

MODULE E

PUBLIC PROCUREMENT TRAINING FOR IPA BENEFICIARIES

Conducting the procurement process

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Conducting the
procurement process

Preparing
tender documents

MODULE
E

PART
1

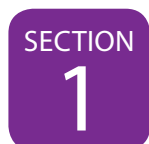
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SECTION 1 INTRODUCTION

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 laboratories 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 operators 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 performance, 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 authority 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 contracting authority
- Issues around sustainability and ongoing maintenance of the structure when it is complete

For further guidance see Appendix B.

**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

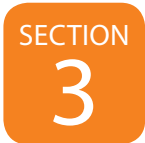
An appropriate specification is vital to the success of any purchase. This Narrative has defined the term “specification”, examined the different types of specification used by procurement practitioners, and considered the merits of each type. The benefits of using a standard and the possibility of allowing 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.



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SECTION 3 EXERCISES

EXERCISE 1 SPECIFYING A REQUIREMENT

What is a specification? Can you define this term in the box below?

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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.

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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.

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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."

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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 specifications” 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.)

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Advertisement
of contract notices

MODULE E

PART 2

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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.

MODULE
E

Conducting the
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PART
2

Advertisement
of contract notices

SECTION
1

Introduction

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.

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PART
2

Advertisement
of contract notices

SECTION
2

Narrative

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.



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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.



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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):		Telephone:
For the attention of:		
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: <input type="checkbox"/> As in abovementioned contact point(s) <input type="checkbox"/> Other: <i>please complete Annex A.I</i>		
Specifications and additional documents (including documents for competitive dialogue and a dynamic purchasing system) can be obtained at: <input type="checkbox"/> As in abovementioned contact point(s) <input type="checkbox"/> Other: <i>please complete Annex A.II</i>		
Tenders or requests to participate must be sent to: <input type="checkbox"/> As in abovementioned contact point(s) <input type="checkbox"/> Other: <i>please complete Annex A.III</i>		

MODULE
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Delete comment where no provisions in legislation for lead purchasing or central purchasing bodies.

Section I.2:

<input type="checkbox"/> Ministry or any other national or federal authority, including their regional or local sub-divisions <input type="checkbox"/> National or federal agency/office <input type="checkbox"/> Regional or local authority <input type="checkbox"/> Regional or local agency/office <input type="checkbox"/> Body governed by public law <input type="checkbox"/> European institution/agency or international organisation <input type="checkbox"/> Other (please specify): _____	<input type="checkbox"/> General public services <input type="checkbox"/> Defence <input type="checkbox"/> Public order and safety <input type="checkbox"/> Environment <input type="checkbox"/> Economic and financial affairs <input type="checkbox"/> Health <input type="checkbox"/> Housing and community amenities <input type="checkbox"/> Social protection <input type="checkbox"/> Recreation, culture and religion <input type="checkbox"/> Education <input type="checkbox"/> Other (please specify): _____
The contracting authority is purchasing on behalf of other contracting authorities yes <input type="checkbox"/> no <input type="checkbox"/>	

→ 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 or 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		
<hr/>		
II.1.2) Type of contract and location of works, place of delivery or of performance		
<i>(Choose one category only - works, supplies or services - which corresponds most to the specific object of your contract or purchase(s))</i>		
(a) Works <input type="checkbox"/>	(b) Supplies <input type="checkbox"/>	(c) Services <input type="checkbox"/>
Execution <input type="checkbox"/>	Purchase <input type="checkbox"/>	Service category: No <input type="checkbox"/>
Design and execution <input type="checkbox"/>	Lease <input type="checkbox"/>	<i>(For service categories 1-27, please see Annex II to Directive 2004/18/EC)</i>
Realisation, by whatever means of work, corresponding to the requirements specified by the contracting authorities <input type="checkbox"/>	Rental <input type="checkbox"/>	
	Hire purchase <input type="checkbox"/>	
	A combination of these <input type="checkbox"/>	
Main site or location of works	Main place of delivery	Main place of performance
<hr/>	<hr/>	<hr/>
<hr/>	<hr/>	<hr/>
NUTS code <input type="text"/>	NUTS code <input type="text"/>	NUTS code <input type="text"/>

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 <input type="checkbox"/>	The setting up of a dynamic purchasing system (DPS) <input type="checkbox"/>
The establishment of a framework agreement <input type="checkbox"/>	
II.1.4) Information on framework agreement (if applicable)	
Framework agreement with several operators <input type="checkbox"/>	Framework agreement with a single operator <input type="checkbox"/>
Number <input type="text"/> <input type="text"/> <input type="text"/> or, if applicable, maximum number of participants to the framework agreement envisaged <input type="text"/> <input type="text"/> <input type="text"/>	
Duration of the framework agreement: Duration in year(s): <input type="text"/> <input type="text"/> or month(s): <input type="text"/> <input type="text"/> <input type="text"/>	
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 <input type="checkbox"/>	no <input type="checkbox"/>
II.1.8) Division into lots <i>(for information about lots, use Annex B as many times as there are lots)</i>			yes <input type="checkbox"/>	no <input type="checkbox"/>
If yes, tenders should be submitted for <i>(tick one box only)</i> :				
one lot only <input type="checkbox"/>	one or more lots <input type="checkbox"/>	all lots <input type="checkbox"/>		
II.1.9) Variants will be accepted			yes <input type="checkbox"/>	no <input type="checkbox"/>

▶ **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 <i>(including all lots and options, if applicable)</i>	
<i>If applicable, estimated value excluding VAT (give figures only):</i> _____	Currency: _____
<i>or range: between</i> _____ <i>and</i> _____	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:	<input type="text"/>	or days:	<input type="text"/>	(from the award of the contract)
or starting	<input type="text"/>	<input type="text"/>	<input type="text"/>	(dd/mm/yyyy)
completion	<input type="text"/>	<input type="text"/>	<input type="text"/>	(dd/mm/yyyy)

II.2.2) Options (if applicable)	yes <input type="checkbox"/>	no <input type="checkbox"/>
If yes, description of these options: _____		

If known, provisional timetable for recourse to these options:		
in months:	<input type="text"/>	or days: <input type="text"/>
(from the award of the contract)		
Number of possible renewals (if any): <input type="text"/> or Range: between <input type="text"/> and <input type="text"/>		
If known, in the case of renewable supplies or service contracts, estimated time-frame for subsequent contracts:		
in months:	<input type="text"/>	or days: <input type="text"/>
(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)	
<hr/> <hr/>	
III.1.2) Main financing conditions and payment arrangements and/or reference to the relevant provisions regulating them	
<hr/> <hr/>	
III.1.3) Legal form to be taken by the grouping of economic operators to whom the contract is to be awarded (if applicable)	
<hr/> <hr/>	
III.1.4) Other particular conditions to which the performance of the contract is subject (if applicable)	yes <input type="checkbox"/> no <input type="checkbox"/>
If yes, description of particular conditions	
<hr/> <hr/> <hr/>	

◀ **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.

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SECTION
2

Narrative

III.3) CONDITIONS SPECIFIC TO SERVICES CONTRACTS

III.3.1) Execution of the service is reserved to a particular profession	yes <input type="checkbox"/> no <input type="checkbox"/>
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 <input type="checkbox"/> no <input type="checkbox"/>

→ **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 carefully. 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	<input type="checkbox"/>
Restricted	<input type="checkbox"/>
Accelerated restricted	<input type="checkbox"/> Justification for the choice of accelerated procedure: _____
Negotiated	<input type="checkbox"/> Candidates have already been selected yes <input type="checkbox"/> no <input type="checkbox"/> <i>If yes, provide names and addresses of economic operators already selected under Section VI.3) Additional Information</i>
Accelerated negotiated	<input type="checkbox"/> Justification for the choice of accelerated procedure: _____
Competitive dialogue	<input type="checkbox"/>
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 <input type="text"/> <input type="text"/> <input type="text"/>	
or envisaged minimum number <input type="text"/> <input type="text"/> <input type="text"/> and, if applicable, maximum number <input type="text"/> <input type="text"/> <input type="text"/>	
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 <input type="checkbox"/> no <input type="checkbox"/>	

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

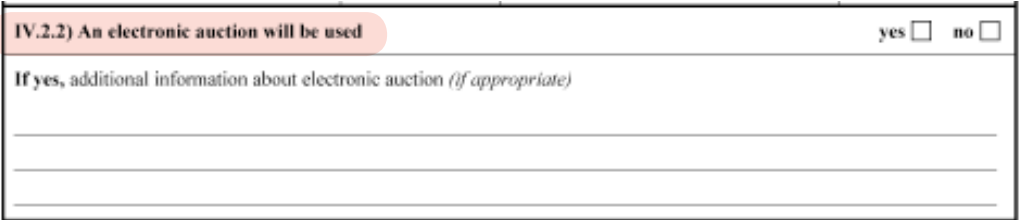
IV.2.1) Award criteria (please tick the relevant box(es))			
Lowest price		<input type="checkbox"/>	
or			
the most economically advantageous tender in terms of		<input type="checkbox"/>	
<input type="checkbox"/> the criteria stated below (the award criteria should be given with their weighting or in descending order of importance where weighting is not possible for demonstrable reasons)			
<input type="checkbox"/> 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.



IV.2.2) An electronic auction will be used	yes <input type="checkbox"/>	no <input type="checkbox"/>
If yes, additional information about electronic auction (if appropriate)		
<hr/>		
<hr/>		
<hr/>		

▶ 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)																			
<hr/>																			
IV.3.2) Previous publication(s) concerning the same contract yes <input type="checkbox"/> no <input type="checkbox"/>																			
If yes,																			
Prior information notice <input type="checkbox"/>	Notice on a buyer profile <input type="checkbox"/>																		
Notice number in OJ: <input type="text"/> /S <input type="text"/> - <input type="text"/> of <input type="text"/> / <input type="text"/> / <input type="text"/> (dd/mm/yyyy)																			
Other previous publications (if applicable) <input type="checkbox"/>																			
Notice number in OJ: <input type="text"/> /S <input type="text"/> - <input type="text"/> of <input type="text"/> / <input type="text"/> / <input type="text"/> (dd/mm/yyyy)																			
Notice number in OJ: <input type="text"/> /S <input type="text"/> - <input type="text"/> of <input type="text"/> / <input type="text"/> / <input type="text"/> (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: <input type="text"/> / <input type="text"/> / <input type="text"/> (dd/mm/yyyy)	Time: <input type="text"/>																		
Payable documents yes <input type="checkbox"/> no <input type="checkbox"/>																			
If yes, price (give figures only): <input type="text"/> Currency: <input type="text"/>																			
Terms and method of payment: <input type="text"/>																			
IV.3.4) Time-limit for receipt of tenders or requests to participate																			
Date: <input type="text"/> / <input type="text"/> / <input type="text"/> (dd/mm/yyyy)	Time: <input type="text"/>																		
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: <input type="text"/> / <input type="text"/> / <input type="text"/> (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
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other: <input type="text"/>																			

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: <input type="text"/> / <input type="text"/> / <input type="text"/> <i>(dd/mm/yyyy)</i>	
or duration in month(s): <input type="text"/> or days: <input type="text"/> <i>(from the date stated for receipt of tender)</i>	
IV.3.8) Conditions for opening tenders	
Date: <input type="text"/> / <input type="text"/> / <input type="text"/> <i>(dd/mm/yyyy)</i>	Time: <input type="text"/>
Place <i>(if applicable)</i> : <input type="text"/>	
Persons authorised to be present at the opening of tenders <i>(if applicable)</i> yes <input type="checkbox"/> no <input type="checkbox"/>	
<input type="text"/>	
<input type="text"/>	

► 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.

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):		Telephone:
For the attention of:		
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):		Telephone:
For the attention of:		
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):		Telephone:
For the attention of:		
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	<input type="text"/> . <input type="text"/> . <input type="text"/> . <input type="text"/> - <input type="text"/>	<input type="text"/> - <input type="text"/> <input type="text"/> - <input type="text"/>
Additional object(s)	<input type="text"/> . <input type="text"/> . <input type="text"/> . <input type="text"/> - <input type="text"/> <input type="text"/> . <input type="text"/> . <input type="text"/> . <input type="text"/> - <input type="text"/> <input type="text"/> . <input type="text"/> . <input type="text"/> . <input type="text"/> - <input type="text"/> <input type="text"/> . <input type="text"/> . <input type="text"/> . <input type="text"/> - <input type="text"/>	<input type="text"/> - <input type="text"/> <input type="text"/> - <input type="text"/> <input type="text"/> - <input type="text"/> <input type="text"/> - <input type="text"/> <input type="text"/> - <input type="text"/> <input type="text"/> - <input type="text"/> <input type="text"/> - <input type="text"/> <input type="text"/> - <input type="text"/>
3) QUANTITY OR SCOPE		
<i>If known, estimated cost excluding VAT (give figures only):</i> _____ Currency: _____ <i>or range: between</i> _____ <i>and</i> _____ Currency: _____		
4) INDICATION ABOUT DIFFERENT DATE FOR DURATION OF CONTRACT OR STARTING/COMPLETION (if applicable)		
Duration in months: <input type="text"/> <input type="text"/> <i>or</i> days: <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> (from the award of the contract) <i>or</i> starting <input type="text"/> / <input type="text"/> / <input type="text"/> / <input type="text"/> / <input type="text"/> / <input type="text"/> (dd/mm/yyyy) completion <input type="text"/> / <input type="text"/> / <input type="text"/> / <input type="text"/> / <input type="text"/> / <input type="text"/> (dd/mm/yyyy)		
5) ADDITIONAL INFORMATION ABOUT LOTS		

----- (Use this Annex as many times as there are lots) -----

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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

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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

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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.

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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:

1.10.2005	EN	Official Journal of the European Union	L 257/3
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

Withholding 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 at 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

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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

MODULE
E

Conducting the
procurement process

PART
3

Selection (qualification)
of candidates

SECTION
1

Introduction

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.)

2.4.1.2 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 contract 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 Entreprises 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 overstressing 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 Entreprises 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 Österreich v Hauptverband der sterreichischen Sozialversicherungsträger* (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 Sozialversicherungsträger* (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 *Hauptverband* 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 Österreich v Hauptverband der sterreichischen Sozialversicherungsträger* (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.

MODULE
E

Conducting the
procurement process

PART
3

Selection (qualification)
of candidates

SECTION
2

Narrative

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 identify 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.

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.

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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 Sozialversicherungsträger* (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 applied 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

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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.

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Exercises

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 designated 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 (*)

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 Εργοληπιακής Εγγαφίας' – MEEI of the Ministry for Environment, Town and Country Planning and Public Works (YTIEXIME);
- 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' (IMOPP/CAIOPP);
- in Finland, the 'Kaupparekisteri'/ 'Handelsregisteret';
- 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 'Βιοτεχνικό ή Εμπορικό ή Βιοεργατικό 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 'Handelsregisteret';
- 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 A

PUBLIC SERVICE CONTRACTS

The relevant professional and trade registers or declarations or certificates are:

- in Belgium, the 'Registre du commerce/Handelsregister' and the 'Ordres professionnels/Beroepsorden';
- in Denmark, 'Erhvervs- og Selskabsstyrelsen';
- in Germany, the 'Handelsregister', the 'Handwerksrolle', the 'Verdieregister', 'Partnerschaftsregister' and the 'Mitgliedsverzeichnisse der Berufskammern der Länder';
- 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 'Μετρώο Μαθητιών' and 'Μετρώο Γραμματέων Μαθητιών';
- 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 'Handelsregisteret';
- 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 sought 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/ORG

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.

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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. Loutermann-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. Puissechot (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 Bundesvergabebamt (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 Bundesvergabamt 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 Bundesvergabamt, 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 Bundesvergabamt 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 Bundesvergabamt had expired on 20 April 2001 without being extended and that the Bundesvergabamt'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 Bundesvergabamt on 20 April 2001. According to the case-file forwarded by the Bundesvergabamt 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 Bundesvergabamt 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 Bundesvergabamt 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 Bundesvergabamt 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 Bundesvergabamt 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.

It is common ground that the Verfassungsgerichtshof, by judgment of 2 March 2002, annulled the decision of 20 April 2001 taken by the Bundesvergabeamt.

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).

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).

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).

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.

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.

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.

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

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 to 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?

MODULE
E

Conducting the
procurement process

PART
3

Selection (qualification)
of candidates

SECTION
5

Chapter summary

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

Setting contract
award criteria

MODULE
E

PART
4

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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 award

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 various 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 für Abfallentsorgungs-Technik (GAT) v Österreichische 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 could not 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.*

**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 at 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 points¹ 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:

$$\text{Total score} = \text{price score} + \text{resolution score}$$

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 ($\text{EUR } 5\,000 / 77 = \text{EUR } 65$) equals that of the technical side given by $\text{EUR } 1\,500 / 23 = \text{EUR } 65$. 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:

$$EP = 77 \cdot [(\text{Reserve price} - \text{Price tender}) / \text{Reserve price}] \cdot 100 = 77 \cdot (\% \text{ discount})$$

Figure 1



Figure 2

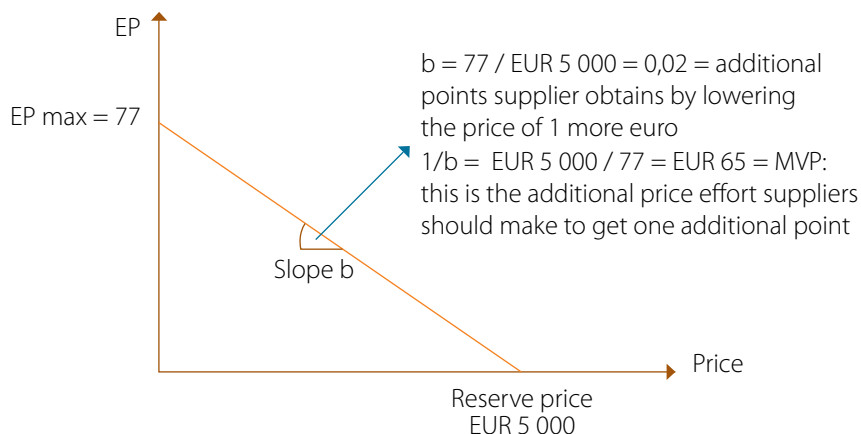


Figure 2 provides a graphical interpretation of the MVP. The MVP is the inverse of the slope (b) of the plotted scoring rule (the straight line). While the slope measures the additional economic points one economic operator obtains by lowering the price by EUR 1, the inverse of the slope ($1/b$) measures 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; $1/b = \text{EUR } 65$, 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 be modified. Notice that now the MVP in $\text{EUR } 5\,000 / 73,6 = \text{EUR } 68 > \text{EUR } 65$, 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

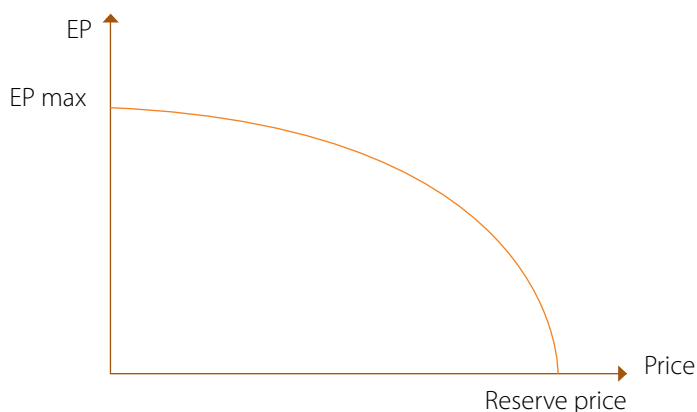
Under non-linear scoring, the economic score does not increase proportionally with price reductions; starting from prices close to the reserve price, subsequent price reductions raise the score more than proportionally. However, as price discounts get larger and larger the economic score goes up but less than proportionally.

Non-linear scoring can be written as follows:

$$EP = EP_{\max} \cdot \left[1 - \left(\frac{\text{Price}}{\text{Reserve Price}} \right)^a \right], \quad 0 \leq \text{Price} \leq \text{Reserve Price},$$

where EP_{\max} is the maximum number of economic points and a (greater than zero, but strictly lower than 1) is a parameter shaping the scoring rule. Given the reserve price and EP_{\max} , the parameter a 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.

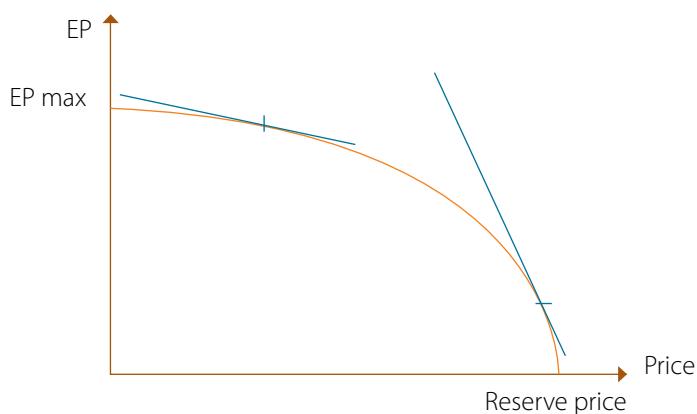
More precisely it is decreasing in the price. Economic operators need to calculate the MVP for any price level and define their tendering strategy accordingly, while in linear scoring the MVP is constant. This means that the contracting authority's price/quality preferences are not linear, in the sense 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 $(b_{\text{def}}+999+3(1000))/5 \leq 999$, which implies $b_{\text{def}} \leq \text{EUR } 996$. More generally, when the number of colluding firms is N , then $b_{\text{def}} \leq (N-1) \text{ EUR } 999 - (N-2) \text{ EUR } 1\,000$.

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, \dots, b_N) . Define b_{\min} , b_{\max} and b_a as the lowest, highest and average tender respectively, where

$$b_a = \frac{b_1 + \dots + b_N}{N}.$$

EP_{\max} indicates the total number of economic points, while EP_i is economic operator i 's economic score obtained by submitting b_i .

Lowest-tender Scoring (LOS):

$$EP_i = EP_{\max} \cdot \left(\frac{b_{\min}}{b_i} \right), i = 1, \dots, N.$$

Highest-tender-lowest-tender scoring (HLS):

$$EP_i = EP_{\max} \cdot \left(\frac{b_{\max} - b_i}{b_{\max} - b_{\min}} \right), i = 1, \dots, N.$$

Average Scoring (AS):

$$EP_i = \begin{cases} EP_{\max} \cdot \left(\frac{r - b_i}{r - f(b_a)} \right), & \text{if } f(b_a) < b_i \leq r, i = 1, \dots, N, \\ EP_{\max}, & \text{if } b_i \leq f(b_a), \end{cases}$$

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.

MODULE
E

Conducting the
procurement process

PART
4

Setting contract
award criteria

SECTION
3

Exercises

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.

MODULE
E

Conducting the
procurement process

PART
4

Setting contract
award criteria

SECTION
3

Exercises

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.

MODULE
E

Conducting the
procurement process

PART
4

Setting contract
award criteria

SECTION
4

The Law

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 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,**

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. Puissechot, 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 Bundesvergabeamt 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 Bundesvergabeamt 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 Rodrigues

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 Simvoulitis 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 *Unitron Scandinavia and 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 and Others* [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

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.

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Setting contract
award criteria

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Chapter summary

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
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Tender evaluation
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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.

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Tender evaluation
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SECTION
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Introduction

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

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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 in 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 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 than 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:

Metalmecchanica Fracasso

(Case C-27/98 *Metalmecchanica 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 or 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.

MODULE
E

Conducting the
procurement process

PART
5

Tender evaluation
and contract award

SECTION
3

Exercises

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.

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Exercises

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 *Metalmecanica Fracasso SpA, Leitschutz Handels- und Montage GmbH v Amt der Salzburger Landesregierung für den Bundesminister für wirtschaftliche Angelegenheiten*,

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SECTION
4

The Law

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 may 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.

PART 2 CASES

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. Puissechot, 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 *Hünernund 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* 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 three provided 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?



Conducting the
procurement process



Tender evaluation
and contract award



Chapter summary

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

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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 issues in 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.

**MODULE
E**

Conducting the
procurement process

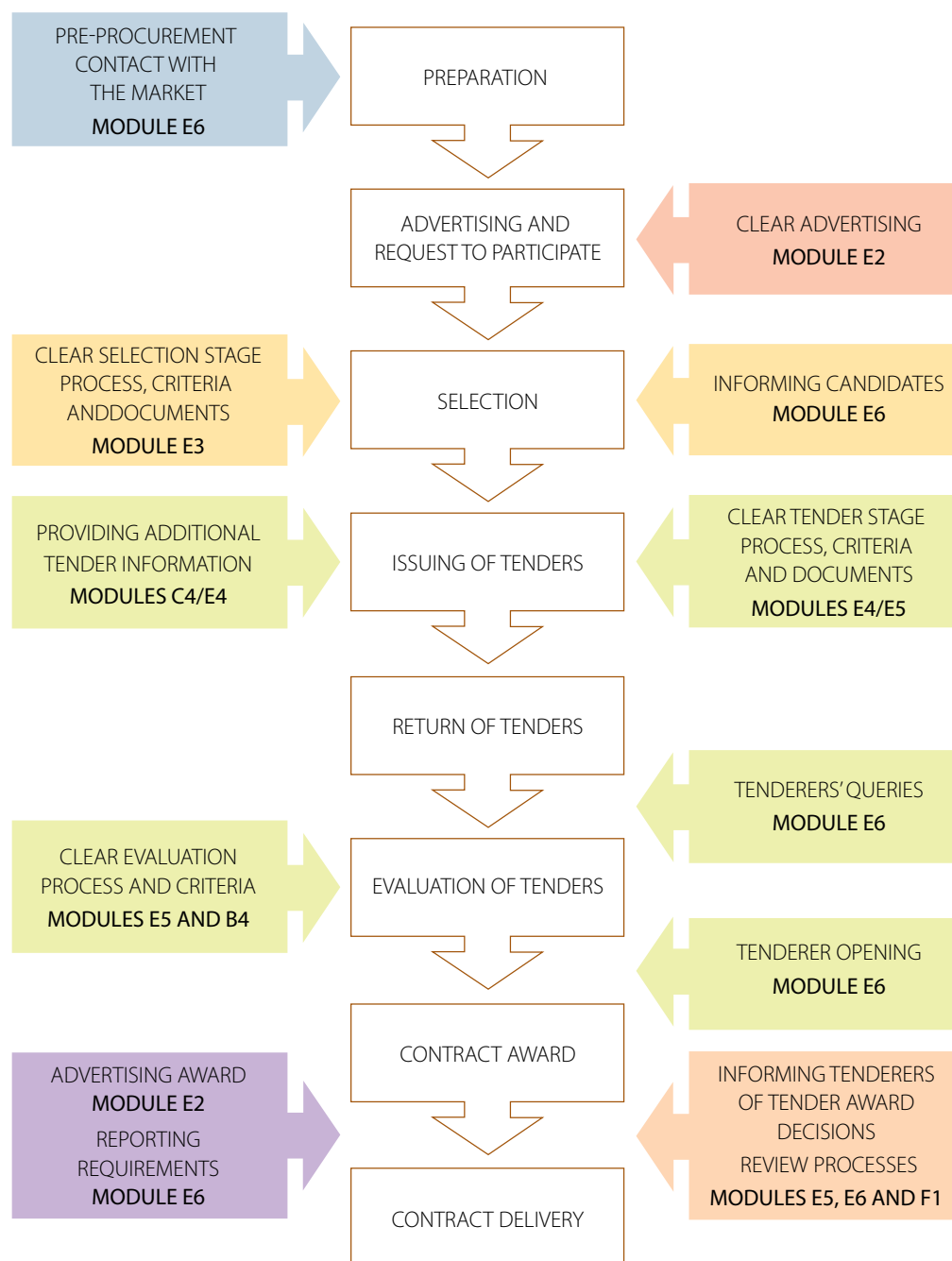
**PART
6**

Transparency, reporting,
informing tenderers

**SECTION
2**

Narrative

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 *Evropaiki 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 *Evropaiki Dynamiki* case concerned a call for tender by the European Commission for the development of IT services. Evropaiki 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, *Evropaiki 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.

MODULE
E

Conducting the
procurement process

PART
6

Transparency, reporting,
informing tenderers

SECTION
3

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?

MODULE
E

Conducting the
procurement process

PART
6

Transparency, reporting,
informing tenderers

SECTION
3

Exercises

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?