



## Brief 8

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### Public Procurement

# Setting the Award Criteria

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## General context

The award criteria constitute the basis on which a contracting authority chooses the best tender and awards a contract. These criteria must be established in advance by the contracting authority and must not be prejudicial to fair competition.

The 2004 Public Sector Directive<sup>1</sup> allowed contracting authorities to award a public contract based on either:

- the lowest-price criterion; or
- the most economically advantageous-tender criterion, which meant applying criteria in addition to, or other than, price.

The choice between those two options was left to the discretion of contracting authorities. Only in very limited cases, such as the use of variants and the application of the competitive dialogue procedures, did the 2004 Directive require the most economically advantageous criterion.

The 2014 Public Sector Directive (the Directive)<sup>2</sup> changed this approach, putting much greater emphasis on the evaluation of tenders on the basis of criteria other than simply the price. Accordingly, the Directive requires contracting authorities to base the award of contract on the most economically advantageous tender. Regardless of the factors that are taken into account, the contract should be awarded to a tenderer offering the most economically advantageous tender. By all means, the application of the price-only criterion is still allowed, although Member States may limit its application.

The concept of the most economically advantageous tender is explained as a tender that is the most economically advantageous from the point of view of the contracting authority. It is identified on the basis of price or cost (using a cost-effectiveness approach, such as life-cycle costing) or the best price/quality ratio. In the latter case, the ratio is assessed on the basis of criteria linked to the subject of public procurement, including qualitative, environmental and/or social aspects. The best price/quality ratio in the Directive is the equivalent of the most economically advantageous tender in the 2004 Directive.

To summarise, the most economically advantageous tender is now the sole criterion for the award of contracts. The application of this criterion may include three different approaches:

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

Whichever approach is used, an economic element should always be involved in the evaluation of offers.

The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

The choice between the three above-mentioned methods is generally left to the discretion of the contracting authority, except in the cases of the competitive dialogue and the innovation partnership, where the criterion of the best price/quality ratio should be used. Member States may also provide that contracting authorities may not use price only or cost only as the sole

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<sup>1</sup> Directive 2004/18/EC on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts, 31 March 2004.

<sup>2</sup> Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, 26 February 2014.

award criterion, or may restrict their application to certain categories of contracting authorities or certain types of contracts.

For those procurement procedures requiring a contract notice, the contracting authority must announce in the contract notice whether it is going to apply the price only, the cost only or the best price/quality approach. In the case of the best price/quality approach, the criteria to be used should be disclosed either in the contract notice or in the procurement documents. The Directive sets out general rules concerning the formulation of the specific criteria that may be applied when the best price/quality ratio approach is used, and it also lays down disclosure obligations concerning the criteria to choose a tender offering the best price/quality ratio. The main objective of the European Union (EU) legislator is to ensure that intra-EU trade is not restricted by discriminatory award criteria.

When setting the award criteria, a contracting authority is to operate with respect to general law and Treaty<sup>3</sup> principles and, in particular to ensure the following:

- **Equal treatment and non-discrimination**, which means that the award criteria must be non-discriminatory and must not be prejudicial to fair competition;
- **Transparency**, which means that the award criteria must be set in advance and duly disclosed to tenderers. The purpose of establishing and formally disclosing the award criteria to be applied is to ensure that:
  - 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, such as 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.

### Application of the price-only criterion

When a contracting authority chooses to apply the most economically advantageous criterion on the basis of price only, the contract is awarded to the tenderer offering the lowest price for a compliant tender. 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. No cost analysis and no quality considerations can come into play in this choice.

**Limitations of the price-only criterion:** The price-only criterion has the advantage of simplicity and rapidity, but it presents some limitations, including the following:

- It does not allow the contracting authority to take into account qualitative considerations. Apart from the quality factors built into the specifications, which must be met by all tenders, the quality of the requirement being procured is not subject to evaluation.
- It does not allow the contracting authority to take into account innovation and innovative solutions. Tenders that meet the set specifications are compliant.

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<sup>3</sup> Treaty on the Functioning of the European Union – consolidated version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 326, 26 October 2012. The Treaty is referred to in the Procurement Brief as “TFEU” or “Treaty”.

- For requirements that have a long operating life, it does not allow the contracting authority to take into account the life-cycle costs 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.

### Methods used to identify the best price/quality ratio

When the most economically advantageous tender on the basis of the best price/quality ratio is used, a contracting authority can take into account other criteria in addition to – or other 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 best price/quality ratio is to identify the tender that offers the best value for money.

**Value for money:** The term value for money means the optimum combination between the various 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.

The concept of value for money recognises that goods, works and services are not homogeneous and 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 various qualities, such as intrinsic costs, longevity and durability, 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 to pay less for a cheaper product that has a higher maintenance cost.

**Advantages of the best price/quality ratio:** The best price/quality ratio, as opposed to the price-only criterion, presents a series of advantages, including in particular the following:

- It allows contracting authorities to take into account qualitative considerations. The best price/quality ratio 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, 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 of the requirement purchased and not only the direct cost of the purchase or the initial purchase price within the set specifications.

### What criteria may be used to determine best price/quality ratio?

A contracting authority may take into account various criteria to determine the best price/quality ratio.

The Directive contains an *illustrative* list of these criteria, which are as follows:

- quality, including technical merit;
- aesthetic and functional characteristics;
- accessibility;
- design for all users;
- social, environmental and innovative characteristics;

- trading and its conditions;
- organisation, qualification and experience of staff assigned to perform the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract;
- after-sales service and technical assistance;
- delivery conditions, such as delivery date, delivery process and delivery period or period of completion.

As the 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.

Award criteria may be divided into two broad categories: **cost-related** criteria and **non-cost-related** criteria.

**Cost-related criteria:** cost-related criteria, which are also referred to as economic criteria, allow the contracting authority to determine the financial cost of the acquisition of the object of the procurement as well as the cost of using and operating it.

### Life-cycle costs

Life-cycle costs are the costs of the goods, works or services through the duration of their life cycle. In broad terms, the life-cycle costs comprise all costs to the contracting authority relating to the:

- acquisition
- operational life
- end of life (such as disposal).

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, such as initial price, purchase and installation costs, initial training or disposal costs. **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. Recurrent costs include service and maintenance charges, repairs, consumables, spare parts and energy consumption.

For further information, see SIGMA Public Procurement Brief 34, *Life-Cycle Costing*.

**Non-cost-related criteria:** The non-cost-related criteria concern key performance requirements and adherence to specifications. Examples of non-cost related criteria include the following:

- **quality** – the quality characteristics that the object of the procurement must satisfy, such as the number of pages per minute produced by a printer or its durability;
- **technical merit** – if the object of the procurement is fit for its 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** – the support that 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 best price/quality ratio into sub-criteria. The sub-criteria indicate the specific factors that are taken into account by the contracting authority within a specific criterion.

### **Are there limitations on the contracting authority’s discretion when establishing the criteria to be applied to determine the best price/quality ratio?**

The Directive refers to the tender that is the most economically advantageous “from the point of view of the contracting authority”, thus putting emphasis on the contracting authority’s discretion in choosing the criteria to be applied. However, this discretion is not unrestricted and has some limitations, as follows:

- The criteria chosen must be linked to the subject matter of the public contract in question.
- The criteria chosen must be aimed at identifying the most economically advantageous tender and they cannot be aimed at other purposes.
- The criteria chosen must be objective and objectively quantifiable.

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. Tenderers should be able to prepare their tenders to take into account the way in which the assessment/evaluation of the tenders would be made.

### **The best price/quality ratio and contract specifications: some important considerations**

In practice, the criteria that a contracting authority may apply to determine the best price/quality ratio must be chosen in such a way that they match the contract specifications. All specifications subject to evaluation should have criteria associated with them.

The preparation of the specifications and the determination of the criteria to be applied to establish the best price/quality ratio go 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 best price/quality ratio is used, generally a contracting authority may decide to operate in one of the following manners:

- The contracting authority may decide to fix the minimum mandatory specifications that all tenders must meet, and the tenders will be evaluated on the basis of a pass or fail system, and then scores will be awarded to those tenders that have achieved a pass. The scores will reflect the degree to which a tender exceeds the minimum specifications.
- The contracting authority may decide to fix, in addition or as an alternative to mandatory specifications, specifications that do not entail the application of a minimum “threshold”, and tenders will be scored on the basis of the level of their compliance with the contracting authority’s requirements. In this case, some variability with regard to the level of compliance is acceptable.

## What methods 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.

- **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.

Through the weighting system, the contracting authority notifies tenderers of the relative importance that it attaches to each criterion chosen and it allows tenderers to prepare more appropriate tenders. At the same time, through the weighting system, the contracting authority 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 scope. The scope 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.

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.

- **Descending order of importance:** Where weighting is not possible for demonstrable reasons, the contracting authority must indicate the criteria applied in descending order of importance. One of the reasons that weighting may not be possible is the complexity of the contract.

**Disclosure obligations with regard to the criteria to be applied to determine the best price/quality ratio 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 criteria representing the most economically advantageous tender,
- their relative weighting or the descending order of importance of such criteria (where, in the opinion of the contracting authority, weighting is not possible).

Except for these 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 a detailed evaluation methodology in advance, this methodology must be fully disclosed to tenderers.

The tender documents should demonstrate 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), as well as the methodologies that will be applied to determine the most economically advantageous tender.

This information 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 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.

**Warning—change of the announced award criteria during the tender process:** 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.

### Overall strategy for application of the award criteria

The overall strategy concerning the award criteria to be applied should be determined before a tender is launched. The checklist below sets out some of the main points that a contracting authority may choose to address when it defines its overall strategy:

- 1) Decide which award criterion to apply: the price-only criterion, the cost-only criterion or the best price/quality ratio, where there is a choice.
- 2) Identify, whenever the best price/quality ratio criterion has been chosen:
  - a) 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);
  - b) the sub-criteria and their relative weighting within the weighting given to that individual criterion, where it has been decided to break each criterion down into sub-criteria;
  - c) a more detailed evaluation methodology, where its application has been decided, and define it in a clear way.
- 3) Identify, in accordance with the requirements of the applicable law, where and how the following elements should be disclosed:
  - a) use of the price-only criterion, the cost-only criterion or the best price/quality ratio, as the case may be;
  - b) whenever the best price/quality ratio has been chosen:
    - (i) 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);
    - (ii) 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;
    - (iii) any evaluation methodology that has been developed.

### Utilities

The 2014 Utilities Directive (Utilities Directive)<sup>4</sup> uses the same approach as the Public Sector Directive and requires contracting entities to base the award of contract on the most economically advantageous tender.

The definition of the most economically advantageous tender, according to Article 82 of the Utilities Directive, is essentially the same as in the Directive, apart from an additional provision that includes in the examples of permitted criteria a reference to “commitments with regard to parts and security of supply” [Article 82(2)(c)].

<sup>4</sup> Directive 2014/25/EU on procurement by entities in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, 26 February 2014.

## Further information

### Publications

SIGMA (2015), *Public Procurement Training Manual* – Module E4, OECD Publishing, Paris, <http://www.sigmaweb.org/publications/public-procurement-training-manual.htm>

SIGMA (2014), *Selected Judgements of the Court of Justice of the European Union on Public Procurement (2006-2014)*, OECD Publishing, Paris, <http://www.sigmaweb.org/publications/Judgements-CourtJustice-31July2014-Eng.pdf>

### Public Procurement Briefs

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

SIGMA (2016), *Life-cycle costing*, Brief 34, OECD Publishing, Paris

SIGMA (2016), *Tender Evaluation and Contract Award*, Brief 9, OECD Publishing, Paris

### Other sources

Selected case law of the Court of Justice of the European Union: 31/87 *Beentjes*, C-513/99 *Concordia Bus Finland*, C-19/00 *SIAC Construction*, C-315/01 *GAT*, C-448/01 *EVN AG and Wienstrom GmbH v Republic of Austria*, C-532/06 *Lianakis and Others*, C-46/15 *Ambisig*, [http://curia.europa.eu/jcms/jcms/j\\_6/](http://curia.europa.eu/jcms/jcms/j_6/)