Community *offer* must be given preference.

In the case of services, there is the possibility of using a safeguard clause which would only be set in motion when the Commission, on the basis of information supplied by member states or otherwise, establishes that a third country, with regard to the award of service contracts:

- does not grant Community undertakings effective access comparable to that granted by the Community to undertakings from that country ('reciprocity');
- does not *grant* Community undertakings national treatment or the same competitive opportunities as are available to national undertakings;
- grants undertakings from other third countries more favourable treatment than Community undertakings.

Where the Commission has established the existence of any of the above situations, it may, at any time, make a proposal to the Council for the suspension or restriction of the award of services contracts to:

- undertakings governed by the law of the third country in question;
- undertakings affiliated to the undertakings specified above, having their registered office in the Community but having no direct and effective link with the economy of a member state;
- undertakings submitting tenders which have as their object services originating in the third country in question.

Public procurement
for economic operators

MODULE H

Which procedures apply?

PART 5

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. The different types of procedures that apply
2. How and under what conditions they may be used
3. The publicity and advertising rules
4. The minimum time limits that contracting entities must respect
5. The information that contracting entities must communicate to unsuccessful economic operators

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- The essential guarantees represented by the procedural rules
- The reasons why contracting entities may justifiably deviate from the "standard" procedures
- The decisions they may take that affect economic operators
- The way in which economic operators participate in each of the procedures
- How economic operators can find out about contracts in the EU
- The rights of economic operators to find out why they have not been successful

This means that it is critical to understand fully:

- The nature of each procedure
- The conditions that apply to exceptional procedures
- The conditions of participation of economic operators in each of these procedures
- The compliance obligations imposed on contracting entities in terms of procedure, timing, publicity, and the provision of information

1.3 LINKS

Module H sets out basic information for economic operators.

Further information on issues addressed in module H is set out in modules A to G. The intended users of modules A to G are the contracting entities, but users of module H wanting to know more about a particular issue are referred to modules A to G

There are particularly strong links with the following modules:

- Module C4 on public procurement procedures and tools
- Module E2 on advertisement of contract notices

1.4 RELEVANCE

This information will be of particular relevance in understanding how to find contracts that will be of interest and to determine what needs to be done in order to compete. This module will help economic operators understand what procedures may be applied and when; what the conditions of participation are likely to be; and what they can do to identify why they may have been unsuccessful.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

It may be useful to have to hand copies of the contract award notices that must be published in the *OJEU*.

SECTION 2
NARRATIVE

2.1 INTRODUCTION

Your rights as tenderers are protected by the Directives which set out procedures which must be followed by all contracting entities subject to the procurement rules. These are designed to ensure that all tenderers from the EU are given fair and equal treatment in procurement throughout the EU and impose certain obligations on the contracting entities.

Part 1 set out the general principles that must be respected and which guarantee your rights. In practice, these are translated into procedures which can be seen as a concrete expression of these rights. The procedures which must be applied by contracting entities detail the methods that they will employ, the publication requirements they must use and the minimum time limits to which they must adhere. The purpose is to provide legal certainty through the application of transparent and consistent procedures which provide all tenderers with the same and equal opportunities for participation.

As with other aspects of the Directives, these procedures represent the minimum guarantees that you, as tenderers, possess. However the national rules are drafted, these procedures must be applied.

2.2 THE GENERAL SCHEME

The rules on advertising and award procedures are similar in both the public and utilities sectors. However, in view of the special characteristics of the utilities sector, the presumption in favour of open or restricted tendering found in the case of the public sector is replaced with a more flexible approach and permits the contracting entities a free choice regarding the procedures they will employ. Further, the new Public Sector Directive introduces a new competitive dialogue procedure which is not available in the utilities sector. Similarly, the Utilities Directive provides for a qualification system which is not explicitly provided for in the public sector.

Both the Public Sector and Utilities Directives have also been brought up to date in terms of the use of technology so that communications may now be made in electronic form with significant consequences in respect of the applicable time limits thanks to the faster and more efficient means of communication employed. The possibilities opened up by modern electronic technology have also led to the creation of two new tools, namely dynamic purchasing systems and electronic auctions.

The three primary procedures which have been inherited from the previous directives are:

- **'open procedures'** whereby all interested contractors, suppliers or service-providers may submit tenders;
- **'restricted procedures'** whereby only those contractors, suppliers or service-providers invited by the contracting entity may submit tenders; and
- **'negotiated procedures'** whereby contracting entities consult contractors, suppliers or service-providers of their choice and negotiate the terms of the contract with one or more of them.

As in the public sector, the new Directives also retains a contract award procedure for

- **'design contests'** whereby contracting entities acquire a plan or design selected by a jury after being put out to competition with or without the award of prizes

With the now explicit reference to framework contracts in the public sector, the Public Sector Directive has imposed a specific procedure for the award of framework contracts:

- **'framework agreement procedure'** whereby one or more contracting authorities and one or more economic operators can enter into an agreement to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged

The new Public Sector Directive has also introduced a new specific procedure (not available in the utilities sector) which provides for a two stage procedure known as:

- **'competitive dialogue'** whereby an economic operator may request to participate in a procedure in which the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender.

Taking on board developments in the field of information technology, the Directives now also provide for two new tools which take a largely electronic form. These are:

- **'dynamic purchasing systems'** whereby contracting entities can use a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting entity, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification;
- **'electronic auctions'** whereby contracting entities can procure through auction by way of a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

Economic operators who submit tenders are referred to as `tenderers'. Those who have sought an invitation to take part in a restricted or negotiated procedure or in a competitive dialogue are designated by the term `candidate'.

2.3 THE AVAILABLE PROCEDURES

This section will consider the specific characteristics of each of the procedures in turn before considering the general procedural requirements imposed by the Directives.

The general principle in the utilities sector is that the contracting entities have a free choice between the open, restricted or negotiated procedures, provided that a call for competition has been made by means of the appropriate notice.

Nevertheless, the negotiated procedure may be used without a prior call for competition in a series of cases which mirror those in the public sector and discussed below.

If the contracting entities use an improper or inappropriate procedure (*i.e.* one which does not meet the conditions set out below), then there may well be a breach of the Directives.

2.3.1 Open and Restricted Procedures

Both procedures allow for full competition and are both advertised in the *Official Journal*. The difference lies in the fact that, in practical terms, the restricted procedures takes place in two stages: the first is effectively a selection (pre-qualification) stage during which candidates are invited to present their qualifications. Those candidates who are selected following this stage will then be invited to submit a tender.

In the open procedure, tenderers submit both their qualifications and their technical tenders at the same time, even if the contracting entity will consider these two aspects (qualification and technical tender) sequentially.

In the restricted procedure, the choice of candidates to be invited to participate in the next (tender) stage is to be made on the basis of the objective criteria discussed in Part 4. The new Directive states that a minimum of five must be invited but does not set any upper limit Where the number of candidates meeting the selection criteria and the minimum levels of ability is below the minimum number, the contracting authority may continue the procedure by inviting the candidate(s) with the required capabilities and in so doing the contracting authority may not include other economic operators who did not request to participate, or candidates who do not have the required capabilities.

In the utilities sector, there is no minimum number to be invited Where a contracting entity intends to apply a mechanism for determining the relative ranking of the candidates with a view to identifying those it will invite to tender, it is obliged to state them out in advance in the contract notice or tender documents.

2.3.2 The Negotiated Procedure

In the public sector, the negotiated procedure is an exception, and the Directive provides for those situations in which use of such a negotiated procedure is permitted. The negotiated procedure may be used with or without publication of a tender notice depending on the circumstances.

In the utilities sector, the negotiated procedure may be used without ay justification as one of the three primary procedures (open, restricted or negotiated) provided it is preceded by a call for competition.

2.3.2.1 Public Sector Negotiated Procedure With a Call for Competition

The Public Sector Directive sets out four situations in which the contracting authority may rely on this derogation. Where this procedure is used, the record of the procedure must include the reasons for choosing it so that the decisions of the contracting authority may be verified. The grounds justifying the use of this procedure are as follows.

(i) **In the event of irregular tenders or the submission of tenders which are unacceptable under national provisions compatible with the Directive, in response to an open or restricted procedure or a competitive dialogue insofar as the original terms of the contract are not substantially altered**

This refers to those situations in which the tenders received are non-compliant or non-responsive.

(ii) **In exceptional cases, when the nature of the works, supplies, or services or the risks attaching thereto do not permit prior overall pricing**

This derogation applies in two circumstances: where (i) the nature of the works, supplies or services or (ii) the risks attaching thereto, do not permit overall pricing. This is particularly true of contracts based on varying degrees of public private partnership ('PPP') which is where this exception has been frequently used.

(iii) **In the case of services, inter alia services within category 6 of Annex II A, and intellectual services such as services involving the design of works, insofar as the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures**

The category 6 services referred to are insurance services, banking and investment services.

(iv) **In respect of public works contracts, for works which are performed solely for purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs**

In the case of supplies, such contracts may be let by way of a negotiated procedure *without* a call for competition.

The negotiated procedure with a call for competition is commenced, in the same way as other competitive procedures, by a contract notice which will include a reference to the to the qualitative selection criteria of the candidates it will invite to the negotiations.

The contracting authority must invite a minimum of three, provided a sufficient number of suitable candidates is available, and the number of candidates invited must, in any event, be sufficient to ensure genuine competition. Any methodology to be used in making that selection must be explained in the notice.

Following the selection (pre-qualification) stage, the invitations to negotiate must be sent *simultaneously* and *in writing* to the selected candidates. The procedure can take place in successive stages in order to reduce the number of tenders to be negotiated.

The numbers will be reduced by applying the award criteria set out in the contract notice or the specifications and the contracting authorities will be able to assess the relative economic advantages offered by the different candidates at each stage of the procedure. In this final stage, the number arrived at must make for genuine competition insofar as there are enough solutions or suitable tenderers.

In reducing the number of candidates through these successive stages, contracting authorities must ensure the equal treatment of all tenderers. In particular, they must not provide information in a discriminatory manner which may give some tenderers an advantage over others.

2.3.2.2 Negotiated Procedure Without a Call for Competition

In both public and utilities sectors, contracting entities may award a contract by way of the negotiated procedure without the prior publication of a contract notice in a series of defined circumstances. This negotiated procedure may be used without a call for competition in the following cases.

- **For All Contracts**

  (i) **When no tenders or no suitable tenders or no applications have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of contract are not substantially altered and on condition that a report is sent to the Commission if it so requests.**

  This ground applies where no tenders were received or where all of those that were received are unsuitable and provided that the initial conditions of contract are not substantially altered.

  (ii) **When, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator**

  This ground encompasses a series of grounds. First, it refers to ***technical*** reasons where a particular contractor is the only one capable of completing a particular project, due to the particular technical expertise or capacity of the contractor concerned whether or not that is subject to any proprietary interest.

The second ground subsumed by this condition refers to ***exclusive rights*** such as intellectual or industrial property rights. Holders of these rights will have a proprietary interest in these rights which may mean that only they may exploit them.

To be relied upon successfully, it will be necessary to demonstrate that there are, in fact, no alternatives.

(iii) **Insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting entities in question, the time limit for the open, restricted or negotiated procedures with publication of a contract notice cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting entity**

All the conditions set out in the derogation must be met, for they are cumulative. It is thus necessary to prove that use of the derogation is (i) strictly necessary when, for (ii) reasons of extreme urgency. (iii) brought about by events unforeseeable by the contracting entities in question, (iv) the time limit for the open, restricted or negotiated procedures with publication of a contract notice cannot be complied with and that (v) the circumstances invoked to justify extreme urgency must not in any event be attributable to the
contracting entity.

- **For Supplies Contracts**

(iv) **When the products involved are manufactured purely for the purpose of research, experimentation, study or development; this provision does not extend to quantity production to establish commercial viability or to recover research and development costs**

(v) **For additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting entity to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance**

(vi) **For supplies quoted and purchased on a commodity market**

(vii) **For the purchase of supplies on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the receivers or liquidators of a bankruptcy, an arrangement with creditors, or a similar procedure under national laws or regulations**

This allows the contracting entities to take advantage of stock clearances based on the financial difficulties of the suppliers.

(viii) In the utilities sector only, **for bargain purchases, where it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than normal market prices**

This derogation is inherited from the GPA where it is intended to cover both the situation of bankruptcy (above) and other situations, notably unusual disposals by firms that are not normally suppliers. It is not intended to cover routine purchases from regular suppliers.

- **For Services Contracts**

(ix) **When the contract concerned follows a design contest and must, under the applicable rules, be awarded to the successful candidate or to one of the successful candidates, in the latter case, all successful candidates must be invited to participate in the negotiations**

- **For Works contracts and Service Contracts**

(x) **For additional works or services not included in the project initially considered or in the original contract but which have, through unforeseen circumstances, become necessary for the performance of the works or services described therein, on condition that the award is made to the economic operator performing such works or services**

In addition to the conditions set out above, the derogation will only be available in two situations:

- when such additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the contracting entities, or
- when such works or services, although separable from the performance of the original contract, are strictly necessary for its completion.

The unforeseeability requirement, to be strictly interpreted, would ensure that the derogation is not used as a means of awarding new works or services contracts under the guise of additions.

(xi) **For new works or services (only new works in the case of the utilities) consisting in the repetition of similar works entrusted to the economic operator to whom the same contracting entities awarded an original contract, provided that such works are in conformity with a basic project for which the original contract was awarded according to the open or restricted procedure**

Unlike the previous derogation, these additional works are those which are foreseen in the original contract which must have been awarded pursuant to the open or restricted procedures. The derogation applies on condition that:

- the possible use of this procedure is disclosed as soon as the first project is put up for tender, *and*
- the total estimated cost of subsequent works shall be taken into consideration by the contracting entities when they calculate the threshold values of the original contract

2.3.3 Design Contests

Specific procedures apply to the award of design contests. These procedures are also commenced by way of a notice and the award is also subject to the prior publication of a contract notice. There are a number of specific conditions.

Firstly, the admission of participants to design contests may not be limited by reference to the territory or part of the territory of a member state. Secondly, where such design contents are restricted to a limited number of participants, the contracting entities must lay down clear and non-discriminatory selection criteria. Where such a selection takes place, the number of candidates invited to participate must be sufficient to ensure adequate or genuine competition.

The third condition relates to the jury which should be:

- independent of the participants in the contest;
- familiar with the professional qualifications required of the participants; (at least a third of the members of the jury should have the same qualification as that required of the participants or its equivalent)
- autonomous in its decisions.

The decision of the jury will be taken only on the basis of projects which have been submitted anonymously and the jury may only take into account the criteria indicated on the appropriate notice.

2.3.4 Public Sector Competitive Dialogue

The new Public Sector Directive introduces an entirely new procedure called the 'competitive dialogue'. The procedure may be used in the case of particularly complex contracts where the use of the open or restricted procedure will not allow the award of the contract. It is nevertheless commenced in the same way as a normal procedure by way of a notice but the contract will be awarded (only) on the basis of the most economically advantageous tender.

As with the restricted and negotiated procedures, the contracting authorities may then select (according to the Directive's selective qualification criteria) a number of candidates with whom to conduct the dialogue. This should be ay least three where three suitable candidates can be found.

Contracting authorities enter a dialogue with the selected candidates with the aim of identifying and defining the means best suited to satisfying their needs. They may discuss all aspects of the contract with the chosen candidates during this dialogue but they must ensure equality of treatment among all tenderers. In particular, they may not provide information in a discriminatory manner which may give some tenderers an advantage over others. Crucially, contracting authorities may not either reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement.

Provided it is announced in advance, contracting authorities may provide for the procedure to take place in successive stages to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or the descriptive document. The contracting authority will continue the dialogue until it can identify the solution or solutions, if necessary after comparing them, which are capable of meeting its needs. The contracting authorities will finally ask the tenderers to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue.

2.3.5 Dynamic Purchasing System

In the new Directives, the Commission created a hybrid electronic procedural tool known as the electronic dynamic purchasing system for commonly used purchases. This purchasing technique allows the contracting entity, through the establishment of a list of tenderers already selected and the opportunity given to new tenderers to take part, to have a particularly broad range of tenders as a result of the electronic facilities available, and hence to ensure optimum use of public funds through broad competition. It thus shares some of the benefits of framework agreements, qualification systems (or lists of official providers) and electronic catalogues although it is none of these things and stands alone as a new procedure.

The basic procedure (based on an open procedure) is that:

- the contracting entity advertises the existence of the system using the open procedure;
- interested operators then submit 'indicative tenders' setting out then terms on which they will supply the requirements;
- all qualifying operators will be admitted to the system (and new operators may be admitted at any time, normally within 15 days);
- when it wishes to place an order, the contracting entity invites a tender from all of those admitted to the system and requests a tender within a time period of at least 15 days;
- the contracting entity must also advertise each intended order in the *Official Journal* to notify any remaining unregistered operators and must provide at least 15 days for the submission of tenders.

The system must be entirely electronic so that all stages from the setting up of the system and the award of contracts under that system will all be carried out by electronic means. The originating notice must also contain all the necessary information concerning the electronic equipment used and the technical connection arrangements and specifications as well as the internet address at which the contracting entity offers unrestricted, direct and full electronic access to the specification and to any additional documents.

A dynamic purchasing system may not last for more than four years, except in exceptional cases and contracting entities may not resort to this system to prevent, restrict or distort competition. No charges may be billed to the interested economic operators or to parties to the system.

2.3.6 Framework Agreements in the Public Sector

Essentially, the contracting authorities will follow the open, restricted or competitive dialogue procedure for all phases up to the award of contracts based on that framework agreement. It is only in the final stage that the procedure differs. The Directive offers a choice between awarding a framework agreement to one economic operator or to several.

Where a framework agreement is concluded with one economic operator, contracts based on that agreement must be awarded within the limits of the terms laid down in the framework agreement. Where a framework agreement is concluded with several economic operators, there must be at least three operators (to the extent that three are available who meet the conditions). Contracts based on framework agreements concluded with several economic operators may be awarded either:

- by application of the terms laid down in the framework agreement without reopening competition, or
- on further or more precisely formulated terms

In the latter case contracting authorities must carry out a 'mini-tender' with the chosen economic operators and consult in writing the economic operators capable of performing the contract; must fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted; accept tenders from the operators in writing; and award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.

When awarding contracts based on a framework agreement, the parties may under no circumstances make substantial amendments to the terms laid down in that framework agreement and the term of a framework agreement may not exceed four years, save in exceptional cases.

Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

2.3.7 Electronic Auctions

This is not a new procedure, only a tool for use with an open, restricted or negotiated procedure with a call for competition. The rules relating to the operation of those procedures will continue to apply adapted to the provisions relating to auctions.

An electronic auction may also be held on the opening for competition of contracts to be awarded under the dynamic purchasing system and, in the public sector, on the reopening of competition among the parties to a framework agreement.

Electronic auctions apply to contracts for works, supplies or services for which the specifications can be determined with precision, for example in the case of recurring supplies, works and service contracts.

The basic mechanism of reverse auctions enables contracting entities to ask tenderers to submit new prices, revised downwards and, when the contract is awarded to the most economically advantageous tender, also to improve elements of the tenders other than prices.

In order to guarantee compliance with the principle of transparency, only the elements suitable for automatic evaluation by electronic means, without any intervention and/or appreciation by the contracting entity, may be the object of electronic auctions, that is, only the elements which are quantifiable so that they can be expressed in figures or percentages. Consequently, certain works contracts and certain service contracts having as their subject-matter intellectual performances, such as the design of works, should not be the object of electronic auctions.

The procedure is commenced by way of a standard form contract notice which must contain some additional information, however:

(a) the features, the values for which will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;

(b) any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract;

(c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;

(d) the relevant information concerning the electronic auction process;

(e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding;

(f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

Before proceeding with an electronic auction, the contracting entities must make a full initial evaluation of the tenders in accordance with the award criterion/criteria set and with the weighting fixed for them. Then, all tenderers who have submitted admissible tenders will be invited simultaneously by electronic means to submit new prices and/or new values.

The invitation will also contain all relevant information concerning individual connection to the electronic equipment being used and state the date and time of the start of the electronic auction. The electronic auction may take place in a number of successive phases but may not start sooner than two working days after the date on which invitations are sent out.

An electronic auction will be based either solely on prices when the contract is awarded to the lowest price or on prices and/or on the new values of the features of the tenders indicated in the specification when the contract is awarded to the most economically advantageous tender. When the contract is to be awarded on the basis of the most economically advantageous tender, the invitation to participate must be accompanied by the outcome of a full evaluation of the relevant tenderer, carried out in accordance with the weighting applied to the various award criteria. The invitation must also state the mathematical formula (including the weightings) to be used in the electronic auction to determine automatic re-rankings on the basis of the new prices and/or new values submitted. Once closed (se below), the contract will be awarded on the basis of the stated award criteria.

Throughout each phase of an electronic auction the contracting entities must instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment. They may also communicate other information concerning other prices or values submitted, provided that that is stated in the specifications. They may also at any time announce the number of participants in that phase of the auction. In no case, however, may they disclose the identities of the tenderers during any phase of an electronic auction.

Electronic auctions can be closed (concluded) in a number of ways:

- on the date and time fixed in advance;
- when the contracting entity receives no more new prices or new values which meet the requirements concerning minimum differences (in that event, the contracting entity will state in the invitation the time it will allow to elapse after receiving the last submission before closing the electronic auction);
- when the number of phases in the auction, fixed in the invitation, has been completed.

2.4 PROCEDURAL REQUIREMENTS

The directives contain a series of provisions which apply to advertising and publicity with a view to guaranteeing the transparency of the system. These are the main transparency provisions and provide the most visible opportunity for tenderers to identify contracts throughout the EU in which they might be interested.

2.4.1 Notices for Publication

The Directives provide for a series of notices to be published in the *Official Journal of the European Union (OJEU)* depending on the award procedure chosen. The Directives also give the contracting entities the option of having published in the *Official Journal* notices announcing works, supplies and services contracts whose value is below the necessary threshold value. Standard form notices indicating the information required are contained in the annexes to the Directives.

Publication of all notices means publication in the OJEU or, alternatively, in the case of prior or periodic indicative notices, on the contracting entity's buyer profile. As well as publication in hard copy, the Office for Official Publications also operates a computer database system known as the Tenders Electronic Daily ('TED'). Contract notices are to be published in full in their original language. A summary of the important elements of each notice shall be published in the other official languages of the Communities, the original text alone being authentic. The translation of the notices is undertaken by the Office for Official Publications so contracting entities need only submit the appropriate notice in their original language.

The contracting entities must be able to provide proof of the date of dispatch.

No notice which must be published at European level (in the *Official Journal*) may be published in any national journal or in the press of the country of the contracting entity before the date of dispatch of the same notice to the Office for Official Publications and the date of dispatch should be mentioned in any national publication. Any publication of the tender notice should not contain information other than that published in the *Official Journal*.

The function of the public sector *prior information notices* is to advise potential tenderers of forthcoming contracts or framework agreements which will be advertised by means of a notice.

The function of the utilities sector *periodic indicative notices* is twofold. First of all, a call for competition may itself be made by means of a periodic indicative notice. Where such a periodic indicative notice is used to make a call for competition, it is subject to the following conditions:

- the notice must refer specifically to the supplies, works or services which will be the subject of the contract to be awarded;
- the notice must indicate that the contract will be awarded by restricted or negotiated procedure without further publication of a notice of a call for competition and invite interested economic operators to express their interest in writing;
- all candidates must subsequently be invited to confirm their interest on the basis of detailed information on the contract concerned before beginning the selection of tenderers or participants in negotiations; and
- be published not more than 12 months before this invitation is sent.

Second, periodic indicative notices may also be used simply as an advance warning mechanism. They are intended to inform potential suppliers that there is likely to be procurement, possibly involving contracts below the threshold value, in classes of goods they are able to supply.

These notices are not compulsory but the advantage for the contracting entity is that the time limit for the receipt of tenders is reduced where such a prior or periodic indicative notice has been published. They may be published in the *Official Journal* or on a 'buyer profile'. A 'buyer profile' is a new concept which refers to an internet site on which contracting entities can publish information relating to the contracts. It may be used as an alternative to the *Official Journal* but is not compulsory. Where it is used, a notice to that effect must also be sent to the *Official Journal*.

In the case of works contracts, the notice is used to forewarn contractors of works contracts which the contracting entities intend to award with a volume not less than the normal threshold value of Euro 4 845 000 (value at *1 January 2010*). In the case of supplies and services, the contracting entities must make known, as soon as possible after the beginning of their budgetary year, the intended total procurement by product area which they envisage awarding during the subsequent 12 months where the total estimated value is not less than €750,000 (value at *1 January 2010*).

2.4.2 Minimum Time Limits

The award procedures of the Directives are subject to specific minimum time limits which are imposed in order to ensure that tenderers in all member states are given adequate time to prepare and submit their tenders.

They are fixed according to the complexity of the contract and the time required for drawing up tenders but must not be less than the minimum periods set out in the Directive.

In the case of open procedures, the minimum time limit for the receipt of tenders is 52 days from the date on which the contract notice was sent.

The time limit runs from the date on which the contract notice was sent. If a contracting entity has published a prior information or periodic indicative notice, the minimum time limit for the receipt of tenders may, as a general rule, be shortened to 36 days, but under no circumstances to less than 22 days. Where notices are drawn up and transmitted by electronic means, the time limits for the receipt of tenders may be shortened by 7 days. In addition to this 7 days, the time limits for the receipt of tenders may be reduced by a further 5 days where the contracting entity offers unrestricted and full direct access by electronic means to the contract documents and any supplementary documents. The cumulative effect of these reductions may not, however, reduce the time period to less than 15 days.

2.4.2.1 In the Public Sector:

In the case of restricted procedures, the minimum time limit

- for receipt of requests to participate is 37 days from the date on which the contract notice is sent;
- for the receipt of tenders is 40 days from the date on which the invitation is sent.

The time limit runs from the date on which the invitation to tender was sent. If a contracting authority has published a prior information notice, the minimum time limit for the receipt of tenders may, as a general rule, be shortened to 36 days, but under no circumstances to less than 22 days. Where notices are drawn up and transmitted by electronic means, the time limits for the receipt of tenders may be shortened by 7 days. In addition to this 7 days, the time limits for the receipt of tenders may be reduced by a further 5 days where the contracting authority offers unrestricted and full direct access by electronic means to the contract documents and any supplementary documents

In the case of negotiated procedures with publication of a contract notice and the competitive dialogue, the minimum time limit for receipt of requests to participate is 37 days from the date on which the contract notice is sent. Where notices are drawn up and transmitted by electronic means, the time limits for the receipt of tenders may be shortened by 7 days.

An accelerated procedure may be used in the case of restricted procedures or negotiated procedures with publication of a contract notice where urgency renders impracticable the above time limits. In these cases, contracting authorities may fix:

- a time limit for the receipt of requests to participate which may not be less than 15 days from the date on which the contract notice was sent, or less than 10 days if the notice was sent by electronic means; and, in the case of restricted procedures,
- a time limit for the receipt of tenders which must be not less than 10 days from the date of the invitation to tender.

2.4.2.2 **In the Utilities Sector:**

In the case of restricted procedures and negotiated procedures with a call for competition, the minimum time limit

- for receipt of requests to participate is, as a general rule, 37 days from the date on which the contract notice is sent and cannot be less than 22 days (where the invitation is not sent by electronic means) or less than 15 days (where the invitation is sent by electronic means);
- for the receipt of tenders may be set by mutual agreement but, failing that, should not, as a general rule, be less than 24 days and in no case less than 10 days from the date of the invitation to tender.

The time limit runs from the date on which the invitation to tender was sent. Where notices are drawn up and transmitted by electronic means, the time limits for the receipt of tenders may be shortened by 7 days. In addition to this 7 days and except where fixed by mutual agreement, the time limits for the receipt of tenders may be reduced by a further 5 days where the contracting entity offers unrestricted and full direct access by electronic means to the contract documents and any supplementary documents.

The cumulative effect of these reductions may not, however, reduce the time period (1) for requests to participate to less than 15 days from the date the invitation is sent (2) for receipt of tenders, except where fixed by mutual agreement, to less than 10 days from the date of the invitation to tender.

2.4.3 Communications

With the acceptance of electronic forms of communication, the Directives now permit all communication and information exchange to be made by post, by fax, by electronic means, by telephone in some circumstances, or by a combination of those means, according to the choice of the contracting entity. However, the means of communication chosen must be generally available and thus not restrict economic operators' access to the tendering procedure.

2.4.4 Information Requirements

Contracting entities must as soon as possible inform candidates and tenderers of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or implement a dynamic purchasing system.

The information must be given in writing based on a request to the contracting entities.

At the request of a tenderer, the contracting entity must as quickly as possible and, in no case, more than 15 days from receipt of the written request, inform:

- any unsuccessful candidate of the reasons for the rejection of his application,
- any unsuccessful tenderer of the reasons for the rejection of his tender,
- any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement.

Contracting entities may decide to withhold certain information where the release of such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between them.

In the utilities sector, contracting entities which establish and operate a system of qualification must inform applicants of their decision as to qualification within a period of six months. If the decision is going to take longer than four months, the entity must inform the applicant, within two months of the application of the reasons justifying the longer period and of the date of the decision. Applicants whose qualification is refused must be informed of this decision and the reasons for refusal as soon as possible and under no circumstances more than 15 days later than the date of the decision. Any intention to bring the qualification of an economic operator to an end must be notified in writing to that operator beforehand, at least 15 days before the date on which qualification is due to end, together with the reason or reasons justifying the proposed action.

Public procurement
for economic operators

MODULE H

Making the most of the tendering process

PART 6

SECTION 1
INTRODUCTION

1.1. OBJECTIVES

The objectives of this chapter are to provide general and practical guidance on:

1. Planning and preparation of tenders
2. Identifying market profile and conducting market research
3. Identifying potential tenders and contracts
4. Preparing tenders

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- The provisions of the Directives that facilitate identification of tenders and contracts
- The expectations of the contracting entities
- The elements that go towards making a potentially successful tender

This means that it is critical to understand fully:

- The nature of your market and your position in it
- The needs of the contracting entity
- The tendering process
- The role and content of tender documentation

1.3 LINKS

Module H sets out basic information for economic operators.

Further information on issues addressed in module H is set out in modules A to G. The intended users of modules A to G are the contracting entities, but users of module H wanting to know more about a particular issue are referred to modules A to G.

There is a particularly strong link with the following:

- Module E2 on advertisement of contract notices

1.4 RELEVANCE

This information will be of particular relevance in preparing and submitting successful tenders.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

It may be useful to have to hand copies of the contract notices that must be published in the *OJEU*.

SECTION 2
NARRATIVE

2.1 INTRODUCTION

The successful preparation and submission of tenders is not a mechanical process consisting of providing standard documents and reproducing existing templates or models using the 'cut' and 'paste' functions of computer software. It is true that tenders will need to be accompanied by certain documents required by the contracting entity, usually those relating to the status and qualifications of the economic operator, but the drafting of a tender provides the economic operator with the opportunity to shine.

It will enable the economic operator not only to demonstrate that it complies with the formal requirements of the contracting entity (client) but also that it is familiar with the client's needs and business in a general sense, that it is committed to the client's goals, that it understands the specific requirements of the client (even where the client has not articulated or has been unable to articulate those requirements clearly) and that it has the right mix of skills, resources and experience to fulfil those requirements.

The successful economic operator will not only respond to advertisements as they arise but will actively seek to position itself to seize the opportunities as they arise. Doing so involves taking the initiative right through from planning its intervention in the market to completing the contract on time and within cost. At each stage of the process, the economic operator will be able to do things which will improve its chances of success. H6 considers the various stages of the tendering process and seeks to identify the possibilities it offers for economic operators to improve their chances of success.

A core mechanism used to ensure maximum participation on fair and equal terms is transparency which operates by guaranteeing that the actions of the public purchaser are both known and available to economic operators and verifiable by the authorities. These objectives inevitably lead to a certain formalism in then procedures which is often compared unfavourably to the more streamlined, but opaque, procedures of the private sector. However, it is this formality which provides economic operators from the EC with the opportunity to identify and to bid for procurement contracts throughout the Community and it is thus important to recognise the practical impact of the provisions of the directives for the economic operators and the benefits that they offer in terms of improved opportunities.

2.2 PLANNING AND PREPARATION

Tendering is just another way of selling products and services. However, it is not a passive activity and requires positive action to be taken to make the sale.

The procurement rules came into existence partly because of the recognition that governments tended to buy products and services from the same suppliers over and over again, very often from their own nationals. Without making any searches in the market (especially the wider European market) to elicit comparison prices, those governments also tended to pay the higher prices asked by the incumbent suppliers who were then able to benefit from their 'monopoly' positions.

The situation was even more acute in the vase of 'national champions', *i.e.*, those companies that operated in what the governments considered to be strategic sectors and who were effectively protected from competition, subsidised or given preferred supplier status. The results of such practices were large price variations for basic goods, works and services throughout the Community as well as artificially inflated prices.

One of the major consequences of the introduction of the procurement Directives is to force contracting entities to apply competitive procedures and thus obtain a range of comparison prices. Armed with such a comparison, contracting entities are able to identify the overpriced goods and services offered and, subject to the permitted quality considerations of the directives (see H4) opt for goods and services offered by economic operators at the lowest prices for the level of quality required – this price/quality combination is often referred to as 'value for money'. One of the effects of this process has also been to see lower prices offered by those economic operators who had previously been able to charge inflated prices thanks to their privileged positions.

European economic operators can no longer rely on their national governments to buy from them at inflated prices. Those governments will now have to base their purchasing decisions on competitive pricing and it is up to the economic operators to demonstrate that they can offer the best prices for the specified requirements.

This does not mean that contracts will go to foreign economic operators. The primary effect of the Directives has been on national procurement markets where competition has been encouraged between national economic operators and where prices offered by those economic operators have decreased to match the prevailing market price.

For large value contracts which attract international competition, there is competition from economic operators from other member states but they are given no preference. Public purchasers are required to base their decisions on an objective mix of quality and price and it is the economic operator that offers the best mix that will win the contract. It makes no difference, from the point of view of the Directives, whether the successful economic operator is a national of the purchaser's country or not.

The crucial factor in successful bidding under the public procurement regime is, therefore, to persuade the contracting entity that the economic operator can meet the stated requirements of the purchaser and has the necessary skills, resources and experience to deliver on time and at the stated price.

The key phrase is 'persuade' – it is for the economic operator to convince the contracting entity that he is the best choice. The economic operator needs to be proactive in this respect and cannot simply rely on vague and unsubstantiated promises to deliver. The tendering procedure which is mandated by the Directives provides the economic operator with a vehicle through which to persuade the contracting entity that he should win the tender. Whilst some of the formality is a necessary evil, the tendering process is the pre-eminent means for the economic operator to make the sale. It is, therefore, a task to be taken very seriously.

2.2.1 Market Profile and Research

Even if the primary procurement procedure for the purposes of the directives is the open bidding procedure commenced by way of advertisement, not every procurement opportunity comes through an advertisement. Even if the economic operator does mostly react to advertisements, it can still seek to position itself in the market to make itself more attractive to potential clients.

Even if there is an advertisement at European level, we saw in H5 that contracting entities are permitted, in addition, to advertise in the national press, provided they do not so before the European level advertisement is placed and provided the national advertisement does not contain any other information. The rationale is to ensure that all bidders (in each member state) are given an equal opportunity of bidding and this means that they are all given the same amount of time to prepare and submit their tenders. Under the same conditions (*i.e.* not before the European advertisement and without additional information), purchasers would also be able to send copies of the notice directly to potential economic operators who they think may be interested. Thus, where purchasers are familiar with a economic operator, maybe as a result of previous work or of general market profile, it may work to the economic operator's advantage. This is particularly true where the purchaser is aware of a economic operator's interest in a particular sector or field of activity.

As indicated in H5, there are also circumstances which justify recourse to less competitive procedures and which allow purchasers to select a number of candidates whom they will invite to submit tenders. There is no doubt that such procedures could be used to prefer a particular economic operator but they may also be used legitimately to the benefit of economic operators. Those who have a high profile in a given market, those who have a good reputation in government circles and those successfully worked with the public sector or the contracting entity before will be in a good position to receive such an invitation based on their quality and reputation.

Economic operators who are specialised in particular fields will participate in trade fairs, will be active in trade associations and may contribute to the relevant technical press. All of these are consulted by and encourage the participation of both the public and private sectors.

The government's technical officers also need to keep abreast of technical developments and will need to gather information on the most recent developments and innovations which affect their field of technical expertise. Such officers will be well aware of high profile and reputable economic operators who are active in the sector. When such technical officers are consulted, as they will be, on reliable operators in the field, economic operators who have positioned themselves in the market will stand a better chance of attracting the interest of the public purchaser. The success of such a public relations exercise depends on the amount and quality of the information the potential client has about the economic operator. Whilst, as we will see below, it is not a good idea to attach general brochures to tenders, there is no reason that such brochures should not be provided as part of a more general marketing campaign. However, any information must be up to date and accurate and must be relevant to the market. Potential economic operators need to be able to showcase their strengths.

At a more direct level, it is important for economic operators to cultivate and maintain a good (and professional) relationship with existing and potential clients. This is not to suggest that decisions will be made on the basis of personal relationships nor that economic operators should overstep the mark and seek to enter into improper relationships with potential clients. But a good working relationship will establish a economic operator's reputation for professionalism, efficiency and reliability which are all factors which will be important to the purchaser. Maintaining contacts may be done through informal and chance meetings at trade fairs or industry gatherings, for example. They may take place at the occasion of applications to register or to maintain registration on lists qualified suppliers.

They will also result from working relationships on existing contracts. It is important for the economic operator to demonstrate at all times the strengths that make him a successful economic operator. These occasions should be taken to inform the potential clients of improvements and developments in the economic operator's resources and experience, indicating the experience of new assignments and pointing out any additional skills or staff acquired.

Even if the economic operator does not know the client personally, there is no reason that it should not make the effort to do some background research. Successful economic operators will research potential clients so that they come to know what to expect. There is little difficulty in researching the structure of the organisation itself and its field of activity. Previous projects will also often provide an insight into the type of projects it prefers to conduct and what sort of goals and objectives it might have. Clients do not always buy or want to buy standard off-the-shelf equipment or to accept standard designs and quality. They will have their own programmes and objectives their own vision of what they want to achieve. Economic operators who are able to tap in to this vision and show the clients that they understand their objectives, support them and share them will be in a far better position than economic operators who merely respond mechanically to solicitation documents.

Researching past projects may also reveal future plans either as planned extensions of previous projects or as an inevitable consequence of them. The Directives require purchasers to publish contract award notices and monitoring such notices could enable the clever economic operator to gain a picture of the purchaser's spend profile. Being able to foresee what a potential client may want and what he is likely to buy will give a economic operator an edge over his competitors and, possibly, a head start.

But foreseeing what public purchasers may but in future is not only a question of guesswork, In addition to the publication of contract award notices, the Directives themselves provide a mechanism for contracting entities to disclose their annual procurement plans. This is done by way of prior information notices (in the public sector) and periodic indicative notices (in the utilities sector.

The function of the public sector *prior information notices* (PINs) is to forewarn potential economic operators of forthcoming contracts or framework agreements which will be advertised by means of a notice.

- In the case of works contracts, the notice is used to forewarn contractors of works contracts which will exceed the normal threshold value. This notice is to be sent to the Office of Official Publications or published on the buyer profile as soon as possible after the decision approving the planning of the works.
- In the case of supplies, however, the PIN does not apply to individual contracts. The contracting entities must make known, as soon as possible after the beginning of their budgetary year, the intended total procurement by *product area* which they envisage awarding during the subsequent 12 months where the total estimated value is not less than €750,000. The product area is to be established by the contracting entities by means of reference to the nomenclature CPV.
- As with supplies, intended total procurement in each of the service categories listed in annex XVIIA which the contracting entities envisage awarding in the 12 months following the beginning of their budgetary year, are to be the subject of an indicative notice where the total estimated value is not less than €750,000.

Apart from references to the CPV, the term product area is not defined. Some contracting entities use this, however, to define their requirements according to what can be supplied by the same supplier. For example, computing equipment, desks, chairs, paper and staplers may have quite different CPV references but they are all items which could be supplied by one type of supplier: an office equipment supplier. If this approach is taken, then the PIN can also be used to disclose the existence of large volume contracts for particular types of supplier.

In the utilities sector, the functions of the utilities sector *periodic indicative notices* may be different. First, they may be used simply as an advance warning mechanism as they are in the public sector. They are intended to inform potential suppliers that there is likely to be procurement, possibly involving contracts below the threshold value, in classes of goods they are able to supply. Secondly, however, a call for competition may itself be made by means of a periodic indicative notice. Where such a periodic indicative notice is used to make a call for competition, the notice must refer specifically to the supplies, works or services which will be the subject of the contract to be awarded and must indicate that the contract will be awarded by restricted or negotiated procedure without further publication of a notice of a call for competition and invite interested economic operators to express their interest in writing. All candidates must subsequently be invited to confirm their interest on the basis of detailed information on the contract concerned before beginning the selection of economic operators or participants in negotiations; and the notice must be published not more than 12 months before this invitation is sent.

These notices are not compulsory but the advantage for the contracting entity is that the time limit for the receipt of tenders is reduced where such a prior or periodic indicative notice has been published. They may be published in the *OJEU* or on a 'buyer profile'. For economic operators, they offer an opportunity to foresee what contracts will become available during the course of a year and would enable them to plan accordingly.

Note:

A 'buyer profile' is a new concept which refers to an internet site on which contracting entities can publish information relating to the contracts. It may be used as an alternative to the *OJEU* but is not compulsory. Where it is used, a notice to that effect must also be sent to the *OJEU*.

As the introduction of the new public sector dialogue procedure shows, there are also cases where the contracting entities cannot always specify in advance what it is they need, either because, for example, the project is innovative and requires new technology or because the requirements may give rise to different technologies. In such cases, economic operators may be invited to discuss technical solutions with the contracting entity. Such a procedure is based on an advertisement and, although, a firm's reputation may lead to a direct invitation following the publication of the notice, the whole process takes place within the context of a finite procedure. However, economic operators with particular technical expertise can also assist at an earlier stage and, thereby, begin to develop a good working relationship with contracting entities.

As already discussed in H4, economic operators are permitted to discuss technical issues with contracting entities before any procurement procedure is launched To get the information he needs, the purchaser will need to communicate with potential economic operators but doing so in the context of a competitive bidding procedure may be a breach of the rules because discussions are generally not permitted with the economic operators during the procedure.

The Directives allow (in their recitals) the possibility of discussing technical specifications with potential economic operators in advance of any contract award procedure. It is referred to as technical 'dialogue'. With the crucial proviso that any discussions should not have the effect of precluding competition, the recitals of the directives provide that 'before launching a procedure for the award of a contract, contracting authorities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications…' The definition of technical dialogue means that such discussions are *prima facie* permitted. They must not, of course, have the effect of precluding competition and so should not provide any potential economic operator with an unfair competitive advantage by, for example, setting the technical specifications by reference to those met by one economic operator, national or otherwise.

2.2.1 Identifying Potential Tenders

In the same way that offering up 'cut and paste; tenders is not particularly efficient and often counter-productive, it is not efficient either for an economic operator to submit tenders for every contract that is advertised. Indeed, this attempt to respond to each advertisement nay be the cause of the poorly drafted tender in the first place so that the economic operator is itself responsible for its lack of success.

The preparation of tenders requires a great deal of effort which translates into the expense of time and money. If the chances of winning a tender are remote, then it is open to question whether the economic operator's resources would be better used elsewhere.

The problem of the cost of tendering is also recognised in the procurement procedures that are made available. Though not stated explicitly in the current directives, the rationale behind the use of the restricted procedure was set out in an earlier directive. One of the reasons why a restricted procedure may be preferred is that it can be used to reduce the tendering costs by splitting up the process into two stages: pre-qualification and tendering. Preparing for qualification is much less onerous than preparing a full technical tender and, by separating out the two stages, a purchaser is first able to concentrate only on the issue of qualification. The benefit for the procuring entity is that it can then invite only those candidates who have a serious chance of winning to submit a full technical bid, thus avoiding the need to evaluate a large number of technical tenders which have no realistic chance of being chosen because the economic operators who have submitted them arte simply not qualified. The benefit for the economic operators is that, if they are not qualified, they are spared the expense of preparing a full technical bid.

Smart economic operators will, however, conduct their own similar exercise for each contract weighing up the chances of success with the costs of submitting a tender. Preparing and submitting a quality tender where the chances are success are limited may be a waste of resources. Economic operators will need to be selective so that their resources are used efficiently and effectively. This involves a cost benefit analysis which takes into account any number of factors.

Some of these factors may be the result of the process itself; others will be the result of the economic operator's own position or the general competitive environment. For example, formal tendering procedures impose certain costs. In those member states which maintain high transaction costs for lower value contracts (by applying the full open or restricted procedures for low value contracts, for example), economic operators may be discouraged from tendering at all. If there are alternative private markets, economic operators may look to these as outlets for their goods and services. Different contracting entities may apply different standards and economic operators will be attracted by procedures which are less costly. Neighbouring member states may also do without unnecessary formality and the intelligent economic operator will start looking further afield for potential contracts. The huge benefit of the directives for economic operators is that they can look for and take the opportunities offered by different contracting entities in the different member states.

Making such assessments also depends on the overall competitive environment. This will include such things as the market conditions and the existence and quality of the potential competitors. It is also here that the results of market research will become useful since that research should also disclose the competitive situation. Knowing when to tender is also a question of knowing when not to tender. Where competition is fierce and where the economic operator cannot offer any discernible advantage over the competition, then the cost/benefit analysis becomes critical.

The factors to be taken into account in this cost benefit analysis will depend on the particular circumstances. Some will be irrelevant, others will become important in respect of one contract or one contracting entity in particular. Some will require no thought on the part of the economic operator; others can only be considered properly after further investigation. Some of the factors that may need to be taken into account include:

- *the competitive environment:* what chances does the economic operator have of winning the tender; does the contracting entity have long standing relationships with other economic operators; is the contract an extension of a previous contract; has the economic operator won any work from this contracting entity before; how well was that contract performed and what is the relationship with the contracting entity; who are the competitors and how do they compare; how many of them are there (this will be known in restricted procedures for example); do the competitors benefit from any state support or subsidies; will you get any support, especially if the contract is abroad;
- *how competitive is the process:* how clear is the tender specification (seek clarifications if it unclear); does it look as if the specifications are drafted to favour certain competitors (this may be unlawful but difficult to prove)[do you have the documents needed to submit the tender; can you get them; how will the tenders be evaluated; does that work in your favour.
- *preparation costs:* what costs are involved in terms of tender preparation drafting, printing, sending; do you have the staff and are they available to prepare the tender; how do these costs compare to the likely profit; have you already spent time in pre-qualifying for the contract and marketing to client; would these costs be lost if you fail to tender; are you required to submit a tender security and/or performance security; what is the cost of this (does it impose an unacceptable burden, *e.g.* where collateral is required); if tendering in another country, will your security be acceptable; will you need to obtain one from a foreign bank; are there any translation costs involved; does that require services to be bought in or can you rely on an existing foreign associate or partners;
- *project costs:* can you accurately ascertain project costs and eventualities; is there a price escalation or variation clause; will these costs outweigh the anticipated profit; will the project have a knock-on effect on other contracts you may have or are planning in terms of the effect on capital and resources which may be diverted; does the project require extensive back office support, does it necessitate additional management time, for example, for the creation and operation of joint ventures or other partners or sub-contractors; where is the contract to be performed; is that acceptable; does it require any additional measures (staff allowances, security measures)

- *price:* how competitive is your price likely to be. Can you undercut the competition; are you in the position of using otherwise under utilised staff and unused resources, can you take advantage of particular bargains (allowed by the directives); are your competitors able to undercut you for similar reasons; do any competitors benefit from State aids (lawful or otherwise); in what currency will you receive payment; does this have any currency exchange rate issues; will you requires additional (foreign) financial services; will you need to take out foreign loans; are there any inflationary pressures; what are the insurance costs;
- *client experience:* how has been your previous experience with the client in terms of working relationship, management and logistical issues. Can you foresee any implementation issues; what are the client's terms of payment; if it does not pay on time, are there interest payments foreseen; is it an important client that you simply cannot refuse; is it a prestige project/client;
- *capacity:* are you capable of completing the contract on time and at cost; do you have the required skills and resources; do you need to provide additional training or buy in more resources and skills.

2.3 IDENTIFYING POTENTIAL CONTRACTS

The Directives of course provide for a series of notices to be published in the *Official Journal of the European Union (OJEU)*. These are the primary means of announcing competitive bidding procedures in the Community. As well as providing model notices for those cases where publication is required, the Directive also give the contracting entities the option of having published in the *OJEU* notices announcing works, supplies and services contracts which are not subject to the publication requirements of the Directives, that is, where the contracts are below the necessary threshold value.

Model notices indicating the information required are contained in the annexes to the directives. These annexes contain references to the information which must be published in the notice sufficient to provide potential economic operators with what they need to decide whether or not to submit a tender and where and when they should do so.

Publication of all notices means publication in the *Official Journal of the European Union* published by the Office for Official Publications in Luxembourg. The *OJEU* is published in a number of volumes: volume 'L' which contains legislative texts; volume 'C' which contains information notices regarding proposed legislation and non-legislative notices and volume 'S' which contains the procurement notices. All of these volumes are available on a subscription service either together or separately. Details are available from:

[insert contact details for OJEU]

The 'S' series is published almost daily in all the official languages of the Community and each edition publishes all of the notices referred to in the directives.

These include:

[TOC of 'S' to be inserted]

The contract notices are published in full in their original language and a summary of the important elements of each notice shall be published in the other official languages of the Communities, the original text alone being authentic. The translation of the notices is undertaken by the Office for Official Publications so contracting entities need only submit the appropriate notice in their original language.

As well as publication in hard copy, the Office for Official Publications also operates a computer database system known as the Tenders Electronic Daily ('TED'). This effectively provides an on-line version of volume 'S' of the *OJEU* which may be accessed electronically. It has the advantage of being searchable through the use of certain keywords and variables (*e.g.* CPV references) and offers a notification service. Such services are also offered by private companies operating in the European market.

The website address of the TED database is:

[insert address]

Taking advantage of new electronic means of communication, the Directives also provide that the prior information and periodic indicative notices may also be published on a 'buyer profile'.

In addition to advertising notices in the OJEU, contracting entities are, as we have seen, also entitled to publish them in any national journal or in the press of the country of the contracting entity provided that this is not done before the date of dispatch of the same notice to the Office for Official Publications. In addition, the date of dispatch should be mentioned in any national publication.

[Possible localisation: if there is a national web portal or national Official Gazette where such notices are published, they should be included here]

Another important condition is that publication of the tender notice in the national press should not contain information other than that published in the OJEU. The conditions are intended to ensure the integrity of the procurement rules by preventing national being given advance oir improved warning of the contracts which will be advertised.

In many cases, the notices will also be published at the national level and in the specialised trade press. Publication in the OJEU is the guarantee of equal opportunity and non-discrimination but a large number of opportunities will be picked up by economic operators through the more traditional channels of the local or international trade press. Nevertheless, more and more contracting entities are making use of the OJEU as their sole source of advertising. Economic operators wishing to make the most of the opportunities available both at home and abroad would, therefore, be well advised to ensure that they adopt a way of accessing and checking the notices published in the OJEU either on- or off-line.

2.4 SUBMITTING TENDERS

Tender preparation is a complicated and sophisticated task. As already stated in the introduction, it is not (or should not be) a mechanical process consisting of providing standard documents and reproducing existing templates or models using the copy/ paste functions of the computer. Success requires more effort.

At a purely logistical level, it is important to manage the process of putting together the tender. This means putting a single person or identifiable team in charge of tender preparation. Among other things, they will need to coordinate:

- the drafting of the tender itself, *i.e.* the narrative parts;
- information gathering which will include the collection of the information and documents required to comply with the requirements regarding the technical specifications and the selection and award criteria;
- compiling of the tender which implies putting g together the various components such as narrative, required documents and certificates; identified means of proof; samples or brochures, as appropriate;
- the proof reading of the document, not only in terms of the narrative but also in respect of any calculations, ensuring that there are no arithmetical errors;
- producing the tender which might include specialised printing and/or binding; and
- sending/delivering the tender in the form stipulated in the tender documents and to arrive at the time and place specified.

This is not a task that should be underestimated. Even the simplest tenders will benefit from good preparation and presentation. Whilst coordination can be carried out by a single person, it is inadvisable that the whole tender should be prepared by a single person. A good tender will generally require the input of many. This can best be achieved through a sensible division of labour with central coordination.

In preparing the tender, there are a number of issues that should be taken into account. They may sound obvious but mistakes are easily made so it is critical to exercise due care and attention. Some points to bear in mind include:

- read the invitation to tender carefully together with attachments; these will contain all the information that is required to complete a tender to the satisfaction of the contracting entity; the attachments will also often contain essential information and should be neglected;
- check all the tender documents thoroughly for missing pages or errors; it is not inconceivable that the contracting entity has made a mistake in compiling and sending the tender documents and it is better to find out about these at the beginning of the tender preparation stage rather at a time that the ender is being finalised since it may well be too late to correct any errors (such as missing certificates or other information);

- if anything is unclear or cannot be properly understood from the tender documents, seek written explanations and clarifications as provided for in the tender documents; do so early enough to allow for clarifications and any consequential amendments you need to make; if those amendments are likely to require more time for the completion of tenders, inform the contracting entity immediately so that it may, where appropriate, extend the time for tender preparation and submission;
- remember that, even in the absence of mistakes or missing pages, invitations to tender are not always complete, quite often because the contracting entity has not been able to articulate its needs fully; in those situations, you should
  - use your own research to complete the picture and respond appropriately;
  - decide whether you need to propose different solutions or alternatives.

In finalising and submitting the tender, there are some cardinal principles to follow to ensure that you present the best possible tender you can. Remember to

- Communicate efficiently without making unnecessary comment;
- Convey the required information and only the required information;
- Present the tender professionally,
- good writing skills
- ensuring that it is easy to read, straightforward and concise
- Use the mandated forms and submit the required certificates
- Follow the formal instructions of the tender documents (with respect to number of copies, submission format such as submission in sealed envelopes, etc.);
- Ensure responsiveness of the tender in technical and substantive terms
- Answer all questions properly, completely and accurately
- Submit your tender within the specified time limits – preferably well in advance of the tender submission deadline.

Public procurement
for economic operators

MODULE H

Challenging breaches of the procurement rules

PART 7

SECTION 1
INTRODUCTION

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. The possibilities available to tenderers to challenge perceived breaches of the rules
2. The measures that can be taken in the national courts
3. The way in which the European Commission can assist directly
4. The specific remedies provided by the Remedies Directives

1.2 IMPORTANT ISSUES

The most important issues in this chapter are understanding:

- The basic and common safeguards provided by EU law and the Directives
- The role of the tenderers
- The role of the European Commission and the Court
- The tools at the disposal of tenderers

This means that it is critical to understand fully:

- The scope of action of the national courts, the European Commission and the European Court
- The precise remedies made available under the Remedies Directives (as amended)
- The procedures that apply to each process
- The time limits that may apply

1.3 LINKS

Module H sets out basic information for economic operators.

Further information on issues addressed in module H is set out in modules A to G. The intended users of modules A to G are the contracting entities, but users of module H wanting to know more about a particular issue are referred to modules A to G.

There is a particularly strong link with the following:

- Module F1 on remedies

1.4 RELEVANCE

This information will be critical to tenderers who feel that they have been unfairly treated and can point to what looks like a breach of the EU procurement rules. This section takes tenderers through the possibilities for challenge and the procedures that apply, so that they are in a position to defend the rights they have been given under the Directives.

SECTION 2
NARRATIVE

2.1 INTRODUCTION

The procurement rules of the EU Directives will be of little value if they are not applied properly by the contracting entities. Improper application can result from mistakes, oversight, or misunderstanding or it could be the result of deliberate action on the part of a procurement officer. Whatever the reason, it is the economic operator who is usually in the best position to identify a possible breach and the Directives provide the tools.

In H7 we will consider the different possibilities offered by Community legislation. These are based on two main Directives

(1) the Remedies Directive for the Public Sector: Directive 89/665, and

(2) the Remedies (Utilities) Directive: Directive 92/13

These Directives have now been amended by a new Directive: Directive 2007/66.

Where economic operators do notice problems or believe that breaches have taken place, the first course of action should always be to contact the representatives of the contracting entity to indicate that a breach may have occurred. If the breach is the result of a mistake, then this will give the contracting entity the opportunity of correcting that mistake and this is what happens in the vast majority of cases. However, if the contracting entity does not remedy the mistake, then a economic operator can then take further action. The Directives themselves provide for a series of possible remedies which may be used either in the national courts or, where they exist, before special review bodies ([Localisation: like XXXX in XXXX]).

The 2006 amendment also allows member states to turn this notification into a request for first review by the contracting entity. If that is the case, then making the request (by fax or electronic means) will trigger a 5 day suspension of the procedure. Where this initial review stage is provided for, therefore, it will offer economic operators a valuable first strike which will be taken seriously given the suspension. This suspension does not interfere with the award of interim measures. [Possible localisation: if this option has been taken up in XXX, it will need to be described].

This is not the only possibility, however. It is also be possible to make a complaint to the European Commission which, if it considers that a breach has taken place, can itself take action against the member state.

As with the main procedural directives, the aim of the Remedies Directive is not to harmonise the laws of the member states in this respect, but to lay down minimum criteria and safeguards to ensure protection of the rights flowing from the procedural Directives. This has been necessary in the light of the very different procedures available in the national jurisdictions which offer flagrant disparities in the means of protection offered to the subjects of Community law. This chapter will consider only those minimum criteria set out in the Remedies Directives.

2.2 ENFORCEMENT IN GENERAL

The enforcement of Community law, including the enforcement of the procurement directives is not governed solely by the Remedies Directives. National courts have a role in ensuring the application of Community law in general and the European Commission has a specific role to play as the guardian of Community law. These roles also need to be considered.

2.2.1 Using the National Courts

The Directives must be transposed into national law, thereby providing national rules which implement Community rules. The rights and obligations of citizens (economic operators) created by Community law must be protected by the national courts or any other recognised tribunal. A number of cases have been brought by individuals before national jurisdictions which dealt with infringements of the procedural Directives. Such infringements were dealt with under the existing procedures and provisions of national law. It was, however, precisely the disparities between the national jurisdictions both in terms of remedies available and the effectiveness of these remedies which led to the adoption of the Remedies Directive which is designed to put economic operators in all member states on a similar, if not always entirely identical, footing.

Apart from the specific enforcement measures provided for in the remedies Directives, the Treaty, bolstered by the European Court of Justice (ECJ), has always provided means of redress for infringements of both primary and secondary legislation of the Community. This flows from the very nature of Community law itself through the creation of rights which may be relied upon by individuals in their national courts (see H1).

It is well established that Community law is capable of creating rights which may be relied upon by individuals (including companies before their national courts which are bound to protect them. This happens where the provisions of the Treaty have direct effect, *i.e.* they have the effect of creating rights without further implementation. This is not automatic and is subject to certain conditions. Direct effect is assured if the obligation imposed on member states is

- clear and precise,
- unconditional and,
- in the event of implementing measures, the member states or Community institutions are not given any margin of discretion.

The case of Directives is more problematic than the Treat provisions since they are generally binding only as to the result to be achieved and only upon each member state to which they are addressed, but leave to the national authorities the choice of form and methods. Nevertheless, the ECJ has also confirmed that directives can also be directly effective where they also fulfil the same three conditions.

However, the direct effect of directives is limited in two ways.

- First, directives are binding only as to the result to be achieved.

  Directives contain a date by which that result is to be achieved and they may *not* be relied upon until the member states have had time to employ the chosen forms and methods of implementation.

Once that time limit is passed and the member state has failed to adopt the implementing measures required by the directive, it may not rely, as against individuals who act in conformity with that directive, on its own failure to perform the obligations of the Directive. Economic operators could also rely on direct effect where, following the date for implementation, the member state has implemented the directive but has done so incorrectly. In those circumstances, the direct effect of the directive will ensure that the provision of the directive will override the deficient national implementation. This means that if a member state has not implemented the directives properly and a contracting entity follows the incorrect implementation, a economic operator can challenge any resulting breach of the Directives where it is harmed by the breach.

- The second limitation is that a directive is addressed to member states.

  The obligation to implement it is on them and nobody else. The term 'member state' includes emanations of the state and will generally include all of those contracting authorities identified in the directive so that economic operators could rely on the direct effect of the directives against the contracting authorities defined in the procedural directive.

  It may not, on the other hand, cover some of the private contracting entities identified in the utilities sector since they are not necessarily 'emanations of the state'. In the utilities sector, therefore, a economic operator would need to be sure that the utility could be considered as beiong a part of the state before seeking to challenge it in the national court under the doctrine of direct effect.

When looking at the direct effect of directives, the ECJ was asked to look at individual provisions of the various procedural directives. Provisions must be looked at in turn and separate articles must be analysed individually. The ECJ held, for example, that the substantive rules relating to advertising, conducting a competitive procedure and the evidence and criteria for selection and award all generally have direct effect.

To ensure consistency throughout the Community, the national courts are entitled and sometimes required to refer questions relating to the validity and interpretation of Community acts which arise in the context of proceedings before them to the ECJ. This is done under a procedure set out in Article 234 of the Treaty. Essentially, Article 234 gives the ECJ of Justice jurisdiction to give preliminary rulings concerning the interpretation of the Treaty and the interpretation and validity of the acts of the Community institutions.

A national court or tribunal is entitled, and if it is a court of last instance, obliged, to ask the ECJ for a preliminary ruling if a question of interpretation or validity is raised before it either by the parties or by the court itself of its own motion. In order to make the reference, the national court must consider that a decision on such a question is necessary to enable it to give judgment. The question or questions are sent by the court making the reference but, in practice, it is the parties to the case and their lawyers that actually draw up the question. Often the ECJ will reword the question in order to give the most appropriate answer but it is important for the parties to the dispute to seek to frame the questions that will provide the answers that they need.

The importance of the procedure lies in the way it ensures the uniform application of Community law. In maintaining the law and acting as ultimate arbiter of Community law it ensures that the rights of individuals flowing from the Treaty and directly effective measures adopted under it are protected equally and uniformly throughout the Community.

2.2.2 How the European Commission can help

The enforcement measures provided for by the Remedies Directive are perhaps only the latest tools available to ensure compliance with the procedural Directives. In the absence of specific remedies to correct infringements of the procurement procedures, the Commission has in the past exercised (and continues to exercise) its traditional role of guardian of the EEC Treaty.

For this purpose it has been granted powers of supervision and enforcement by the Treaty which it has used successfully in the area of public procurement. Many of the early cases dealing with infringements of the procurement Directives which came before the ECJ were the result of Commission action either at its own initiative or on the basis of a complaint from an individual economic operator. As well as those few cases which reach the ECJ, the Commission deals with an increasing number of irregularities which are resolved informally. On the other hand, the limitations of the Commission's resources are such that it can carry out no more than a highly selective review of the application of the procurement procedures in the member states.

Article 226 of the Treaty gives to the Commission a crucial role in supervising the compliance of member states with their obligations under the Treaty including, among other things, compliance with specific directives such as the procurement directives.

If the Commission considers that a member state has failed to fulfil an obligation under the Treaty, it may, after following certain procedural steps, bring the matter before the ECJ. In the case of directives, this usually means the non-implementation or the incorrect implementation of directives into national law.

The procedure is often used, although most cases are settled at the administrative stage before proceedings are begun in the ECJ. In the event that the matter is brought before the ECJ and the latter decides that a member state has not fulfilled its obligations, the state is obliged to take the necessary measures to comply with the judgment. For the competent authorities of a member state (including the national courts) this means a prohibition against applying a national rule recognised as incompatible with the Treaty and, if the circumstances so require, an obligation on them to take all appropriate measures to enable Community law to be fully applied. Member states may also be obliged to pay a fine.

The procedure may be started by the Commission either of its own motion or as the result of a complaint by an individual.

Even if the complaint is against a specific procuring entity, the Commission's actions will be against the member state. Whether based on its own initiative or on the complaint of an individual, the procedure is essentially the same. The basic procedure is as follows:

(a) **The complaints procedure**

The Commission finds out about member states' failures in many ways. It monitors national implementing measures and, in the field of public procurement, must normally be informed of national measures implementing the procurement Directives (this is provided for in the Procedural Directives). There are many instances of infringement, however, about which the Commission simply does not hear and it is here that individuals and companies which have been wronged have a role to play.

Where an individual or company feels that a member state is in breach of its obligations under the Treaty, he can make a complaint to the Commission. This complaint may be informal or formal. A company which feels injured may wish to remain anonymous and may prefer that the Commission does not disclose his identity to the member state or government agency concerned. This might be to maintain business confidentiality or perhaps because there is a fear of commercial retaliation. In such circumstances, the individual could approach the Commission informally to put the services concerned on notice of potential breaches of Community law. This may be possible where the breaches complained of are generalised and not `traceable', but is more difficult where it is the result of an isolated incident.

However begun, the complaint procedure leads to legal action by the Commission and does not directly involve the individual complainant. Informal complaints serve only to remove even further the possibility of identification. In practice, however, the absence of a known individual complainant may deprive the Commission of a specific incident to which it may need to refer. Informal complainants may neglect to supply the Commission with sufficient information and evidence on which to proceed. Although the legal procedure following a complaint is a Commission, the complainant will generally be informed of the progress and will, therefore, have the opportunity to make further observations should that be necessary.

(b) **Making the complaint**

Cases involving public procurement are not subject to strict procedural requirements. Nevertheless, experience has shown that there are certain elements which should be included in any complaint. The complaint should contain basic information about the complainant as well as the facts of the case.

The most important aspect of the complaint is to describe, in as much detail as possible, the full facts of the case. Strictly speaking, it would be for the Commission to determine and prosecute any breaches uncovered by the facts and, even if the complainant does refer to possible breaches, the Commission may not always take them all into account. It is, at the end of the day, for the Commission to decide on the breaches it will pursue. However, for the same reasons as it is necessary to produce a detailed factual statement, it is preferable to help the Commission as much as possible. Where a full list of potential breaches of the Treaty is put before the Commission, the Commission services will be in a better position to investigate the allegations. The complainant will have more time (and more interest) in finding and substantiating the breaches of the member state and will have, at its disposal, more time, information and resources.

The Commission itself will not be able to award damages as compensation for any loss complained of (although a national court might) but the existence of such damage will help establish the seriousness of the complaint. In certain very serious cases, the Commission may go to the ECJ for interim relief where urgent action is necessary to avoid such damage.

An indication of the procedural steps taken at national level to remedy the situation will also be helpful. It is not a hard-and-fast rule that the Commission will only act after other national remedies have failed but it is certainly a significant factor. Quite often, it will become clear that the national administrative or political procedures are inadequate to protect the rights of individuals in the face of a breach of Community law or even non-existent. In such cases, proof of these failures in the national system may incite the Commission to further action.

Any such complaint should be sent in writing to the attention of DG Markt/ Procurement.

(c) The procedure under Article 226

Once the complaint has been delivered, the case is out of the complainant's hands. The Commission services may request further information from the complainant but the conduct of the case from this stage on is entirely the responsibility of the Commission. The complainant may not force the Commission to proceed and with-drawing the complaint will not necessarily stop the procedure. This is, of course, a tactical weapon in the hands of potential complainants.

If the Commission decides that there are breaches of Community law, it will take formal steps to correct the situation. It will normally use the procedure provided for in Article 226 of the Treaty. The essential steps are as follows:

- *Contacting the member state authorities*

  The Commission will contact the member state authorities concerned, raising the alleged infringements and requesting the member state to submit its observations. It will do this by way of formal notice. There is no time limit for this part of the procedure and much will depend on the importance given to the infringement by the Commission services.

- *Reply by member state*

  The member state will usually reply to the Commission's objections. The complainant may be informed of the different positions (but there is no 'right' to this information) and he may wish to make further comments. There is guarantee that the complainant will be in a position to provide more. If the Commission is not satisfied with the member state's response, it will proceed further.

- *Reasoned opinion from the Commission*

  The Commission issues a 'reasoned opinion'. This will include a full statement of the facts and a formal statement of the infringements of Community law alleged to have taken place. The reasoned opinion will require the infringements to be brought to an end but will not normally suggest the measures to be taken. There is no set time-limit between the previous stage and the issue of reasoned opinion but there will be a time limit within which the member state is required to comply. This would usually be set at two months.

- *ECJ*

  If the member state does not comply within the time limit set, the matter will be brought before the ECJ in Luxembourg. If the final result is a judgment against the member state, the latter will be obliged to bring the infringement(s) to an end. The complainant does not have any standing in the ECJ procedure, may not be represented and may make no comments even as an observer.

(d) **Interim measures**

Article 243 the Treaty gives the ECJ the power to prescribe any necessary interim measures in *any* cases before it. Given that cases brought before the ECJ may often take up to two years before final judgment, this power will be of particular value in cases in which there is a degree of urgency. The application for interim measures must be made by a party to a case before the ECJ and must relate to that case. Thus, in the current context, it is only the Commission (and not the complainant) that would have the right to seek interim relief in a case which has already been brought before the ECJ.

The application for interim relief which may be made at the same time as, but in separate documents to, the commencement of proceedings will be heard either by the President or the ECJ (the applications, in all the public procurement cases so far, have been heard by the President). The application will normally be served on the opposite party who will be given a short period within which to submit written or oral observations. However, the President may, exceptionally, grant the order ex parte, before the observations of the opposite party have been submitted.

The principles governing the grant of interim relief have been developed in the case law of the ECJ. In practice, the ECJ will expect the party seeking interim relief to show a *prima facie* case and the necessity for immediate action to avoid serious and irreparable harm (urgency). An order will be granted unless the opposing party can show that he, too, would suffer serious and irreparable harm (the balance of interests test).

2.3 THE COMMON REMEDIES OF THE REMEDIES DIRECTIVES

The basic provisions of the directives are the same but there are some material differences which will be explained below.

Article 1 of both Directive sets out the aims. These are to ensure that decisions taken by contracting entities taken in the context of contract award procedures falling within the scope of the relevant procedural Directives may be *effectively and rapidly reviewed* with regard to their compatibility with Community law in the field of public procurement.

In the utilities sector, the Remedies Directive provides for the possibility of using the same three specific remedies to be made available in the national courts and before national review bodies as in the case of the public sector. These are interim measures, set aside of decisions and the award of damages. However, whereas damages will always be available, member states are free to choose between two alternative but concomitant systems of remedies. The first system is the same as the system foreseen in the public sector and concerns the powers to award interim relief and set-aside. As in the public sector, the Commission is also given specific powers to intervene in addition to those it possesses under Article 226 of the Treaty. The second system refers to the power to award dissuasive payments instead of interim measures and set aside.

The 2006 amendment also introduced a mandatory 'standstill' period. This is an important innovation and one which may benefit economic operators seeking to challenge alleged breaches.

2.3.1 Application

The Remedies Directives apply in the case of those contracts which fall within the scope of the procedural Directives. It would not apply, for example, to those contracts which do not meet the value thresholds of those Directives.

The remedies are available against decisions taken by a contracting entity, although the term 'decision' is not defined. It is clearly intended to cover the use of discriminatory technical, economic or financial specifications; decisions to include or exclude particular economic operators or to award or not award contracts to particular economic operators are also 'decisions' for the purposes of the Remedies Directives. These 'decisions' may only be made on the basis of the selection and award criteria permitted by the procedural Directives.

In those cases where the contracting entity has not commenced a contract award procedure at all or advertised a contract notice where it should have complied with the Directives in the award of that contract, any resulting contract will be deemed to be a "direct illegal award" and will be 'ineffective'. This concept of ineffectiveness has now been introduced through the 2006 amendment and follows a series of cases in which the ECJ found that there had been such direct illegal awards and permitted a challenge even though there may not have been an actual 'decision' open to challenge.

The remedies must be available on substantive and procedural conditions which are no less favourable than those applicable for remedies for purely national situations. Measures adopted pursuant to the Remedies Directives must offer the same protection as is offered by the national provisions which have evolved in the meantime suggesting also that the otherwise national procedures may not offer less.

Under the EC annexes to the WTO's Government Procurement Agreement, the benefits of the Remedies Directives have also been extended to economic operators from GPA signatory states so that contracting authorities which are simultaneously contracting authorities for the purposes of the GPA will have to grant the same remedies to such economic operators in the event of a breach of the applicable procurement rules.

2.3.2 Interim Measures

The first remedy which must be made available is the possibility for the tribunal to take, at the earliest opportunity, interim measures by way of interlocutory procedures. The aim of these interim measures may be twofold:

- to correct an alleged infringement of the procedural Directive;
- to prevent further damage to the interests concerned.

The measures must include at least two remedial possibilities which reflect the twofold aims of this remedy. These are measures to suspend or to ensure the suspension of

- the procedure for the award of the public contract, or
- the implementation of any decision taken by the contracting authority.

This latter remedy may be used in conjunction with the set-aside remedy available in cases where a decision has been taken allegedly in contravention of the procedural Directive. The availability of interim measures in these circumstances ensures that action may be taken swiftly even where a decision has been made.

This is a particularly important right in view of the fact that infringements of the procurement rules may only come to light at the end of the contract award procedure where a decision has been taken. However, the Remedies Directives give to the member states the option to provide that, once the contract has been concluded (as opposed to awarded), the only remedy available is the award of damages to a person harmed by an infringement. Of course, where the contract was awarded without following the provisions of the Directives at all (*i.e.* in the case of an illegal direct award), then the contract itself may be declared ineffective and, in certain circumstances, the contracting authority fined.

However, the ECJ has also held that the principle of effectiveness means that the remedies of both set aside and interim measures must be available against any reviewable decision. This would not be the case where the award and conclusion of the contract are simultaneous because there would be no opportunity to challenge the award of the contract before it is concluded. The right given to member states under Article 2(6) cannot, therefore, be used to exclude review. This issue came to the fore in the famous Alcatel case which led to the introduction, in the 2006 amendment, of a mandatory standstill provision following award in which to allow aggrieved economic operators to bring complaints. This is discussed in more detail in section 2.3.5.

The power to award suspensive measures is also of relevance with regard to the other measures provided for. Review procedures do not need to have an automatic suspensive effect on the award procedures to which they relate. Whether they are, in fact, suspensive is a matter for the national authorities to decide except that, where an application has been made for interim measures or for review to an independent review body, no contract may be concluded before the end of the standstill period. It would still be possible to continue with the procedure up to that point, although this would clearly be a dangerous tactic once the application for review is in place.

It may not always be appropriate or necessary to suspend the award procedure where the infringement can be corrected without disturbing the course of the procedure. The counterbalance offered by the availability of interim measures will ensure that, in cases where it is necessary, the procedures may never the less be suspended.

In providing the remedy of interim relief, the member states are free to provide that the body awarding such relief may have regard to the balance of convenience. They may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits.

A decision not to grant interim measures will not prejudice any other claim (that is, of set-aside or damages) of the plaintiff.

2.3.3 Set Aside

The setting aside of unlawful decisions gives economic operators two means of action.

- In the first place, there must be powers to set-aside or to ensure the setting aside of decisions taken unlawfully.
- This includes, secondly, the power to ensure the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure.

The member states may provide that contested decisions must be set aside (or declared unlawful, in the utilities sector) before a claim for damages is made on the grounds that an unlawful decision was taken. Once a contract has been concluded unlawfully, therefore, the cumulative remedies of set-aside and damages would be available. In other cases, where this option has not been exercised by the member states, they may provide only for damages following the conclusion of a contract.

The other aspect of this remedy is designed to enable the correction of contract documents containing unlawful technical specifications or other criteria relating to the economic or financial capability of the economic operators. It refers to all documents related to the contract award procedure including any periodic indicative notices (in the utilities sector) and notices of the existence of a qualification system.

This will be important in practice, since the illegality of such specifications and criteria will be the most visible and immediate indications of infringement of the procedural Directive. It is also a means, together with interim relief, of ensuring compliance with the Directive at an early enough stage to be of real value to economic operators who see their chances being reduced unfairly. The power to amend would also avoid the impracticality of setting aside the whole procedure in the event of an unlawful specification.

2.3.4 Damages

The third remedy which must be made available is the award of damages to the person harmed by an infringement. This may, as was seen above, be the only remedy which is made available by a member state once the contract has been concluded.

The Remedies Directives do no more than require that damages be available and do not indicate either the quantum of damages or the grounds for calculating such damages. This will be left to the national courts. In most cases, this will allow economic operators who have been rejected as the result of a breach of the directives to recover at least their wasted tender costs as well as their lost profits or a proportion of their lost profits.

To recover the full amount of their lost profits, economic operators would theoretically need to prove that, had there been no breach, they would have won the contract. In most cases, they will have been only one among a number of economic operators and, other than in the case of an award criterion based on the lowest price only, it may be very difficult to demonstrate with any certainty that a particular economic operator would have won the contract.

This depends very much on national law. [Localisation required: In XXX, for example, a successful complainant would be able to recover damages representing…]

2.3.5 Ineffectiveness

As stated above, the amending Directive has introduced the concept of contract ineffectiveness. This applies to cases where contracts have been awarded without any regard for the procedural directives at all. To provide an adequate remedy in these cases, the Directives render illegal direct awards as ineffective. This concept also applies where the contract is awarded during the standstill procedure or during the time when a suspension of the conclusion of a contract is in place.

If the contracting entity publishes a notice to the effect that it has awarded a contract with following the provisions of the procedural directives, there is a minimum time limit of 30 days from that date to bring proceedings. In other cases, there will be a minimum of 6 months from the date of the conclusion of a contract. Member states may provide for longer time limits. [Localisation: In XXX, the time limit is: xxx]

Depending on local law, the overturning of a signed contract may be retroactive (*i.e.* all contractual obligations, including those already performed, are to be cancelled, and the tenderer and contracting authority must settle their relationship under local rules) or prospective (*i.e.* only future and unperformed contractual obligations may be annulled). In the case of prospective cancellation, there must also be other penalties, such as fines imposed on the contracting authority. Such fines must be adequately high in order to punish the unlawfulness. Their amount should take into account both the seriousness of the breach as well as the contracting authority's conduct. The harmed tenderer is entitled to ask for compensation in any event.

2.3.6 The 'Standstill' Period

Following the *Alcatel* case where, in effect, the award and conclusion of a contract took place at the same time, measures have been taken in the amending Directive to ensure that economic operators can still challenge the award decision before a contract is concluded. The way this has been done is to require contracting entities to provide a standstill period of at least 10 days during which time no award of the contract can be made, enabling economic operators to bring complaints where they believe there has been an infringement of the Directives. The 10 day period applies if communications are sent by fax or by e-mail. if other forms of communication are used, the period will be 15 days. This provides economic operators with a significant opportunity and time to identify, investigate and complain about potential breaches before it is too late. The contracting entity will no longer be able to rush into signing a contract with a successful economic operator so as to avoid challenge.

The standstill provision operates at a number of levels:

- for contracts awarded in accordance with the Directives, the introduction of a 10 calendar day standstill period between the date on which economic operators are given a reasoned notification of the award decision and the conclusion of the contract;

  It is important to note that time starts running from the date of a reasoned notification, *i.e.* a notification from the contracting entity which provides the reasons for the award and for the rejection of certain tenders – remember that economic operators may seek information on the reasons for disqualification and/or tender rejection and this must be provided within 15 days at most.
- for contracts which are awarded directly without following the procedures of the Directives (*i.e.* where the contracting entity believes that the Directives do not apply), the introduction of a 10 calendar day standstill period, except in cases of extreme urgency, between the date on which the contracting entities provide 'sufficient' publicity of the award decision by way of a simplified award notice and the conclusion of the contract;
- for contracts which are concluded during this standstill period, the introduction of a concept of the ineffectiveness of the conclusion of the contract.

It is for the member states to decide what this means in their legal systems but for economic operators it means that they will be able to challenge unlawful contracts even after they have been signed.

2.4 THE COMMISSION'S CORRECTIVE MECHANISM

Article 3 of the Remedies Directives makes provision for the specific application of the Commission's general power of supervision exercised under Article 226 of the Treaty and discussed above. This gives the Commission explicit power to intervene at any time (before or after the conclusion of the contract - before the 2006 amendment, it could only act before the conclusion of a contract). It will do this where it considers that there has been a 'serious infringement' infringement of Community provisions in the field of procurement during a contract award procedure falling within the scope of the procedural Directive (before the 2006 amendment, it could act only where it saw a 'clear and manifest' infringement). It will notify the member state and contracting entity concerned of the reasons which have led it to conclude that such an infringement has been committed and request its correction.

The member state and not the contracting entity will then be given 'reasonable' time (previously, this was 21 days) from the date of receipt of that notification to communicate to the Commission one of three things:

- its confirmation that the infringement has been corrected;
- a reasoned submission as to why no correction has been made;
- a notice to the effect that contract award procedure has been suspended either by the contracting entity on its own initiative or on the basis of interim relief granted pursuant to the powers conferred by the Remedies Directives.

In the event that a member state relies on the second alternative explaining why no correction has been made, it may rely on the fact that the alleged infringement is already the subject of judicial review proceedings or that the decision of the review body is being reviewed by the independent body set up for that purpose. Where the member state relies on this provision, it must inform the Commission of the result of these proceedings as soon as it becomes known.

Where the member state has notified the Commission that the award procedure has been suspended, any lifting of the suspension or the commencement of any new contracting award procedure relating in whole or in part to the same subject matter must be notified to the Commission. This notification must also include confirmation that the alleged infringement has been corrected or, if not, a reasoned submission must be made as to why not.

Where these procedures are not followed correctly by the member state concerned, for example, by omitting to notify the required information or by failing to make the required submission or where the Commission is not satisfied by the replies received, it will be open to the latter to commence proceedings under Article 226 of the EEC Treaty. Thus, the Commission's role remains intact and it may be called upon simultaneously to protect the rights of the economic operators where those rights are threatened either by non-compliance with the procedural Directive or the inability of the national courts to protect those rights. The vigilance of the subjects of Community law will also, therefore, remain an important factor in the protection of their own rights.

2.5 THE ALTERNATIVE SYSTEM OF THE REMEDIES (UTILITIES) DIRECTIVE

This refers to an alternative system to interim measures and set aside called dissuasive payments. Previously (before the 2006 amendment) there were also two additional mechanisms provided for in the utilities sector, namely attestation and conciliation. These have now, however, been removed.

The member states make this choice between the systems either for all contracting entities or for categories of entities. If member states exercise this choice in relation to categories of entities, these must be defined on the basis of objective criteria. The term `objective criteria' is not defined in the Remedies Directive but would include such things as the nature of the contracting entities in terms of the sector covered, their size or legal status Denmark, for example, opted early on for this second system in the case of entities who carry out exploration and extraction activities

This second system consists in the power to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures (other than damages and set-aside) with the aim of correcting any identified infringement and preventing injury to the interests concerned. In particular, this will include the power to make an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented. The sum to be paid must be set at a level high enough to dissuade the contracting entity from committing or persisting in an infringement. Further, the payment of that sum may be made to depend on a final decision that the infringement has in fact taken place. Since the Directive does not specify the level of this sum other than in general terms, it is up to the discretion of the member states and/or the review bodies to set the level of the dissuasive sums either generally or in each individual case.

[Localisation required: if this system is used in XXX, this should be explained and described in sufficient detail]

2.5 THE REVIEW BODIES

The powers to be made available by the member states may be conferred on separate bodies responsible for different aspects of the review procedure. This will enable the existing practices and procedures of the different national systems to remain in place where appropriate. These bodies may be judicial in character or independent and non judicial. This gives the member states the opportunity to create bodies with perhaps more technical expertise, for example, than is the case with national courts.

Where the body is not judicial, it must give written reasons for its decisions. A guarantee must also be made whereby *any* allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 234 of the Treaty. The reason for this is that only courts and tribunals have the power and, in the case of courts or tribunals of last instance, the obligation to refer questions of interpretation to the ECJ for a preliminary ruling. Thus, where the review body does not have the power to make such a reference, its decisions must be open to a review by a body which does. Such a body must be independent both of the contracting entity and the review body.

The independent body which must be given the power to review decisions of a non judicial review body whose decisions are not subject to judicial review, is subject to certain requirements. The members of this body must be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office and their removal. At least the president of this independent body must have the same legal and professional qualifications as members of the judiciary. The independent body will take its decisions following a procedure in which both sides are heard and these decisions will, by means determined by each member state, be legally binding.

[Localisation required:

In XXX, the review body is (describe in detail and explain how it complies with the above conditions.

If possible, information should be given about how to commence proceedings, the costs involved and the likely length of the proceedings.

If there is a website for the review body which contains the relevant details, a link to the website should be included in the text.]