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Creating Change Together

SIGMA

Public Procurement

Training Manual

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Module C

2 Rue André Pascal
75775 Paris Cedex 16
France

<mailto:sigmaweb@oecd.org>

Tel: +33 (0) 1 45 24 82 00

Fax: +33 (0) 1 45 24 13 05

www.sigmaweb.org

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Module C1 Procurement Planning

Section 1 Introduction

1.1. Objectives

The objectives of this module are to make participants aware of:

1. The vital need for planning, and what happens if planning does not take place
2. A sample procurement plan, which participants can mould to the needs of their own contracting authority
3. The role of stakeholders during planning
4. The need to research the supply market
5. The advantages of networking with other procurement officers
6. The need to relate requirements to budgets
7. Options for packaging requirements, to encourage competition from economic operators

1.2. Important issues

Harvey MacKay said, “Failures don't plan to fail; they fail to plan.”

Planning is a vital part of a procurement officer's activity. The amount of planning undertaken is one of the distinguishing characteristics between good procurement professionals and others.

1.3. Links

Links to other modules appear throughout the text of this document. There is, however, an especially strong link to:

- Module B2 on the procurement cycle
- Module B3 on the role of the procurement officer
- Module B4 on the role of stakeholders
- Module E1 on specifications

1.4. Relevance

Procurement officers need to understand the concepts and benefits of procurement planning in order to do their job effectively.

1.5. Legal information helpful to have at hand

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

Additional information

SIGMA Public Procurement Briefs:

No. 26, *Organising Central Public Procurement Functions*

No. 30, *2014 EU Directives: Public Sector and Utilities Procurement*

LOCALISATION WILL NEED TO REFER TO SPECIFIC LEGAL DOCUMENTS

Section 2 Narrative

1 Overview

This module looks at the need for procurement planning in the context of both annual procurement plans and individual procurement plans. A sample process linked to the budgeting round is provided, and an assessment has been made of the advantages of procurement planning and the consequences of not undertaking procurement planning. The role of stakeholders during the planning stage is considered, and the need to actively research the supply market is explored. During planning activities, the advantage of networking with other procurement officers is described, and the advantage of packaging requirements to encourage competition is also reviewed. Finally, comments are made related to planning for the procurement of works.

2.1 Introduction

This section describes the procurement officer's involvement in procurement planning. It covers:

- 2.2 Need for procurement planning
- 2.3 Annual procurement planning, a sample process linked to the budgeting round, and advantages of undertaking procurement planning (and consequences of not planning)
- 2.4 Individual procurement plans
- 2.5 Role of stakeholders during the planning stage
- 2.6 Need to research the supply market
- 2.7 Advantages of networking with other procurement officers
- 2.8 Options for packaging requirements to encourage competition from economic operators

2.2 Need for procurement planning

Procurement planning is defined as both:

- A process used by contracting authorities to plan purchasing activity for a specific period of time
- A plan for the purchase of a specific requirement

To achieve both definitions, procurement officers will need to be closely involved with budget-holders and other stakeholders. Procurement planning applies to the procurement of works, supplies and services.

Harvey MacKay said that "failures don't plan to fail; they fail to plan". Planning is a vital part of a procurement officer's activity. The amount of planning undertaken is one of the distinguishing characteristics between good procurement professionals and others.

Following a decision to proceed with the procurement of works based upon a business case procurement (described in Module B2, where it constitutes step eight of the procurement process and an example of business case contents is included), other procurement planning activities before proceeding with the project may include a feasibility study, a more detailed project plan, and an environmental impact assessment.

To a large extent the procurement becomes a project and is managed using project management techniques. For example, a project initiation document and sophisticated software may be required to plan hundreds of individual actions involved in a construction project. A specialist project manager may manage the project and these actions, but procurement will also be involved, as described below.

2.3 Annual procurement plan

The first definition in the section above refers to step 1 of the procurement process, the annual procurement plan, which is linked to the budgeting cycle of the contracting authority, where departments are required to request budgets for staff, expenses, and purchases. An annual procurement plan may be a requirement under local laws or local procedures.

The annual procurement plan is also the first step in the procurement planning process. Ideally, the relationship that procurement officers have with stakeholder departments should be so close that they are involved at an early stage of the budgeting round and asked for their view of the likely cost of given purchases to feed into the budget. It is recognised that in some cases the budgeting cycle may be bi-annual.

2.3.1 Sample process and timeline linked to the budgeting round

In one contracting authority, where the budget year ran from January to December, the process for requirements – irrespective of whether they were works, supplies or services – worked like this:

- Early September: The department heads received purchasing proposals from staff on their teams. These proposals were debated and an agreed initial target list was put forward.
- End-September: The procurement specialists linked to each department and other stakeholders used their experience to put initial budget figures to the agreed initial target list.
- Mid-October: A meeting with the head of department, the procurement specialists and others as necessary refined the list in the light of initial and further work on likely costs to produce a draft budget to send to finance (to achieve this, parallel work streams took place).
- By the end of October two activities had to be completed in parallel. Firstly, the finance department reviewed all of the budget requests submitted and pruned the requests as it considered appropriate. Secondly, the procurement team reviewed the purchase content of all budgets to check for economies of scale, combining the requirements of various departments and making recommendations accordingly.
- In early November the actual budgets were finalised and by mid-November the governing body of the contracting authority was asked to approve the budget. Once this was complete, the procurement team and the stakeholders could proceed with early planning on purchases for the coming January.

The above process was sometimes hectic and on some occasions it felt rushed, but everyone involved agreed that it was a worthwhile use of time and energy.

Your contracting authority may have a different calendar year and it may also have a different timetable. Adjust the above timetable to suit your needs and involve all of the necessary contributors in the preparation of the annual procurement plan.

Localisation – plans may run for a different calendar year and there may be different or mandatory timetables and processes.

2.3.2 Advantages of the procurement planning process

The advantages of the procurement planning process are as follows:

- Links are forged between the stakeholders, finance department and procurement team from the earliest notion of there being a requirement. Procurement officers are then alerted for any information on the potential requirements.
- Economies of scale are gained by uniting the requirements of different areas.
- There are no surprises when requirements manifest themselves in later months.
- Requirements can be timed to the year-end of economic operators that may be tendering so as to achieve better deals.
- Everyone can plan and schedule resources for the coming year more effectively.
- Periodic indicative notices can be published on the basis of the procurement plan (these are not obligatory but can help competition by pre-warning economic operators of new opportunities).
- Co-operation with other contracting authorities is more fruitful.
- The procurement plan is linked to the strategic plan of the contracting authority.

2.3.3 Consequences of not undertaking procurement planning

By not undertaking such a planning process, it would mean that:

- Stakeholders, the finance department and the procurement team would work in isolation, unaware of each other's needs.
- Requirements received by the procurement team would be surprises, for which no pre-planning would have been possible.
- Procurement officers would miss information on the potential requirements because they would not know they existed.
- Economies of scale would be lost because the requirements of different areas would be processed separately.
- Requirements would not be timed to the year-end of potential economic operators and so better deals could not be achieved.
- Resource scheduling would be difficult.
- Periodic indicative notices would not be published as easily.
- Co-operation with other contracting authorities would be more difficult as visibility of future needs would be limited.
- There would be no procurement plan linked to the strategic plan of the contracting authority.

Good practice note – stakeholder budgets

In one case in the contracting authority referred to above, an obstructive senior stakeholder refused to share information on his budget with procurement at the September meeting. "It was too confidential", he said. The procurement officer concerned approached the finance department, obtained the budget information and made cost-saving proposals at the mid-October meeting. An argument ensued, the cost-saving proposals were accepted, and the senior stakeholder was removed from office two months later by the head of the contracting authority, who could not understand the stakeholder's attitude.

Here, the lesson for procurement is to be persistent and not to be put off by obstructive people.

The primary concept of procurement is that advanced planning, scheduling and joint projects will result in cost savings, more efficient and effective processes, and therefore increased value-for-money. Procurement planning also links the strategy of the contracting authority to procurement activity and individual purchases.

Appendix 2 contains the City of Cork's (Eire) procurement plan for 2008-2010.

2.4 Individual procurement plans

2.4.1 Introduction

Examples of individual procurement plans are provided in Appendix 1 below.

- Appendix 1, section A.2 contains a plan that is annotated with boxes referring to the tabulated notes in this section
- Appendix 1, section A.3 contains a raw plan with no annotation. This plan is intended to be copied and used by participants in their own contracting authority
- Appendix 1, section A.4 contains a sample completed procurement plan

2.4.2 Note on completing the procurement plan in Appendix 1, section A.2

This text starts on the next page.

Completing the procurement plan

Introductory comments

1. The procurement plan presented to you in the annotated procurement plan is not a fixed document. You must adapt it to meet the needs of your contracting authority and the needs of the requirement being purchased.
2. A common mistake is to try to use the same format for every purchase made. The essence of success is to have the same template plan with some essential elements, which is adapted to suit the specific job in hand.
3. Completing a procurement plan is not a five-minute job. It requires time, investigation, and working with others. The first activity of the procurement officer should be to organise the way in which the plan will be completed and who will be involved in the task.
4. This plan and the planning that it involves should be undertaken once a procurement need has been identified or once it has been decided to commence planning for a requirement that is included in the annual procurement plan. The activity will start at step 2 of the procurement cycle and, for straightforward requirements, could almost be completed at that stage. However, for substantial procurement the plan will require the work of several persons over a period of time and will probably involve activities up to and including step 9 of the procurement process (approval). There is no single right or wrong approach.
5. Each of the text boxes and tables in the plan should be expanded as necessary; sometimes the total length of the plan will exceed 10 pages. The template is a tool, not a straightjacket.
6. The procurement plan is an important document. At the top of the document should appear the contracting authority logo.
7. In the table below a number has been provided for each box on the annotated procurement plan; each box includes recommended contents, notes on the contents, and an indication of who should be responsible for completing it. This table has been based on how procurement practitioners use this sort of document. If you wish to adapt the boxes to the needs of your contracting authority, feel free to do so.
8. It is presumed that a multi-disciplinary team, led by a procurement officer, will complete this document. This team is comprised of the persons referred to in box 3 below.

Box	Recommended contents	Notes on contents	To be completed by
1	Contracting authority name, name of requirement, requirement reference number, author's name and contact details, date of plan, version number, budget, target date of procurement and other basic information as necessary in your contracting authority	<p>This box needs adapting and probably breaking down into subheadings or a table to reflect your contracting authority, your department names and your style of operation. Budget and cost information could be included here, although actual cost information may also be an output of market research.</p> <p>The key point about this box is that it contains all of the relevant basic information to allow anyone reading the plan to understand the essence of the document that follows.</p>	The procurement officer running the procurement
2	This table indicates who the key stakeholders are in this procurement exercise and their department(s). It also includes a space for them to 'sign off' the plan when it is completed.	<p>Identifying stakeholders is an important part of preparing a procurement plan. The stakeholders identified in this table will include:</p> <ul style="list-style-type: none"> ◦ heads of department, who will use the requirement once it is procured ◦ budget-holders ◦ heads of finance ◦ technical specialists ◦ legal representatives <p>These stakeholders are the decision-makers who will approve the plan once it has been completed. They may second other people who work for them to complete the plan, but they will sign the document allowing the project to go ahead.</p>	<p>The procurement officer running the procurement in conjunction with the persons named in the boxes</p> <p>The persons named to sign off the document</p>
3	This table indicates the names of the 'worker stakeholders' within this procurement exercise and their department. The term 'worker stakeholders' denotes	It is important for the senior stakeholders in the contracting authority to be able to understand who has been involved in the preparation of the procurement plan:	The procurement officer running the procurement in conjunction with the

Box	Recommended contents	Notes on contents	To be completed by
	<p>persons playing an active role in the development of the plan. It also has space for them to sign the plan when it is completed.</p>	<ul style="list-style-type: none"> ◦ If they see that a specific person or department has not been included, they may want this person or department to be involved and to sign off the plan before they themselves sign it off. ◦ If a named person who was involved in preparing the document has not signed the document, a senior person may refuse to sign the document until that other person has signed it. <p>The contents of this box should include the name of every person who has a responsibility to be involved in the procurement.</p>	<p>people named in the boxes</p> <p>The persons named to sign off the document</p>
4	Names of others consulted	<p>This area of the document can be used to demonstrate that the core team involved in the requirement have consulted others in the contracting authority.</p> <p>Any external consultants or experts consulted would be noted here.</p>	<p>The procurement officer running the procurement in conjunction with the persons named in box 3</p>
5	Requirement summary	<p>This box should summarise the requirement being purchased. It needs to contain enough detail to describe the requirement and convey its essence, but should not be unnecessarily long.</p> <p>Where the budget is a real issue, it could be referred to here.</p>	<p>The technical specialist stakeholder and/or the other members of the team</p>
6	Areas affected by this requirement	<p>This box is used to record the names of persons in areas of the contracting authority who are affected by the requirement. It acts as a reminder to the team that it needs to consult these areas.</p>	<p>The procurement officer running the procurement in conjunction with the persons named in box 3</p>

Box	Recommended contents	Notes on contents	To be completed by
		Persons signing off in box 2 will want to ensure that everyone affected by the requirement has been consulted.	
7	Constraints	This box is where the team indicates the constraints. These may be specific technical issues or generic items, such as the budget, time or space. Where the budget is smaller than would ideally be sought, this could be considered as a constraint and included here.	The procurement officer running the procurement in conjunction with the persons named in box 3
8	Market analysis	<p>Procurement officers should make an attempt to ascertain the state of the market for their requirement and inform the team. It may be competitive or monopolistic, or it may be suspected that the market is controlled by a cartel. This information will assist in planning the procurement.</p> <p>Market research may be conducted using a variety of sources. One output of market research is the determination of likely costs and the relation of those costs to the budget.</p>	The procurement officer running the procurement in conjunction with the persons named in box 3
9	SWOT analysis (Strengths, Weaknesses, Opportunities and Threats) – from the point of view of the contracting authority	<p>The box invites the team to attempt to identify the strengths, weaknesses, opportunities and threats that it faces in carrying out this procurement. The strengths and weaknesses are normally internal to the contracting authority and the opportunities and threats are usually external.</p> <ul style="list-style-type: none"> ◦ Strengths could include the fact that there is a purchase to make that will attract economic operators. ◦ Weaknesses could include not having the desired budget size or suspecting that persons from the economic operator have good contacts in the 	The procurement officer running the procurement in conjunction with the persons named in box 3 and others as necessary

Box	Recommended contents	Notes on contents	To be completed by
		<p>contracting authority and know about the requirement.</p> <ul style="list-style-type: none"> ◦ Opportunities could include the shortage of work that some economic operators may currently have. ◦ Threats could include the busy state of the market and the unattractiveness of the requirement. <p>Be honest when completing these entries; do not pretend that a situation is better than it is!</p>	
10	SWOT analysis – from the point of view of the economic operator	<p>The box invites the team to attempt to identify the strengths, weaknesses, opportunities and threats that economic operators may face in submitting a tender for this procurement. The strengths and weaknesses are normally internal to the economic operator and the opportunities and threats are usually external.</p> <ul style="list-style-type: none"> ◦ Strengths could include the fact that the economic operator team knows the contracting authority and its staff well, and feels that it understands the way in which the authority works. Equally, it could be that the economic operator team is convinced that it offers the best solution. ◦ Weaknesses could include neither knowing the contracting authority and its staff well nor knowing how it works or having failed previously when working for the contracting authority.. Equally, it could be that the team believes that it does not have the best solution to offer here. ◦ Opportunities could include the fact that this business is placed in competition when other economic operators are not competing for the work. 	The procurement officer running the procurement in conjunction with the persons named in box 3 and others as necessary

Box	Recommended contents	Notes on contents	To be completed by
		<p>◦ Threats could include the fact that there will be several competitors competing for this work and that the economic operator team must be sharp in quoting this requirement.</p> <p>Be honest when completing these entries; do not pretend that a situation is better than it is!</p>	
11	Knowledge gaps to fill and actions taken to fill the gap	<p>This is an area where poor procurement officers will assume that there is nothing to find out and prudent procurement officers will realise that there are things that they don't know and need to find out.</p> <p>Be honest when completing these entries; do not pretend that a situation is better than it is!</p> <p>These gaps may be apparent from the SWOT and market analyses or from questions that the team may consider. Typical gaps can include:</p> <ul style="list-style-type: none"> • Stakeholder requirements and priorities • Requirement characteristics, features, and possible variations with the requirement • Technologies involved – possible choices and options • Supply market characteristics • Supply chain characteristics and cost-drivers • Economic operators' pricing policies (which impact on the cost for the contracting authority) • Economic operators' roadmaps • Current economic operator's capabilities • Current economic operator's performance for similar contracts 	The procurement officer running the procurement in conjunction with the persons named in box 3 and others as necessary

Box	Recommended contents	Notes on contents	To be completed by
		<ul style="list-style-type: none"> • Other (be inventive!!) <p>At the start of the plan there may be many gaps, but as the plan develops the gaps should be closed.</p> <p>Some contracting authorities make this area in the plan a separate task, assigning responsibilities to the team members and then presenting a summary in the document.</p>	
12	Risk management	Some contracting authorities include a risk management matrix at this stage of the procurement process. They identify the risks, set out plans to mitigate the risks, and allocate responsibilities and time schedules.	The procurement officer running the procurement in conjunction with the persons named in box 3 and others as necessary
13	Deliverables	<p>Deliverables can be an early version of the tender award criteria, but at this stage they do not have to be specific.</p> <p>The vital action here is to oblige the team to make a statement about what the benefit of procuring this requirement will be.</p> <p>In the final version of the plan it may be that the award criteria are included.</p> <p>Delivering within the iron triangle may be referenced here (see notes below for information on the “iron triangle”).</p>	The procurement officer running the procurement in conjunction with the persons named in box 3 and others as necessary
14	Strategy to deliver deliverables	This box should summarise the strategy that the team is going to adopt for this requirement and the tactics that it is going to use to get there.	The procurement officer running the procurement in conjunction with the persons named in the box

Box	Recommended contents	Notes on contents	To be completed by
		<p>This strategy should state:</p> <ul style="list-style-type: none"> • which of the public procurement procedures are going to be adopted for this requirement - open, restricted, competitive procedure with negotiation, competitive dialogue, innovation partnership procedure or particular procurement regimes used for the procurement of social and other specific services • which of the tools will be used, such as framework agreements, electronic auctions, dynamic purchasing systems, e-catalogues or a central purchasing body 	and others as necessary
15	Action plan	This box should identify the outline timing of the procurement exercise in the form of a plan detailing who will be responsible for each part. A Gantt chart could be useful here, as could budget monitoring and a project plan for works developments.	The procurement officer running the procurement in conjunction with the persons named in box 3 and others as necessary

2.5 The role of stakeholders during planning

The role of stakeholders in the procurement process is covered in Module B4. Additionally, sections 2.3 and 2.4 of this document have covered the role of stakeholders in the annual planning exercise and in the completion of the specific procurement plan. The brief notes in this section add to the other information provided.

Stakeholders' prime function is to carry out their normal duties, be it as an IT manager, a maintenance engineer, a catering manager or a tax collector. Their involvement in procurement is for them a means to an end. Procurement officers must treat stakeholders as customers (this topic was covered in Module B2).

Bearing all of this in mind when considering procurement planning, procurement officers must work with stakeholders to encourage them to consider the process as a convenient means of achieving their objectives. The role of stakeholders in the procurement planning process can be summarised as:

1. Identifying the requirements they need to procure
2. Providing input to the annual procurement plan
3. Examining options for the goods, services and works required with procurement
4. Working with other stakeholders and procurement officers to combine requirements to achieve economies of scale
5. Considering packaging options for the requirements with procurement and other stakeholders
6. Developing requirement specifications
7. Considering the analyses within individual procurement plans with procurement officers and other stakeholders
8. Timing their needs

2.6 Need to research the supply market

2.6.1 The contribution of supply market research

One of the major contributions that procurement officers can make to stakeholders is market research. The Internet makes research a much easier option than it was previously.

Supply market research involves understanding the full range of current and potential economic operators, current and potential products and services, and the nature and dynamics of the local and global markets involved.

Procurement officers must not be limited to local country markets; they must extend their research so as to obtain regional and global views.

This research complements current knowledge and experience held by the contracting authority, which may be incomplete, fragmented or out-of-date. It aims to build a systematic, in-depth and comprehensive view of the whole market for the requirement in question.

This process can require a substantial commitment of time and resources depending on the starting position, but it is essential to continuously monitor and update the information gathered.

Research is an ongoing task – it is important to understand how economic operators and the market are changing in order to spot opportunities and build potential strategies for developing the market.

Procurement officers and technical specialist stakeholders can aspire to understanding their economic operators as well as the contracting authorities understand themselves, and to knowing more about the supply market than any individual economic operator. Knowledge is power.

2.6.2 Objectives of supply market research

The objectives of supply market research include:

- Supporting the creation of annual and individual procurement plans and strategies through an understanding of how markets operate
- Clarifying where the leverage points and opportunities exist in the marketplace
- Visualising and understanding the marketplace from the economic operators' perspective
- Influencing economic operators through a better understanding of their playing field, strengths, weaknesses and opportunities

2.6.3 Sources of information

Sources of information include:

- Patents
- Press and industry associations
- Company reports and brochures
- Plant tours and visits to economic operators
- History, contracts, agreements
- Formal enquiries
- Planned interviews
- Former employees
- Financial analysts
- Economic operators and their competitors
- Colleagues
- Other procurement officers
- Internet

2.6.4 Information to be gathered

The information to be gathered can include:

- History
- Market profiles
- Dynamics
- Diversity
- Niches
- Economic operators and their supply chain

History

- Previous purchases, volumes, shares, economic operators
- Price changes by economic operator over time, patterns of change, by niche
- Patterns of technology introduction
- Changes in market share

Market profile

- Market size, quantities, local, regional or international nature
- Commodity make-up
- Number of economic operators, market share of each
- Niches and specialist areas

Market dynamics

- Market cycles, natural and induced
- Life cycles and how they are changing
- New segments being created or old ones dying
- Impact of current and future technology
- Growth or decline, segment differences
- Profitability changes

Market diversity

- Fundamentals of supply and demand in the market
 - Changes in capacity – past, present and future
 - Changes in demand – past, present and future
- Cost-drivers:
 - Impact of transportation, energy, raw material cost shocks, labour costs, low-cost country sourcing
 - Possible technology changes and cost impacts
- Substitutes and allied products available
- Other products available that are not currently used
- Value-added – what is available?
- New/ better options or uses being created by innovation and technology
- Location of key global geographic centres and currency and duty impacts
- Geopolitical impacts, historical and future
- Barriers to entry

Niches

- Determining the niches existing in the market place, how they are populated with products and economic operators, and what are the important dynamics and drivers in the niches that are relevant to us:
 - How do channels to the market act as niches?

- Compare economic operators and products/services within niches, and niches with each other, on the basis of price, cost, technology, added-value and dynamics
- How does a service or product offering change in value and price from one niche, industry or channel to another?

Economic operators and the supply chain

- Who are the economic operators? What is their size? Breadth of line? Niche focus? Relationship with us?
- Who are the major buyers? By niche and product/service? For what purpose do they use the product/service? Relationship with us?
- Who supplies the economic operator? The cost breakdown of the goods and services?
 - What are the key components of cost that drive those goods/services and markets?

2.7 Advantages of networking with other procurement officers

Module B2 refers to co-operating with other contracting authorities.

The aim of this activity is to exchange good practice. **Good practice does not include exchanging specific costs, prices and performance of economic operators**, but it does include:

- Approaches to contract formulation
- Approaches to bundling requirements
- Terms and conditions that have worked
- Generic tactics being tried by economic operators on contracting authorities
- Solutions to problematic issues

Information must be exchanged at a high generic level; however, the essence of networking is that someone else may have solved the problem you face.

One advantage that public procurement officers have in this area is the fact that they are not in competition, and therefore persons working with other contracting authorities will feel freer to share information with them.

2.8 Packaging requirements to encourage competition

The golden rule of attracting competition is to specify in a generic way. This aspect of the procurement process is dealt with in Module E1. However, even a generic specification may not always attract many economic operators. The following notes aim to act as guidance on making the bundle of the requirement to be advertised as 'attractive' to as wide a range of economic operators as possible. These notes should be read in conjunction with Module A4, which looks at the economic issues related to the packaging of contract opportunities. This is part of the procurement planning process, and as you will see there is no single correct approach.

- In some cases even a generic specification for a tiny requirement or a requirement in a remote location will not attract economic operators. One solution here is to include the requirement in a

larger package of similar work or to work with other contracting authorities to create a more attractive requirement in the supply market.

- The opposite of the above example is where the requirement is huge, reflecting a major expenditure and a national requirement. As such, this requirement may only be supplied by one or two large economic operators. Here a solution is to divide the requirement into smaller packages, either geographically or by their nature. An example would be the supply of IT hardware as one contract, installation as another and maintenance as a third contract. This solution may promote competition, but it may also deny economies of scale and create management problems.
- Issuing a Prior Information Notice (PIN) to ensure that interested economic operators have as much time as possible to prepare for participation is another way of increasing attractiveness to the supply market.
- Holding 'meet the buyer' days, where a number of public sector procurement officers are available to meet persons from prospective economic operators, is another option.
- Prospective economic operators could consider developing and providing a good information pack about the proposed project. The pack should ideally include an insight into your contracting authority's business, its vision, objectives and business constraints, a clear performance specification and the flexibility around the time frames for the proposed work, making clear any mandatory deadlines.

Note: Article 46 of the 2014 Directive concerns the division of contracts into lots to encourage SME participation. It requires contracting authorities to state the main reasons for a decision to not divide a contract into lots, either in the procurement documents or in the individual report required under article 84. See Modules E3 and E4 for more information on the requirement to consider whether or not to divide a contract into lots.

2.9 Planning for the procurement of works

Localisation to reflect requirements, such as budgetary approval

The size, risk, impact and overall cost of works means that procurement officers need to be involved in additional activities when procuring works, although the purchase of complex services and equipment may also benefit from some of the steps identified below.

2.9.1 The business case

For the procurement of works, the following information should be included in the business case:

- The outline capital and operating budgets for the works over their expected lifetime, which will include capital construction costs and operating revenue necessary to maintain the completed structure
- Quantification of the benefits that the works are likely to deliver to the contracting authority or to the community at large over its lifetime
- How the works will be financed

- Risk assessment of the cost, time and performance, examining the probability, impact and duration of risks if they materialise. Supporting assistance of specialist consultants may be useful here.
- Outline programme for the construction
- Indication of the procurement procedure to be used (open, restricted, competitive dialogue, negotiated procedure with prior publication of a contract notice)
- Resources that will be required from the contracting authority

Many of these points are interrelated and it may be necessary for the persons who are running the procurement to trade off benefits and costs. The business case will test the feasibility of the project in cost, resource and commercial terms, but technical feasibility studies may also be required.

2.9.2 Technical feasibility studies

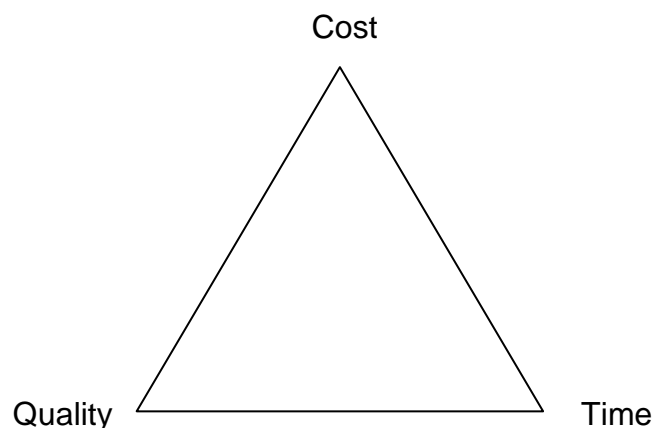
A technical feasibility study may be necessary to ascertain whether the project is technically feasible, even if the time, resources and budgets are available. A city may wish to build a bridge over a river at a given point, but geological surveys may reveal that the underlying land is too marshy to support a structure. Equally it may be possible to support the structure, but the cost of the additional piling may break the budget and a different location may need to be sought. Examples of areas where technical feasibility are used include:

- Construction projects (buildings, bridges, airports)
- Computer system integration projects (integrating new and existing system components)
- Updating complex equipment (seeking new engines for a fleet of 500 railway engines)
- Telephony (integrating a new exchange with existing equipment)

It will be necessary to indicate the ground on which a building or bridge is to be built or the existing interior of buildings that are to be renovated.

2.9.3 The 'iron triangle'

Procurement officers experienced in works projects talk of a concept called the 'iron triangle'. The three points of the triangle, as shown below, are cost, time and quality.



The vital consideration behind the iron triangle is that a change in one component will impact on the others, and therefore:

- An attempt to reduce the cost may impact on and reduce the quality of the works as delivered.
- An increase in cost arising from the technical feasibility study (which has determined, for example, that the foundations of the building must now be five metres rather than three metres) will impact on the cost. Even if quality is not to be affected, additional costs and additional time will be necessary to excavate the additional two metres.
- If time must be reduced, then additional costs may be required, or reducing the scope may impact on quality.
- If quality is to be increased or if a reduction of scope is to be avoided when there is a potential budget overrun, then there will be an impact on cost.

The iron triangle is 'iron' because it is difficult to move!

2.9.4 An example of how these factors impact on a works procurement

The following examples of how aspects from the business case and from the iron triangle shaped the public procurement for a desalination plant are given below:

- Capital budget of €30m was agreed
- Operating costs were budgeted at €1m per year
- Construction would take 24 months
- The project would end water shortages and avoid the necessity of building a €100 dam and piping system
- Proven processes from elsewhere were to be selected
- The quality was to be such that the plant would last in excess of 25 years
- Water processing targets in litres per hour were agreed
- The city council would finance the project from local taxation
- The site chosen was fixed and had a low environmental impact
- Latency for expansion was to be considered up to 20% of the specified capacity
- A restricted procedure was selected and incentivisation clauses were to be included to ensure on-time delivery

The project was completed in 22 months.

NB: Incentivisation relates to additional payments to economic operators to encourage the delivery of improved service (in this case an earlier handover date) and reduced payments for poorer service (in this case a later handover date).

2.9.5 Detailed planning

For works projects procurement officers may be involved in detailed planning with the project manager. On some occasions the contracting authority may also have a project manager. This activity may involve concepts such as critical path analysis and the use of Gantt charts to plan and monitor the progress of the project. Here, procurement officers are required to work closely with the project manager or project team to:

- assist in the development of the detailed plan
- activate specific sub-purchases within the plan and within the time frame
- monitor progress and ensure arrival/delivery to time schedule
- handle any detailed project questions or issues with economic operators delivering various parts of the project
- handle any detailed questions or issues that economic operators may have in delivering various parts of the project

2.9.6 Environmental impact assessment

Works procurement may involve an environmental impact assessment (EIA).

Note on Environmental Impact Assessments:

For certain types of public and private projects it is obligatory to undertake an Environmental Impact Assessment (EIA). This obligation does not derive from the procurement Directives but from Directive 85/337/EC (as amended), “the EIA Directive”. Where a project is of a type which is subject to the EIA Directive, then the contracting authority must carry out an EIA in advance so that the authority has all relevant information which enables it to take a decision in the full knowledge of the environmental impact of that decision. The types of project covered are set out in the EIA Directive and can include, for example, oil refineries, power stations, major infrastructure projects and waste disposal installations.

Where an EIA is produced then this may have an effect on the subject matter of the contract and/or on the performance clauses.

For further information on the EIA Directive see: europa.eu/environmental/eia

An EIA should include the following elements:

- A summary, overview and description of the purchase
- A description of the environment at the site
- An indication of the alternatives covered
- A description of the impacts on the environment of the options considered
- Steps taken to mitigate the impact upon the environment
- The selected option

Brief notes on each of the above elements follow.

A summary, overview and description of the purchase

The purchase or project must be described to give a clear understanding of its objectives and benefits. This should include:

- A description of the actual project and a site description
- Dissecting the works development into its key components, i.e. construction, operations, decommissioning
- A list of all of the sources of environmental disturbance for each component
- Identification of the inputs and outputs, e.g. air pollution, noise, hydrology

A description of the environment at the site of the works development

The EIA should describe all aspects of the environment that may be effected by the works development. This can include:

- Local population
- Fauna
- Flora
- Air
- Soil
- Water
- Landscape
- Cultural heritage

This analysis is frequently carried out with the help of local experts, e.g. in the UK if a wind farm would have an impact on the bird population, the RSPB would be involved.

LOCALISATION – USE THE NAME OF A SPECIAL INTEREST GROUP IN THE COUNTRY CONCERNED.

An indication of the alternatives covered

This part of the EIA should describe the alternative solutions examined and how they attempt to minimise the impact. Examples could include:

- Diverting the course of the road
- Providing a tunnel under the road for frogs to use to avoid being run over
- Sourcing fuel locally to reduce the carbon footprint
- Delaying the construction to avoid the mating season
- Doing nothing

A description of the impacts on the environment of the options considered

This part of the EIA should describe the impact of the alternative solutions examined. Examples could include:

- Diverting the road would avoid the project's impacting on the frogs but would cost an additional €3.82m.
- The tunnel would cost €4,500, but 40% of the frogs would still use the road and 50% would be run over by cars.
- Local fuel would cost 20% more but reduce the carbon footprint by 'x' tons as coal was not sourced in Siberia.

- The project would incur additional costs by delaying its start until June, but the rare birds would be able to mate as normal.
- Doing nothing would mean that 80% of the frogs crossing the new road would be squashed by vehicles using it. The population would be reduced by 90% in five years.

One method used to quantify impact is the Leopold Matrix, which identifies the potential impact of a works development on the environment. The Leopold Matrix consists of columns representing the various activities of the works development and rows representing the various environmental factors to be considered. The intersections are filled in to indicate the magnitude (from -10 to +10) and the importance (from 1 to 10) of the impact of each activity on each environmental factor.

Steps taken to mitigate the impact upon the environment

The previous analysis leads to an understanding of where the impact is the greatest so that plans can then be made to:

- avoid negative impacts in the planning and execution of the works development
- work with economic operators to design detail into the works to accommodate a favourable impact on the environment
- avoid negative impacts in the operation of the developed facility
- brief the general public on the actions being taken
- learn lessons for future projects

The selected option

Throughout the works development and subsequent operation, information should be available to the public on the continuing environmental management of the site and on improvements made to the site. Learning from the development can also be circulated to others embarking on similar developments and the actions taken can contribute to future research.

Section 3 Exercises

Exercise 1: The Annual Procurement Planning Process

Assume that you have moved to a new contracting authority, one that has not used an annual planning process before. The financial year is January to December. Assume that the Director of Finance has asked you to propose a planning process involving:

- Heads of departments and the people who work for them
- Technical specialists
- The finance department.

The Director of Finance indicates that she feels that the process should start in September and be complete by mid-November.

Your task

Your task is to draw a flowchart of the process. A spare sheet of paper is provided.

Exercise 1 Flowchart

Exercise 2: The Annual Procurement Plan

What are the advantages of constructing an annual procurement plan? Write your suggestions in the box below.

What might be the consequences of not undertaking an annual procurement plan? Write your suggestions in the box below.

Exercise 3: An Individual Procurement Plan

The following list contains 18 items that might be in an individual procurement plan. Three of them are incorrect. Can you identify which three comments are incorrect and then place all remaining items in the proper sequence within the plan?

There is no absolutely “right” sequence; however, it *is* logical to place some items before others in the plan. To add to the challenge, one of the wrong items *might* be right.

Item	Description of item	Sequence within plan
A	A list of areas within the contracting authority impacted by the requirement	
B	A list of stakeholders and people who should sign off the plan	
C	A list of worker stakeholders and people who will be involved in constructing the procurement plan from different departments	
D	A market analysis of the supply market for the procurement	
E	A summary of the requirement	
F	An analysis of the economic operator’s tender	
G	An analysis of the strengths, weaknesses, opportunities and threats faced by the contracting authority in procuring this requirement	
H	An analysis of the strengths, weaknesses, opportunities and threats faced by the economic operator in supplying this requirement to the contracting authority	
I	Basic information about the requirement and its stakeholders	
J	Constraints that may be faced by the team working on the procurement	
K	How the economic operator can implement the requirement	
L	Knowledge gaps – things not known by the procurement team or stakeholders	
M	Names of other people consulted in the construction of the plan	
N	Risk management issues	
O	The action plan of who will do what and when	
P	The deliverables of the procurement if it is made	
Q	The name of your preferred economic operator	
S	The specification of the requirement	
T	The strategy and tactics to be used to approach the supply market to procure this requirement	
U	The terms and conditions you wish to use	

Exercise 4: The Contents of an Individual Procurement Plan

Your tutor will provide you with handouts for this exercise.

Section 4 Chapter Summary

Self-test questions

No.	Question
1	How would you define procurement planning?
2	What are the advantages of procurement planning?
3	“Selecting the economic operator” is one of the 8 actions of a stakeholder in procurement planning. True or false?
4	“Working with other stakeholders and procurement officers to combine requirements to achieve economies of scale” is one of the 8 actions of a stakeholder in procurement planning. True or false?
5	Complete this sentence: One of the _____ that procurement officers can make for stakeholders is market research.
6	What are the objectives of market research as part of procurement planning?
7	This module identified 13 sources of information for market research. Can you identify five of those?
8	What information from “history” should assist us in market research?
9	In networking with other procurement officers, is it appropriate to share prices and performance data from economic operators?
10	If a procurement officer has a national contract to place that she feels may only attract one or two economic operators, how can she make the requirement open to more competition?

Websites

Information on the Leopold matrix and its use in environmental impact assessments can be obtained from <http://www.fao.org/docrep/005/v9933e/v9933e02.htm>

Appendix 1 The procurement plan

Appendix 1, A.1 Introduction

This section contains a sample procurement plan in three forms:

- Section A.2 contains a plan that is annotated, with boxes referring to the tabulated notes in section 2.4
- Section A.3 contains a raw plan with no annotation, which is intended to be copied and used by participants in their own contracting authority
- Section A.4 contains a sample completed procurement plan

Section A.2 Procurement plan – annotated version

This document follows on the next page.

Your logo

Procurement plan

Box 1

Basic information

Box 2

Stakeholders		
<i>Name</i>	<i>Department</i>	<i>Sign-off</i>

Box 3

Plan prepared by		
<i>Name</i>	<i>Department</i>	<i>Signature</i>

Box 4

Names of others consulted	
<i>Name</i>	<i>Department</i>

Requirement summary

Box 5

Areas affected by this requirement

Box 6

Constraints

Box 7

Market analysis

Box 8

SWOT analysis from the contracting authority's viewpoint

Box 9

<i>Strengths</i>	<i>Weaknesses</i>
<i>Opportunities</i>	<i>Threats</i>

Box 10

SWOT analysis from the economic operator's viewpoint	
<i>Strengths</i>	<i>Weaknesses</i>
<i>Opportunities</i>	<i>Threats</i>

Box 11

Knowledge gaps		
	<i>Knowledge gap</i>	<i>Information to fill the gap</i>
1		
2		
3		
4		
5		

Box 12

Risk management				
<i>No,</i>	<i>Risk description</i>	<i>Mitigation action</i>	<i>Action by</i>	<i>Time frame</i>
1				
2				
3				
4				
5				

Box 13

Deliverables

Box 14

Strategy

Box 15

Action plan

No,	Action	Action by	Time frame
#.1			
#.2			
#.3			
#.4			
#.5			
#.99			

Section A.3 Procurement plan – raw version

This document follows on the next page.

Your logo

Procurement plan

Basic information

Stakeholders		
<i>Name</i>	<i>Department</i>	<i>Sign-off</i>

Plan prepared by		
<i>Name</i>	<i>Department</i>	<i>Signature</i>

Names of others consulted	
<i>Name</i>	<i>Department</i>

Requirement summary

Areas affected by this requirement

Constraints

Market analysis

SWOT analysis from the contracting authority's viewpoint	
<i>Strengths</i>	<i>Weaknesses</i>
<i>Opportunities</i>	<i>Threats</i>

SWOT analysis from the economic operator's viewpoint	
<i>Strengths</i>	<i>Weaknesses</i>
<i>Opportunities</i>	<i>Threats</i>

Knowledge gaps		
	<i>Knowledge gap</i>	<i>Information to fill the gap</i>
1		
2		
3		
4		
5		

Risk management				
<i>No,</i>	<i>Risk description</i>	<i>Mitigation action</i>	<i>Action by</i>	<i>Time frame</i>
1				
2				
3				
4				
5				

Deliverables

Strategy

Action plan			
No,	Action	Action by	Time frame
#.1			
#.2			
#.3			
#.4			
#.5			
#.99			

Section A.4 Procurement plan – completed with sample data

This document follows on the next page.

K City Council - Procurement plan 2010/07

Plan number 2010 – 07 Version 2.5 Updated 12th January 2010
Project name – IT System for Tax Collection
Procurement department – K City Council
Originated by AB Procurement Manager Tel Ext 1234
Target implementation date November 2010
Budget €6m

Stakeholders		
<i>Name</i>	<i>Department</i>	<i>Sign-off</i>
CD	Head of taxation	
DE	Head of finance	
FG	CEO	
HI	Head of legal	
JK	Head of IT	

Plan prepared by		
<i>Name</i>	<i>Department</i>	<i>Signature</i>
LM	Taxation specialist	
NO	Senior accountant	
PQ	IT consultant	
RS	Taxation lawyer	
TU	Procurement manager	
VW	Procurement officer	

Names of others consulted	
	<i>Department</i>
AC	Customer liaison officer
BD	Network communications specialist
FG	City councillor
GI	IT manager

Requirement summary

K City Council plans to purchase software to enhance its ability to collect local taxes. The system will integrate with other finance and accounting systems and national banks. The software should allow individuals in the region to pay their taxes online via the Internet. The software must be capable of operating on the existing hardware and software platforms operated by K City Council.

Areas affected by this requirement

Taxation, tax collection, finance, banking, IT, IT maintenance, taxpayer liaison department, debt collection, procurement

Constraints

Our current software platform is the X system.
 Our current hardware platform will not constrain a solution.
 Our current network is N1234.
 The budget is €6m, which includes all contingencies.
 This project must be implemented by January 2011.

Market analysis

The market is competitive. It has segments that include prestigious applications and basic applications, most of which can run on the X system. Local economic operators and national offices of international software vendors should be interested in this procurement opportunity.

SWOT analysis from the contracting authority's viewpoint	
<i>Strengths</i>	<i>Weaknesses</i>
We have a €6m budget, we have a definite approved project and we have the world's most common system as a software platform	Our track record on implementing these projects is poor, last time there was a €400k overrun
<i>Opportunities</i>	<i>Threats</i>
The opportunities presented by the software in the market should allow us to collect tax more efficiently and pursue tax dodgers more effectively. We will also need less people with this automated system. Forecasting the income of the council will be improved by the integration with financial applications	If we cannot find an economic operator to deliver this requirement on time, then the performance of the council will be more ineffective in 2010.

SWOT analysis from the economic operator's viewpoint	
Strengths	Weaknesses
K City Council has up-to-date IT applications and is a 'go-ahead' council. They have implemented the latest version of Oracle Financials in 2008. Our software will integrate with Oracle Financials.	Our budget may not be sufficient to procure the most advanced software solutions.
Opportunities	Threats
We may be able to use K as a reference site.	There will be a lot of competition, particularly from software written in India.

Knowledge gaps		
	Knowledge gap	Information to fill the gap
1	Integration with existing applications rather than interfacing	Economic operators will specifically be asked this in the tender. We know someone at Y Town Council, which has done something similar, and are going to network with him.
2		
3		
4		
5		

Risk management				
No.	Risk description	Mitigation action	Action by	Time frame
1	Project overrun	LM is going on a project management training programme.	LM	Feb 2010
2	Non-integration	Research and questioning of economic operators and others	PQ	Jan 2010
3				
4				
5				

Deliverables

The implementation of tax collection software and associated processes working on our existing software platform, which will integrate with other key financial functions, reduce tax collection costs, and add effectiveness to tax collection processes in K, all for the benefit of its residents

Strategy

A period of indicative notice was placed for this requirement in December 2009 and it is in the procurement plan published in December 2009 for 2010.

The taxation, finance and IT representatives will produce a generic performance specification that will be tendered to the market using the open procedure. MEAT will be the evaluation criteria.

Action Plan			
No.	Action	Action by	Date by
1	Specification complete	Team	Feb 2010
2			
#.3			
#.4			
#.5			
#.99			

Module C2 Contract Terms

Section 1 Introduction

1.1. Objectives

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

1. The basic aspects of a contract
2. Risks in commercial contracts
3. The layout and contents of some standard contracts for the procurement of supplies
4. The layout and contents of some standard contracts for the procurement of works
5. The layout and contents of some standard contracts for the procurement of services

1.2. Important issues

The most important issues in this chapter are understanding:

- The risks that may arise under a contract
- How the contract can share those risks between parties
- The features of commonly used standard contracts

1.3. Links

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

- Module C1 on procurement planning
- Module C5 on social and environmental considerations
- Module E1 on preparing tender documents
- Module E2 on advertisement of contract notices
- Module E3 on selection (qualification) of candidates
- Module E4 on setting contract award criteria
- Module E5 on contract evaluation and contract award
- Module G1 on contract management
- Module G3 on measuring performance in public procurement

1.4. Relevance

This information will be of particular relevance to those procurement professionals responsible for procurement planning, for the development of projects, and for the preparation of contract documents. It is also relevant for those involved in project implementation, including contract management.

It will moreover be of particular relevance to those persons that, within the line management of the organisation of a contracting authority, have responsibilities and decision-making powers – including delegation powers – with regard to procurement (for example, decisions on the allocation of risk).

1.5. Legal information helpful to have at hand

Adapt for local use

The 2014 Directive

In this context it is helpful to look at both the recitals to the 2014 Directive and the relevant articles:

- Recitals 1 and 2: context for the new 2014 Directive, facilitating in particular SME participation
- Recitals 37 and 40 and Article 18, principles of procurement: compliance of economic operators in the performance of public contracts with environmental, social and labour law established by European Union law, national law or collective agreements or by the international environmental, social and labour law provisions listed in Annex X
- Recital 36 and Articles 20 and 77: reserved contracts for sheltered workshops and other social businesses whose main aim is to support the social and professional integration or reintegration of disabled and disadvantaged persons, such as the unemployed and members of disadvantaged minorities or otherwise socially marginalised groups
- Article 42: technical specifications, environmental characteristics and accessibility criteria for people with disabilities
- Article 43: use of labels as proof that the works, supplies or services correspond to specific environmental, social or other characteristics
- Article 46: provisions on lots, with the aim of encouraging contracting authorities to divide contracts into lots and thus increase SME participation
- Article 62: quality assurance standards and environmental management standards
- Article 67: contract award criteria

- Article 71: provisions on subcontracting requiring the main contractor to provide details on subcontractors and their changes as well as compliance of subcontractors with obligations under environmental, social and labour law and the optional provision for Member States of direct payment to subcontractors
- Article 72: modifications of contracts during their term (see Module G1 for more information on these new provisions)
- Articles 74 to 77: particular procurement regimes for social and other specific services, including reserved contracts for certain "light regime" services

Regulation (EC) N°593/2008 ("Rome 1") on choice of applicable law

United Nations Convention for the International Sale of Goods ("Vienna Convention" 1980)

Additional information

SIGMA Public Procurement Briefs:

No. 30, *2014 EU Directives: Public Sector and Utilities Procurement*

Section 2 Narrative

2.1 Basics of a contract

What is a contract?

A contract is an agreement giving rise to obligations that are enforced or recognised by law.

Adapt for local use

Within a commercial environment, a contract for the supply of goods is an agreement by which the supplier (known as an “economic operator” under the 2014 **Directive** transfers or agrees to transfer the property in the goods to the buyer (known as the “contracting authority” under the 2014 **Directive** for money consideration, called the price. Similarly, a contract for the supply of works or services is an agreement by which the supplier provides or agrees to provide the works or services to the buyer in return for the agreed price.

For an agreement to be reached there must be an offer and an acceptance of that offer. The offer expresses willingness by the party making the offer to contract on certain terms with the intention that the offer shall become binding as soon as it is accepted by the party receiving the offer.

The offer can be withdrawn at any time prior to acceptance by the other party unless it stated that it would remain valid for a fixed period of time.

The acceptance must be a final and unqualified expression of assent to the terms of the offer. In general, the acceptance has no effect until it has been received by the party making the offer. The acceptance must reach the party making the offer within the time stated in the offer or if none is stated, within a time which is reasonable under the circumstances. In some circumstances, the conduct of the recipient of the offer is deemed to be acceptance.

A response that seeks to vary the terms of the offer may fail to take effect as an acceptance. Such a reply may constitute a counter-offer.

When the parties carry on lengthy negotiations there may be several counter-offers, and it can be difficult to determine exactly when and on what terms agreement was reached. In some cases, the parties may continue negotiations on an important point after they have agreed on all other matters of principle. This frequently occurs in the construction industry, when a project developer (the contracting authority) may issue a “letter of intent” setting out terms under which construction work is expected to begin, pending agreement on all other terms and the signature of a complete package of contract documents. It is not rare for the complete package of contract documents to never be signed, and in such an event a court may have to determine whether a contract existed for the whole of the works and to determine the terms of that contract. In other cases, the parties themselves may disagree as to whether they had ever agreed at all. In such cases, the court must look at the record of the negotiation in order to decide whether an agreement has been reached, and determine the terms of that agreement.

The “Battle of Forms”

Problems can arise when each party purports to contract with reference to their own set of standard terms, and the two sets conflict. If, throughout the process of offer and counter-offer, each party consistently refers to their own set of standard terms, no agreement will ever be reached. If a party alleges that an agreement was eventually reached, the court will have to determine whether at some stage one of the parties conceded the point in conflict in a communication or through their conduct.

When the parties believe that an agreement has been reached, it is usual for the agreement to be recorded in writing. In many countries, a contract can be made orally without ever being recorded in writing and there may never be any dispute over the terms of the agreement. However, to avoid disputes and in the interests of enforceability, it is preferable for the parties to set down precisely the terms of the entire agreement.

Contracts for the supply of goods, works or services of significant value will contain detailed terms set out in many clauses, the purpose being to safeguard the interests of each of the parties by clearly allocating responsibility for the risks to which the parties may be exposed by virtue of the contract. For transactions of lesser value, the contract may be shorter and less detailed because the financial impact, should a risk event occur, will be far less significant. Furthermore, the transfer of risk has an effect on price. When the goods, works or services are relatively minor, it could be uneconomic for the buyer to transfer risk to the seller via a complex and detailed contract.

The use of a standard form of contract – such as one of the FIDIC¹ suite of contracts for works of construction or the ICC² Model International Sale Contract for the supply of goods – can limit the volume of drafting work and negotiation, but the choice of standard form and the definition of particular conditions must be given careful thought.

The question to be constantly borne in mind when drafting and negotiating all contracts should be “What if ...?”

Consideration

Under English law, a promise to do something (or not to do something) is generally not enforceable as a contract unless it is either made under seal or is supported by “consideration”. In other words, “something of value in the eye of the law” must be given. This “consideration” may be some detriment to the promisee or some benefit to the promisor. Usually this detriment and benefit are the same thing looked at from the different viewpoints of the parties. Thus delivery of goods by the seller (which is to his detriment and to the benefit of the buyer) is good consideration for the buyer’s promise to pay. Having suffered a detriment upon delivering the goods, the seller can enforce the buyer’s promise to pay the price. The amount of the detriment or benefit is irrelevant because it is not consideration for the contract (it does not have to equal the value of the goods) but

¹ Fédération International des Ingénieurs de Conseil – a worldwide organisation based in Geneva that represents consulting engineers (see later section).

² International Chamber of Commerce – a worldwide organisation based in Paris that represents businesses.

consideration for the promise. The promisee may give good consideration for the promise merely by doing something that they were not otherwise legally required to do.

2.2 Risks in a commercial contract (see also Module A4)

The applicable law of a contract allocates the risks envisaged in that contract to the contracting parties, and it is the function of the contract to affirm that allocation, or to redistribute these risks from one to the other contracting party, or to spread them to third parties.

If a risk is not allocated to one of the contracting parties either by the applicable law of the contract or by the terms of the contract itself, then it would be expected that the courts will ask the following questions when they are required to adjudicate the issues arising:

- Which party can best foresee the risk?
- Which party can best control the risk?
- Which party can best bear the risk?
- Which party most benefits or suffers if the risk eventuates?

It is impractical if not useless to allocate a risk to a party who cannot bear its consequences unless that party is able to shift or spread its allocated risk to others who can. This shift or spread is usually done through insurance.

In preparing any contract for the procurement of supplies, works or services, the main areas of risk to be considered are the following:

- the proper specification of the supplies, works or services to be provided;
- compliance with the specification (quality assurance; inspection; rectification of defects; guarantees and warranties; acceptance);
- timing (commencement; programme; delivery/completion; delay);
- price and payment (definition of price; amount of payments; timing of payments; method of payment; delayed payment);
- damage and Injury (to supplies or works during transport or during erection; to employees; to third parties; intellectual property; insurances);
- social and environmental issues;
- failure to perform (delay damages; performance damages; default; termination; security);
- “boilerplate clauses” (law of the contract; language of the contract; order of precedence; severability; waiver; assignment; amendment; notices);
- resolution of disputes.

2.3 The proper specification of the works, supplies or services

It is usual practice for the supplies, works or services to be defined within a document or series of documents forming part of the contract and known as the technical specification(s).

Annex VII of the 2014 **Directive** states that “technical specification” means one of the following:

“(a) in the case of public works contracts, the totality of the technical prescriptions contained in particular in the procurement documents, defining the characteristics required of a material, product or supply, so that it fulfils the use for which it is intended by the contracting authority; those characteristics include levels of environmental and climatic 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, user instructions and production processes and methods at any stage of the life cycle of the works; those characteristics also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve;

and

“(b) in the case of public supply or service contracts, a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental and climatic 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 at any stage of the life cycle of the supply or service and conformity assessment procedures.”

What does the 2014 **Directive** require of a technical specification?

1. “Technical Specifications should take into account accessibility criteria for disabled people, whether general public or staff of the contracting authority” [art. 42(1)];
2. They should not have the effect of creating unjustified obstacles to free competition” [art. 42(2)];
3. Without prejudice to mandatory national rules (e.g. earthquake resistance requirements), they shall be formulated either
 - a. in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject matter of the contract and to allow contracting authorities to award the contract; or
 - b. by reference to technical specifications as defined in Appendix VII and in order of preference to:
 - national standards transposing European standards
 - European Technical Assessments

- common technical specifications
- international standards; or
- other technical reference systems established by European standardisation bodies or
- national standards, national technical approvals or national technical specifications.

Each reference must be accompanied by the words 'or equivalent'

- c. in terms of performance or functional requirements, as referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements; or
 - d. by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements referred to in point (a) for other characteristics." [art. 42(3)]
4. "Unless justified by the subject matter of the contract, technical specifications shall not refer to a specific make or source, or to a particular process which characterises the products or services provided by a specific economic operator or to trademarks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or products. Such references shall be permitted, on an exceptional basis where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to paragraph 3 is not possible. Such reference shall be accompanied by the words 'or equivalent'." [art. 42(4)]

It may seem evident that the party procuring the works, supplies or services (the "Contracting Authority" in the 2014 Directive should properly specify the works, supplies or services that it is seeking to procure. However, the proper description of the supplies, works or services can go well beyond purely technical aspects or the choice of European or national standard. These other aspects may be addressed in parts of the contract other than the technical specification, *e.g.* in the conditions of contract, or may influence the form of the contract itself.

For example, in relation to a contract for public works, who will prepare the design: the contracting authority (the "contracting authority/employer") or an "engineer" on their behalf, or the economic operator (the "contractor")? Are all materials to be provided by the contractor, or will some materials be provided by the contracting authority/employer or another economic operator chosen by them (a "nominated supplier")? Will the contractor have exclusive occupation of the site and undertake all of the works, or will other contractors be present carrying out parts of the works? If the latter, how are the interfaces to be defined?

Will a fully detailed technical specification be provided, or will the supplies, works or services be defined in terms of performance criteria, permitting the contractor some flexibility in the choice of equipment to be installed, provided that the performance criteria are met? What will be the input of the contracting authority/employer with respect to the approval of the design? Will they seek to approve or comment upon every detail throughout the design and construction phases, or will their

involvement be limited to checking that the completed works comply with the performance specification?

With respect to the technical specification itself, is a one-off document to be prepared or is a standard document available for reuse? Does the standard document apply fully or does it need to be adapted to the particular circumstances? Serious problems can arise when the technical specifications are composed from a number of documents without careful co-ordination.

The answers to questions such as these may influence the contracting authority/employer to opt for a turnkey contract using a standard contract form such as the FIDIC “Silver Book” (under which the contractor undertakes to design and construct the works and carries most of the risk, but under which the contracting authority/employer is allowed only little involvement until the Works are almost complete). Or conversely, the contracting authority/employer may choose a form of contract that allows them much greater involvement, such as the FIDIC “Red Book” for works designed by the contracting authority/employer.

When defining the supplies, works or services that are to be provided, it is important for the contracting authority to precisely and accurately state all of their requirements but without infringing rules of free competition. This requires input from personnel with relevant experience, including in the technical, contractual and procurement aspects.

It should be remembered that in the event of an unclear description, the contract is generally to be interpreted against the drafting party (the “contra-proferentem” rule in common law countries) or against the party who stipulated the obligation (the “contra-stipulatorem” rule in civil law countries, *e.g.* article 1162 of the French Civil Code).

2.4 Compliance with the specification

Having defined the works, supplies or services that are to be provided, the contracting authority will wish to ensure that the supplies, works or services that are actually provided do comply with the definition. The technical specification may have required quality assurance measures, tests or inspections, and for a small contract these provisions may suffice. However, for more substantial procurement contracts, it is commonplace for the contracting authority to allow themselves wide-ranging powers to ensure conformity. This is particularly so for major public works contracts, for which a failure to identify nonconformity at an early stage may result in prohibitively high rectification costs at a later date.

Thus the contract should provide for:

- vetting of materials and workmanship before use on site (*e.g.* testing of welders, independent testing of materials);
- inspection of major equipment during manufacture and/or before shipment to site;
- the establishment of a QA/QC system by the contractor with audits by the contracting authority/contracting authority/employer, their engineer or an independent third party;

- checking of designs by the contracting authority/employer, their engineer or an independent third party;
- authority for the contracting authority/employer to reject defective materials or workmanship prior to completion of the works, with power to employ others to rectify the defects should the contractor fail to do so within a reasonable time;
- final checking of the works prior to them being taken over by the contracting authority/employer;
- a period following takeover of the works during which the contractor must rectify any defects that become apparent (often referred to as the “defects notification period”, the “defects liability period” or the “maintenance period”);
- no approval is being considered final except for the performance certificate or similar issued upon completion of rectification of defects that become apparent during the stipulated period following takeover of the works.

In addition, the contracting authority/employer may wish to further protect themselves or the final end user against the risk of future defects via a guarantee provided by the contractor, often supported by an insurance policy (a ten-year guarantee is usual in many civil law countries) or via a system of collateral warranties. (See also Module C3 for general commentary on the guarantee/warranty period.)

A collateral warranty is a guarantee issued by one party in favour of another party, without there being any direct contractual link between them. Thus, the contract may require the contractor to provide the contracting authority/employer or the end user of the works with a warranty from the supplier of waterproofing materials to cover defects appearing in the waterproofing during a period of 20 years from the date of handover of the works.

A major building project may involve dozens of collateral warranties, each with a different warranty period. These warranty periods are usually longer than the general guarantee period or the defects notification period. It is common practice for them to be fixed by the technicians who draft the detailed technical specifications, which can often extend to thousands of pages. This can lead to the warranty periods being overlooked by one or both of the contracting parties, until a problem arises. In the interests of dispute avoidance, it is good practice to include within the contract a summary table of all such warranty periods.

In relation to the sale of goods, it is often indicated that the goods do not conform with the contract unless:

- they are fit for the purpose for which similar goods are ordinarily used;
- they are fit for the particular purpose that was expressly or impliedly indicated to the seller at the time the contract was concluded, except where it can be shown that the buyer did not rely on or it was unreasonable for them to rely on the skill and judgment of the seller;
- they possess the qualities of goods presented by the seller to the buyer at the time as samples or models;
- they are packed in the manner usual for such goods or, where there is no such manner, in a manner adequate to protect the goods.

2.5 Timing

The subject of timing is usually one of the three matters of fundamental importance in a procurement contract, the others being quality and price. Budgets must be established taking account of when the supplies, works or services will be provided. A multitude of other decisions and actions may depend upon the date of delivery. For example, if a piece of hospital equipment is delivered late, it may be necessary to transport patients to another facility for treatment until the new equipment is available. Conversely, if it is delivered ahead of schedule, it may be necessary to organise off-site storage in special conditions. All such measures will increase the costs to the contracting authority. It is thus of paramount importance that the contract carefully address timing: when the contract is to take effect; when the economic operator is to begin his activities; when the contracting authority is to take action required of him; when delivery is to take place; what will happen in the event of delay by a) the contracting authority or b) the economic operator; whether there are any intermediate milestone dates to be met; whether delay damages will be charged in the event of failure to meet the intermediate milestone dates or the date for completion, and if so how much and on what basis; whether there will be any incentive payments for early completion.

It should also be remembered that the timing will affect the price demanded by the economic operator. If they are to provide supplies, works or services within a very short period, they will charge a premium because they may have to reschedule supplies to other clients, increase their resources in order to meet the deadline, or pay additional transport costs. On the other hand, if from the outset they know that they will be unable to proceed as quickly as they would like because of constraints imposed by the contracting authority, they may have to allow in their price for additional overheads and cost increases due to inflation. In general, the more time constraints are placed upon the economic operator, the greater will be the price that they charge to the contracting authority.

A balance must be found between protecting the contracting authority against the risk of delays and exposing them to a higher price because of unnecessarily severe time constraints on the economic operator. This is a task that must be shared between the technicians and legal draftsmen with the relevant experience.

Timing is often defined by means of a programme, showing graphically the order in which certain activities will take place and their durations in order to meet contractual deadlines. Under the FIDIC forms of contract for works, such programmes are not included as contract documents. This is because the FIDIC forms of contracts were originally based on an English form and under English law, if a programme is included as part of the contract, it must be followed precisely. In other words, if either party deviates from the programme, that party will be in breach of the contract. In view of the fact that the main purpose of a programme is to serve as a working tool that allows the parties to see how adjustments can be made to the organisation of activities in order to recover lost time or otherwise, it is generally viewed as bad practice to rigidly impose every detail of the programme as a binding contractual requirement.

2.6 Price and payment

The third matter of fundamental importance in any procurement contract is of course the price and, related to this, the method of payment. Among the questions that the drafter of the contract needs to consider are:

- Is there to be a single purchase or a series of purchases?
- Is there to be a single lump-sum price, or a series of unit prices to be applied to the actual quantity delivered?
- What does the price (or prices) cover? Are there exclusions from the price? Who is to pay for transport, insurance, import duties and charges for imported supplies?
- Is the price (or prices) to be fixed for the duration of the contract, or is there to be adjustment to take account of inflationary increases (or decreases)? If the prices are to be adjusted, how is the adjustment to be determined?
- In which currency or currencies are payments to be made, and who shall bear the risk of exchange rate fluctuation?
- Is payment to be made by cheque, bank transfer or by documentary credit?
- Is payment to be made immediately upon delivery or within a defined period after delivery?
- Is there to be an advance payment, stage payments (sometimes called “interim payments”), or a single payment? How are the amounts of these payments to be determined? If there is an advance payment, how is account to be taken of this advance payment in calculating the amount of subsequent payments?
- Is part of the payment to be withheld for a period to cover the risk of defects (known as “retention” or “retention money”), or can this risk be covered by a bank guarantee from the economic operator? (See Module C3 for more on bonds and retention money.)
- Is the contracting authority to provide a guarantee of payment?
- What is to be done in the event of late payment? Will the economic operator be paid interest and, if so, on what basis? Will the economic operator be entitled to slow down or suspend performance until they are paid overdue amounts? Will they be entitled to terminate the contract?
- If the contracting authority wishes to modify the supplies, works or services, what will be the procedure and how is the new price to be determined?
- If the supplies, works or services do not fully comply with the specification, can the price or prices be reduced and, if so, on what basis?

The answer to each of these questions will have an impact on the offers (referred to as “tenders” in the 2014 **Directive** received from economic operators (referred to as “tenderers” or “candidates” in the 2014 **Directive**).

Every response that increases the burden upon tenderers, or puts them at risk, will increase the amount of the tenders. In most circumstances, it is more economical for the contracting authority to share the risk and thereby to obtain lower prices.

When a contract is between two private entities (such as a property developer and a construction company), it is commonplace for many of these matters to be negotiated – for example, the amount of the advance payment, the payment periods, interest on late payment, a bank guarantee instead of retention, a price adjustment formula, and allowance for exchange rate fluctuations. However,

within the context of a procurement contract within the European Union to which a public body is a party, there is much less scope for such matters to be negotiated.

Recital 90 of the 2014 **Directive** states:

“Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender. It should be set out explicitly that the most economically advantageous tender should be assessed on the basis of the best price-quality ratio, which should always include a price or cost element. It should equally be clarified that such assessment of the most economically advantageous tender could also be carried out on the basis of either price or cost effectiveness only. It is furthermore appropriate to recall that contracting authorities are free to set adequate quality standards by using technical specifications or contract performance conditions.”

Recital 90 goes on to say:

“To ensure compliance with the principle of equal treatment in the award of contracts, contracting authorities should be obliged to create the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied in the contract award decision. Contracting authorities should therefore be obliged to indicate the contract award criteria and the relative weighting given to each of those criteria.”

Article 67 of the 2014 **Directive** requires the criteria to be listed in the contract notice or the contract documents, together with the relative weighting attached to the criteria. Article 67 provides as follows:

1. “Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities shall base the award of public contracts on the most economically advantageous offer.”
2. “The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject matter of the public contract in question.”
3. “The contracting authority shall specify in the procurement documents the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone...”

Thus, if the amount of advance payment is to be open to proposals from tenderers, this must be listed among the criteria together with an indication of the importance attached to that aspect. Upon receiving the tenders, the contracting authority must evaluate the effects of the advance payments requested by tenderers, and take this evaluation into account in determining which tender is the most economically advantageous. (See Module E4 for more on award criteria.)

2.7 Damage and injury

Another area of risk that must be considered by the contract drafter is that of damage, whether to the subject matter of the contract or to other property, and related to this the risk of injury to those involved in the contract or to third parties.

In relation to a contract for supplies, the contract drafter must consider the risk of damage during the transport of the supplies, the risk of environmental damage, and the risk of injury to those using the supplied products.

In relation to a contract for works, they must consider the risk of damage to third party property as a result of the execution of the works (including for example the risk of damage to roads and bridges leading to the site). They must also consider the risk of environmental damage during the execution of the works or due to their design. They must take account of the risk of damage to the works themselves prior to completion, whether by causes for which the contractor is responsible or by external causes over which the contractor has no control (war, terrorism, forces of nature, etc.). They must consider the risk of injury to the contractor's employees and others engaged on the construction of the works, to the contracting authority's/employer's own personnel visiting the site or working there, and to third parties.

Particularly in relation to a contract for services but possibly in relation to a contract for supplies or works, they must consider the risk of infringement of intellectual and industrial property rights.

They will deal with these risks in three ways:

- (a) by imposing safety procedures and the like in order to minimise the risk of damage or injury,
- (b) by limiting the liability of one party through indemnities issued by the other party (as far as legally possible) in the event that damage or injury is caused by the other party and
- (c) by insuring against the risk directly or by obliging the economic operator to subscribe to a policy to cover the risk on terms stated in the contract.

2.8 Social and environmental issues (see Module C5 for a detailed explanation)

The 2014 Directive encourages contracting authorities to integrate environmental protection measures into their procurement activities.

Recital 36 and article 20 state that Member States may reserve the right to participate in public contracts to workshops providing sheltered employment for people with disabilities.

Articles 42 and 43 refer to the possibility for contracting authorities to lay down environmental characteristics within technical specifications and to use eco-labels. It also calls for technical specifications to take account of accessibility criteria for disabled persons.

Recitals 78 and 79 as well as articles 46 and 71 encourage the involvement of small and medium-sized undertakings through provisions on lots and subcontracting.

Recital 99 and article 76 allow for award criteria or contract performance conditions intended to favour on-site vocational training, to encourage the recruitment of long-term job-seekers, or to recruit more handicapped persons than are required under national legislation, provided that they relate to the works, supplies or services to be provided under the contract.

Recital 101 and article 57 mention the possible exclusion from the procedure for the award of public contracts of economic operators which have proven unreliable, for instance because of violation of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violation of competition rules or of intellectual property rights.

The same is stated with respect to a failure to observe national provisions concerning equal treatment of workers. Under article 57 the commission of such an offence or such grave misconduct may result in the economic operator being excluded from participation in the contract.

Recital 75 and article 58 foresee the possibility of environmental management measures being required of the economic operator.

Such issues are also addressed by some standard forms of contract. The FIDIC suite of contracts used commonly for public works includes provisions within the general conditions dealing with rates of wages, working hours, worker accommodation, feeding and transport, health and safety, worker supervision, etc. The version of FIDIC contracts that has been adapted for use by multilateral development banks includes provisions prohibiting the use of child labour and forced labour, and requiring contractors to take steps to limit the spread of HIV/AIDS among their workers.

Although the contract drafter should not modify these general conditions because of copyright considerations, within the particular conditions or the technical specifications he can make these provisions more onerous for the economic operator, in the direction suggested by the 2014 **Directive**. In doing so, he must bear in mind that there will be an impact on price, particularly if the risk associated with the more onerous provisions is difficult for tenderers to establish.

2.9 Failure to perform (delay damages, performance damages, default, suspension, termination, security)

Whenever a contracting authority enters into any but the most minor of contracts, he should be concerned about the risk that the chosen economic operator fails to perform. This failure to perform may be in one or more ways. For example, an economic operator who is close to being insolvent will not have the funds available that are needed to maintain normal progress. As a result he will miss

deadlines, may not produce work of the required quality, and may be unable to refund the advance payment at the due time. In such a case, the contracting authority would incur additional costs due to the delay, may have to pay others to rectify defects, and may be unable to recover the advance payment made to the economic operator.

With these possible consequences in mind, the contract drafter should seek to protect the contracting authority as much as is economically viable – that is, to the extent that the resulting increase in the price demanded by tenderers does not exceed the benefit.

The range of measures available to the drafter includes:

- Tender bond issued by a bank (or insurance company) on behalf of a tenderer to ensure that the tenderer does not refuse to abide by his tender if this is accepted by the contracting authority. If he does refuse to be bound by his tender and refuses to sign the contract, the bank must pay the contracting authority the amount of the tender bond. The bonds are released by the contracting authority when the successful tenderer has signed the contract.
- Advance payment bond, by which the issuing bank must pay the contracting authority if the bank's client, the economic operator, fails to reimburse the advance payment. The amount of the bond is initially equal to the amount of the advance payment, but may be reduced in proportion to any reimbursement that is made by the economic operator. The bond is released only when the advance payment has been fully reimbursed to the contracting authority.
- Performance bond, which is issued by a bank on behalf of the economic operator to guarantee performance of his obligations under the contract. The amount of the bond is usually expressed as a percentage of the accepted contract price. The bond is sometimes released in stages but more usually is held by the contracting authority until it is satisfied that all obligations of the economic operator have been fulfilled.
- Parent company guarantee, which is issued by the mother company of which the economic operator is a subsidiary. In the event that the economic operator fails to perform, the mother company is obliged under the terms of the parent company guarantee to step into the place of the defaulting subsidiary and perform the unfulfilled obligations.
- Delay damages (often referred to as "liquidated damages" and expressed as an amount per day of delay or as a percentage of the price per day of delay).
- Performance damages, which cover a failure to meet performance criteria such as energy consumption levels or the required levels of production.
- The right to suspend further performance until the default has been rectified.
- Termination provisions that allow the contracting authority to terminate the contract with the defaulting economic operator, particularly in the event of their insolvency, bankruptcy, etc. Such provisions usually allow the contracting authority to appoint another party to fulfil all remaining obligations and to set off the cost of doing so against amounts that would otherwise be due for payment to the defaulting economic operator. (In the interests of a balanced contract, it is usual for the economic operator to have a similar right to terminate in the event of insolvency, bankruptcy, etc. of the contracting authority.)

Many standard form contracts include all of these measures, but the applicable amounts must be decided by the contracting authority. This is a matter for careful thought, because if the contracting

authority seeks an unusually high level of protection, that will be reflected in the tenders that he receives. One possible consequence is that contracting authority receives no tenders at all. For example, many major European construction companies will not submit tenders for works for which the contracting authority seeks a performance bond in excess of 15% of the contract price.

When the expression “liquidated damages” is encountered in a contract it is usually in relation to delay, but it is sometimes encountered in relation to a failure to achieve specified levels of performance. The expression refers to an amount set out in the contract that is intended to compensate one party in the event of a breach by the other party. The amount is said to be a genuine pre-estimate of the loss that is likely to be suffered by the innocent party if the breach occurs. In the event of the stated breach, the innocent party is entitled to the liquidated damages regardless of the actual loss incurred. If the actual loss is less than the liquidated damages, the party in breach cannot have the amount of the liquidated damages reduced – but conversely, if the actual loss is greater than the liquidated damages, the innocent party cannot usually claim more. The advantage to the parties is that from the outset they know the limits of the risk being taken.

It should be noted that the concept of liquidated damages is rooted in common law. A court in a common law jurisdiction will apply the liquidated damages provision in almost all cases of breach without modifying the rate of damages fixed in the contract, even if the breach has caused no actual loss. In civil law countries, the position is not always the same. In some countries, liquidated damages clauses will not be applied unless there has been actual loss. In some countries, the courts will modify the rate of the liquidated damages. In some countries the innocent party will lose their entitlement to liquidated damages unless they follow specific procedural rules that are not always mentioned in the contract.

It is therefore important to check the position of liquidated damages under the law applicable to the contract.

2.10 “Boilerplate clauses”

A number of other matters of a legal nature that are often included in commercial contracts are collectively known as “boilerplate clauses”. They are intended to limit the risk of future disagreement and include matters such as:

- the law of the contract
- the language of the contract
- the order of precedence
- severability
- waiver
- assignment
- amendment
- notices
- retention of title
- limit of liability

- resolution of disputes

Each of these matters is explained below except for the resolution of disputes, which is treated separately in the following section.

The law of the contract

When the contract is purely domestic – that is, between a contracting authority and an economic operator from the same country – it is not usually necessary for the contract to stipulate the country whose laws will govern the contractual relationship. Indeed, in some countries the parties have no freedom to choose the law governing a domestic contract. However, when it is likely or possible that the economic operator comes from a country different from that of the contracting authority, it is necessary for the contract to specify the country by whose laws the contract must be interpreted. The parties may agree that the relationship should be governed by the laws of the state from which one of the parties comes, but they may agree instead that the laws of a third country should apply.

Within the European Union, the freedom to choose the law of the contract is expressly stated in Regulation (EC) No. 593/2008, known as the “Rome 1 Regulation”:

“A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract” [art. 3.1].

“To the extent that the law applicable to the contract has not been chosen in accordance with Article and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

- (a) A contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
- (b) A contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
- (c) A contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;
- (d)” [art. 4.1]

“Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.” [art. 4.4]

The choice of law can be critical. For example, an English court will not revise the amount of liquidated damages for delay that has been agreed between the parties even if the actual loss suffered because of the delay is much less or much more than the amount of liquidated damages. The amount of the liquidated damages may even exceed the amount of the contract if no limit is fixed in the contract. However, a French court will revise the amount and in general will not allow a percentage in excess of 20% of the contract amount.

On the other hand, an English court will not apply a penalty clause – liquidated damages are not considered a penalty and must correspond to an estimate, made before signing the contract, of the damage that is likely to be suffered in the event of a default by the other party, such as delay. Under French law, contractual penalties are allowed and one often sees contracts that allow one party to fine the other for failing to attend meetings, breaches of the safety plan, etc.

In recent years, there has been a surge in privately financed infrastructure works, often with funds sourced from banks in the City of London. These banks have insisted that the lending agreements be governed by English law. To minimise their risks, the concession companies have chosen English law as the governing law in their relationships with the large construction contractors (often foreign to the country where the works are located). However, the large construction contractors have been obliged to accept local law as the basis for their contracts with subcontractors. Such duality of legal systems can create problems. For example, the subcontractor might be able to have his works declared as complete under the local law, whereas the main contractor may not be able to do so under English law.

Although the parties may choose the country whose laws are to govern their contractual relationship, they cannot entirely avoid the law of the country in which the works are to be constructed or the supplies to be used:

Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.” [art. 3.3 of Rome I Regulation]

and

Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. ... [art 9.3]

Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests – such as its political, social or economic organisation – to such an extent that they are applicable to any situation falling within their scope.

Thus, a building in Warsaw must be constructed in accordance with Polish building standards and Polish safety regulations, even if the contract is to be interpreted in accordance with English law. In the past, problems often arose when contracts allowed the use of technical standards from different countries. It was commonplace for contracts to state, for example, that works were to be executed in accordance with BS³ standards from the United Kingdom, DIN⁴ standards from Germany, or NF⁵ from France, whichever were the more stringent. Because of differences between the national standards, long discussions could occur at the design stage with consequent delays to completion of the works.

³ BS = British Standard.

⁴ DIN = Deutsches Institut für Normung.

⁵ NF = Normes Françaises.

With the advent of European standards, such problems occur much less frequently, and under the 2014 **Directive** a contracting authority is obliged to accept an equivalent technical standard and must be able to provide a reason for any decision that equivalence does not exist in a given case (art. 42). However, difficulties can still arise when a national standard differs from European standards – for example, with respect to wind or snow loads on a building – which are highly dependent upon geographic location. Thought must be given to these aspects when drafting the technical specification.

The language of the contract

When the contracting parties come from different countries, it is also important for the contract to define the governing language. It is possible that two or more languages will be used in communications, but in order to deal with translation problems the contract should clearly state which language shall take precedence over the other.

The contract relating to the execution by a French contractor of a building project in Moscow was in both Russian and French. A dispute arose during the construction of the works and the French contractor could not understand the position of his Russian client. After obtaining two separate translations of the relevant clause of the contract, it was found that the Russian version could be translated into French in two different ways. As the contract stated that Russian would be the governing language, the French contractor had to concede the argument.

The order of precedence

The order of precedence applicable to the contract documents should also be carefully defined. In some cases, all relevant documents are bound into the contract; in other cases, some documents may form part of the contract simply by a reference to them. Frequently, the contract is composed of several documents (*e.g.* contract agreement, general conditions of contract, particular conditions of contract, sample forms of bond, general specification, particular specifications, drawings, bills of quantities, minutes of negotiation meetings, invitation to tender, tender bulletins, contractor's tender, etc.). For a complex contract such as one for public works, these documents together may extend to thousands of pages and it is almost impossible to avoid conflicts between some of their contents. A defined order of precedence can be of great assistance in overcoming these conflicts – but an order of precedence that has been drafted with insufficient attention can make matters worse. This can often be the case when there are circular references within documents or when the same document can be found in two places, for example as an annexe to another document (see example overleaf). Sometimes one can find two different orders of preference in the same contract. This is usually because the contract has been drafted by several people – a technician prepared the specifications, where they included “their” order of precedence, while a jurist prepared the conditions of contract in which they inserted “their” order of precedence.

If no order of precedence is defined, the courts will apply a number of rules in interpreting conflicting provisions:

- Particular provisions will take precedence over general provisions.

- A specific document will take precedence over a non-specific document (*e.g.* a standard form contract).
- Handwritten provisions will take precedence over printed provisions.
- Later documents will take precedence over earlier documents.
- An unclear provision will be interpreted against the party drafting the provision.
- An unclear provision will be interpreted in favour of the party carrying the burden of the obligation under the provision.

A PRECEDENCE NIGHTMARE

The following extracts come from a contract for building works in Indonesia, between an Indonesian investor advised by consultants from US and New Zealand, and a contractor from Australia. Unravelling the order of precedence became a major source of headaches.

Conditions of Contract

–The order of precedence for the Contract Documents shall be as follows:

- The Form of Agreement
- The Letter of Intent
- Contractor’s letter of 22 March
- Conditions of Contract
- Contract Drawings
- Contract Specifications
- Contract Bills

Articles of Agreement (not referred to as “Form of Agreement” mentioned in the Conditions of Contract”)

–The following documents are hereby incorporated by reference:

- Form of Tender
- Conditions of Contract
- Specifications
- Bills of Quantities
- Final Summary
- List of Contract Drawings Addendum
- Contract Drawings

Letter of Intent (not listed in the Articles of Agreement)

–The following documents shall form the basis of and shall be incorporated into the formal Contract Document:

- The Tender Document and the Bill of Amendment
- The Tender
- Tender Queries 1 to 9
- Letter issuing the Bill of Amendment
- Contractor’s letter of 22 March

Bills of Quantities

–The Contract Documents shall comprise:

- Letter of Invitation to Tender, Instructions to Tenderers and the Form of Tender
- The Articles of Agreement
- The Conditions of Contract
- The Specifications
- Bills of Quantities
- Contract Drawings
- All correspondence exchanged prior to the award of the Contract
- The Letter of Intent

Appendix F to the Contract

–Correspondence forming part of the Contract Documents

- Tender Queries 1 to 9
- Letter issuing the Bill of Amendment
- Letter issuing revised pages for the Bill of Quantities
- Contractor's Tender clarifications and qualifications
- Tender Summary
- Contractor's letter of 22 March
- The Letter of Intent

Severability

A severability clause in a contract allows the terms of the contract to be independent of one another, so that if a term in the contract is deemed unenforceable by a court, the contract as a whole will not be deemed unenforceable. If there were no severability clause, the whole contract could be deemed unenforceable because of one unenforceable clause. An example of a severability clause is as follows:

“In the event that any one or more of the provisions contained herein shall, for any reason, be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions of this agreement, but this agreement shall be construed as if such invalid, illegal or unenforceable provisions had never been contained herein, unless the deletion of such provision or provisions would result in such a material change so as to cause completion of the transactions contemplated herein to be unreasonable.”

The last part of the severability clause is intended to prevent the nature of the contract being fundamentally modified by the deletion of the problem clause.

Waiver

A so-called waiver clause is in fact a “non-waiver clause”, for it is intended to prevent one party from arguing that the other party, through their actions or inaction, has abandoned a right that they had under the contract:

“No failure or delay on the part of any party to exercise any right, remedy, power or privilege under the contract or course of dealing between the parties shall operate as a waiver thereof, or of the exercise of any other right, remedy, power or privilege.”

In some contracts, there is a provision to the opposite effect – that is, a party is not allowed to deny an action taken by them when as a result the other party acted to their detriment. Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods, also known as the Vienna Convention (1980), states:

A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct. [Emphasis added]

Assignment

Assignment refers to the ability (or not) of a party to a contract to transfer their rights and obligations under that contract to a third person. Sometimes the contract does not permit either party to assign their rights and obligations; sometimes assignment is allowed provided that the party wishing to assign seeks the prior agreement of the other party; sometimes only one party is permitted to assign (usually the contracting authority). Contracting

authorities are reluctant to allow economic operators the right to assign because they are concerned that, in return for a fee, the economic operator who has been carefully chosen may transfer the contract to an operator, who has not been vetted.

It should be noted that assignment (which concerns the whole of a contract) is not the same as subcontracting (which concerns parts of a contract). However, in contracts that do not permit assignment, in order to ensure that assignment does not take place under cover of a right to subcontract, it is usual practice to include a rider within the subcontracting clause stating that the subcontracting of the whole of the works or services is not permitted.

Amendment

The amendment clause sets out the means by which the parties may amend the contract – usually by a document, signed by authorised representatives of both parties, possibly in front of witnesses.

Notices

The notice clause defines the means by which the parties are to communicate on important matters. It will state whether electronic communications are permitted or whether all important communications must be by physical delivery of a letter to a stated address, possibly against a receipt.

Retention of title

A “retention of title” clause is a provision in a contract for the sale of goods that allows the seller to retain the title to the goods until certain obligations (usually payment of the purchase price) have been fulfilled by the buyer. The main purpose of such a clause is to ensure that where goods are supplied on credit, if the buyer subsequently goes into bankruptcy, the seller can repossess the goods. However, this may not be possible when the goods have already been modified by the buyer or mixed with similar goods, or when they have already been resold to a third party.

In some jurisdictions, such clauses are not enforceable.

Limitation of liability

“Limitation of liability” clauses are quite common, particularly in contracts for the provision of services but also in other procurement contracts. They are intended to limit the liability of the parties to a stated amount – often equal to the contract price (or a percentage of this price) and/or they seek to exclude liability for certain categories of loss, such as loss of revenue, loss of profit and consequential damage. Courts tend to examine such clauses closely and there are numerous examples of these clauses being struck down, particularly when they seek to limit liability for latent defects. In some jurisdictions, they are not enforceable. In others, the limitation must not be so severe that the clause is, in effect, an exclusion of liability.

Other boilerplate clauses commonly found include confidentiality clauses and entire agreement clauses.

2.11 Resolution of disputes (see Module G2 for more on this topic)

The provisions dealing with the resolution of disputes can range from a simple statement that all disputes will be referred to the court at a stated location, to a complex description of a stepped procedure which might include: a formal effort to reach an amicable settlement between senior executives; mediation; expert opinion; dispute adjudication; arbitration; and litigation. In the latter case, it is usual for a strict timetable for each step to be set out in the contract. The contract can contain provisions concerning the choice of mediator, adjudicators and/or arbitrators, the procedure to be followed in each process, the body that will administer the proceedings, the location of the proceedings, the language to be used, etc.

Thus in relation to an arbitration, the contract might state that an arbitration will be administered by the Japanese International Arbitration Centre, with three arbitrators from Australia, sitting in Singapore, applying the procedural rules of the International Chamber of Commerce, the law of the contract being Vietnamese and the language being English. It is evident that with such complicated arrangements, it is possible for the parties to have different interpretations of the contract. It is therefore of paramount importance for the dispute resolution provisions to be carefully drafted.

Many problems have arisen in the past because of poorly worded dispute resolution clauses; therefore, the main administering bodies propose standard wording if the contract is to provide for their services to be used. Such is the case for the International Chamber of Commerce, based in Paris, which suggests standard wording (in more than 30 languages):

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

It should be noted that the timetable for resolving disputes that is stated in the contract must be consistent with limitation periods (prescription periods) imposed by the law of the contract.

2.12 Standard contracts for the supply of goods

2.12.1 The ICC Model International Sale Contract

Important note: The ICC Model International Sale Contract has been updated. A new edition was published in 2013. The narrative in Module C2 on the ICC International Sale Contract has not been updated to reflect changes introduced in the 2013 edition of the ICC International Sale Contract.

Manufactured goods intended for resale;

The International Chamber of Commerce (ICC) is a body that seeks to represent businesses in every part of the world. It has member companies and associations in more than 130 countries. Its declared aim is to promote an open international trade and investment system and the market economy worldwide. To do so, it establishes rules that govern the conduct of business across national borders. Among these rules is the ICC Model International Sale Contract (the “Model Contract”).

The Model Contract is destined for use primarily in relation to the supply of finished goods for resale to third parties, *i.e.* where the buyer is a distributor, importer or wholesaler. It was not intended for use in relation to custom-made goods for sale to the end user, for which the authors recommend the use of other forms – such as the Orgalime Standard Conditions, which covers the supply of mechanical, electrical and associated electronic products. This being stated, the authors of the Model Contract do not seek to prevent its use in relation to sales other than those primarily targeted but recommend that in such circumstances the parties take care to satisfy themselves that all the terms of the Model Contract are appropriate.

The Model Contract is composed of two parts: Part A sets out the specific conditions applicable to the particular contract of sale, and Part B sets out the general conditions applicable to all contracts incorporating the ICC General Conditions of Sale. Although parties would normally use both parts, they are free to incorporate into their contract only Part B, in which case any specific terms must be set out within the body of the particular contract.

Applicable law

In the absence of a contrary agreement between the parties, the Model Contract is subject to the United Nations Convention for the International Sale of Goods (also known as the Vienna Convention of 1980), which is annexed to the Model Contract. The Model Contract was drafted on the basis that the Vienna Convention would apply, and for questions not covered by the Vienna Convention the applicable law would be that of the country where the seller has their place of business. The parties have the possibility to choose domestic law but are discouraged from doing so.

Modifications

The Model Contract requires that any modification to the Contract must be in writing (art. 1.5 of Part B). However, a party may be precluded from invoking the requirement of writing if they have agreed to a modification orally or by conduct and the other party has relied on this oral agreement or conduct.

Shipment & delivery

Important note: INCOTERMS are periodically updated. The eighth version, Incoterms® 2010, was published on 1 January 2011. The narrative below has not been updated to reflect changes introduced in Incoterms® 2010. The narrative below refers to INCOTERMS 2000.

The Model Contract allows the parties to choose the conditions for shipping the goods based on the trade terms to be found under INCOTERMS (see below).

INCOTERMS 2000 published by the ICC

<p>EXW = EX WORKS (place) “Ex works ...” means that the seller delivers the goods when he puts them at the disposal of the buyer either at his premises or another named place – not yet loaded, not cleared for export.</p>	<p>FCA = FREE CARRIER (named place) “Free Carrier ...” means that the seller delivers the goods to the carrier nominated by the buyer at the named place, cleared by the seller for export. If the named place is the seller’s premises, the seller is responsible for loading otherwise loading is the responsibility of the buyer.</p>
<p>FAS = FREE ALONGSIDE SHIP (named port) “Free Alongside Ship ...” means that the seller delivers the goods when they are placed alongside the vessel at the named port of shipment – cleared by the seller for export.</p>	<p>FOB = FREE ON BOARD (named port) “Free On Board...” means that the seller delivers the goods when they pass the ship’s rail at the named port of loading, cleared by the seller for export – only suitable for transport by water.</p>
<p>CFR = COST AND FREIGHT (named port of destination) “Cost and Freight ...” means that the seller delivers the goods when they pass the ship’s rail in the port of shipment at which time the risk of loss or damage passes to the buyer (including the cost of unforeseen events) but the seller must pay the cost of transporting the goods to the port of destination and must clear them for export – only suitable for transport by water.</p>	<p>CIF = COST, INSURANCE AND FREIGHT (named port of destination) “Cost, Insurance and Freight ...” means that the seller delivers when the goods pass the ship’s rail in the port of shipment at which time the risk of loss or damage passes to the buyer (including the cost of unforeseen events), but the seller must pay the cost of transporting the goods to the port of destination, must clear them for export and must take out and pay for minimal insurance cover – only suitable for transport by water.</p>
<p>CPT = CARRIAGE PAID TO (named place of destination) “Carriage paid to ...” means that the seller delivers the goods when they reach the first carrier named by him at which time the risk of loss or damage passed to the buyer, but the seller must pay the cost of transport to the named destination. The seller must clear the goods for export.</p>	<p>CIP = CARRIAGE AND INSURANCE PAID TO (named place of destination) “Carriage and insurance paid to ...” means that the seller delivers the goods to the carrier named by him at which point the risk of damage passes to the buyer but the seller must pay the all the costs of bringing the goods to the named destination and must take out and pay for minimal insurance cover. The seller must clear the goods for export.</p>
<p>DAF = DELIVERED AT FRONTIER (named place) “Delivered at Frontier ...” means that the seller delivers the goods when they are placed at the disposal of the buyer on arrival</p>	<p>DES = DELIVERED EX SHIP (named port of destination) “Delivered Ex Ship ...” means that the seller delivers the goods when they are placed at the disposal of the buyer on board the ship</p>

at the named point and place at the frontier, cleared for export, but not yet unloaded, not yet at the customs border of the adjoining country, nor cleared for import.	at the port of destination but not yet cleared for import. The seller bears all the costs and risks in bringing the goods to the port of destination before unloading – only suitable for transport by water.
DEQ = DELIVERED EX QUAY (named port of destination) “Delivered Ex Quay ...” means that the seller delivers when the goods, not yet cleared for import, are placed at the disposal of the buyer on the quay at the named port of destination, at which point the risk passes to the buyer. The seller bears all the costs incurred in bringing the goods to the port of destination and unloading them, including the cost of insurance cover. The buyer is responsible for clearing the goods for import and pays all the associated costs – only suitable for transport by water.	DDU = DELIVERED DUTY UNPAID (named place of destination) “Delivered duty unpaid ...” means that the seller delivers the goods to the buyer at the named place of destination but not cleared for import and not yet unloaded from the means of transport. The seller bears the costs and risk of transporting the goods to the place of destination but no costs associated with the import of the goods, nor the costs or responsibility for delay in clearing the goods for import.
DDP = DELIVERED DUTY PAID (named place of destination) “Delivered Duty Paid at ...” means that the seller delivers the goods to the buyer at the named place of destination, cleared for import but not yet unloaded from the arriving means of transport. The seller bears all costs and risks involved in bringing the goods to the named place including the costs and risks of import clearance.	

Given that manufactured goods are normally loaded into containers at terminals – either inland or close to ports – rather than being loaded directly on board ships (as are raw materials and large items of equipment), the Model Contract encourages parties to avoid shipping terms such as FAS, FOB, DES and DEQ and terms that require transferable transport documents such as CIF or CFR, normally used for goods that may be resold or pledged during transit. It recommends the use of terms such as EXW, FCA, CPT, CI, DAF, DDU or DDP.

Although INCOTERMS define responsibility for transport costs and risk, they do not always address the matter of insurance. It is therefore for the parties to agree who will take out the appropriate insurance cover and pay the costs. Other INCOTERMS make no mention of responsibility for terminal handling charges, leaving this matter to the parties to agree.

Time of delivery

Under the Model Contract, the time of delivery refers to the moment when the seller must fulfil his delivery obligations under the chosen INCOTERM. It does not define the date at which the goods must reach the buyer’s premises. According to the INCOTERM agreed upon,

this could for example be the moment when the goods are available to the buyer at the seller's premises (EXW), or the moment when they are ready for loading on board ship (FAS), when they are unloaded from the ship (DEQ), or when they arrive at the buyer's premises (DDP). Clearly, in fixing the time of delivery the parties must pay careful regard to the details of the chosen shipping term. This time of delivery can be a fixed date or at the end of a fixed period that starts from a defined date such as signature of the contract. If a period is agreed, the seller can deliver at any time before the end of the agreed period.

Payment

The Model Contract allows the parties to agree the means and timing of payment. The means can be bank transfer, cheque or documentary credits such as a letter of credit. Timing, for example, can be by advance payment (all payment must arrive at the seller's bank before they despatch the goods); by letter of credit issued before shipping, which allows the buyer to recover the corresponding funds upon presentation of the proper shipping documents (see below); or by a cheque or bank transfer upon delivery of the goods to the buyer or within a defined period (such as 60 days) after delivery or receipt of invoice. If payment is to be made by bank transfer, the parties must indicate all the relevant details concerning the seller's bank account. In the event of late payment, the Model Contract provides for interest to be paid by the debtor at a defined rate.

Documents to be provided

It is common practice in relation to international sales for the seller to provide the buyer with certain documents that are needed by them for insurance purposes, customs clearance and the release of payment. These documents include invoices, transport documents, quality certificates, insurance documents, etc. Within the Model Contract, the parties can insert the details of the documents that are to be provided. In doing so, they should pay attention to two aspects:

- Which documents are required as a result of the choice of INCOTERMS?
- Which documents are required to obtain release of payment under a letter of credit?

Such documents can include:

Bill of lading – transferable document that allows the buyer to pledge or sell goods during transit; used for water transport or multimodal transport.

Multimodal transport document – also called combined transport bill or container bill of lading; covers transport by at least two different methods.

Seawaybill – also called non-negotiable bill of lading or cargo quay receipt – buyer can change delivery instructions during transport (unless there is a NO DISP clause), but cannot pledge or sell the goods.

Mate's receipt – provides proof of delivery to sea carrier, often tendered to buyer instead of bill of lading.

Air waybill – used for transport by air, sometimes called air consignment note.

Consignment note – used for land transport, sometimes called CIM consignment note or waybill for rail or CMR consignment note or waybill for road.

Warehouse warrant – used for sea or land transport when the goods are to be stored in a warehouse awaiting collection by buyer.

Freight-forwarder's document – used for all modes of transport.

Packing list – used for sea, land or multimodal transport; records details of goods packed into crate, container or lorry; may be used as proof of delivery but it is important to check who issues list and when.

Retention of title

The parties may agree under the Model Contract that property in the goods remains with the seller until they receive full payment. However, the seller needs to verify that such retention of title is permitted under the applicable law.

Warranty to consumers

The Model Contract is designed for use primarily in relation to manufactured goods. Such goods are often covered by a warranty against defects given by the manufacturer in favour of the end user or consumer. The warranty takes effect at the date of purchase by the end user, who in the event of a defect can take action either against the manufacturer under the warranty or against the party selling him the defective goods, under his contract of sale. To deal with these circumstances, the Model Contract allows the seller (who may be the manufacturer of the goods) and the buyer (who may be the party who sells the goods to the consumer) to set out how they will co-operate. For example, the buyer may undertake to repair or replace the goods on behalf of the seller.

Limitation of liability

The Model Contract permits the parties to fix a limit of liability for default by the seller. It provides for liquidated damages at 0.5% of the price of the goods for each week of delay in delivery of the goods, up to a limit of 5% of the price of the delayed goods. In the event that the buyer terminates the contract because of excessive delay, they are entitled to recover proved damages up to a maximum of 10% of the price of the goods, in addition to the above liquidated damages. Whereas the buyer does not have to prove that they have suffered loss before being entitled to liquidated damages, they do have to prove the loss claimed as a result of termination due to excessive delay.

In the event that the supplied goods are defective, the buyer has three options: they can seek replacement of the defective goods; they can accept them against a reduction in price; or they can terminate the contract and claim a refund of amounts paid. If the replacement

of the defective goods is not completed within the original time for completion, the buyer is entitled to liquidated damages due to the delay up to a maximum amount of 5% of the price of the delayed and/or defective goods. If the buyer opts to accept the defective goods against a reduction in price, the Model Contract limits the reduction to 15% of the price of conforming goods. If the buyer opts to terminate the contract, they are entitled to claim reimbursement of amounts paid for the goods, plus delay damages, plus additional damages that can be proved up to a maximum of 10% of the price of the non-conforming goods.

The above formulae were considered by the authors of the Model Contract to strike a reasonable balance between the interests of buyer and seller, but the parties are free to modify these formulae should they wish to do so.

Termination

The Model Contract allows the buyer to terminate the contract for default by the seller under three circumstances:

- when the seller fails to deliver the goods by the cancellation date stated in the contract;
- five days after the receipt by the seller of a notice of termination due to his liability for liquidated damages for delay having reached the maximum amount allowed by the contract (normally after ten weeks), the seller having been previously given a notice of delay;
- five days after the receipt by the seller of a notice of termination, due to his failure to replace or rectify defective goods when his liability for damages for defective goods and/or delay has reached 5% of the price of the non-conforming goods.

Force majeure

The Model Contract permits a party to suspend execution of its obligations (except payment of amounts already due) in the event of force majeure, subject to proper notice being issued to the other party. If the circumstances continue for six months, either party may terminate the contract.

Resolution of disputes

The Model Contract allows the parties to choose between litigation and arbitration for the resolution of disputes. In both cases, they are invited to state the place of litigation or arbitration. In the event that the parties are silent as to their chosen method for resolution of disputes, the Model Contract assumes that it will be by arbitration conducted under the ICC Rules and suggests the standard arbitration clause recommended by the ICC.

2.12.2 The Vienna Convention

The Convention is divided into four parts:

- Part 1 deals with the scope of application and contains general provisions;
- Part 2 deals with the formation of contracts for international sale of goods;

- Part 3 deals with the rights and obligations of the parties under the contract;
- Part 4 contains the final clauses relating to the application of the Convention itself.

The articles under Part 1 define the circumstances that fall within the scope of the Convention and those that are expressly excluded (*e.g.* consumer sales, contracts for the supply of labour to assemble products from materials supplied by the buyer of the products, etc.). The scope of the Convention is limited to the formation of the contract of sale and the rights and duties of the parties arising from the contract. It does not cover aspects such as the liability of the seller for death or injury that might be caused by the goods to a user or other third person.

The Convention allows the parties to exclude the application of the Convention to their contract or to derogate from or vary some of its provisions. The exclusion could be expressly stated or could come about through the choice of a domestic law as the law applicable to the contract.

As far as possible, in the event of dispute and in the absence of an express mention of the particular matter within the Convention, courts are encouraged to settle the issue in accordance with the general principles on which the Convention is based.

Part 1 of the Convention also includes provisions dealing with the interpretation of statements made by the parties and of their conduct. The parties may be bound by custom observed within the particular industry or trade to which the contract refers.

Article 11 provides that no written agreement is necessary for the conclusion of the contract, but if the contract is in writing and requires that any modification should also be in writing, article 29 provides that the contract cannot otherwise be modified. However, a party may be precluded by their conduct from relying upon the lack of writing, if the other party has relied on that conduct. States that require contracts of sale to be in writing can opt out of Clauses 11 and 29.

Part 2 addresses a number of questions that may arise in relation to the formation of the contract by offer and acceptance: the nature of the offer, the date of its effect, withdrawal, revocation, rejection, acceptance, counter-offer, time for acceptance, withdrawal of acceptance, conclusion of the contract, etc.

Part 3 sets out the obligations of the seller to deliver conforming goods at the date for delivery, to hand over the documents required by the agreed terms of the contract and to transfer property in the goods free of third party rights. In connection with the seller's obligation to deliver conforming goods, the buyer is under the obligation to inspect the goods as soon as is practicable and to notify the seller of any non-conformity without delay. The obligations of the buyer are much less extensive; they are to pay the price for and take delivery of the goods as set out in the contract.

In respect of each set of obligations, the remedies for breach of contract are set forth. The aggrieved party may require performance of the defaulting party's obligations, may claim damages or may void the contract. In addition, the buyer has the right to reduce the price when they accept non-conforming goods. The buyer can only require delivery of substitute

goods if those delivered were in such a condition that the buyer was deprived of that which they were entitled to expect, and the result was not foreseen by the seller and could not have been foreseen by a reasonable person of the same kind in the same circumstances – referred to as a “fundamental breach”. This is an important limitation on the rights of the buyer.

A further limitation on the rights of the parties is that a party cannot recover damages that they could have mitigated by taking proper measures. This is in fact an express statement of the position to be found within many jurisdictions.

Within any contract for the sale of goods, it is important to be able to determine the exact moment when the risk of loss or damage passes from the seller to the buyer, and the Convention sets forth a set of rules to deal with the situation where the contract does not contain an express provision or does not refer to a recognised trade term (*e.g.* EXW, FOB, etc.). In doing so, the Convention deals with two situations: a) where the contract involves the carriage of goods and b) where the goods are sold in transit. In all cases, the risk passes to the buyer when that party takes over the goods or when they were put at the buyer’s disposal but the buyer failed to take delivery, whichever is the earlier. In order to be placed at the buyer’s disposal, it must be possible to distinguish the particular goods from a mass of similar goods (*e.g.* the sale is for a quantity of grain that is to be found within the hold of a ship containing a greater quantity of the same grain).

The Convention contains special rules in relation to anticipatory breach and suspension of performance – that is, the right to suspend performance or to void the contract when it becomes apparent that the other party will not perform a substantial part of their obligations or will be in fundamental breach.

Part 3 also contains a provision that exempts a party from liability for damages in the event of failure to perform an obligation due to an impediment that they could not reasonably have foreseen and which they could have avoided or overcome. The exemption may also arise when the failure is due to a failure of a third party engaged to perform the whole or part of the contract (*e.g.* a carrier of the goods).

The Convention places an obligation on both parties to take care of the goods in their possession that belong to the other party. Under certain circumstances, one party may sell the goods and to retain from the proceeds of sale an amount equal to the reasonable expense of preserving the goods and of selling them, the balance being payable to the other party.

Part 4 deals with the application of the Convention, adoption by signatory states and the possibility to opt out of certain provisions.

2.13 Standard contracts for works

There are several standard contracts available that have been drafted to cover the execution of works. The choice of a particular standard contract will depend on a number of factors:

- Is the contract to be domestic (both parties from the same country) or international (at least one of the parties does not come from the country in which the works are to be situated)?
- What is the size of the works – can they be categorised as “minor” or “major”, or are they of medium size?
- Is the economic operator (the “contractor”) to be responsible only for the construction of the Works, for the design and construction of the works or are the works to be undertaken on a turnkey basis?
- What is the nature of the works – building, civil engineering, industrial?

If the contract is to be international in nature, the contract can be chosen, for example, from among the FIDIC suite of contracts, the “ICC Model Turnkey Contract for Major Works”, or the “ICC Model Contract for the Turnkey Supply of an Industrial Plant”.

The FIDIC Suite of Contracts

“Conditions of Contract for Construction for Building and Engineering Works Designed by the Contracting Authority/Employer” – known as the Red Book;

“Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant and for Building and Engineering Works Designed by the Contractor” – known as the Yellow Book;

“Conditions of Contract for EPC/Turnkey Projects” – known as the Silver Book;

“Short Form of Contract” – known as the Green Book;

“Conditions of Contract for Design, Build, Operate Projects” – known as the Gold Book.

If the contract is to be a domestic contract, the country in which the works are to be constructed (and from which the parties come) may have its own standard form or forms. In the United Kingdom, for example, parties can choose a contract from the suite of contracts published by the Institution of Civil Engineers, from the suite published by the Joint Contracts Tribunal, or the suite published by the Institution of Chemical Engineers. In France, the parties might use a contract based on the “Cahier des Clauses Administratifs Générales de Travaux”.

It can be seen from the above titles that certain standard documents are suitable for works executed on a turnkey basis (where the contracting authority or “contracting authority/employer” has little involvement between signature of the contract and completion of the works); others are suitable for works designed and constructed by the contractor (but where the contracting authority or “contracting authority/employer” is closely involved); and others are to be chosen on the basis of the size of project. (The ICC Model Contract for Major Works is clearly intended for large projects; the FIDIC Short Form of Contract is intended for small projects that do not require a complex contract document.)

2.13.1 The FIDIC suite of contracts

The “Fédération International des Ingénieurs de Conseil” (FIDIC) is an organisation based in Geneva, whose members are national associations of consulting engineers. Its main objective is to represent worldwide the majority of firms providing technology-based intellectual services for the built and natural environment. FIDIC, in the furtherance of its goals, publishes international standard forms of contracts for works and for clients, consultants, sub-consultants, joint ventures and representatives, together with related materials such as standard pre-qualification forms.

2.13.1.1 Background to FIDIC contracts

In their original format, the FIDIC conditions were the “Conditions of Contract (International) for Works of Civil Engineering Construction”. The first edition was published in August 1957. In the forty years following this first edition, three more editions of the contract were published, but each tended to follow practice in the United Kingdom of using general conditions together with “conditions of particular application” that were actually suggestions for subjects upon which the parties were required to make their own agreements.

As with the English ICE conditions there was also a form of tender and appendix, and a form of agreement. The FIDIC conditions themselves contemplated the existence of drawings and specification and bills of quantities as contract documents. The role of “engineer” was assumed, who was to undertake functions such as certification and other determinations. It was implied that the engineer would act impartially in making decisions required of them by the contract. The form also followed the English basis of re-measurement of the quantities actually executed, together with the system of nomination of subcontractors.

From the beginning it had been presumed that the design would be provided to the contractor by the contracting authority/employer or his engineer. The civil engineering basis for the FIDIC conditions had derived from the anticipated infrastructure projects of the nature of roads, bridges, dams, tunnels and water and sewage facilities.

Thus the standard terms in the Red Book were less than satisfactory for contracts where major items of plant and alike were manufactured away from site. Focusing on this aspect led to the first edition of the FIDIC Yellow Book for mechanical and electrical works in 1963, with its emphasis on testing and commissioning and more suitable for the manufacture and installation of plant.

In the mid-1990s FIDIC responded to the increasing popularity of projects being procured on a design and build or turnkey premise, and published the Orange Book, namely the Conditions of Contract for Design-Build and Turnkey.

The Orange Book reflected a significant move away from the earlier FIDIC forms, which had adopted the traditional role of the engineer. The Orange Book dispensed with the engineer entirely and provided for the “contracting authority/employer’s representative”. The requirement to be impartial was also relinquished, although when determining value, costs or extensions of time, the contracting authority/employer’s representative had to “determine the matter fairly, reasonably and in accordance with the Contract”.

To assist in the resolution of disputes, an independent Dispute Adjudication Board (DAB) was introduced, consisting of either one or three members appointed jointly by the contracting authority/employer and the contractor at the commencement of the contract, with the cost being shared by the parties.

Shortly afterward, the existing Red, Yellow and Orange Books were modified substantially so that the choice of contract would be based on responsibility for design rather than whether the works were to be of a civil engineering nature or mechanical/electrical engineering nature.

Final publication of these new contracts was in 1999:

- Conditions of Contract for Construction for Building and Engineering Works Designed by the Contracting authority/employer: the 1999 Construction Contract (the so-called “Red Book”);
- Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant and for Building and Engineering Works, Designed by the Contractor – the 1999 Plant and Design/Build Contract (the so-called “Yellow Book”);
- Conditions of Contract for EPC/Turnkey Projects: the 1999 EPC Turnkey Contract (the so-called “Silver Book”);
- 1999 Short Form of Contract (the so-called “Green Book”).

Under the 1999 Red Book, the contractor is paid on the basis of measurement of works actually constructed according to a design supplied by others (usually by a consulting engineer on behalf of the contracting authority/employer); and under the 1999 Yellow Book and Silver Book, the contractor is paid on a lump-sum basis for providing works to his own design (the actual design may still be carried out by a consulting engineer, but on behalf of the contractor).

2.13.1.2 Structure of FIDIC contracts

2.13.1.2.1 General

Each of the 1999 contracts includes general conditions together with the second part – guidance for the preparation of the particular conditions – and in the third part, the letter of tender, contract agreement and dispute adjudication agreements.

The guidance is for those preparing the particular conditions, and (to a limited extent) those preparing the other documents for issue to tenderers. Some sample texts are included.

The general conditions are intended to be used unchanged for every project. The particular conditions are prepared for the particular project; they include any changes or additional clauses to suit the local and project requirements.

The general conditions generally include the “appendix to tender”, which gives essential project information – some of which must be completed by the contracting

authority/employer before issuing the tender documents, together with certain information that must be added by the Tenderer.

In each of the 1999 editions, the general conditions comprise twenty clauses, covering similar subject matter in all three contracts with the exception of the following three clauses:

Red Book	Cl. 3 – the engineer; Cl. 5 – nominated subcontractors; Cl. 12 – measurement and evaluation
Yellow Book	Cl. 3 – the engineer; Cl. 5 – design; Cl. 12 – tests after completion
Silver Book	Cl. 3 – The contracting authority/employer’s administration; Cl. 5 – design; Cl. 12 – tests after completion

2.13.1.2.2 Groups of clauses

The main clauses of the general conditions can be considered in groups dealing with related subjects:

1: General provisions – covers subjects that apply to the contract in general, such as definitions, the applicable language and law, the priority of the different documents that make up the contract and the use of the different documents.

2 - 5: The contracting authority/employer; the engineer; the contractor; nominated subcontractors – deal with the duties and obligations of the different organisations that play a part in the execution of the works. It is significant that the contractor’s clause contains more sub-clauses than all the others added together.

6, 7: Staff and labour; plant, materials and workmanship – deal with the requirements for the items of personnel and materials that the contractor brings to the site in order to execute the project.

8 - 11: Commencement, delays and suspension; tests on completion; contracting authority/employer’s taking over; defects liability – follow the sequence of events during the construction of the project.

12 - 14: Measurement and evaluation; variations and adjustments; contract price and payment – give the procedures for the contracting authority/employer to pay the contractor for his work.

15, 16: Termination by contracting authority/employer; suspension and termination by contractor – are logically at the end of the construction sequence.

17: Risk and responsibility – relates to the project as a whole and includes sub-clauses that are only used rarely, together with matters critical to the parties’ responsibilities, and that overlap with the requirements of other important sub-clauses.

18: Insurance – includes important procedures, which must be implemented at or before the commencement of the works.

19: Force majeure – is a general clause that will only be used when the particular problem occurs.

20: Claims, disputes and arbitration – will probably be the most frequently used clause in the whole conditions of contract. It includes procedures, such as the submission and response to contractor’s claims, which must be used when a problem has arisen. It also includes the procedures for the appointment of the dispute adjudication board, which must be used at or before the commencement of the works.

Similarly, the structure of the general conditions can be summarised as:

General	Definitions
	Descriptions of the principal actors
Execution	Staff and labour
	Materials, equipment and workmanship
Time	Time for completion
	Taking over
	Defect notification period
Money	Measurements
	Payments
	Variations
Contractual	Termination
	Risk
	Insurance
Force majeure	
Claims & disputes	Claims
	DAB
	Arbitration

2.13.1.2.3 Forms

Forms of security and forms of letter of tender, contract agreement and dispute adjudication agreement are included in each of the 1999 editions. There are sample texts for six forms of securities, which are available in electronic form. In the Red Book and Yellow Book, the appendix to tender provides a checklist of all the essential data required for the various sub-clauses:

- Parent company guarantee
- Tender security

- Performance security, with alternative examples
- Advance payment guarantee
- Retention money guarantee, and
- Payment guarantee by contracting authority/employer.

At the end of all the 1999 editions, the dispute adjudication agreements incorporate (by reference) the general conditions of dispute adjudication agreement appended to the general conditions.

2.13.1.3 Contract preparation

2.13.1.3.1 Conditions of contract

The FIDIC conditions of contract do not just give the rights and obligations of the parties, to be used for resolve disputes, in isolation from the other documents that make up the contract. They include project management procedures, which are considered to be essential for the administration of the project.

The conditions of contract on their own are not complete; certain information must be provided in other documents in order to make them complete. Information must be coordinated with the other documents in order to ensure that the contract, as a whole, will serve its intended purpose. In order to prepare the contract documents for a project using the FIDIC procedures, it is necessary to incorporate the FIDIC general conditions unchanged, together with the general conditions of dispute adjudication agreement and the annex – procedural rules.

In order to use these conditions, each contract’s conditions of contract should be defined by wording inserted in the foreword to that contract:

The Conditions of Contract comprise the “General Conditions”, which form part of the “Conditions of Contract for...” First Edition 1999 published by the Federation Internationale des Ingénieurs-Conseils (FIDIC), and the following “Particular Conditions”, which include amendments and additions to such General Conditions.

The general conditions include numerous references to information that is given in other documents:

- Appendix to tender
- Particular conditions
- Specification, and in the contract

Therefore:

- Insert essential information in the appendix to tender, which is printed near the end of the FIDIC publication. The contracting authority/employer must insert some of the information required in order to complete the general conditions. Other information

will be inserted by the tenderer. Each item in the appendix to tender relates to a sub-clause in the general conditions.

- Prepare particular conditions to suit the contracting authority/employer's requirements for the particular project.
- Check the sub-clauses that refer to information in the specification.
- Check the sub-clauses that refer to information that may be included elsewhere in the contract.
- Consider the need for a contract agreement: the FIDIC standard agreement may need to be modified to suit the contracting authority/employer's requirements, but the information that is contained in the FIDIC form must be included.
- Decide whether to require a one-person or three-person dispute adjudication board and whether to nominate potential members. Any amendments to the general conditions of dispute adjudication agreement or the annex – procedural rules must be included in the particular conditions.
- Consider the use of FIDIC Annexes A to G for the forms of securities that are referred to in the general conditions and the appendix to tender. The FIDIC contracts may need to be modified to suit the contracting authority/employer's requirements and the applicable law.
- Consider the use of a standard letter of tender for use by tenderers when submitting their tender. The information given in the FIDIC standard form must be included and if the FIDIC standard form is not used, then the instructions to tenderers should include the requirement that the tenderer confirm these details.
- In the preparation of the particular conditions there are cross-references with the appendix to tender and specifications. It is essential to have no contradictions.
- FIDIC recommends having particular conditions reviewed by a lawyer.

2.13.1.3.2 Particular conditions

Ideally a contract is an agreement freely negotiated between two parties of equal bargaining power with equal access to legal advice and assistance. Where there is an imbalance of bargaining power between the parties, there is a danger that the terms and conditions of the contract become unbalanced.

The general conditions of the construction contract may be modified in consideration of the actual project circumstances and requirements by adding particular conditions. If modifications introduced for a particular project alter to a large extent the originally contemplated risk distribution and the risks allocated to the contractor become excessively high, the following problems may occur:

- Higher bid price;

- Bid failure and disruption of project implementation;
- Non-participation in the bid of conscientious and capable contractors;
- Contract award to a bidder who fails or was not capable of estimating the risks properly;
- Poor construction quality and delay to the progress of the work due to lack of risk contingency;
- Undermining of the relationship of mutual trust and respect between the contracting authority/employer and the contractor;
- Repetition of groundless claims from the contractor;
- Frequent disputes between the contracting authority/employer and the contractor;
- In an extreme case, termination of the contract.

2.13.1.3.3 Appendix to Tender

Appendix to tender provides two types of information:

- (i) Non-financial
- (ii) Financial

Why is the “Appendix to Tender” important? – It is important because various clauses refer to information that is to be stated in the appendix to tender. There are also clauses that are not applicable if there is no information related in appendix to tender.

2.13.2 The ICC Model Turnkey Contract for Major Works

2.13.2.1 Background

The aim of the International Chamber of Commerce in producing the Model Turnkey Contract for Major Works was to provide a balanced contract for the parties to turnkey construction projects, recognising the need for proper allocation of risks and providing certainty with respect to scope of the works to be provided and the price to be paid for them. The contract was intended to address several legal issues that are likely to arise in a clear and succinct manner in order to minimise resort to national laws.

The basic concept of the Model Turnkey Contract is that the contractor shall provide the works ready for use by the contracting authority/employer, at the agreed price. While it is often said that the contracting authority/employer has little involvement in such a turnkey project, the ICC recognised that some contracting authority/employers do want to be actively involved at all stages.

2.13.2.2 Structure of ICC Model Contract

2.13.2.2.1 General

The structure of the ICC Model Contract is very similar to that of the FIDIC suite of contracts. Whereas the FIDIC contracts are composed of a contract agreement, general conditions of contract, particular conditions of contract, appendix to tender, guidance notes and a number of annexes, the ICC Model Contract is composed of a main contract agreement, conditions of contract, schedule of contract amendments (Appendix 1) and a number of other appendices. Whereas the annexes to the FIDIC guidance notes provide standard wording for the various guarantees to which the general conditions of contract refer, the appendices to the ICC Model Contract are wider in scope and include the following:

Appendix 1	Sample schedule of contractual amendments (equivalent to FIDIC's particular conditions)
Appendix 2	Payment and milestone schedule guidance notes
Appendix 3	Payment application format
Appendix 4	Contractor's access after taking over
Appendix 5	Guidelines relating to performance tests
Appendix 6	Contracting authority/employer's requirements
Appendix 7	Sample advance payment guarantee
Appendix 8	Sample performance guarantee

2.13.2.2.2 Groups of clauses

The clauses of the general conditions are grouped under a series of subjects:

1 - 12: General and preliminary articles – cover subjects that apply to the contract in general, such as definitions, coming into force of the contract, the applicable language and law, changes in law and regulations and the priority of the different documents that make up the contract. Unlike FIDIC, this section also deals with “good faith”, assumptions on which the parties entered into the contract and the making of claims on bonds.

13 - 19: Obligations of the parties – deal with the duties and obligations of the different organisations that play a part in the execution of the works, such as provisions of the site, proof of the contracting authority/employer's ability to pay, co-operation with others, quality assurance, staff and labour, duty to notify.

20 - 31: Execution of the contract – deals with matters such as the scope of the contract price and works, information for use by the contractor, unexpected physical conditions, safety, public convenience, environmental protection, services/supplies to be provided by the contracting authority/employer, ownership of goods, materials and equipment.

32 - 35: Design responsibility and management; variations – deal with the allocation of responsibility for design, the design review process, changes to the design, intellectual property rights.

36 - 39: Commencement; the time to taking over, scheduling and progress – deal with the start date, extensions of time and additional costs, delay damages and bonuses, contractual dates, the time schedule and reporting of progress.

40 - 44: Contract price and payment – deal with payment of the contract price, applications and procedure for payment, VAT/GST or similar consumption taxes, financing charges.

45 - 48: Completion and taking over of the works – deal with completion, commissioning and performance tests, taking over/provisional acceptance.

49: Defect correction period – deals with liability for defect correction, inspection procedures, price abatement (a discount in lieu of remedial work), final acceptance.

50 - 55: Allocation of risk and responsibility and exclusions from liability – deal with passing of responsibility, liability for damage to third party property, limitations on liability, extension of limitations and exclusions, warranty against claims from future users in favour of the contractor.

56 - 57: Force majeure and termination – deal with force majeure and consequences, suspension and termination.

58: Insurance – works insurance, contracting authority/employer's liability and worker's compensation insurance, automobile insurance, third party liability insurance.

59 - 65: Miscellaneous provisions: confidentiality, bribery, entire agreement, severability, amendments, waiver, joint & several liability, subcontractors, assignment, communications/notices.

66: Claims, dispute resolution and arbitration

Although the FIDIC contracts and the ICC Model Turnkey Contract for Major Projects are broadly laid out in terms of both structure and allocation of risk, there are differences. Therefore, as with any contract, the details should be studied carefully.

2.13.3 The ICE conditions of contract – Minor works

Important note: In 2009 the ICE terminated its involvement in the administration of the ICE conditions of contract. The ICE now endorses the use of the NEC3 suite of contract documents ("New Engineering Contract"). See the ICE website for further information:

<https://www.ice.org.uk/disciplines-and-resources/professional-practice/nec-contracts-and-ice-conditions-of-contract>

The narrative below has not been updated to reflect these changes.

2.13.3.1 Background

The Institution of Civil Engineers (ICE) is a professional body representing civil engineers that counts 60 000 members in the United Kingdom and 10 000 members in other countries. For many years, it has drafted standard conditions of contract for use in relation to civil engineering works. Among these, one finds a contract for construction of works designed by the contracting authority/employer, a contract for works designed and constructed by the contractor, a contract for long-term or repeat work (such as maintenance work), a “target cost” contract (under which the parties share the profit or loss that results from the works), the “NEC” suite of contracts (which are drafted in simpler English and are designed to encourage greater co-operation between the parties) and the minor works contract.

The Minor Works Contract was drafted for use in relation to projects where:

- the risks for both the contracting authority/employer and the contractor are considered to be small;
- the works are simple and straightforward in nature;
- the contractor has no responsibility for design unless there is some design of a specialist nature to be undertaken by them or their subcontractors;
- the design of the works is complete before tenders are invited, except for any specialist design work that the contractor is to undertake;
- nominated subcontractors are not used (that is, the contracting authority/employer does not impose any subcontractors on the contractor);
- the contract value does not exceed EUR 300 000 and the period for completion is less than six months (unless payment for the works is made on the basis of Dayworks⁶ rates or on a “cost + fee” basis).

2.13.3.2 Structure of the Minor Works Contract

The Minor Works Contract is composed of:

- an agreement,
- a contract schedule – which lists all documents forming a part of the particular contract (drawings, schedule of rates or bill of quantities, Dayworks schedule, etc.),
- the conditions of contract, and
- an appendix to the conditions of contract – which lists all important data and features.

The standard contract form is accompanied by a set of guidance notes.

2.13.3.3 Clauses

The conditions of contract contain only 13 clauses, although some contain several sub-clauses. The subjects of the clauses are as follows:

1. Definitions
2. The engineer

⁶ “Dayworks” refers to work carried out on the basis of daily or hourly rates. Labour and equipment is paid for on the basis of the time spent on the work multiplied by these rates. Materials are paid for on the basis of actual cost + a mark-up, often about 15%.

3. General obligations
4. Starting & completion
5. Defects
6. Additional payments
7. Payment
8. Assignment and subcontracting
9. Statutory obligations
10. Liabilities and insurance
11. Disputes
12. Application to Scotland & Northern Ireland
13. Construction (design and management) regulations 1994

It can be seen immediately from the above that the Minor Works Contract does not contain many of the so-called “boilerplate clauses” except for Clause 8, dealing with assignment, and Clause 11, which deals with the resolution of disputes. This is because the Minor Works Contract is intended for “low-risk situations” where the parties are unlikely to become embroiled in complex contractual arguments.

As the Minor Works Contract was not intended for use in an international context, it is assumed that the contract will be interpreted in accordance with local laws. As within the United Kingdom the laws of Scotland and the laws of Northern Ireland are slightly different from the laws of England and Wales, Clause 12 has been inserted to deal with this position.

Although the subjects of the other clauses closely match the groups of clauses found under the ICC Model Turnkey Contract for Major Works, the content of each clause within the Minor Works Contract is very brief compared to the content of corresponding clauses under the ICC Model Turnkey Contract. For example, the definitions clause within the Minor Works Contract gives only five definitions whereas the corresponding clause in the ICC Model Turnkey Contract lists 66 definitions.

The Contract recognises that in relation to minor works, the parties and the engineer are unlikely to put in place a large management team. Therefore, it is anticipated that the engineer will be a named individual rather than a firm (for larger projects, a firm is often named as the “engineer” rather than an individual). Clause 3.4 requires the contractor to give the names of individuals who are empowered to receive instructions from the engineer, because the Contractor is unlikely to have a manager on site on a full-time basis.

The guidance notes also draw attention to the fact that a small contractor may not be able to insure the works without a very high “excess”, which means that a large portion of any loss will be borne by the contractor rather than his insurers. The conclusion to be drawn

from this note is that the contracting authority/employer should consider taking out the insurance instead of placing the risk on the contractor.

The guidance notes also state that the defects correction period should normally be six months and in no case should exceed 12 months. In comparison, for larger projects the standard contracts normally impose a defects period of at least 12 months and sometimes the contracting authority/employer requests much more. This reduces the risk on the contractor.

In the same way, the guidance notes suggest that retention money should be limited to an amount between 2.5% and 5% of the final contract amount, whereas for larger projects it is usual to retain between 5% and 10%. Retention money is the only financial guarantee foreseen by the Minor Works Contract – there is no requirement for the contractor to provide a performance guarantee or a parent company guarantee.

It can be seen from the above that under the Minor Works Contract, the contracting authority/employer accepts much more of the risk than they would under a standard contract form for larger projects.

This voluntary acceptance of risk is particularly evident when the Contracting authority/employer decides to use the possibility foreseen under the Minor Works Contract to pay on a Dayworks basis.

In accepting to pay the contractor on such a basis, the contracting authority/employer bears a large part of the risk related to the pricing of the works.

The contractor will be paid for the number of workers actually used. They do not need to estimate the number of workers, and provided that they correctly determined the hourly rates, they will be unconcerned about budget and waste. Thus the contracting authority/employer must ensure that the contractor does not over-man and that the workers are productively employed.

In the same way, the contractor will be reimbursed the actual cost of materials used plus a mark-up. Therefore they have no incentive to avoid wastage.

In seeking to control the amount of manpower and materials used, the contracting authority/employer must bear in mind that it will be difficult to hold the contractor liable for delay if the contractor wanted to increase the number of workers but the contracting authority/employer refused.

2.14 Standard contracts for the provision of services

2.14.1 Basic contents

There are many standard contracts available covering the provision of services. Often these are related to a specific industry. For example, within France the geological investigation industry has a recognised system defining, by means of codes, the various scopes of work

that might be undertaken by those providing such services. Thus, those procuring a geological investigation service may order a G11 investigation and both parties know the precise extent of this investigation. It will merely be necessary to complete this definition of the scope with details of the particular mission that is to be accomplished (names of parties, price, timing, location of investigation, etc.).

Any contract for the provision of services should include the following:

- The names and addresses of the service provider and of the buyer of those services;
- Details of the services to be provided;
- The status of the service provider as independent contractor or otherwise;
- Payment terms and frequency of payments;
- Liability and insurances;
- Provisions related to breaches of contract;
- Date of commencement, duration, and any deadlines;
- Renewal of the contract;
- Termination of the contract;
- “Boilerplate clauses” such as confidentiality; law and language; severability; amendment; assignment; waiver; notices; resolution of disputes.

In many cases, there should also be a clause dealing with intellectual property rights and possibly a clause dealing with insurance.

Example: The FIDIC Client/Consultant Model Services Agreement (known as the “White Book”).

Similarly to the FIDIC contracts for works, the FIDIC White Book proposes an agreement, a set of general conditions, a set of particular conditions and a set of appendices.

The agreement, which is intended to be signed by both parties, identifies the buyer of the services (the client) and the provider of the services (the consultant), briefly describes the services to be provided, and lists documents forming part of the agreement.

It states that:

In consideration of the payments to be made by the Client to the Consultant ... the Consultant hereby agrees with the Client to perform the Services in conformity with the provisions of the Agreement

The Client hereby agrees to pay the Consultant in consideration of the performance of the Services such amounts as may become payable under the provisions of the Agreement at the times and in the manner prescribed by the Agreement.

The general conditions include sections entitled:

- Definitions
- Obligations of the consultant
- Obligations of the client
- Personnel
- Liability and insurance
- Commencement, completion, alteration and termination of the agreement
- Payment
- General provisions

Obligations of the consultant

Within the obligations of the consultant is the basic requirement for the consultant to perform the services which are detailed in Appendix A and which are broken down into:

- Normal services defined as such in Appendix A;
- Additional services defined as such in Appendix A or otherwise agreed by the parties to be additional;
- Exceptional services which are not normal or additional but which are necessarily performed by the consultant. Clause 28 states that the need for such exceptional services would arise in the event of certain changed circumstances, suspension or resumption of the services, etc.

There is also a requirement under Clause 5 for the consultant to exercise reasonable skill, care and diligence in the performance of their obligations under the agreement. The reasonableness of their actions is to be judged by the standard of performance of a fellow professional providing a similar service. This is the standard normally required of a professional service provider in a common law country. There is no guarantee of “fitness for purpose”. Within civil law countries, the service provider is often stated to be under an obligation to provide the necessary means, but not an obligation to produce the desired result.

Since the consultant under a contract based on the FIDIC White Book is often to undertake the role of the engineer, under a FIDIC contract for works, Clause 5 also requires the consultant:

- to exercise any duties and powers required of them under a contract between the client and a third party (the contractor) in accordance with the said contract;
- when required by that contract to certify, decide or exercise discretion, to do so fairly, not as an arbitrator but as an independent professional using their skill and judgement; and

- if authorised to vary the obligation of the third party, to do so after obtaining the prior approval of the client of any variation that might have an important effect on costs, on time or on quality.

2.14.2 Obligations of the client

Among the client's obligations are those to avoid delay to the services by providing within a reasonable time all relevant information that is within the client's power to obtain and all necessary decisions. The client is also to do all in their power to assist the consultant and his personnel in relation to:

- visas,
- import and export of personal belongings,
- repatriation in emergencies,
- access to information and
- the provision of the authorities necessary for the import of foreign currency for the services and personal use, and for the export of money earned in relation to the services.

The client is also to provide the equipment and facilities, to select and delegate personnel in their employment, and to arrange for the services of others, all in accordance with Appendix B and all free of charge to the consultant. The consultant shall not be responsible for the said service providers or for their performance.

2.14.3 Personnel

Under the section dealing with personnel, all personnel sent by the consultant to work in the country of the project must have been physically examined and found to be fit and must hold qualifications acceptable to the client. If the client cannot supply the personnel and/or services required of them under Appendix B, the consultant shall arrange the supply as an additional service. If it is necessary to replace any person, the party responsible for the appointment shall immediately arrange for replacement by a person of comparable competence.

2.14.4 Liability and insurance

Under the liability and insurance provisions, in the event that the consultant is in breach of his obligation to exercise reasonable skill and care they shall be liable to compensate the client. Likewise, the client shall be liable to the consultant if they are found to be in breach of their duty towards the consultant. The amount of the compensation shall be limited to the amount of reasonably foreseeable loss and damage, but will be limited to the amount stated in the particular conditions. This maximum amount is applicable to all claims taken together.

Any claim must be made before the expiry of the relevant period stated in the particular conditions.

If either party makes a claim against the other that is found to be unfounded, they shall entirely reimburse the costs of the other party incurred as a result of the claim.

To the extent that the applicable law permits, the client shall indemnify the consultant against all claims arising out of the agreement, including claims by third parties made after the end of the period stated in the particular conditions, except insofar as they are covered by insurances taken out by the consultant at the request of the client. This indemnity and the limit of liability do not apply to claims that do not arise in connection with the services or that arise from deliberate default or reckless misconduct.

The client may request that the consultant insures against his liabilities under the agreement on terms acceptable to the client, but the cost of the insurance shall be at the expense of the client.

2.14.5 Commencement, completion, alteration and termination

The agreement takes effect upon receipt by the consultant of the client's letter of acceptance of his proposal or the latest signature needed to complete the formal agreement, whichever is the later.

The services are to be commenced and completed at times stated in the particular conditions.

The agreement can be varied by written agreement of the parties. If requested by the client, the consultant shall submit proposals for altering the services, the preparation of such proposals being additional services for which the client must pay. If the duration of the services must be extended because of impediment or delay by the client or his contractors, the increase shall be regarded as additional services.

If circumstances for which the consultant is not responsible make it impossible or irresponsible for them to perform the services such that certain services have to be suspended, they shall be entitled to an extension of time plus a reasonable period for resumption of the services.

The client may, after giving the appropriate notices, suspend the services or terminate the agreement either for convenience or because of the consultant's default. The consultant may, after giving the appropriate notices, suspend the services or terminate the agreement due to overdue payment or suspension of the services in excess of 182 days.

2.14.6 Payment

The client must pay for normal services in accordance with details stated in Appendix C and pay for additional services at rates and prices given in or based on those in Appendix C, or otherwise agreed. Unless otherwise agreed, the client shall pay for exceptional services the

same as for additional services in respect of extra time spent by the consultant's personnel plus the net cost of all other extra expense incurred by the consultant. Payments must be made promptly and the consultant shall be compensated for late payment at the rate stated in the particular conditions. Payments shall be made in the currencies stated in the particular conditions.

If during the performance of the services the conditions in the client's country prevent or delay the movement of local or foreign currencies, restrict the availability or use of foreign currency, or impose taxes or differential rates of exchange such as to inhibit the consultant in the performance of the services, the consultant shall be entitled to suspend or slow down the performance of the services, with the option to terminate the agreement should the suspension exceed 182 days.

Except where specified in the particular conditions or Appendix C, the client is to arrange the granting of exemptions for the consultant and expatriate personnel from taxes, duties, etc. in relation to their remuneration, imported goods (other than food and drink) and documents. If the client is unable to arrange the exemptions they must reimburse the consultant for payments properly made.

If any part of a consultant's invoice is contested, the client shall notify the consultant promptly and shall not delay payment of the undisputed portion.

The consultant is to maintain records clearly identifying the relevant time and cost expended, and these records shall be available for audit by a reputable firm of accountants during normal working hours, subject to a minimum of seven days' notice.

2.14.7 General provisions

This section includes provisions dealing with languages and law; changes in legislation; assignment and subcontracting; copyright; conflicts of interest, corruption and fraud; notices; publications. Interestingly, whereas the "changes in legislation" provisions under the FIDIC works contracts deal only with changes in the country where the works are located, the provisions under the White Book deal with changes in any country in which the services are to be performed, except that of the consultant's principal place of business. Many European consultants now have offices worldwide where the services can be undertaken, and under these provisions would be entitled to compensation for changes in the laws in the country where the services are undertaken provided it is not their principal place of business.

2.14.8 Settlement of disputes

The settlement of disputes is to be by a stepped procedure: attempt at amicable settlement; mediation; non-binding opinion of the mediator; arbitration.

Section 3 Exercises

Exercise 1

What is the major risk that you foresee in the following situation, and how would you provide for it in setting up the works contract?

A new factory is to open in a town isolated by mountains. The factory will be very welcome in the area, which suffers from high unemployment. To get the finished goods to markets, lorries must use a long winding road through the mountains and cross an old bridge that is in very poor condition. It has been decided to construct a road tunnel 22 km long to shorten the road to the town and to avoid the use of the old bridge.

Exercise 2

Which INCOTERM would you use in each of the following situations? Give alternatives in descending order of precedence.

- a) You require 2 500 tonnes of salt from an Algerian company for use on roads during winter.
- b) You require a turbine for a new power station, which is to be manufactured to a particular specification that can only be obtained from the United States.
- c) You wish to place a fairly large order for computer equipment directly with the manufacturer in China.
- d) You urgently need a spare part from a manufacturer in Japan.
- e) You wish to buy some building materials from a local manufacturer.

Exercise 3

What risks do you see in the following situation? What questions would you ask before drafting or agreeing to the contract?

You wish to appoint a catering company to provide a small buffet for 30 people, to take place in a town 120 km away in relation to a visit by a government committee.

Section 4 Chapter Summary

Note on amendments to Self-Test Questions: The Trainer's Manual has not been updated to reflect the amendments below.

Self-test questions

1. List at least six areas of risk that must be considered when drafting a contract.
2. How should national standards be handled when preparing a technical specification under the 2014 Directive
3. Can the drafter of a Technical Specification under the 2014 Directive list approved manufacturers of products to be supplied under the contract?
4. In a contract of works, what are the main risks of damage or injury that must be considered by the drafter?
5. How can the drafter of a contract deal with the risk of damage of injury?
6. In a contract for supplies, what are the four criteria commonly used to determine whether goods supplied conform to the contract?
7. How can the drafter protect the contracting authority against a failure to perform by the economic operator? List at least five measures.
8. Under Rome 1 Regulation, how is the governing law determined if the contract is silent on this matter?
9. List six subjects covered by "Boilerplate clauses".
10. What is a severability clause?
11. What is a limitation of liability clause?

Module C3 Financial Instruments and Safeguards

Section 1 Introduction

1.1. Objectives

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

1. The different forms of non-financial safeguards
2. The different forms of financial safeguards
3. The financial instruments used to provide such safeguards

1.2. Important issues

The most important issues in this chapter are understanding:

- The purposes of the safeguards
- The cost implications of using financial safeguards
- The various means of providing safeguards

This means that it is critical to understand fully:

- The difference in the functions of the financial safeguards
- The legal nature of the financial instruments
- The practical aspects of securing such financial instruments
- The advantages and disadvantages of requiring safeguards from tenderers

1.3. Links

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

- Module C1 on procurement planning
- Module E1 on preparing tender documents
- Module G1 on contract management

1.4. Relevance

This information will be of particular relevance to those procurement professionals who are responsible for procurement planning, as well as those involved in the preparation of tender documentation (including the organisation of the tender) and in contract administration.

1.5. Legal information helpful to have at hand

It would be useful to refer to the Practical Guide (PRAG) and its Annexes.

[Localise: where such provisions exist in XXX: reference should be made to XXX]

Additional information

SIGMA Public Procurement Briefs:

No. 30, 2014 EU Directives: Public Sector and Utilities

Section 2 Narrative

2.1. Introduction

As indicated in Module A1, the Directives do not provide a complete procurement code. Rather, they set up minimum conditions that must be met throughout the Community for the maintenance of a single procurement market. EU Member States may continue to apply their own procurement rules provided that these are adapted to reflect the terms of the Directives. Similarly, it is for the member states to regulate, if they wish, the practical or organisational aspects of the procurement process. The Directives do not seek to pre-empt these considerations.

Some member states have traditionally regulated procurement and contain many supplementary provisions of an organisational nature. Others provide little in the way of practical detail and leave this up to the contracting authorities. These organisational or practical issues might include, for example, provisions on tender submission (form and means of submission) or tender opening procedures (whether public or not). Another important issue concerns the use of financial instruments to guarantee various aspects of the tendering process.

Guarantees or securities and the financial instruments that support them figure highly in the procedures of the International Financial Institutions (e.g. EBRD, World Bank). They also appear in the UNCITRAL Model Procurement Law, which has influenced and informed the development of procurement laws in a number of the newer EU Member States.

When the Commission itself acts as a contracting authority using the general budget or where beneficiary countries receive funds from the general budget or the European Development Fund (EDF), they must apply the Practical Guide (PRAG) for the procurement. The PRAG also contains a series of guarantees and supporting financial instruments, examples of which are provided in Section 4.

[Localise: if they are used in XXX, refer to the relevant texts]

In this module we will first consider one very important non-financial safeguard (tender validity), which is also supported, at least in part, by a financial instrument (tender security).

We will then consider two other financial safeguards, namely performance securities and advance payment guarantees, including the various means of providing them.

Finally, brief reference will be made to other safeguards of a contractual nature.

2.2. Tender validity

In some countries, the instructions to tenderers contained in the tender documents might well contain provisions relating to tender validity. Essentially, this provision requires tenderers to guarantee the terms and conditions of their tenders, including prices, for a

certain period of time. That period of time will generally be the time it is estimated that it will take the contracting authority to reach its award decision. During that period, the tenderer guarantees that it will honour the offer made in its tender.

As well as providing sufficient time for the evaluation of the tenders to be completed, the requirement for maintaining valid tenders, together with the tender securities, ensures that only serious tenderers participate so that the contracting authority may be sure that it will waste no time in evaluating tenderers that are not in a position to perform the contract.

It also enables tenders to be evaluated on a comparable basis since the tender validity will include validity of the prices quoted. The tenders will be required to remain valid for the number of days after the deadline for the submission of tenders indicated on the tender form. The period of validity is something of a balance. Whilst it needs to be short enough to accommodate a forecast of the market and other conditions applying to the tenders, it must also be realistic enough to take account of the complexity of the contract, notably in the case of works, and of the time likely to be required for obtaining references, clarifications, clearances and approvals and for notification of the award. Long validity periods, however, will normally imply an increase in costs, since the degree of uncertainty on price forecasts is increased for economic operators that will need to factor this into the tendered price.

It is not always possible, for various (legitimate) reasons, for the contracting authority to finalise the evaluation process within the tender validity period. In those cases and prior to the expiry of the original tender validity period, the applicable law will generally allow the contracting authority to request that the tenderers extend the period of validity for a specified additional period. A tenderer that refuses to extend the tender validity period may be eliminated but will not, however, forfeit its tender security (see next section). At the same time, tenderers agreeing to extend the period are not, as a result, required or entitled to modify their tenders in any way. It is simply an extension of the time period.

Example of tender validity clause taken from the PRAG:

2.8.5. Period of validity

Tenderers are bound by their tenders for the period specified in the letter of invitation to tender and/or in the tender dossier. This period should be sufficient to allow the Contracting Authority to examine tenders, approve the contract award proposal, notify the successful tenderer and conclude the contract. The period of validity of tenders is fixed at 90 days from the deadline for the submission of tenders.

In exceptional cases, before the period of validity expires, the Contracting Authority may ask the tenderers to extend the period for a specific number of days, which may not exceed 40 days. The successful tenderer must maintain the validity of the tender for a further 60 days. The further period of 60 days is added to the validity period irrespective of the date of notification.

2.3 Tender securities

Partly to strengthen the tender validity period, the provisions might also enable a contracting authority to require a tender security of some sort. It may be a tender security or guarantee, a tender bond or even earnest money, paid in cash or by banker's certified cheque, cash warrant or demand draft.

The main purpose of the tender security is twofold – to ensure:

- (1) that no tenderer withdraws its tender during the period of validity of the tender; and
- (2) that the successful tenderer enters into the contract following award and furnishes the required performance security.

The reason for the tender security is to avoid wasting time and valuable resources in the evaluation of tenders that are unaccountably withdrawn or those submitted by tenderers that subsequently refuse to sign contracts. They may have legitimate reasons for doing so. They may also have less legitimate reasons for doing so, and the submission of such tenders has sometimes been used as a means of operating cartels and other forms of collusion. In any event, the purpose of the security is to provide the contracting authority with some financial protection (in the form of compensation) against such defaulters as well as protecting the authority from its own withdrawal or failure to sign.

Note

There is sometimes confusion between the tender security and the performance security. The tender security relates only to the tender itself and guarantees that it will remain valid and that the successful tenderer will sign the contract. The performance security is there to guarantee the performance of the contract and will be of a value significantly higher than the tender security.

In the event of withdrawal before the end of the tender validity period or in the event of the failure of the successful tenderer to either sign the contract or provide the required performance security, the tender security of that tenderer will be forfeited. The contracting authority will thus receive some compensation for the time spent evaluating a bogus or withdrawn tender.

The period of validity of the tender security would normally extend beyond the period of validity of the tender itself in order to take account of those eventualities. There must be sufficient time within which to conclude the contract and obtain the performance security. In addition, should the successful tenderer fail to sign the contract, the contracting authority may further need time, in those systems that allow it, to approach the second-ranked tenderer, where appropriate.

The tender securities of the unsuccessful tenderers will be discharged/returned promptly after the award of the contract and, in any event, within the period of validity of the security.

The amount of the tender security tends to vary between jurisdictions but is ordinarily fixed as a percentage value of the contract, amounting to usually 1 to 2 per cent of the tender price for the contract. In terms of timing, this implies that the amount of the tender security will only be known at the end of the tender preparation stage. It poses some practical difficulties since the tender price will often be a last-minute decision, making it difficult to negotiate the security with the provider.

This may be feasible for smaller-value contracts but, in the case of very large contracts with a value exceeding, for example, 100 million GBP, tender securities of over 1 million GBP are generally not needed. It should be recalled that the purpose is to provide compensation to the contracting authority for any wasted effort. The tender security will also act as a deterrent, but the intention is not usually to impose large penalties or to provide the contracting authority with windfall profits.

It should also be recalled that the costs to the tenderers of obtaining such securities are far from negligible and will inevitably be taken into account by the tenderer in its tender price. In the case of high-value contracts, therefore, the tender security may often be based on an arbitrary or maximum figure for any contract above a certain value.

Practice Note

In some countries, there may be other reasons for preferring a fixed tender security that is not based on the estimated value of the contract in question. Where the banking system is undeveloped or where there is distrust among contracting authorities and tenderers as to the guarantee of confidentiality, there may be concern that the value of tender securities may be disclosed to the tenderers. If the tender security is based on a fixed percentage of the tender price, it is a simple calculation to determine the price of the tender. In appropriate circumstances, therefore, the tender security may be determined by the procuring entity as a fixed sum calculated as a percentage of the total estimated cost. This would also have the benefit of allowing tenderers to calculate and obtain a tender security earlier in the tender preparation process.

However, where fixed amounts are used in this way, the contracting authority would be well advised to make it clear that the estimated total cost is a hypothetical figure used only for the purpose of establishing the required level of tender security and does not reflect the detailed expectations of the procuring entity with regard to the tender prices to be submitted. A further alternative is simply to require a tender security of 'not less than' a fixed percentage of the tender price. Tenderers would then be at liberty to offer higher securities in relation to their tender prices, thereby preventing the accurate calculation of their tender prices by tenderers who have succeeded, in one way or another, in obtaining confirmation of the levels of the other tenderers' tender securities.

The costs involved for tenderers in obtaining tender securities are not negligible. They will include administrative fees as well as, normally, a cost based on a percentage of the credit obtained. There are less tangible costs also, such as the effect that any outstanding security may have on the tenderer's credit line with its bank. The requirement to provide tender securities may well act as a deterrent to many companies, particularly SMEs, especially where the value of the contract being let is relatively low. The charges incurred by the tenderers in obtaining the securities will also, in one way or another, be passed on to the contracting authority by way of increased tender prices. Care needs to be taken, therefore, in deciding whether tender securities are necessary.

They may be advisable in the case of large works contracts where the time involved in conducting an open tendering process is so costly that the untimely and unjustified withdrawal of a tenderer would have significant time and cost implications for the contracting authority. They may also be advisable in the case of tenders that are open to international competition (by definition, mostly higher-value contracts), where contracting authorities are less inclined to trust the potential, largely unknown, tenderers. Where tender securities are required when they are, in reality, unnecessary, the consequences may be fewer tenderers and increased costs for the contracting authority. Few of the older EU Member States apply tender securities in any systematic way; where they do, this tends to be only for large-value works contracts.

They are much less frequently used in the case of selective tendering and in the procurement of consultancy services. They are inadvisable in the case of low-value contracts.

2.4 Performance securities

The contracting authority may well need to protect itself from the effects of the failure of the economic operator to perform its obligations, as well as against the risk of non-performance due to bankruptcy or other financial difficulties of the economic operator.

If the procurement procedure has been conducted well based on the appropriate use of technical specifications, qualification and selection criteria, the danger of non-performance is reduced. The application of the provisions on abnormally low tenders (see Module E5), which include the possibility of checking the capacity and capability of the economic operator to complete and execute the contract as expected, will also provide some guarantee of satisfactory performance.

Nevertheless, especially in the case of large-value or complex works contracts, the contract terms and conditions will often contain a requirement for the provision of a performance guarantee.

The purpose of providing a guarantee for performance is to ensure that the beneficiary receives the services, including materials, that it contracted for and that it receives these services within the time limit stipulated in the contract. The undertaking by the guarantor is directly related to and makes express reference to the underlying contract.

Retention monies (the practice of retaining or withholding part of the payment due to the economic operator under the terms of the contract) are sometimes regarded as security for complete and exact performance of the contract. The disadvantage with retention monies, however, is that they accrue only as and when the economic operator becomes entitled to progress payments. Thus an economic operator may have run into financial difficulties preventing the proper performance of the contract before the retention fund has reached a size sufficient to serve as protection. Additional security measures are therefore needed as safeguards to performance.

As with tender securities, performance 'securities' may be given in various forms, but most usually in the form of a performance 'bond' or 'guarantee'.

2.5 Advance payment guarantees

In the case of some contracts, it is sometimes customary to provide the economic operator with an advance payment. This may happen in the case of the supply of major equipment, for example, where advance payment may be made before the seller puts the goods at the buyer's disposal. An advance payment is also common in construction contracts, where payment is made either before or at the time that the economic operator sets up its on-site camp, delivers its equipment and assembles its work force; it is usually referred to as a mobilisation advance. The economic operator is entitled to payment before it has actually produced any benefits to the contracting authority commensurate to the amount of the mobilisation advance.

Such an advance is often recovered through deductions from monthly bills received from the economic operator. Contracting authorities might take the additional precaution of deducting from the monthly bill a small percentage in order to build up a 'retention fund'. The purpose of the retention fund is to make sure that the contracting authority is not overpaying the economic operator in the early phase of the work and also to build up a reserve to secure fulfilment of the economic operator's maintenance obligations.

However, the retention fund implies a loss of interest for the economic operator and, possibly, a negative cash flow. Bearing in mind possible high interest rates, the retention monies represent an important cost element in the overall price, and the tendering documents should therefore be explicit concerning the amount of retention and the time at which the retention fund will be returned to the economic operator.

Where an advance payment is made, many contracting authorities require the successful economic operator to provide them with an advance payment guarantee, which is equivalent to the amount of the advance payment. This prevents situations where unscrupulous economic operators fail to complete the contract and walk away with the advance payment.

In some cases, advance payments are repaid through retention monies even where there is an advance payment guarantee. To avoid excessive costs, the value of the advance payment guarantee should be reduced in line with the repayments, although this does not always happen in practice. It is a cumbersome procedure, but any other action, where these

instruments are combined, exposes the economic operator to increased costs, which will need to be recovered from the contracting authority. It is not unknown for advance payments to be interest-bearing. This defeats the object of providing a mobilisation advance and would again impose a disproportionate cost burden on the economic operator.

2.6 Means of providing securities

Securities may be issued in a number of forms. In addition to the simple practice of using 'earnest money' referred to above, which can be paid by various means, such as in cash or by banker's certified cheque, cash warrant or demand draft, securities are most often issued in the form of a 'bond' or 'guarantee'. A bond is generally issued by an insurance company and a guarantee by a bank. In practice, the difference between these instruments can be quite large.

2.6.1 Bonds

A performance bond usually leaves the guarantor the options of remedying a specific default by the economic operator, performing the contract in its place, or paying the beneficiary what it costs to have the contract performed – up to a certain monetary limit. Sometimes the monetary limit in a performance bond corresponds to the amount of the contract, and sometimes the level is slightly lower.

Given the fact that acute problems rarely arise in the early stages of contract execution, a protection at the level of 50% of the contract value is generally sufficient to protect the beneficiary. It provides the guarantor with an incentive to carry out the contract rather than to pay the beneficiary for having the contract performed.

The wording of the performance bond is normally not very specific with regard to the circumstances under which the bond will come into operation. In practice, the bonding company will be approached as soon as the economic operator is in default, and the beneficiary and the guarantor will discuss with the economic operator what steps are to be taken to remedy the default. If the beneficiary does not obtain satisfaction, it will require the bonding company to complete the contract.

How the bonding company elects to complete the contract is a matter for it to decide. The most common course of action is for the original economic operator to finish the job with financial assistance from the bonding company. The guarantor may also decide, however, to put the remaining work out for competitive tender and to select a new economic operator to take over the work.

Bonds constitute a useful 'pre-qualification' in the selection of the economic operators that are interested in tendering for a contract. Furthermore, the cost of the bond is relatively small compared with the potential losses due to non-performance of a major construction or installation contract.

The disadvantages of bonds from the beneficiary contracting authority's point of view is that the circumstances under which the bonding company can be called upon to perform are

either specified in favour of the economic operator and guarantor or are not specified at all. As a result, the beneficiary may find it difficult to obtain speedy remedial action.

Despite their relatively low cost, however, bonds are not universally obtainable and in particular smaller companies with little experience may have difficulty in qualifying for them.

2.6.2 Guarantees

Performance guarantees are issued by banks and similar financial institutions.

One attractive feature of performance guarantees is their 'triggering' mechanism, i.e. whether they are called on demand or whether the beneficiary needs to prove in some form that the economic operator is in default under the main contract. Commercial banks, as a matter of business policy, do not like to pass judgment on the performance of economic operators or to assess whether the buyer is entitled to a contractual remedy or not. When commercial banks issue performance guarantees, therefore, they prefer to pay against documentary evidence, much as in the case of letters of credit.

The simplest form of evidence is a letter from the beneficiary to the bank demanding payment, perhaps adding an allegation by the beneficiary (the contracting authority) of default by the principal (economic operator). No proof of default is required.

This 'on demand' type of security is obviously contentious and has prompted calls for guarantees to be payable only against production of documentary evidence, such as engineer's reports or arbitral decisions certifying an actual failure to perform. Given their nature, performance guarantees are more expensive, in percentage terms, than performance bonds in relation to the maximum of the guarantee amount.

2.7 Other safeguards

In addition to performance securities, recourse may also be had to warranties, whereby the economic operator undertakes to remedy latent defects that appear during a specific period (usually a year) after delivery of the goods or completion of the works.

Additionally, the contract may also include clauses that will entitle the contracting authority to liquidated damages, notably in the event of delays in performance. Such clauses give the buyer the right to deduct a certain amount of money from the price payable under the contract for each day or week of delay as compensation for losses. The amount is often expressed as a percentage of the value of the contract or of those goods and services exposed to delay.

Despite the frequency of such clauses, their enforceability is subject to some dispute. In common law jurisdictions, for example, such a clause is not enforceable unless it represents a genuine pre-estimate of the damage likely to occur as a result of the delay. The usual construction of the clause in terms of a percentage of the contract value sits uneasily with the idea of genuine pre-estimate.

Section 3 Exercises

Exercise 1: Internet Search

Using the Internet:

1. Find sample tender securities and performance securities for EBRD and World Bank.
2. Compare these with the examples set out in Section 4:
 - (a) What are the differences?
 - (b) What are the similarities?
 - (c) Are there practical differences?

Exercise 2: Group Discussion on Tender Securities

Split into groups of no more than six for a debate on the use of tender securities.

Half of the groups will take the position that tender securities should be used for all contracts.

The other half will take the position tender securities are only appropriate for highly complex or high-value works contracts.

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

- the need to protect the interests of the contracting authority purchaser;
- the costs of obtaining the securities;
- the effects that this may have on price.

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

Section 4 Examples of Financial Safeguards taken from the PRAG

4.1 Tender Guarantee Form

Works contract

(To be completed on paper bearing the letterhead of the financial institution)

For the attention of

(Address of the Contracting Authority

referred to below as the “Contracting Authority”

Title of contract: <Title of contract>

Identification number: [Publication reference

We, the undersigned, [name and address of financial institution], hereby irrevocably declare that we will guarantee, as primary obligor, and not merely as a surety on behalf of [Tenderer's name and address], the payment to the Contracting Authority of [amount of the tender guarantee], this amount representing the guarantee referred to in article 11 of the Procurement Notice.

Payment shall be made without objection or legal proceedings of any kind, upon receipt of your first written claim (sent by registered letter with confirmation of receipt) if the Tenderer does not fulfil all obligations stated in its tender. We shall not delay the payment, nor shall we oppose it for any reason whatsoever. We shall inform you in writing as soon as payment has been made.

We note that the guarantee will be released at the latest within 45 days of the expiry of the tender validity period, including any extensions, in accordance with Article 15 of the Instructions to Tenderers [and in any case at the latest on (1 year after the deadline for submission of tenders)]⁷.

The law applicable to this guarantee shall be that of <enter Belgium or the name of the country of the Contracting Authority if this is not the European Commission / country in which the financial institution issuing the guarantee is established>. Any dispute arising out of or in connection with this guarantee shall be referred to the courts of (enter Belgium or the name of the country of the Contracting Authority if this is not the European Commission)

The guarantee will enter into force and take effect from the submission deadline of the tender.

⁷ This mention has to be inserted only where required, for example where the law applicable to the guarantee imposes a precise expiry date

Done at, .././..

Name and first name: On behalf of:

Signature:

- **[stamp of the body providing the guarantee]**

4.2 Performance Guarantee

SPECIMEN PERFORMANCE GUARANTEE

(To be completed on paper bearing the letterhead of the financial institution)

For the attention of

(Name and address of the Contracting Authority)

referred to below as the "Contracting Authority"

Subject: Guarantee No...

Performance Guarantee for the full and proper execution of contract (contract number and title) (please quote number and title in all correspondence)

We, the undersigned, [name, and address of financial institution], hereby irrevocably declare that we guarantee, as primary obligor, and not merely as a surety on behalf of [Contractor's name and address], hereinafter referred to as "the Contractor", payment to the Contracting Authority of [amount of the performance guarantee], representing the performance guarantee mentioned in Article 15 of the Special Conditions of the contract (contract number and title) concluded between the Contractor and the Contracting Authority, hereinafter referred to as "the Contract".

Payment shall be made without objection or legal proceedings of any kind, upon receipt of your first written claim (sent by registered letter with confirmation of receipt) stating that the Contractor has failed to perform its contractual obligations fully and properly or that the Contract has been terminated. We shall not delay the payment, nor shall we oppose it for any reason whatsoever. We shall inform you in writing as soon as payment has been made.

We accept notably that no amendment to the terms of the Contract can release us from our obligation under this guarantee. We waive the right to be informed of any change, addition or amendment to the Contract.

We note that the guarantee will be released in accordance with article 15.8 of the General Conditions to the Contract [and in any case at the latest on (at the expiry of 18 months after the implementation period of the Contract)]⁸.

[The whole paragraph should be deleted when the Contracting Authority is the Commission:

Any request to pay under the terms of the guarantee must be countersigned by the Head of Delegation of the European Commission. In case of a temporary substitution of the Contracting Authority by the Commission, any request to pay will only be signed by the representative of the Commission, namely whether the Head of Delegation, or the authorised person at headquarters' level.]

The law applicable to this guarantee shall be that of <enter Belgium, or the country of the Contracting Authority if this is not the European Commission / country in which the financial institution issuing the guarantee is established>. Any dispute arising out of or in connection with this guarantee shall be referred to the courts of <enter Belgium, or the name of the country of the Contracting Authority if this is not the European Commission >.

The guarantee shall enter into force and take effect upon its signature.

Done at, .././..

Name and first name: On behalf of:

Signature:

[stamp of the body providing the guarantee]

4.3 Advance Payment Guarantee

SPECIMEN PREFINANCING PAYMENT GUARANTEE

(To be completed on paper bearing the letterhead of the financial institution)

For the attention of

(Name and address of the Contracting Authority)

Referred to below as the "Contracting Authority"

⁸ This mention has to be inserted only where required, for example where the law applicable to the guarantee imposes a precise expiry date

Subject: Guarantee No...

Financing Guarantee for the repayment of pre-financing payable under contract (Contract number and title) (please quote number and title in all correspondence)

We the undersigned, [name, and address of financial institution], hereby irrevocably declare that we guarantee as primary obligor, and not merely as surety on behalf of [Contractor's name and address], hereinafter referred to as "the Contractor", the payment to the Contracting Authority of [indicate the amount of the pre-financing], corresponding to the pre-financing as mentioned in Article 46 of the Special Conditions of the contract (Contract number and title) concluded between the Contractor and the Contracting Authority, hereinafter referred to as "the Contract".

Payment shall be made without objection or legal proceedings of any kind, upon receipt of your first written claim (sent by registered letter with confirmation or receipt) stating that the Contractor has not repaid the pre-financing on request or that the Contract has been terminated. We shall not delay the payment, nor shall we oppose it for any reason whatsoever. We shall inform you in writing as soon as payment has been made.

We accept notably that no amendment to the terms of the Contract can release us from our obligation under this guarantee. We waive the right to be informed of any change, addition or amendment of the Contract.

We note that the guarantee will be released in accordance with the article 46.7 of the General Conditions. [and in any case at the latest on (at the expiry of 18 months after the implementation period of the Contract)]⁹.

[The whole paragraph should be deleted when the Contracting Authority is the Commission:

Any request to pay under the terms of the guarantee must be countersigned by the Head of Delegation of the European Commission. In case of a temporary substitution of the Contracting Authority by the Commission, any request to pay will only be signed by the representative of the Commission, namely whether the Head of Delegation, or the authorised person at headquarters' level.]

The law applicable to this guarantee shall be that of <enter Belgium, or the country of the Contracting Authority if this is not the European Commission / country in which the financial institution issuing the guarantee is established>. Any dispute arising out of or in connection with this guarantee shall be referred to the courts of (enter Belgium or the name of country of the Contracting Authority if this is not the European Commission).

The guarantee will enter into force and take effect on receipt of the pre-financing payment in the account designated by the Contractor to receive payments.

Done at, .././..

Name and first name: On behalf of:

⁹ This mention has to be inserted only where required, for example where the law applicable to the guarantee imposes a precise expiry date.

Signature:

[Stamp of the body providing the guarantee]

Section 5 Chapter summary

Self-test questions

1. What is a tender validity period?
2. Why is it necessary to have one?
3. How does a tender security reinforce the tender validity period?
4. What other purposes does a tender security serve?
5. Explain how knowledge of the value of a tender security could distort competition.
6. Is a tender security always necessary?
7. What is the difference between a tender security and a performance security?
8. What is the purpose of a performance security?
9. Explain the purpose of an advance payment guarantee.
10. What is retention money?
11. Distinguish between bonds and guarantees.
12. Give 2 examples of other safeguards.

Module C4 Public Procurement Procedures and Techniques

Section 1 Introduction

1.1. Objectives

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

1. The types of procurement procedure
2. Similarities and differences between the procedures
3. When to use the procedures
4. How each procedure works in practice
5. Techniques to be used in delivering successful outcomes
6. The very limited circumstances where a competitive procurement process may not be required

1.2. Important issues

The most important issues in this chapter are understanding:

- When and how each of the procurement procedures can and should be used
- When and how each of the procurement techniques can and should be used
- How to identify the rare circumstances under which competitive procurement may not be required?

This means that it is critical to understand fully:

- The advantages and disadvantages of each of the procedures and techniques
- The need for thorough preparation and clarity as to the desired outcomes of the process
- The legal constraints

If these points are not properly understood, the choice and conduct of the procedures or the techniques may be flawed or may not deliver the required outcomes. This could mean that the tender process is challenged; or that it needs to be cancelled and restarted; or that the best tender is not selected. If a decision is made not to use a competitive process and that decision is incorrect, the result could well be a successful legal challenge.

1.3. Links

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

- Module A1 on the basic principles of public procurement
- Module C1 on preparation for procurement which steers you through the contract specific issues which must be resolved before you start a procurement
- Modules E3 and E4 on selection and evaluation

1.4. Relevance

This information will be of particular relevance to those procurement professionals who are responsible for procurement planning, specifically in the preparation of contract notices of tender documentation including specifications, and to those involved in the evaluation process. It will also be of particular relevance to those persons who, within the line management of a contracting authority, have the responsibilities and decision-making powers – including delegation powers – to make procurement decisions (e.g. to approve the launch of a tender process, make award decisions, sign contracts, etc.).

1.5. Legal information helpful to have at hand

Adapt for local use

The legal requirements relating to the type of procedures are set out in **Directive 2014/24/EU**, articles 26 to 32 and articles 74 to 82:

- Article 26 confirms that contracting authorities may apply the open, restricted or innovation partnership procedures. No conditions are specified for the use of those procedures in article 26.
- Article 26 sets out the conditions for the use of the competitive dialogue procedure and competitive dialogue. The conditions are the same for both procedures. Article 26 also contains some provisions on the form of call for competition.
- Article 27 concerns the conduct of the open procedure.
- Article 28 concerns the conduct of the restricted procedure.
- Article 29 concerns the conduct of the competitive procedure with negotiation - this procedure has been significantly revised and renamed by the 2014 Directive.
- Article 30 concerns the conduct of the competitive dialogue procedure.
- Article 31 concerns the conduct of the innovation partnership procedure – introduced by the 2014 Directive.
- Article 31 sets out the limited conditions where the use of the negotiated procedure without prior publication is permitted.
- Articles 74 to 77 cover the rules applying to the award of contracts for social and other specific services – introduced by the 2014 Directive,
- Articles 78 to 82 cover the rules applying to design contests.

Numerous other articles in the 2014 Directive set out more detailed provisions on how the procedures are conducted, including how to advertise, statutory timescales, the minimum number of economic operators to be invited to tender, and how to select economic operators and award tenders.

The legal requirements relating to the types of procurement technique are set out in:

- Article 33 on framework agreements
- Article 34 on dynamic purchasing systems
- Article 35 on electronic auctions
- Article 36 on electronic catalogues – introduced by the 2014 Directive

Utilities

A short note on the key similarities and differences applying to utilities is set out at the end of Section 2.

Section 2 Narrative

Note: Except where specified or the context indicates otherwise, the narrative in this Module C4 discusses the rules applying to contracts that are of a certain type and value, which means that they are subject to the full application of the 2014 Directive, and the term 'contract' should be interpreted accordingly. For commentary on contracts falling outside the application of the 2014 Directive or only partially covered by the 2014 Directive, see Module D3. For low-value (sub-threshold) contracts, see below.

Introduction

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology. Delete references to competitive dialogue if not allowed for under local legislation.

The basic presumption in public procurement is that contracts will be procured using an advertised, competitive procedure that is open, fair and transparent, ensuring equality of opportunity and treatment for all candidates and tenderers. There are only limited circumstances where a procedure without advertised competition is permitted.

The main competitive procurement procedures available under the 2014 Directive are the open procedure, restricted procedure, competitive dialogue procedure, competitive procedure with negotiation, and the innovation partnership procedure. The 2014 Directive (1) updated the negotiated procedure with prior publication of a contract notice and renamed it the “competitive procedure with negotiation”; (2) introduced the new “innovation partnership” procedure; and (3) removed the provisions in the 2004 Directive on subsidised housing schemes and public works concessions. Concession contracts for works and services are subject to the Concessions Directive 2014/23/EU. There are also particular procurement regimes set out in the 2014 Directive, which are to be used for the procurement of social and other specified services and for design contests.

The Directive sets out the processes to be followed by a contracting authority when using each of these competitive procedures. The level of detail set out in the Directive differs according to the procedure.

The Directive also includes provisions covering procurement tools that a contracting authority may choose to use in conjunction with the competitive procedures, where permissible. These are framework agreements, electronic auctions, dynamic purchasing systems, and electronic catalogues (“e-catalogues”). The 2014 Directive added the provisions on e-catalogues, and the provisions on dynamic purchasing systems were substantially amended to make them more user-friendly.

Where a contracting authority wishes to award a contract without competition, using what is known as the ‘negotiated procedure without prior publication, then it can only do so if specific conditions set out in the Directive are met. The European Court of Justice (ECJ) had confirmed that these conditions were narrowly interpreted and that the award of a contract without competition should only occur in exceptional circumstances.

Overview of content

Change overview to reflect local content.

Section 2.1 covers the various types of competitive procurement procedures available to a contracting authority for contracts subject to the full application of the Directive. It includes:

- a broad overview of how each procedure operates;
- the circumstances in which each of the main types of competitive procedures may be used;
- a more detailed analysis of how each of the procedures works in practice;
- a description of the less commonly used procedure for design contests, including looking at when that procedure can be used and how it operates in practice;
- **Electronic catalogues:** The 2014 Directive introduced the concept of electronic catalogues (“e-catalogues”), which are documents in electronic format submitted in place of tenders or as part of a tender.

Section 2.2 looks at three public procurement tools specifically covered by the Directive. These are:

- **Framework agreements:** which allow a contracting authority or a number of contracting authorities to enter into arrangements with a single economic operator or a number of economic operators and which permit the repeated award of contracts to the selected economic operator(s) over a specified time limit, subject to a number of legal constraints.
- **Electronic auctions:** which can be used as a method of receiving final or refined tenders using an online competition, subject to a number of legal constraints.
- **Dynamic purchasing systems:** which are completely electronic systems for making commonly used purchases and which are open to economic operators to join at any stage, subject to a number of legal constraints.

Section 2.3 looks at the very limited circumstances where a contracting authority may be able to use the negotiated procedure without publication of a notice.

Sub-threshold contracts

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology. Briefly set out the requirements of the local legislation for sub-threshold contracts.

Where local legislation or local requirements for contracts below the EU thresholds are based on or are the same as EU procurement procedures, as is sometimes the case, then this should be specifically referred to in this section.

This module describes the requirements for contracts of a certain type and/or value, which means that they must be advertised using a contract notice published in the *Official Journal of the European Union - OJEU* (see Module D for more information on the types of contract covered and the financial thresholds).

In practice, contracting authorities award many contracts that are not subject to the requirement to advertise in the *OJEU*. This is the case because, for example, they are a type of contract that is not subject to those obligations or they are of small value and therefore do not meet the required thresholds (they are 'sub-threshold' contracts).

The Directive does not set out specific rules that apply to the award of these types of contracts, but the basic general law and Treaty principles, including the requirements for transparency, non-discrimination and equal treatment, do apply to the procurement process followed by the contracting authority in procuring those contracts.

EU Member States may opt to introduce their own rules for sub-threshold contracts and other contracts that are not subject to the detailed procurement requirements of the Directive. Individual contracting authorities may also be permitted or required to publish and follow their own internal purchasing rules. **Add special notes if the country has decided to apply EU procedures to contracts below the EU financial thresholds.**

Examples of processes that may be required under local law for sub-threshold contracts and other contracts that are not subject to the procedural requirements of the Directive include:

- Direct invitations
- Competitive quotes or requests for proposals from a specified number of economic operators
- Local advertising and a local competitive process

Many of these procedures for sub-threshold contracts do include a competitive element. When the contracting authority runs a competitive process, although it does not have to comply with the detailed rules set out in the Directive, it must run the process in a transparent way so as to ensure that all economic operators are treated in an equal and non-discriminatory manner.

2.1 Competitive procedures

2.1.1 What are the main types of competitive procedures available for contracting authorities to use?

Overview

Delete references to forms of procedure not allowed for under local legislation.

There are **five** main competitive procedures:

- Open procedure
- Restricted procedure
- Competitive dialogue procedure
- Competitive procedure with negotiation
- Innovation partnership procedure

The first four procedures are shown in flow charts on the next page. A short explanation of the innovation partnership procedure, introduced by the 2014 Directive, is set out later in this section.

Key features of each of the five main competitive procedures are as follows:

- Open procedure: this is a 'single-stage' competitive procedure that can be used for works, supplies and services contracts without having to fulfil any special conditions.
- Restricted procedure: this is a 'two-stage' competitive procedure that can be used for works, supplies and services contracts without having to fulfil any special conditions.
- Competitive dialogue procedure: this is a 'two-stage' competitive procedure that can be used subject to fulfilling certain conditions. Under the 2014 Directive the conditions for using the competitive dialogue procedure and the competitive procedure with negotiation are the same.
- Competitive procedure with negotiation: this is a 'two-stage' competitive procedure that can be used for some works, supplies and services contracts, subject to fulfilling certain conditions. Under the 2014 Directive the conditions for using the competitive dialogue procedure and the competitive procedure with negotiation are the same.
- Innovation partnership procedure: this is a "two stage" competitive procedure that can be used where the contracting authority has a need for an innovative product, service or work that is not available on the market.

The key distinction between a single-stage procedure and a two-stage procedure is that in the single-stage open procedure economic operators submit both selection information and tenders at the same time. In two-stage procedures economic operators first submit selection stage (pre-qualification) information and then the contracting authority invites only selected economic operators to submit tenders or to participate in the competitive dialogue or negotiation stage.

There is a particular procurement regime for the procurement of social and other specific services.

- Public contracts for the award of social and other specific services listed in Annex XIV of the 2014 Directive are to be awarded in accordance with national provisions, which must comply with the basic principles set out in articles 74 to 76 of the 2014 Directive (see Module D3 for further information on this procurement regime).

- Design contest procedure: this is a competitive procedure that involves the use of a jury to judge the designs submitted. There are no detailed requirements relating to the number of stages to be used. This procedure can only be used for the design of public works.

Good practice note: The importance of thorough preparation before advertising

The flow charts below start with the advertisement that marks the formal commencement of the procurement procedure. Full preparation prior to the publication of the advertisement is critical to the success of a procurement procedure. In practice, the advertisement should only be dispatched once the contracting authority has undertaken all of the necessary preparatory work. The 2014 Directive introduced a requirement for all procurement documents to be available by electronic means, free of charge, on the date of publication of a contract notice or when an invitation to confirm interest is sent (as appropriate). All procurement documents must be complete and comprehensive. See Module C on the preparation for procurement and Modules E3 and E4 on selection criteria and award criteria.

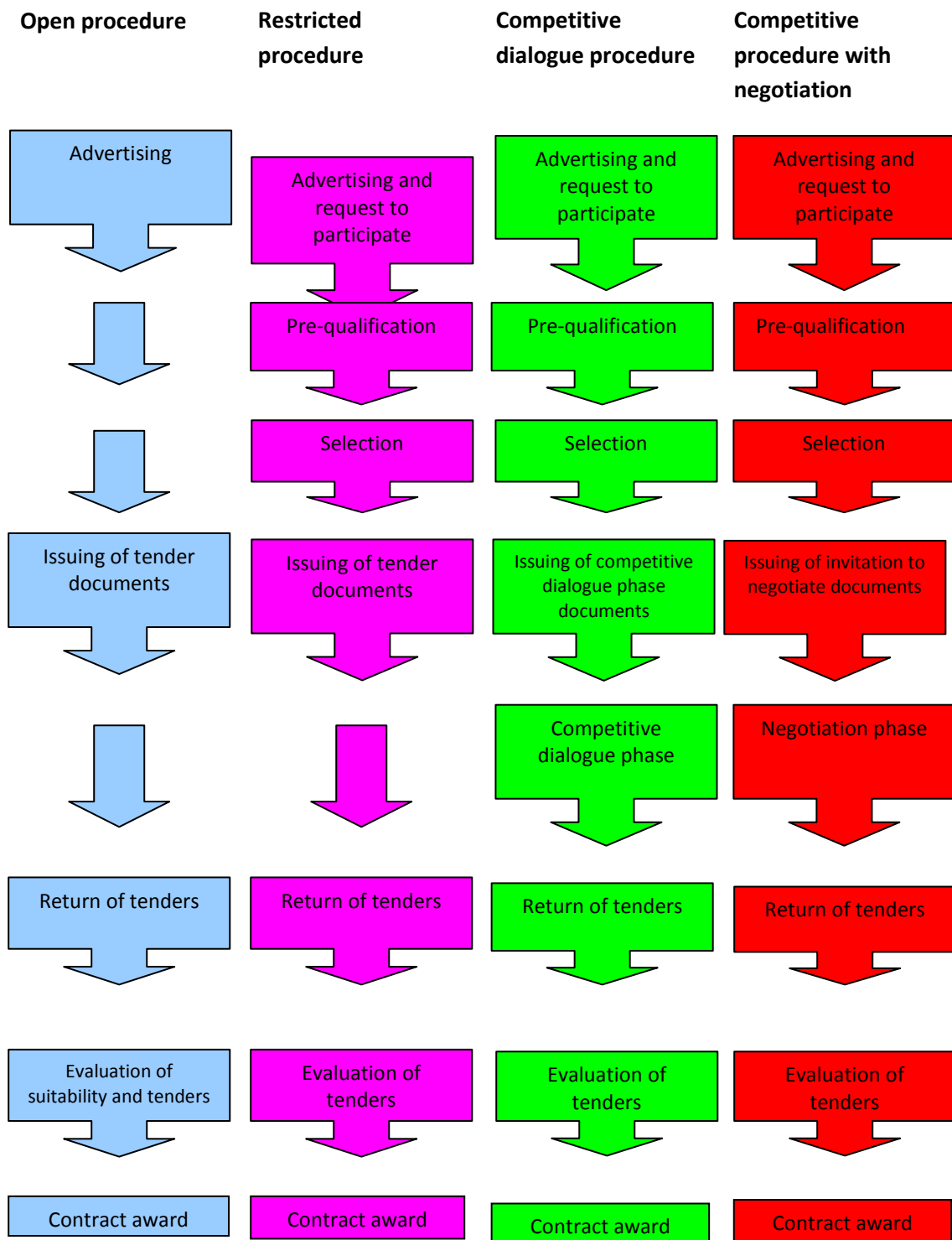
Good practice note: Statutory time limits

In the detailed narrative covering each of the competitive procedures there are references to the statutory time limits that apply to the various stages of the procurement process.

When preparing a tender timetable, the contracting authority must ensure that the statutory time limits are complied with.

The statutory time limits specify the minimum time limits that must be allowed for particular stages of the procurement process. The contracting authority should use the statutory time limits as a starting point for the tender timetable, and it should then consider whether longer time limits would be more appropriate. Time limits should always be based on the nature, complexity and size of the contract in order to allow economic operators sufficient time to prepare pre-qualification and selection stage information and a competitive and correct tender.

2.1.2 Flowchart 1: The four main competitive procedures:



The five main competitive procedures can be summarised as follows:

Open procedure

The open procedure is a single-stage process. A contracting authority advertises the contract opportunity and then issues full tender documents, including the specification and contract, to all economic operators that request to participate. Economic operators submit both selection (qualification) information and tenders at the same time in response to the contracting authority's advertised requirements. The contracting authority may receive a large number of tenders; it cannot control the number of tenders that it receives, but not all of those tenders will necessarily be considered. Only tenders from suitably qualified economic operators that have submitted the required documents and that meet the selection criteria are considered. Tenders must be evaluated on the basis of the most economically advantageous tender. No negotiations are permitted with economic operators, although contracting authorities may clarify aspects of the tender with tenderers.

Restricted procedure

The restricted procedure is a two-stage process. The contracting authority advertises the contract opportunity, and the economic operators first submit selection stage (pre-qualification) information, which is used by the contracting authority to establish whether the economic operators are qualified to perform the contract and to select the economic operators that are to be invited to tender. The contracting authority is permitted to limit the number of economic operators that it invites to tender and to draw up a shortlist of economic operators. This means that not all of the economic operators that qualify have to be invited to tender. The contracting authority issues the full invitation to tender documents, including the specification and contract, to the economic operators that it has selected or shortlisted. This means that, unlike the open procedure, the restricted procedure allows the contracting authority to limit the number of tenders that it receives. Tenders must be evaluated on the basis of the most economically advantageous tender. No negotiations are permitted with economic operators, although contracting authorities may clarify aspects of the tender with tenderers.

Competitive dialogue procedure Delete this section if competitive dialogue is not permitted under local legislation.

The competitive dialogue procedure is a two-stage process. The contracting authority advertises the contract opportunity, and the economic operators first submit pre-qualification and selection stage information, which is used by the contracting authority to establish whether the economic operators are qualified to perform the contract and to select the economic operators that are to be invited to tender. The contracting authority is permitted to limit the number of economic operators that it invites to tender and to draw up a shortlist of economic operators. The contracting authority issues the invitation to participate only to the economic operators that it has shortlisted, and it then enters into a competitive dialogue phase with those economic operators. During the competitive dialogue phase, all aspects of the project can be discussed with the economic operators and the number of solutions can be reduced as part of the process. Once the contracting authority is satisfied that it will receive proposals that will meet its requirements, it declares the competitive dialogue phase closed and invites tenders. Under this procedure, tenders can

only be evaluated on the basis of the best price-quality ratio. Under the 2014 Directive the contracting authority is specifically permitted to negotiate with the tenderer presenting the best price-quality ratio in order to confirm financial commitments or other terms in the tender, subject to safeguards.

Competitive procedure with negotiation

The competitive procedure with negotiation is a two-stage process. The contracting authority advertises the contract opportunity, and the economic operators first submit pre-qualification and selection stage information, which is used by the contracting authority to establish whether the economic operators are qualified to perform the contract and to select the economic operators that are to be invited to tender. The contracting authority is permitted to limit the number of economic operators that it invites to tender and to draw up a shortlist of economic operators. The contracting authority issues the invitation to negotiate only to the economic operators that it has shortlisted. It receives initial proposals and then enters into negotiation with the shortlisted tenderers in respect of those proposals. Tenders must be evaluated on the basis of the most economically advantageous tender.

Innovation partnership procedure

The innovation partnership procedure is a two-stage process. The contracting authority advertises the contract opportunity. The economic operators submit information, which is used by the contracting authority to establish whether the economic operators are suitable, from a qualitative perspective, to participate in the innovation partnership process. The contracting authority is permitted to limit the number of economic operators that it invites to participate and to draw up a shortlist of economic operators or to invite only one economic operator to participate in the innovation partnership. The rules on the conduct of negotiation phase of the innovation partnership procedure are flexible, and the way in which the procedure is conducted can therefore vary considerably. An underlying principle is that the procedure is conducted in successive phases, which must be structured in the sequence of steps in the research and innovation process, which may include the manufacture of products, provision of services or completion of works. During the innovation partnership, all aspects of the project can be discussed with the economic operators, and the number of solutions can be reduced as part of the process. It is possible for the contracting authority to purchase the final product, service or work developed through the innovation partnership, but it is not obliged to do so. Under this procedure, contracts can only be awarded on the basis of the best price-quality ratio.

2.1.3 When can each of the main competitive procedures be used?

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology. Delete references to competitive dialogue if not allowed for under local legislation.

Article 26 of the 2014 Directive covers the circumstances where the main competitive procedures can be used.

Open and restricted procedures: A contracting authority is free to choose between the open procedure and the restricted procedure. No legal conditions apply to the circumstances where either of these two procedures may be used, and a contracting authority is not required to use one procedure in preference to the other and therefore has complete freedom of choice.

Comment

Open or restricted? Choosing which procedure to use

As part of the procurement planning process, the contracting authority should carefully consider which of the procedures is the most appropriate for the particular procurement. In the majority of cases it will be a choice between the open procedure and the restricted procedure.

For more complex procurement, the contracting authority may need to consider whether it can use the competitive dialogue procedure or the negotiated procedure with prior publication of a contract notice. For specialised procurement, the other procedures described later on in this section may be appropriate.

Advantages of the open procedure: The open procedure provides for the maximum amount of competition possible. It is also the most transparent procedure, as there is no discretion in selecting providers. The potential for corruption, with a particular economic operator being favoured, is lower. In general, collusion between economic operators is less likely.

The statutory time limits are also shorter than under the restricted procedure.

Disadvantages of the open procedure: The overall costs to the contracting authority when using the open procedure can be high, as the contracting authority must issue full tender documents to all parties (although these costs can be significantly reduced if the documents are available electronically). The contracting authority may have to evaluate many applications if there are a large number of interested economic operators, which can be costly and time-consuming. In addition, economic operators may be less keen to participate in an open procedure if the contract is more complex, and as a result the tender documents are not routinely prepared and require high levels of input. The cost of preparing a full tender can be a disincentive to participation where the likelihood of success is lower due to the high level of competition.

Advantages of the restricted procedure: By restricting the number of economic operators participating at the tender stage, the contracting authority's costs can be lower and the time spent in evaluation may be less than under the open procedure. The restriction in the number of tenderers can assist in avoiding unnecessary costs related to economic operators that are not suitable. This can also result in more interested economic operators that submit better quality tenders, thereby facilitating more effective competition.

Disadvantages of the restricted procedure: There is more potential for corruption under this procedure due to the greater exercise of discretion, and the possibility of collusion may be higher. The statutory time limits are also longer than for the open procedure.

Good practice

The open procedure is generally suitable to be used for routine, straightforward and commodity-type purchases.

The restricted procedure can also be used for routine, straightforward and commodity-type purchases where the contracting authority is of the view that there will be benefits derived from limiting the number of tenderers. The restricted procedure is particularly suited to more complex procurement and to non-routine purchasing.

In determining which procedure to use, the contracting authority needs to weigh a range of factors, including the costs of running the procedure, the benefits of full, open competition, the advantages of restricting competition, and the likely risk of corruption and/or collusion.

This choice of procedure is part of the procurement planning process covered in Module C1.

Competitive dialogue and competitive procedure with negotiation: The competitive dialogue and competitive procedure with negotiation can only be used where specific conditions are met. These conditions are set out in article 26 for the competitive dialogue procedure and for the competitive procedure with negotiation, and the same conditions apply for both procedures. There are no legal provisions in the Directive requiring a contracting authority to use one of these procedures in preference to the other.

As mentioned above, the conditions in the 2014 Directive for the use of the competitive dialogue and the competitive procedure with negotiation are identical [article 26(4)]. According to recital 42, these conditions are intended to be broader than those in the 2004 Directive. In summary, the conditions are as follows:

- The needs of the contracting authority cannot be met without the adaptation of readily available solutions.
- The works, supplies or services to be procured include design or innovative solutions.
- The contract cannot be awarded without prior negotiations due to specific circumstances related to the nature, complexity or legal and financial make-up or because of the risks attached to them.
- The technical specifications cannot be established with sufficient precision with reference to defined standards or technical specifications.
- Only irregular or unacceptable tenders were submitted in an open or restricted procedure.


Examples of irregular or unacceptable tenders, provided in article 26 (4)(b), are tenders that do not comply with the procurement documents, tenders that were received late, tenders where there is evidence of collusion or corruption, tenders

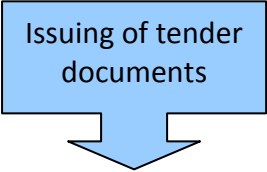
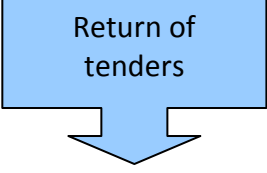
that have been found by the contracting authority to be abnormally low, tenders that were submitted by tenderers that do not have the required qualifications, or tenders with a price exceeding the contracting authority's budget, as determined and documented prior to the launching of the procurement procedure.


This narrative now examines in more detail the four main competitive procedures: (1) open procedure, (2) restricted procedure, (3) competitive dialogue procedure, and (4) competitive procedure with negotiation. A short explanation of the fifth competitive procedure, the innovation partnership procedure introduced by the 2014 Directive, is provided later in this section.

2.1.4 Open procedure

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology, including statutory time limits and publication requirements.

 <p>Advertising and requests to participate</p>	<p>Advertising at the start of contract-specific procurement marks the formal commencement of the procurement process.</p> <p>The contracting authority must use the standard form contract notice and dispatch this to the <i>Official Journal of the European Union</i> in accordance with the procedures set out in the Directive. See Module E2 for further information on advertising requirements.</p> <p>A key objective of the 2014 Directive is to ensure the accessibility of contract opportunities. Accessibility could be jeopardised if contracting authorities set very short time limits for responses, therefore certain minimum response time limits are required in articles 46 to 48. Article 45 makes clear that contracting authorities must take into account the complexity of the contract and the time required for economic operators to respond.</p> <p>In order to increase efficiency, the 2014 Directive nevertheless introduces shorter minimum statutory time limits for the receipt of tenders. The time limit is 35 days from the date of dispatch of the contract notice to the office of the OJEU. This 35-day minimum time limit can be reduced in the following circumstances:</p> <ul style="list-style-type: none">• to a minimum of 15 days, where a suitable prior information notice (PIN) has been published, which (a) includes all of the information required for a standard contract notice insofar as the information was available at the time the PIN was dispatched for publication, and (b) is dispatched no less than 35 days and no more than 12 months before the date on which the contract notice for the contract is dispatched (see Module E2 for further information on prior information notices).
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	<ul style="list-style-type: none"> • to a minimum of 15 days from the date of dispatch of the contract notice in the event of urgency. Under the 2014 Directive, a contracting authority may, for the first time, use an accelerated open procedure in the case of urgency [recital 46 and article 27 (3)]. • to a minimum of 30 days if documents are available electronically. • Article 53 require contracting authorities to ensure by electronic means "full direct access free of charge to the procurement documents" from the date of publication of the notice. Where such access cannot be provided, the minimum time limit for submission of tenders in the open procedure must be increased by five days. This increase does not apply when the time limits have been reduced for duly substantiated urgency [art. 25 (3)]. <p>See the note below on extending the time limit if the specifications and supporting documents or if the additional information are not provided within specified time limits or if economic operators need to undertake site visits or on-the-spot inspections in order to prepare their tenders.</p>
 <p>Issuing of tender documents</p>	<p>Comment: Tender documents issued to economic operators will often include: instructions to tenderers, the specification and supporting documents, together with contract documents as well as the request to submit a tender.</p> <p>Where the specification and supporting documents are not available by electronic means on the date of publication of the contract notice, then they must be sent to economic operators within six days of receipt of the request to participate, provided that the request was made in good time prior to the date of submission of tenders [art. 53(2)].</p> <p>Where the specification and supporting documents are not made available within the six-day time limit or where tenders can only be made after a visit to the site or after on-the-spot inspection, then the time limit for receipt of tenders must be extended so that all economic operators concerned may be made aware of all of the information they need for preparing their tenders (art. 47).</p>
 <p>Return of tenders</p>	<p>Economic operators return all documents and forms fully completed by the specified date.</p>

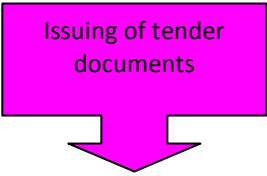
<p style="text-align: center;">Evaluation of suitability and tenders</p> 	<p>The information received from tenderers is evaluated. Firstly, the selection-related information is evaluated against the set selection criteria in order to determine the economic operators that are qualified to perform the contract. Secondly, the tender information is evaluated on the basis of the most economically advantageous tender as redefined in the 2014 Directive [see also Module E4 (Narrative)], using the pre-disclosed award criteria and weightings.</p>
<p style="text-align: center;">Contract award</p>	<p>Where the evaluation process results in the decision to award the contract to the successful economic operator, the decision is notified in accordance with statutory requirements, including compliance with the statutory standstill period. See Module F1 for further discussion of the statutory standstill requirements. Article 50 requires the contract award notice to be sent within 30 days of the conclusion of the contract.</p>

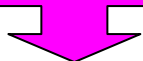
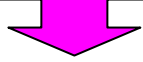
2.1.5 Restricted procedure

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology, including statutory time limits and publication requirements.

Restricted procedure




<p style="text-align: center;">Advertising and requests to participate</p> 	<p>Advertising at the start of the contract-specific procurement marks the formal commencement of the procurement process.</p> <p>The contracting authority must use the standard form contract notice and dispatch this to the <i>Official Journal of the European Union</i> in accordance with the procedures set out in the Directive. See Module E2 for further information on advertising requirements.</p> <p>Economic operators that wish to participate in the process and to submit a tender are required to inform the contracting authority by means of a request to participate.</p> <p>A key objective of the 2014 Directive is to ensure the accessibility of contract opportunities. Accessibility could be jeopardised if contracting authorities set very short time limits for responses. The time limit for receipt of requests to participate remains at 30 days (article 29). Article 45 makes it clear that contracting authorities must take into account the complexity of the contract and the time required for economic operators to respond.</p> <p>In case of urgency, the 30-day period for receipt of requests to participate can be reduced to a minimum of 15 days.</p>
<p style="text-align: center;">Pre-qualification</p> 	
<p style="text-align: center;">Selection</p> 	<p>Economic operators provide selection stage information to the contracting authority, as requested in the advertisement.</p> <p>The contracting authority may choose to use a pre-qualification questionnaire (PQQ) to request the selection stage information (see Module E3 for further discussion on the use of PQQs).</p> <p>The contracting authority evaluates the selection stage information against the set selection criteria to determine the economic operators that are qualified to perform the contract, and it may then select a limited number of economic operators.</p>



	<p>The contracting authority must invite a minimum of five economic operators to submit tenders, provided that there are five suitably qualified candidates (article 65(2)). The number of economic operators invited to participate must be sufficient to ensure genuine competition and so in certain circumstances five candidates may not be sufficient.</p>
<p style="text-align: center;">Issuing of tender documents</p> 	<p>The contracting authority issues the invitation to tender to the selected economic operators.</p> <p>Restricted procedure without a PIN: A statutory time limit of 30 days applies for the period extending from the dispatch of invitation to tender until the return of tenders (article 29).</p> <p>Restricted procedure with publication of a standard PIN: Where contracting authorities publish a suitable prior information notice (PIN), the 30-day period can be significantly reduced, to 10 days. The time limit can only be shortened if (i) all of the required information has been set out in the PIN, and (ii) the PIN was sent for publication between 35 days and 12 months before the dispatch of the contract notice.</p> <p>In the case of urgency the time limit for the receipt of tenders can be reduced from 30 days to a minimum of 10 days.</p> <p>If electronic documents are available, the time limit for the receipt of tenders can be shortened to 25 days. Article 53 requires contracting authorities to ensure "full direct access free of charge to the procurement documents" by electronic means. Where such access cannot be provided, the minimum time limit for submission of tenders must be increased by five days. This increase does not apply when the time limits have been reduced for duly substantiated urgency [article 26(6)].</p> <p>See the note below on further flexibility available for sub-central authorities.</p> <p>See the note below on extending the time limit if the specification supporting documents or additional information are not supplied within the specified time limits or if economic operators need to undertake site visits or on-the-spot inspections in order to prepare their tenders.</p> <p>According to article 54, the invitation to tender must be in writing and issued simultaneously to the selected candidates. It must include, at least:</p> <ul style="list-style-type: none"> • a reference to the contract notice published; • the deadline for receipt of tenders;

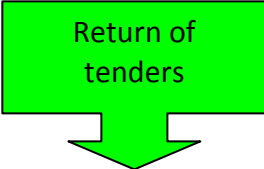
	<ul style="list-style-type: none"> • the address to which tenders must be sent; • the language of the tender; • a reference to any adjoining documents to be submitted in support of declarations provided at the selection stage or to supplement that information; • the weighting of criteria for the award of the contract (and, in practice, the criteria as well) or, where appropriate, the descending order of importance of those criteria if they are not set out in the contract notice or specification (although it is good practice to repeat the information in the invitation to tender if the information was provided in the contract notice or specification); • a copy of the specification(s) plus any supporting documents or a reference to where those documents can be accessed by electronic means.
<p style="text-align: center;">Return of tenders</p> 	<p>Economic operators return tenders within the specified time limits and in the format specified by the contracting authority.</p> <p>Comment: Tender documents issued to economic operators often include: the specification and supporting documents, together with contract documents, and a request for qualification information as well as a request to submit a tender.</p> <p>Where the specification and supporting documents are not available by electronic means on the date of publication of the contract notice, then they must be sent to economic operators within six days of the date of receipt of the request to participate, provided that the request was made in good time before the date for the submission of tenders [article 53(2)].</p> <p>Where the specification and supporting documents are not made available within the six-day time limit or where tenders can only be made after a visit to the site or after on-the-spot inspection, then the time limit for the receipt of tenders must be extended so that all economic operators concerned may be made aware of all of the information they need for preparing their tenders (article 47).</p>
<p style="text-align: center;">Evaluation of tenders</p> 	<p>The contracting authority evaluates the tenders on the basis of the most economically advantageous tender, as redefined in the 2014 Directive, using the pre-disclosed award criteria and weightings.</p>
<p style="text-align: center;">Contract award</p>	<p>Where the evaluation process results in the decision to award the</p>

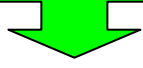
	<p>contract to the successful economic operator, the decision is notified in accordance with statutory requirements, including compliance with the statutory standstill period. See Module F1 for further discussion of the statutory standstill requirements. Article 50 requires the contract award notice to be sent within 30 days of the conclusion of the contract.</p>
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2.1.6 Competitive dialogue procedure

<p style="text-align: center;">Advertising and request to participate</p> 	<p>Advertising at the start of the contract-specific procurement marks the formal commencement of the procurement process.</p> <p>The contracting authority must use the standard form contract notice and dispatch this notice to the <i>Official Journal of the European Union</i> in accordance with the procedures set out in the Directive. See Module E2 for further information on advertising requirements.</p> <p>Economic operators that wish to participate in the process and to submit a tender are required to inform the contracting authority by means of a request to participate.</p> <p>A key objective of the 2014 Directive is to ensure the accessibility of contract opportunities. Accessibility could be jeopardised if contracting authorities set very short time limits for responses. The time limit for receipt of requests to participate remains at 30 days (article 29). Article 45 makes it clear that contracting authorities must take into account the complexity of the contract and the time required for economic operators to respond.</p> <p>In cases of urgency, the 30-day period for receipt of requests to participate can be reduced to a minimum of 15 days.</p>
<p style="text-align: center;">Pre-qualification</p> 	
<p style="text-align: center;">Selection</p> 	<p>Economic operators provide selection stage information to the contracting authority, as requested in the advertisement.</p> <p>The contracting authority may choose to use a pre-qualification questionnaire to request the selection stage information (see Module E3).</p> <p>The contracting authority evaluates the selection stage information against the selection criteria to determine the economic operators that are qualified to perform the contract and selects a limited number of economic operators.</p> <p>The contracting authority must invite a minimum of three economic operators to participate in the negotiation, provided that there are three suitably qualified candidates [article 65(2)].</p>

	<p>In each negotiation the number of candidates invited to participate must be sufficient to ensure genuine competition, and so it may be necessary to invite more than three economic operators to participate.</p>
<p style="text-align: center;">Issuing of competitive dialogue phase</p> 	<p>The contracting authority issues an invitation to participate in the competitive dialogue and provides the related documents to the selected economic operators.</p> <p>There are no statutory time limits for the period from the issue of the invitation to participate in the dialogue to the return of tenders.</p> <p>According to article 54, the invitation to tender must be in writing and issued simultaneously to the selected candidates. It must include, at least:</p> <ul style="list-style-type: none"> • a reference to the contract notice published; • a reference to any possible adjoining documents to be submitted in support of declarations provided at the selection stage or to supplement that information; • the weighting of criteria for the award of the contract (and, in practice, the criteria as well) or, where appropriate, the descending order of importance of those criteria if they are not set out in the contract notice or specification (although it is good practice to repeat the information in the invitation to tender if the information was provided in the contract notice or specification); • a copy of the specification or of the descriptive document, as well as any supporting documents or a reference to where those documents can be accessed by electronic means.
<p style="text-align: center;">Competitive dialogue phase and invitation to tender</p> 	<p>The contracting authority can discuss all aspects of the proposed solutions with the economic operators. The numbers of solutions can be reduced during this phase. Once the contracting authority is satisfied that it will receive suitable tenders, it formally declares the dialogue phase closed and invites tenders.</p> <p>Article 30 does not contain detailed rules about how a contracting authority is to run the competitive dialogue phase, but it does provide that during this phase the contracting authority can discuss all aspects of the proposed solution or solutions with the tenderers and reduce the number of solutions (and therefore in practice often also reduce the number of tenderers).</p>

	<p>The contracting authority is responsible for deciding how the competitive dialogue phase is to be conducted, subject to ensuring that the process is conducted in a manner that complies with the general law and Treaty principles, in particular by ensuring that it is an open, fair and transparent process, with all tenderers treated equally.</p> <p>The following specific requirements apply to the competitive dialogue phase. Contracting authorities must:</p> <ul style="list-style-type: none"> • ensure equal treatment and in particular not provide information in a discriminatory manner; • not reveal solutions; • set out in advance the award criteria, weightings or order of importance in the contract notice or the descriptive document. <p>The competitive dialogue phase must continue until the contracting authority identifies a solution or solutions capable of meeting its needs.</p> <p>The invitation to tender must be in writing and must include, at least:</p> <ul style="list-style-type: none"> • the deadline for receipt of tenders; • the address to which tenders must be sent; • the language of the tender.
	<p>Economic operators return tenders within the specified time limits and in the format specified by the contracting authority.</p>

<p style="text-align: center;">Evaluation of tenders</p> 	<p>The contracting authority evaluates the tenders on the basis of the most economically advantageous tender, as redefined in the 2014 Directive.</p> <p>Following conclusion of the competitive dialogue phase, there are limits on any further discussion with tenderers, but the final tenders may be clarified, specified and optimised at the contracting authority's request. See section 4, 'The Law' for further information.</p>
<p style="text-align: center;">Contract award</p>	<p>Where the evaluation process results in the decision to award the contract to the successful economic operator, the decision is notified in accordance with statutory requirements, including compliance with the statutory standstill period. See Module F1 for further discussion of the statutory standstill requirements. Article 50 requires the contract award notice to be sent within 30 days of the conclusion of the contract.</p>

Commentary on the competitive dialogue procedure

The competitive dialogue procedure is a relatively new procedure, which was introduced for the first time in the Directive (2004/18/EC) to address the specific needs of projects such as private finance initiative (PFI) projects, public-private partnerships (PPPs), and other contracts with complex requirements.

The competitive dialogue procedure was introduced in response to practical problems faced by contracting authorities when procuring these projects. In some EU Member States, negotiation was regarded as a necessary and essential part of the process in order to ensure that the best outcome was achieved. The open and restricted procedures were felt to be too limited, as they did not permit negotiation with tenderers. However, there were concerns that the negotiated procedure, which was increasingly used as a matter of course for major procurement in some member states, provided too much room for unrestricted negotiations and raised the potential for inappropriate practices and unfair treatment.

It was generally accepted that this was an unsatisfactory situation, and so a long running debate ensued about how best to cater for the requirements of complex projects. The outcome of the lengthy negotiations was the inclusion in the Directive of a new and additional procedure – the competitive dialogue procedure, which codifies some elements of negotiation, permitting discussions with economic operators. The aim is to provide a method of procurement that balances the commercial need for flexibility and negotiation, enabling the development of one or more solutions jointly with tenderers, with the procurement need to ensure a transparent competitive process that treats all tenderers equally.

In the consultation phase leading to the preparation of the 2014 Directive, according to recital 42 "a great need for contracting authorities to have additional flexibility to choose a procurement procedure which provides for negotiations", was identified. The recital explains that "use of the competitive dialogue has significantly increased in terms of contract values over the past years. It has shown itself to be of use in cases where contracting authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions. This situation may arise in particular with innovative projects, the implementation of major integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing." The use of procedures involving negotiation are thus positively encouraged.

2.1.7 Competitive procedure with negotiation

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology, including statutory time limits and publication requirements.

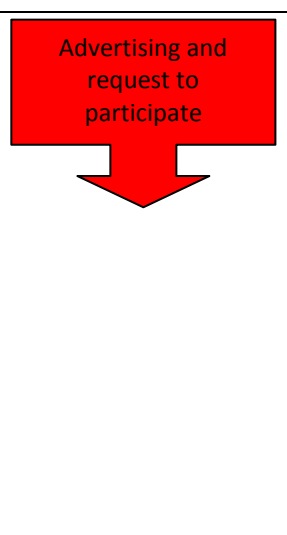
Note on the competitive procedure with negotiation where procurement has previously failed:




The procedure outlined in the flow chart below applies to the circumstances where the competitive procedure with negotiation is being used and where there has been no prior competitive process. Where there has been a prior competitive process, which failed due to irregular or unacceptable tenders, no new selection process is required. A contract notice is required, but this notice merely alerts the marketplace to the fact that a negotiation will take place. New economic operators are not invited to participate in the subsequent process. There is no expression of interest and no selection stage.


Localisation: Where local legislation distinguishes between ‘irregular’ and ‘unacceptable’ tenders and, in particular, where the effects are different, this note will need to be expanded to reflect local circumstances.

Article 26(4)b of the Directive confirms that a contracting authority is permitted to publish a contract notice and then to enter into negotiation with the tenderers that had submitted tenders during the prior open or restricted procedure or competitive dialogue. This negotiation must involve all of and only those tenderers in the negotiation, and the original terms of the contract must remain substantially unaltered.


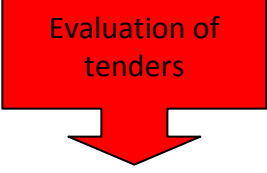
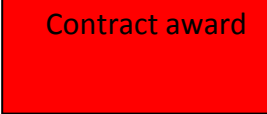
In these circumstances a contracting authority is to negotiate with tenderers the tenders that they have submitted in order to adapt them to the requirements that the contracting authority has set out in the contract notice, specification and additional documents, with the aim of seeking out the best tender. The contracting authority must ensure the equal treatment of all tenderers.

	<p>Advertising at the start of the contract-specific procurement marks the formal commencement of the procurement process.</p> <p>The contracting authority must use the standard form contract notice and dispatch this notice to the <i>Official Journal of the European Union</i> in accordance with the procedures set out in the Directive. See Module E2 for further information on advertising requirements.</p> <p>Economic operators that wish to participate in the process and to submit a tender are required to inform the contracting authority by means of a request to participate.</p> <p>Statutory time limits apply for the period from the dispatch of the</p>
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	<p>contract notice to the return of requests to participate. The contracting authority must allow 30 days from the date of dispatch of the contract notice to the deadline date of receipt of requests to participate. In cases of urgency, the 30-day period may be reduced to 15 days.</p> <p>See the note below on further flexibility available for sub-central authorities.</p>
<p style="text-align: center;">Pre-qualification</p> 	
<p style="text-align: center;">Selection</p> 	<p>Economic operators provide selection stage information to the contracting authority, as requested in the advertisement.</p> <p>The contracting authority may choose to use a pre-qualification questionnaire to request the selection stage information (see Module E3).</p> <p>The contracting authority evaluates the selection stage information against the selection criteria to determine the economic operators that are qualified to perform the contract, and it selects a limited number of economic operators.</p> <p>The contracting authority must invite a minimum of three economic operators to participate in the negotiation, provided that there are three suitably qualified candidates [article 65(2)].</p> <p>In each negotiation the number of candidates invited to participate must be sufficient to ensure genuine competition, and it may therefore be necessary to invite more than three economic operators to participate.</p>
<p style="text-align: center;">Issuing of invitation to negotiate documents</p> 	<p>The contracting authority issues the invitation to negotiate and related documents to the selected economic operators.</p> <p>There are no statutory time limits for the period starting with the issue of the invitation to negotiate and ending with the return of tenders.</p> <p>According to article 54, the invitation must be in writing and simultaneously issued to the selected candidates and must include, at least:</p> <ul style="list-style-type: none"> • a reference to the contract notice published; • the deadline for receipt of tenders;

	<ul style="list-style-type: none"> • the address to which tenders must be sent; • the language of the tender; • a reference to any possible adjoining documents to be submitted in support of declarations provided during the selection stage or to supplement that information; • the weighting of criteria for the award of the contract (and, in practice, the criteria as well) or, where appropriate, the descending order of importance of those criteria if they are not set out in the contract notice or specification (although it is good practice to repeat the information in the invitation to tender if the information was provided in the contract notice or specification); • a copy of the specification or of the descriptive document, as well as any supporting documents or a reference to where those documents can be accessed by electronic means.
<div style="text-align: center;">  <p>Negotiation phase</p> </div>	<p>See note above on the conduct and purpose of the negotiation phase where the procedure is being used because of a prior failed competitive procedure [article 26(4)b].</p> <p>In other cases, the Directive does not contain detailed rules about how a contracting authority is to run the negotiation phase. The contracting authority is responsible for deciding how the negotiation phase will be conducted. Negotiations are permitted to improve initial and subsequent tenders, subject to a provision that minimum requirements cannot be negotiated and to an obligation to ensure equal treatment of all tenderers.</p> <p>Article 29(6) confirms that the procedure can take place in successive stages in order to reduce the number of tenders, provided that the option to do so was set out in the contract notice or in the specifications. When reducing the number of tenders, the award criteria set out in the contract notice of the specifications must be used.</p> <p>The contracting authority may award contracts on the basis of the initial tenders without negotiation where this was indicated in the contract notice or in the invitation to confirm interest. See box below on “Evaluation of Tenders” for principles that apply to the evaluation.</p>

	<p>When the contracting authority intends to conclude negotiations, it shall inform the remaining tenderers and set a common deadline to submit revised tenders... [article 29(7)].</p> <p>No negotiations are permitted after the receipt of the final tenders.</p>
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	<p>Economic operators return tenders within the specified time limits and in the format specified by the contracting authority.</p> <p>Competitive procedure with negotiation without a PIN: Statutory time limits apply for the period from the dispatch of invitation to tender to the return of tenders. The contracting authority must allow 30 days from the date of dispatch of the invitation to tender to the deadline date for the receipt of tenders.</p> <p>Competitive procedure with negotiation with the publication of a standard PIN: Where contracting authorities publish a standard prior information notice (PIN), the 30-day period can be significantly reduced to 10 days. The time limit can only be shortened if all of the required information has been set out in the PIN and if the PIN was sent for publication between 35 days and 12 months before the dispatch of the contract notice.</p> <p>In the case of urgency the time limit for the receipt of tenders can be reduced from 30 to a minimum of 10 days.</p> <p>If electronic documents are available, the time limit for the receipt of tenders can be shortened to 25 days. Article 53 requires contracting authorities to ensure "full direct access free of charge to the procurement documents" by electronic means. Where such access cannot be provided, the minimum time limit for submission of tenders must be increased by five days. This increase does not apply when the time limits have been reduced for duly substantiated urgency [article 26(6)].</p>
	<p>The contracting authority evaluates the tenders on the basis of the most economically advantageous tender, as redefined in the 2014 Directive, using the pre-disclosed award criteria and weightings.</p>
	<p>Where the evaluation process results in the decision to award the contract to the successful economic operator, this decision is notified in accordance with statutory requirements, including compliance with the statutory standstill period. See Module F1 for further discussion of the statutory standstill requirements. Article</p>

	50 requires the contract award notice to be sent within 30 days of the conclusion of the contract.
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2.1.8 Innovation partnership procedure

The innovation partnership procedure: The 2014 Directive establishes a new competitive procedure, the innovation partnership procedure. The intention is to "allow contracting authorities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works, provided that such innovative product or service or innovative works can be delivered to agreed performance levels and costs... the innovation partnership should be structured in such a way that it can provide the necessary "market pull", incentivising the development of an innovative solution without foreclosing the market..." (recital 49).

Article 31 sets out the rules for this new procedure, which consists of three phases: a first phase in which the partners are chosen, a second "innovation phase", and a third phase involving the purchase of the outcome of the innovation phase. The innovation partnership may be terminated without all of the phases being completed.

The innovation partnership, like the competitive dialogue, provides for only a minimum time scale for receipt of requests to participate of 30 days; a further acceleration in the case of urgency is not allowed. There are no explicit time scales for the invitation to submit tenders or a deadline for final tenders, and there are relatively limited provisions concerning the conduct of the innovation phase of the procedure.

The contract or contracts are concluded after the standstill period; the contract award notice has to be dispatched within 30 days after the conclusion of the contract.

When can the innovation partnership procedure be used? The procedure can be used when a solution involving innovation is required. The definition of "innovation" in Directive 2014 refers to "the implementation of a new or significantly improved product, service or process...with the purpose of helping to solve societal challenges or to support the Europe 2020 Strategy for smart, sustainable and inclusive growth" [article 2(22)]. Article 31(1) refers to the contracting authority's identification of a need "that cannot be met by purchasing products, services or works already available on the market".

2.1.9 Reducing statutory time limits

Adapt this section for local use – check whether this is permitted and whether there are local statutory time limits.

Accelerated open and restricted procedures as well as accelerated competitive procedure with negotiation

In certain circumstances the 2014 Directive allows for an "accelerated" procedure in the case of duly substantiated urgency. Under the 2014 Directive it is possible for contracting authorities to not only reduce the statutory time limits described above for the restricted procedure and for the competitive procedure with negotiation but also, for the first time, for the open procedure. The contracting authority must point out in the contract notice the reason why a procedure with a normal minimum time scale is impracticable.

In the case of the open procedure, the minimum time scale for submission of tenders can be reduced from 35 days to a **minimum of 15 days** from the date of dispatch of the contract notice [article 27(3)].

In the case of the restricted procedure [article 28(6)] and the competitive procedure with negotiation [Article 29(19)]:

- **the normal minimum time limit for receipt of requests to participate of 30 days can be reduced to a minimum of 15 days;**
- **the normal time limit for the receipt of tenders can be reduced from 30 days to a minimum of 10 days.**

In the case of competitive dialogue (article 30) and innovation partnership (article 31), reduction of the time limit is not allowed.

The statutory standstill time limit still applies.

The contracting authority is required to indicate its reasons for using an accelerated procedure in section V.C.19 of the standard form contract notice.

Minimum timescales - Restricted procedure and Competitive procedure with negotiation					
Standard timescales	If suitable PIN is published	If urgent	If electronic documents available	Sub-central authority (where permitted)	
				Normal	If urgent
Dispatch of contract notice					
Minimum 30 days	Minimum 30 days	Minimum 15 days	Minimum 30 days	Minimum 30 days	Minimum 15 days
Deadline for expression of interest					
Selection of tenderers					
Dispatch of invitation to tender					
Minimum 30 days	Minimum 10 days	Minimum 10 days	Minimum 25 days	By agreement with tenderers or, if no agreement, minimum 10 days	By agreement with tenderers or, if no agreement, minimum 15 days
Deadline for tenders					
Assessment of tenders and standstill					
Conclusion of contract					

Dispatch of contract award notice within 30 days

Minimum timescales - Restricted procedure and Competitive procedure with prior negotiation - with PIN as a call for competition				
Standard timescales	If urgent	If electronic documents available	Sub-central authority (where permitted)	
			Normal	If urgent
Dispatch of PIN as call for competition				
No explicit timescale	No explicit timescale	No explicit timescale	No explicit timescale	No explicit timescale
Deadline for expression of interest				
Request to confirm interest				
Minimum 30 days	Minimum 15 days	Minimum 30 days	Minimum 30 days	Minimum 30 days
Deadline for confirmation of interest				
Selection of tenderers				
Dispatch of invitation to tender				
Minimum 30 days	Minimum 10 days	Minimum 25 days	By agreement with tenderers or, if no agreement, minimum of 10 days	By agreement with tenderers or, if no agreement, minimum of 10 days
Deadline for tenders				
Assessment of tenders and standstill				
Conclusion of contract				
Dispatch of contract award notice within 30 days				

Comment and practice note

The justification for use of accelerated procedures must be based on circumstances “where urgency renders impracticable” the normal time limits.

Recital 46 points out that the contracting authority need not prove that the urgency has been brought about by unforeseeable events and is not attributable to the authority. The 2014 Directive itself does not give examples of what may constitute appropriate urgent circumstances, but it is generally assumed that the reason must be genuine and, ideally, externally driven rather than, for example, merely due to the contracting authority’s own failure to plan well in advance. It is advisable to keep a clear, written audit trail that demonstrates why the normal time limits are impracticable. When deciding whether or not to use an accelerated procedure, it is also important to consider the ability of the economic operators to respond within the accelerated time limits.

In December 2008 the European Commission issued a statement (IP 08/2040) that appears to relax the rules on justifying the use of the accelerated restricted procedure in some circumstances. In summary, this statement indicated that, in the light of the economic climate, a faster procurement process would benefit economies by providing a quicker distribution of public funds into markets. The Commission considered that the use of the accelerated restricted procedure for major projects would enable this to happen. The relaxation of the rules governing the procedure applied throughout 2009 and continue to apply in 2010. This statement is an interesting illustration of the way in which the accelerated restricted procedure can be justified.

Further flexibility measures available for sub-central contracting authorities:

Sub-central authorities are contracting authorities that are not central government authorities as listed in Annex 1, for example local government authorities.

- **Agreement of shorter time limits for the receipt of tenders in the restricted procedure [article 28(4)] and in the competitive procedure with negotiation [article 29(1)]:** Directive 2014 allows Member States for the first time to decide whether they allow only specific categories of sub-central contracting authorities or all of these authorities to vary the standard minimum times for tendering, in agreement with tenderers. The sub-central authority may set the time limit for the receipt of tenders by mutual agreement between the contracting authority and the selected tenderers, provided that it ensures that all economic operators are given the same time to prepare and submit their tenders. If there is no mutual agreement, the time limit must be at least 10 days from the date on which the invitation to tender is issued.
- **Prior information notice (PIN) as a call for competition:** Directive 2014 allows Member States for the first time to decide whether they allow specific categories of sub-central contracting authorities or all of these authorities to use a PIN as a call for competition instead of a contract notice in the restricted procedure and in the competitive procedure with negotiation. The PIN as a call for competition must meet the conditions set out in

article 48. Economic operators interested in tendering for the contracts described in the PIN as a call for competition must express an interest in one or a number of contracts by responding to that PIN. There is no requirement to publish another contract notice prior to starting the tendering process. The contracting authority invites those economic operators that have expressed an interest in response to the PIN.

This narrative now examines special types of procedures that can be used in specified circumstances:

- Design contests
- "Light" regime for the procurement of social, health and other specific Annex XIV services, introduced by the 2014 Directive.

2.1.10 Design contests – Articles 78 to 82

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology, including statutory time limits and publication requirements.

A design contest is defined in article 2(21) of the 2014 Directive as a process that enables the contracting authority to acquire a plan or a design as a result of a competition, with or without the award of prizes. This process is mainly, although not exclusively, used in the field of town and country planning, architecture, engineering or data processing. It is used particularly for the procurement of landmark buildings, where design is a very important element, in which case the contracting authority often chooses to award the design contract separately from the works contract, rather than combining these two elements.

The contracting authority advertises the design contest, using a standard form contract notice, in the *Official Journal of the European Union* and then conducts the process in accordance with articles 78 to 82 of the 2014 Directive. There are no detailed provisions covering matters such as time limits, the contents of the documents inviting candidates to participate, or criteria for selection and evaluation, and therefore those aspects of the process are governed by the basic principles requiring the process to be conducted in a transparent manner, ensuring equal treatment and non-discrimination.

The contracting authority appoints a jury, which selects the plan or design. When considering the design contest proposals, the jury does not know who has submitted each of the proposals and so the decision is made anonymously.

The design contest process may lead either to the award of a service contract to implement the design in full or to the award of prizes and/or payments.

Example

A local authority requires a new state-of-the-art theatre and performance space on a city centre site close to a number of historic buildings. This building will have significant local and national importance, as it will provide a new home for the national dance theatre company. The local authority would like to have a building that excites interest but that also fits in with the local surroundings. As it wishes to seek a range of creative solutions, it decides to run a competition for the design of the building. The authority intends to award the design contract to the winner of the design contest.

The local authority will then run a separate tender process for the construction works and require the works economic operator to use the designs prepared by the winner of the design contest.

Overview of articles in the 2014 Directive covering the conduct of design contests

Articles 78 to 82 of the 2014 Directive set out the rules applying to the conduct of design contests. These articles specify the scope of design contests and cover the issue of financial thresholds. They also set the requirements for advertising and for the conduct of the competitive process, including how juries are set up, operate and make their decisions.

The articles are summarised as follows:

Article 78 requires design contests to be run in accordance with the rules set out in articles 78 to 82.

It further provides that the admission of participants is not to be limited by reference to territory or to part of a territory of an EU Member State or by the laws of a member state requiring participants to be natural or legal persons.

Article 78 contains provisions relating to the scope of design contests. First of all, it specifies the types of contracting authorities and the financial thresholds that apply. Secondly, it refers to the types of contracts and the way in which the financial thresholds are to be calculated. The financial thresholds are different for different types of contracting authorities. The provisions covering the calculation of the financial thresholds specify that the total value of both prizes/payments and any potential public service contract must be taken into account.

Article 79 covers the requirements to advertise by using an *OJEU* contract notice, both to advertise the opportunity to participate in the competition and following the appointment of the successful participant(s). Where contracting authorities intend to award a subsequent service contract in a negotiated procedure without prior publication [article 32(4)], this intention has to be indicated in the contest notice.

Article 80: Selecting participants

A contracting authority may choose to limit participants and where it does so, it must lay down clear and non-discriminatory selection criteria. The minimum number of participants is not specified, but there must be a sufficient number of participants to ensure genuine competition.

Articles 81 and 82: The jury and conduct of the evaluation

- The jury must be comprised of individuals who are independent from the participants in the competition.
- The number of members of the jury is not specified.
- Where the contest requires participants to be from a particular profession, then at least one-third of the members of the jury must have that qualification or an equivalent qualification.
- The anonymity of the candidates must be preserved until the jury has reached its opinion or decision.
- The jury must:
 - be autonomous in its decision-making;
 - examine the plans and projects submitted by the candidates anonymously;
 - examine those plans and projects solely on the basis of the criteria indicated in the contest notice;

- record its ranking of projects in a report that is signed by its members. The report must include the jury's remarks and any points that need to be clarified.
- Where the jury has concluded its report and has recorded questions or points of clarification, then the candidate may be invited to answer those questions or points of clarification; complete minutes must be drawn up of the dialogue between the jury and those candidates.
- When the opinion or decision has been made (*and the successful candidates announced*), the contracting authority must publish a contract award notice in accordance with the requirements of article 79(2).

See section 4, 'The Law', for further details.

2.1.11 "Light" regime for the procurement of social, health and other specific Annex XIV services, introduced by the 2014 Directive

Services covered by the light regime: The 2014 Directive abolishes the distinction between Annex II A and Annex II B services. The 2014 Directive introduces a **"light" procurement regime** in articles 74 to 77, to be used for the **procurement of social, health and other specific services**, listed in Annex XIV of the 2014 Directive. Services not listed in Annex XIV are subject to the full application of the 2014 Public Sector Directive. Although the list of services in Annex XIV is similar to the list in Annex II B, the lists are not identical.

Financial threshold: Services listed in Annex XIV are subject to a light regime, where the value of the contract exceeds a threshold of EUR 750 000.

Process for procuring light regime services: The 2014 Directive contains only a few provisions governing the process for procuring light regime services. Member States are required to put into place national provisions concerning the process for procuring light regime services. The limited provisions in the 2014 Directive include a requirement to advertise the contract opportunity in the *OJEU*, using a contract notice or PIN, and to publish a contract award notice in the *OJEU*. In addition, the principles for awarding contracts must comply with the principles of transparency and equal treatment of economic operators. Contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, and a number of other listed factors. See Module D3 for further information.

2.1.12 The 2014 Concessions Directive

Prior to the 2014 Concessions Directive, the award of public works concession contracts was subject to articles 56 to 65 of the 2004 Public Sector Directive. Services concessions were not regulated by the Public Sector Directive. That is no longer the case. The 2014 Concessions Directive intends to provide clear and simple rules at EU level governing the award of public and utilities works **and** services concessions above specified thresholds. It aims to improve legal certainty by creating a firm regulatory basis for the uniform application of the Treaty principles by all Member States to both works concessions and services concessions. However, the Member States remain free to structure the provision of works or services according to their needs, by either using their own resources, co-operating with other authorities, or outsourcing to third parties. The 2014 Concessions Directive, for the first time, gives adequate judicial protection to candidates and tenderers in concession award procedures by bringing these procedures under the scope of the Remedies Directives 89/665/EEC and 92/13/EEC.

For more detailed information, see also SIGMA Brief No. 31, *2014 EU Directives: Concessions*.

Section 2.2

Procurement tools

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology, including statutory time limits and publication requirements.

Delete sections where local legislation does not allow for such procurement tools.

This section looks at a number of procurement tools that can be used by contracting authorities. The following tools are specifically provided for in the Directive, and EU Member States have the option of deciding whether or not to implement these provisions:

- Framework agreements (article 33)
- Electronic auctions (article 35)
- Dynamic purchasing systems (article 34)
- Electronic catalogues (article 36), introduced by the 2014 Directive

Each of these procurement tools uses one or more of the main competitive procedures as a starting point for the procurement process to be followed.

Framework agreements

Delete if local legislation does not allow for framework agreements.

Adapt all of this section for local use – using relevant local legislation, processes and terminology, including statutory time limits and publication requirements.

What is a framework agreement?

The term ‘framework’ can be used to describe a number of commercial and procurement arrangements. However, the Directive provides a definition of a ‘framework agreement’, and it is this type of framework agreement that is discussed in this section.

Prior to the adoption of the 2004 Directive, there were no specific provisions covering the establishment and operation of framework agreements in the public sector (there were provisions, however, applying to the utilities sector). However, contracting authorities in many EU Member States operated framework-type arrangements, which were typically used to ‘draw on’ commonly procured supplies and services as and when needs arose during a given period.

In the absence of specific provisions covering framework agreements, the operation of such agreements varied widely, and there was uncertainty as to how some of these arrangements complied with the legal requirements of the procurement directives. The provisions in the 2004 Directive set out the manner in which framework agreements may be established and operated. EU Member States had the option to adopt these provisions.

In the 2014 Directive, the provisions of framework agreements have been strengthened to require increased transparency, particularly in relation to the identification of the contracting authorities that are party to the framework agreement and the way in which contracts are awarded under framework agreements.

A framework agreement is defined in article 33(1) as:

“an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged”.

In other words, a framework agreement is a general term for agreements with economic operators that set out the terms and conditions under which specific purchases may be made.

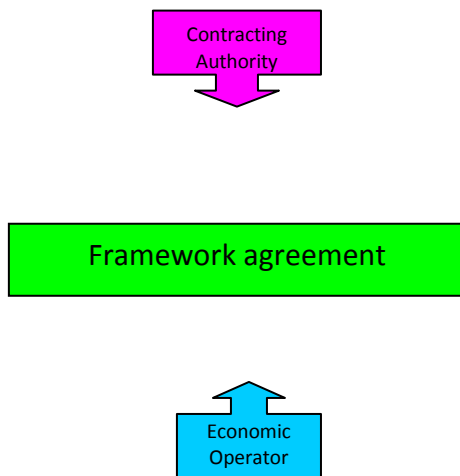
Comment

A difficulty raised by the definition of a framework agreement is that it may or may not be a ‘contract’ for the purposes of the Directive, as this is dependent on national law. What the Directive does is to effectively enable a non-binding framework agreement to be treated in the same way as a binding framework agreement. This issue is discussed in more detail in section 2.2.4 of Module D3.

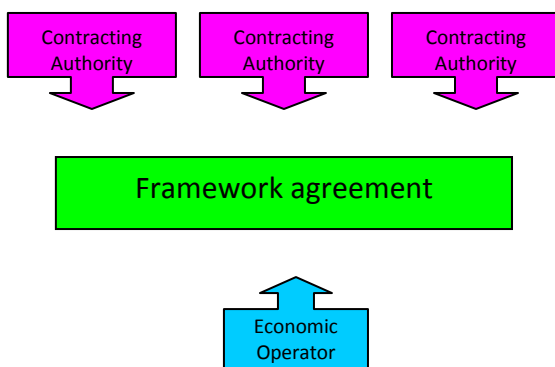
It is worth noting from the above definition that framework agreements may be set up to benefit more than one contracting authority and may involve a number of economic operators. Framework agreements are commonly set up for use by more than one contracting authority – either by a lead authority or a central purchasing body – and they involve a number of economic operators – also referred to in this context as ‘providers’. See Module D1 for further details concerning central purchasing bodies and Module B2 on co-operation between contracting authorities.

The following diagrams provide some examples of how framework agreements may be set up.

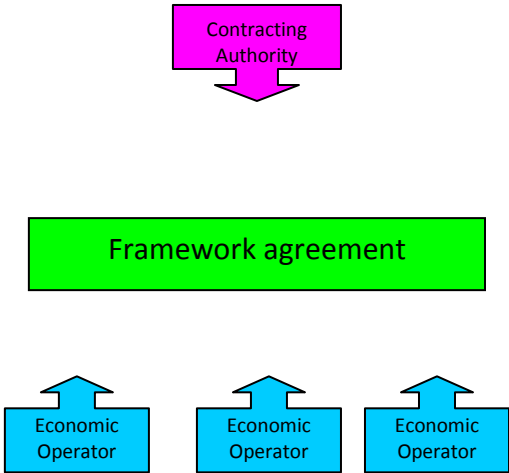
Single-supplier framework – between one contracting authority and one provider



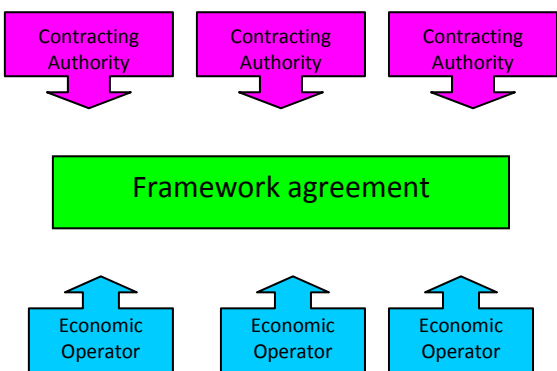
Single-provider framework – between a number of contracting authorities and one provider



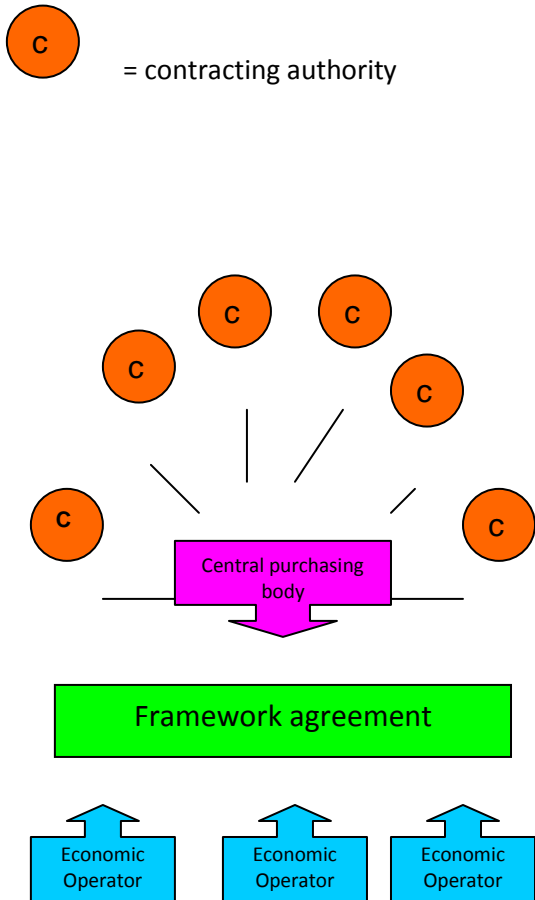
Multi-provider framework – between one contracting authority and multiple providers



Multi-provider framework – between a number of contracting authorities and multiple providers



Multi-provider framework – between a central purchasing body acting on behalf of a number of contracting authorities and multiple providers



Suitability of frameworks

Frameworks may not be suitable for all types of purchasing, and contracting authorities need to be certain that a framework will provide an economic and efficient means of purchasing. See Module A4 on the economics of public procurement for further discussion on the suitability of frameworks.

The most appropriate use of frameworks is where a contracting authority has a repeated requirement for works, services or supplies, but the exact quantities are unknown.

Some examples of framework agreements:

- A single government department enters into a framework agreement for stationery with three providers.
- Four neighbouring local authorities enter into a framework agreement with one economic operator for the maintenance of roads.
- A central purchasing body, acting on behalf of 10 health bodies, enters into a framework

agreement with four providers for vehicle maintenance services.

Contracting authorities must be in a position to manage a framework agreement, as the needs of both the contracting authority or authorities and the provider(s) must be met, and the operation of the framework agreement must be closely monitored.

Care must also be taken to ensure that framework agreements are not set up in such a way as to distort competition and that they are not improperly used.

To assess the suitability of a framework agreement, contracting authorities need to understand the advantages and disadvantages of framework agreements, the various types of framework agreements, how they are set up and how they operate in practice.

Setting up a framework agreement

Who can set up a framework agreement?

A framework can be set up by:

- an individual contracting authority;
- a contracting authority acting on behalf of a number of other contracting authorities;
- a central purchasing body acting on behalf of a sector or group of contracting authorities.

Where a framework is set up on behalf of a group of contracting authorities or by a central purchasing body, in order to satisfy the requirements of transparency, the *OJEU* contract notice must clearly indicate the contracting authorities that are party to the framework agreement.

In section I.ii of the *OJEU* contract notice, a contracting authority is to indicate if it is purchasing on behalf of other contracting authorities.

Comment: Identifying contracting authorities that will participate in the framework

There is room for debate about precisely how the contracting authorities participating in the framework are to be identified in the contract notice.

Where there is only a single authority setting up the framework agreement, it is straightforward, as that authority is identified as the contracting authority in the *OJEU* contract notice. Where the procurement is on behalf of a pre-identified group of contracting authorities, then these authorities can also be referred to by name in the *OJEU* contract notice.

The situation is more problematic where there is a very large group of potential contracting authorities or where there is some uncertainty about precisely which authorities will participate. This situation may occur where, for example, a central purchasing body representing a particular sector sets up a framework for all bodies in that sector.

The Public Sector Directive 2004 is silent on this issue. The European Commission, in its *Explanatory*

Note – Framework Agreements – Classic Directive (CC 2005/03) confirms in paragraph 2.1 the Commission’s view that contracting authorities must be explicitly identified in the contract notice, either by naming them directly in the notice itself or by referring to other documents, such as a list held by a central purchasing body. The note also indicates that a more generic description may be acceptable, provided that it permits the immediate identification of the contracting authorities concerned, such as ‘the municipalities of X province or Y region’.

Explanatory notes issued by the Commission are not legally binding, but they do provide a useful indicator of the thinking behind the drafting of the legislation.

This aspect has been clarified in recital 60 combined with article 33 of the 2014 Directive; the contracting authorities that are party to a specific framework agreement from the outset should be clearly indicated either by name or by other means, such as a reference to a given category of contracting authority within a clearly delimited geographical area, so that the contracting authorities concerned can be easily and unequivocally identified.

Likewise, once the framework agreement has been concluded, it should not be open to the entry of new economic operators.

The contracting authorities that are party to the framework agreement remain fixed for the duration of the agreement, and therefore new authorities may not join the framework once it has been established (article 33 of the 2014 Directive).

When does a framework agreement need to be advertised in the OJEU?

A framework agreement needs to be advertised in the *Official Journal of the European Union (OJEU)* if the estimated value of all purchases to be made under the agreement exceeds the relevant EU threshold for that type of contract. The contract notice is advertised at the start of the process to establish the framework agreement.

The total value to be taken into account is the maximum estimated value of all of the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system. The total value excludes value-added tax (VAT). See Module D5 for further information about the calculation of thresholds.

Once the framework agreement has been established, there is no further requirement to advertise each time a contract is awarded under the agreement.

What procedure is used for procuring a framework agreement?

Article 33(1) of the Directive provides that any competitive procedures provided for in the Directive may be used for procuring a framework agreement. It is only when contracts are awarded under the framework agreement that different, framework agreement-specific provisions apply.

Good practice note

Although it is possible to use any procedures provided for in the Directive to procure a framework agreement, in practice there is little likelihood of using the competitive dialogue

or the competitive procedure with negotiation. This is because the subject matter and the complexity of contracts where these procedures are used is unlikely, in most cases, to be appropriate for the award of a framework agreement.

It should be noted that a framework agreement is not a list of selected economic operators that are qualified to provide the works, services or supplies covered by the agreement. To be appointed to the framework agreement, economic operators will have to have both qualified and submitted tenders, which are evaluated by the contracting authorities, and it is those tenders that will provide the basis for future awards under the framework agreement.

How is a framework agreement advertised?

A framework agreement is advertised using the standard form *OJEU* contract notice [see Annex V, Part C (13)]. See Module E2 for details concerning the standard form contract notices. The comment box below focuses on completing the standard form contract notice for a framework agreement.

Comments on completing the standard form OJEU contract notice for framework agreements

The standard form *OJEU* contract notice includes a section on framework agreements, which must be completed when a framework agreement is established.

Contracting authorities that intend to award a framework agreement must, in addition to other relevant sections, complete:

- Section II.1.3, which confirms that a framework agreement is being established;
- Section II.1.4, which indicates whether the framework agreement will involve the appointment of a single economic operator (single-provider agreement) or several economic operators (multi-provider agreement). This section then requires the contracting authority to provide further information, such as the envisaged number of providers and the time frame of the framework agreement.

Number of providers for a multi-provider framework agreement: Where the framework agreement will be with several economic operators (multi-provider agreement), then the envisaged number or maximum number must be indicated in the *OJEU* contract notice.

Under the Public Sector Directive 2004 the minimum number of economic operators for a framework agreement involving several economic operators is three, provided that there are three suitably qualified economic operators [article 32(4)]. This requirement was eliminated in the 2014 Directive, making it possible for contracting authorities to conclude framework agreements with only two economic operators, even where other admissible tenders have been submitted. There is no statutory limitation on the maximum number of economic operators participating in a framework agreement.

Good practice note

Although there is no statutory limitation on the maximum number of economic operators that may participate in a framework agreement, there are practical issues to consider. For example, a very large number of economic operators may act as a disincentive for the participation of economic operators, as the likely share of business obtained from the framework may be rather small. Also, if the mini-competition process is used (see below), then it may be necessary to invite all of the economic operators to participate in the framework and, again, economic operators may be disinclined to participate if there are too many of operators appointed to the framework. There is also the practical issue for the contracting authority running the framework of the increased level of administration that will be involved.

The contracting authority should carefully assess the market as well as its own requirements and resources at the preparation stage in order to decide on the appropriate number of economic operators for a particular framework agreement.

No changes in the membership of a framework agreement can be made, other than the exceptions specified in the 2014 Directive: The economic operators that are party to the framework remain fixed for the duration of the framework. Article 72 of the 2014 Directive allows for an economic operator to be changed in specific circumstances, such as insolvency. See article 72(1)(d)(ii) for the specific circumstances and conditions that must be met.

Amendments to a framework agreement: For the first time, the 2014 Directive permits modifications to a framework agreement. Article 72 sets out the circumstances and conditions where modifications are permitted. See Module G1 for further information on the provisions concerning contract modification in article 72 of the 2014 Directive.

Time frame of the framework agreement: The time frame of a framework agreement may not generally exceed four years.

The time frame may only exceed four years “in exceptional cases duly justified, in particular by the subject of the framework agreement.” The Directive is silent as to what constitutes due justification for exceeding the four-year time frame.

What issues does the framework agreement cover?

The framework agreement typically includes details concerning:

- parties
- duration
- subject matter
- whether or not the agreement is binding
- contract terms

- how contracts will be awarded, including criteria for call-offs and/or arrangements for mini-competitions and criteria to be applied
- tendered costs and/or costing methodology for future awards

Awarding contracts under the framework agreement

Agreement with one economic operator (single-provider agreement) [article 33(3)]

Where the framework agreement is a single-provider agreement, the Directive provides that contracts “shall be awarded within the limits of the terms laid down in the framework agreement” [article 33(3)]. This means that the contracting authority awards the contract directly to the economic operator, and there is no requirement for further competition.

Article (33(2) indicates that “contracting authorities may consult the operator party to the framework in writing, requesting it to supplement its tender if necessary”.

Where a contract has been awarded and where consultation has taken place, “the parties may under no circumstances make substantial amendments to the terms laid down in the framework agreement”.

Comment

These provisions do allow for some flexibility when the contracting authority awards a contract. The provisions clearly envisage the need for additional, contract-specific information and consequent changes, but how much flexibility is available and what sort of additional information and changes is envisaged is not clear.

Agreement with more than one economic operator (multi-provider agreement) [article 33(4)]

Where the agreement is with more than one economic operator, the contracting authority has a choice. There are two ways of awarding a contract:

- by application of the terms laid down in the framework agreement without reopening competition, awarding the contract directly to a particular economic operator; or
- by running an additional competition, inviting all suitably qualified economic operators in the framework to participate (a ‘mini-competition’).

Contracting authorities should make it clear when setting up the multi-provider framework how contracts will be awarded, and the framework agreement should include provisions covering the manner of awarding the contract.

Award to an economic operator without further competition: Where the contracting authority wishes to use the first option and to award a contract directly to one of the economic operators in the framework, then:

- it must do so on the terms laid down in the framework agreement;
- “the parties may under no circumstances make substantial amendments to the terms laid down in the framework agreement”; and
- the award must not be made improperly or in such a way as to prevent, restrict or distort competition.

Award following a mini-competition: The contracting authority may use the second option of a mini-competition, where not all terms are laid down in the framework agreement. This process allows the terms referred to in the specification to be introduced or existing terms to be more precisely formulated. This option is still subject to the principle that “the parties may under no circumstances make substantial amendments to the terms laid down in the framework agreement”.

All of the suitably qualified economic operators in the framework are invited to participate in a competition on this basis so as to ensure equal treatment, non-discrimination and transparency.

Article 33(5) of the Directive sets out the requirements for the conduct of the mini-competition:

- The contracting authority must consult the economic operators capable of performing the contract.
- The contracting authority must consult the economic operators in writing.
- The time limit fixed for the return of tenders must be sufficiently long to allow for the submission of tenders for the specific contract, taking into account such factors as the complexity of the subject matter of the contract and the time needed to submit tenders.
- Tenders are to be submitted in writing.
- The content of tenders is to remain confidential until the stipulated time limit for reply has expired.
- The contract is to be awarded to the tenderer that has submitted the best tender on the basis of the award criteria set out in the procurement documents for the framework agreement.
- The award must not be made improperly or in such a way as to prevent, restrict or distort competition.

The 2014 Directive introduces for the first time the concept of using electronic catalogues for regulated procurement, such as framework agreements. Where a multi-provider agreement has been set up using e-catalogues, contracting authorities may provide that the mini-competition processes for call-offs are to take place on the basis of updated catalogues [article 36(4)].

Framework agreement where both mini-competitions and award without a mini-competition may be used

According to the 2014 Directive, a framework agreement with more than one economic operator can include more than one type of procedure to award a contract. Mini-competitions between the suppliers and an award based on the terms of the framework agreement can both be used in the same framework agreement. The choice of the method to be used must be made in accordance with objective criteria set out in the procurement documents [article 33(4)b and recital 61].

Good practice note

The Directive is silent as to the details of how mini-competitions are to be conducted. There are no statutory time limits specified, and the manner of inviting economic operators to participate and to submit tenders is not set out in detail. This means that the contracting authority has discretion in determining how to conduct this process.

However, this does not mean that the process should be undertaken in a vague or unstructured manner. The framework agreement should be clear about how economic operators are to be deemed capable of performing the contract, and it must also set out the criteria to be applied in awarding the contract.

It is also good practice to set out in the framework agreement how mini-competitions will be conducted. It is permissible to use electronic auctions when conducting a mini-competition.

The award process must be conducted in compliance with the general law principles and Treaty principles, including the requirement to run the process in a transparent manner so as to ensure equal treatment and non-discrimination.

Refer to local provisions that may govern the conduct of mini-competitions. For example, in Hungarian legislation the price and other conditions cannot change if the changes are less favourable than the price and conditions in the original bid.

Standstill time limit and framework agreements

There are special provisions in the Remedies Directive covering the standstill requirements on the establishment of a framework agreement and on the award of contracts under a framework agreement. See Module F1 for full details.

Electronic auctions (Article 35)

Delete if local legislation does not allow for electronic auctions.

Adapt all of this section for local use – using relevant local legislation, processes and terminology, including statutory time limits and publication requirements as well as reference to local e-auction systems.

The provisions on e-procurement in the 2014 Directive represent a change in approach from the 2004 Directive. Recital 52 indicates that "electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes". Electronic means should become the standard means of information exchange in procurement procedures. Article 53 obliges contracting authorities to offer full and unrestricted access, free of charge, to the relevant procurement documents as from the date of publication of the contract notice (or where a PIN is used as a call for competition, as from the date when the invitation to confirm interest was issued).

Electronic auctions are a method of inviting revised final tenders following the conduct of a full tender process. They involve an online electronic system that is used by economic operators to submit new prices and/or other revisions to elements of their tenders for a particular contract in real time and in direct competition with other economic operators.

Definition: An electronic auction is defined in article 1(7) of the 2004 Directive. (There is no definition of an electronic auction in the 2014 Directive. However, lengthy provisions on electronic auctions are set down in article 35 of the 2014 Directive)

"An electronic auction is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, allowing them to be ranked using automatic evaluation methods."

Exclusions

Article 35(1) and recital 67 exclude certain types of contracts: "...certain public service contracts and certain public works contracts having as their subject matter intellectual performances, such as the design of works, which cannot be ranked by using automatic evaluation methods, shall not be the object of electronic auctions."

Practice note

There will be other types of purchases, in addition to those specified in article 35(1), where an electronic auction is not a suitable method, such as contracts where more complex needs must be tailored for a particular project. The contracting authority needs to think carefully about the appropriate use of electronic auctions.

For example, a contract for the supply of paper where the type and quality of paper can be easily specified and where there is a good level of competition in the market would be suitable for an

electronic auction.

A contract for complex medical equipment where a number of products are available, all with slightly different specifications, and where there are service delivery issues is unlikely to be suitable for an electronic auction.

See the discussion in Module A4 on the economic advantages and disadvantages of an electronic auction.

Prior competitive process: The electronic auction is the final stage of the tender process. Prior to conducting an electronic auction the contracting authority must first use a competitive process.

Competitive processes that may be used prior to an electronic auction [article 35(2)]: An electronic auction may be used where the contract specification can be established with sufficient precision and the contracting authority uses:

- an open procedure
- a restricted procedure
- a competitive procedure with negotiation

An electronic auction may also be used for a mini-competition under a framework agreement and under a dynamic purchasing system.

In all cases, in order to run an electronic auction, the contracting authority must have received initial tenders from all participating economic operators. The electronic auction is used to request new prices, revised downwards, and where the contract is awarded to the most economically advantageous tender, the process may also be used to improve elements of the tender other than the price.

Example

A local authority wishes to purchase street lighting equipment. It advertises the contract, which is above the EU financial threshold for supplies, in the *Official Journal of the European Union*. The contract notice states that the contracting authority is using the restricted procedure and will award the contract to the most economically advantageous tender. It confirms in the contract notice that it will use an electronic auction at the final stage of the procurement process.

The contracting authority receives requests to participate and issues a pre-qualification questionnaire. It receives pre-qualification and selection stage information from eight economic operators. It assesses the information received, pre-qualifies seven economic operators and then establishes a shortlist of five economic operators.

The contracting authority issues an invitation to tender (ITT) to the five economic operators that had submitted their tenders within the 40-day statutory time limit. The ITT includes information on the date, place, time and other technical requirements of the electronic auction, which will be held after

the receipt of tenders. The contracting authority assesses the tenders and uploads the evaluation results, based on an assessment of the most economically advantageous tender, into the electronic auction software. The tenders are ranked from 1 to 5, with 1 being the most economically advantageous tender.

The contracting authority then invites all five economic operators to participate in an online, real-time electronic auction on the issue of price only and in accordance with the details set out in the ITT.

The electronic auction continues for a fixed time limit of one hour, during which time economic operators submit revised prices that are lower than those originally submitted. The electronic auction closes at the end of the hour, and the contract is awarded to the economic operator that scored the highest mark.

The economic operator that had a tender ranked as number 2 at the end of the original tender process submitted a low price during the electronic auction, which meant that its tender was the most economically advantageous tender at the conclusion of the electronic auction .

Conduct of electronic auctions: Article 35 contains detailed provisions concerning the way in which electronic auctions are to be conducted.

Basis of award [article 35(3)]: Electronic auctions can be based on:

- prices alone, but only where the contract is awarded on the sole basis of price; or
- prices and/or new values of the features indicated in the procurement documents, when the contract is awarded on the basis of the best price-quality ratio or of the lowest cost using a cost-effectiveness approach.

Notification [article 35(4)]: The contracting authority must indicate in the contract notice that it intends to use an electronic auction (section IV.2.2 of the standard form *OJEU* contract notice).

Specifications: The specifications are to include, *inter alia*, the following details:

- the features that will be the subject of the electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;
- any limits on the values that may be submitted, as they result from the specifications relating to the subject of the contract;
- the information that will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;
- the relevant information concerning the auction process;
- the conditions under which tenderers will be able to bid and, in particular, the minimum differences that will be required when bidding;

- the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

Full initial evaluation [article 35(5)]: The contracting authority must make a full evaluation of tenders before proceeding with an electronic auction. The evaluation must be conducted in accordance with the pre-set award criterion or criteria and weightings.

Inviting electronic bids: All tenderers that have submitted admissible bids must be invited to participate in the e-auction. The tenderers must be invited simultaneously by electronic means to submit new prices and/or values.

Content of the invitation to participate: The invitation to participate in the electronic auction must:

- contain all relevant information concerning individual connection to the electronic equipment being used;
- state the date and time of the start of the electronic auction, which may not be sooner than two working days after the invitation is sent out;
- state the mathematical formula to be used in the e-auction to determine automatic re-ranking on the basis of the new prices and/or new values submitted;
- be accompanied – when the contract is to be awarded on the basis of the most economically advantageous tender – by the outcome of the full evaluation of the relevant tenderer’s tender, and therefore each tenderer receives information about its own tender, but not about others’ tenders;
- indicate the timetable for phases of the auction where phases are to be used and where the end of the phases is triggered by a lapse in time between receipt of the last new price and/or new value and the close of a phase – if that approach is used;
- indicate how the auction will be closed.

Note on the mathematical formula

- The mathematical formula is used in the e-auction to determine automatic re-ranking on the basis of the new prices and/or new values submitted.
- This formula must be disclosed in the invitation to participate in the electronic auction.
- The mathematical formula must incorporate the weighting of all criteria that are fixed to determine the most economically advantageous tender, as indicated in the contract notice or specifications.
- Any ranges with respect to weightings that were specified in advance in the contract notice or specifications must be reduced to a specified value, and that specified value must be incorporated into the mathematical formula.

- Where variants are authorised, a separate formula must be provided for each variant.

[article 35(6) of the Directive]

Successive phases [article 35(5)]: The electronic auction can be conducted in successive phases, and the invitation to participate in the auction must include the timetable for each phase of the auction.

Comment

It is essential for the rules applying to the conduct of the electronic auction to be very clear. For example, if there are to be a number of rounds of bidding that are to be conducted at specific times, this must be made clear to participants so that they know when they need to submit initial and subsequent online bids.

Instantaneous communication of relative ranking [article 35(7)]: Throughout each phase of the electronic auction, the contracting authority is required to instantaneously communicate to all tenderers information that is at least sufficient to enable them to ascertain their relative ranking at any moment.

Closing the auction [article 35(7)]: The contracting authority has a choice as to how to close the auction process. It can close the auction:

- at the date and time specified in advance in the invitation to participate in the auction;
- when it receives no more new prices or new values (that meet the requirements concerning minimum differences) for a pre-specified time limit. The time specified as the time required to elapse between the receipt of the last new price or new value and the close of the auction must be stated in the invitation to participate in the auction.
- when the number of phases in the auction, as specified in the invitation to participate in the auction, has been completed. Where phases are to be completed following an elapse of time between the receipt of the last new price and/or new value and the close of the auction, then the timetable must be stated in the invitation to participate in the auction.

See the discussion in Module A4 on the economic arguments relating to how to decide to close the tender.

Award of the contract [article 35(9)]: The contract is awarded following the close of the electronic auction and on the basis of the results of that auction.

Comment

Electronic auctions generally result in a reduction in prices relative to the prices submitted at the close of the initial tender stage before the conduct of the electronic auction. Where the electronic auction involves requests to revise other elements, these revisions can also result in improvements

in quality.

An electronic auction can also result in a change in ranking of the economic operators that have submitted tenders. The economic operator that is ranked first at the end of the initial tender stage may not be ranked first at the end of the electronic auction.

Tenderers need to understand that where the criterion for award is the most economically advantageous tender, the results of the electronic auction will take into account all of the criteria used to assess the most economically advantageous tender.

This means, for example, that an economic operator that was initially ranked number 2 may remain number 2 at the end of the electronic auction, even if it submitted a lower price than the initially first-ranked economic operator in the electronic auction. This is because the combined scores of price and other factors may still result in the first-ranked economic operator submitting the most economically advantageous tender overall.

Dynamic Purchasing Systems (article 34)

Delete if local legislation does not allow for dynamic purchasing systems.

Adapt all of this section for local use – using relevant local legislation, processes and terminology, including statutory time limits and publication requirements as well as reference to local dynamic purchasing systems.

A dynamic purchasing system (DPS) is defined in article 34(1) of the 2014 Directive as follows:

A dynamic purchasing system may be used:

“For commonly used purchases the characteristics of which, as generally available on the market, meet the requirements of the contracting authorities..”, contracting authorities may use a dynamic purchasing system.

A dynamic purchasing systems is:

“a completely electronic process and shall be open throughout the period of validity of the purchasing system to any economic operator that satisfies the selection criteria. It may be divided into categories of products, works or services that are objectively defined on the basis of characteristics of the procurement to be undertaken under the category concerned. Such characteristics may include reference to the maximum allowable size of the subsequent specific contracts or to a specific geographic area in which subsequent specific contracts will be performed.”

Where the total estimated value of purchases under a dynamic purchasing system exceeds the relevant thresholds, then the Directive applies to the setting up and operation of that system.

What sort of purchases are suitable? The definition of a dynamic purchasing system makes it clear that it is intended only for ‘commonly used purchases’ and refers to those purchases being ‘generally available on the market’. Dynamic purchasing systems are generally only suitable for commodity-type purchasing where there is an active market in standard items. A dynamic purchasing system operates rather like a live, online Internet-based catalogue, which economic operators can join at any time.

Contracting authorities must not use a dynamic purchasing system to prevent, restrict or distort competition.

How is a dynamic purchasing system set up?

Procedure: To set up a dynamic purchasing system, the contracting authority must have an electronic, Internet-based system. The contracting authority must follow the rules of the restricted procedure [article 34(2)], with a selection process that will operate at the DPS set-up, but also allows for new suppliers to join the DPS during the lifetime of the DPS. The requirement of the 2004 Directive that indicative tenders must be submitted in each award process has been removed in the 2014 Directive, to simplify the DPS and make it more user-friendly.

Advertising: The contracting authority starts the process by publishing a call for competition for the establishment of the system in the required format [article 34(4)(a)]. See Module E2 for details concerning standard form *OJEU* contract notices.

The contracting authority must include in the specification the following details:

- nature and quantities of the purchases envisaged;
- necessary information concerning the electronic purchasing system;
- electronic equipment used, technical connections and specifications.

[article 34(4)(b)]

Contracting authorities shall also indicate any division into categories of products, works or services and the characteristics defining them [Article 34(4)(c)].

The contracting authority must offer unrestricted, direct and full access to the specification and any additional documents and must indicate in the contract notice the Internet address where these documents can be found [article 34(4)(d)]. This requirement for access to the specification and additional documents applies from the day of publication of the contract notice and for the duration of the dynamic purchasing system.

The contracting authority evaluates tenderers' submissions. The tenderers that are permitted to join the dynamic purchasing system are those that have satisfied the selection criteria.

Operation of the system

Membership of the system – economic operators: Unlike framework agreements, where membership is fixed when the framework is set up, under a dynamic purchasing system new economic operators may apply to join the system at any time.

New economic operators: New economic operators may access the DPS throughout its validity period [article 34(5)]. New suppliers can request to participate in the DPS under the same conditions as the original entrants. These requests must be decided upon within 10 working days after their receipt unless there are reasons, such as the review of additional documentation, that justify an extension to 15 working days.

The contracting authority is obliged to inform the tenderer applying for membership of the system of its decision to admit or reject its application 'at the earliest possible opportunity' [article 34(5)].

Awarding a contract: Each contract that a contracting authority wishes to award in the framework of a dynamic purchasing system must be the subject of a separate invitation to tender. There is no requirement, as in the 2004 Directive, to publish a contract notice for each contract that a contracting authority wishes to award. According to the 2014 Directive, the process is as follows [articles 34(2)(b) and 34(6)]:

- The contracting authority invites all admitted participants in the DPS to submit a tender for the specific procurement, in accordance with the provisions of article 54 (Invitations to candidates),
 - Where the DPS has been divided into categories, the contracting authority shall then invite all participants admitted to the category corresponding to the specific procurement.

- The contracting authority shall award the contract to the tenderer that submits the best tender on the basis of award criteria set out in the contract notice (or in the invitation to confirm interest where a PIN as call for competition was used).
 - Those criteria may, where appropriate, be formulated more precisely in the specific invitation to tender.

Comment

The concept of an online system that provides flexibility for improvements in tenders and allows for new economic operators to join the system is appealing. Unfortunately, the requirement under the 2004 Directive to advertise each individual contract opportunity meant that the system had significant built-in delay and was not truly 'dynamic'.

Contracting authorities have found that this requirement did not necessarily provide for a speedy and efficient purchasing system, and therefore the take-up of this procurement tool by contracting authorities was limited.

The 2014 Directive, as described above, aims to simplify the DPS and thus encourage contracting authorities to use a combination of DPS and e-catalogues for the purchase of commodity items.

Electronic catalogues (Article 36)

The 2014 Directive introduced electronic catalogues (e-catalogues) as a new electronic purchasing technique (recital 68).

Where e-catalogues are required in a procurement process, contracting authorities must indicate in the contract notice that e-catalogues are required and give all the necessary information on the format, electronic equipment used and the technical connection arrangements and specifications for the catalogue.

Section 2.3

Negotiated procedure without prior publication

Adapt all of this section for local use – using relevant local legislation, processes and terminology – as well as practical examples from local appeals commission decisions and/or court decisions.

Contracting authorities should start with the assumption that a competitive process is required. There are only very limited circumstances where a contract that is of a certain type and value, which means that it is subject to the full provisions of the Directive, may be awarded without prior publication of a contract notice and without the use of a competitive process. The permitted derogations have been amended in the 2014 Directive in article 32 and are summarised below.

Practical note

The derogations in article 32 do not apply consistently to all types of contracts, and so considerable care must be taken when assessing the availability and justification for use of these derogations for the contract in question.

Derogations for public works, public supplies and public services contracts:

- **No tender/request to participate or no suitable tenders/requests to participate were received:** A derogation to apply the negotiated procedure without prior publication may be given in cases where an open or restricted procedure has already been conducted and no tender/request to participate or no suitable tender/request to participate was received; the negotiated procedure may be used, provided that the conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests [article 32(2)(a)]. The 2014 Directive provides a definition of an unsuitable tender or request to participate.

Localisation note: where the local legislation distinguishes between ‘irregular’ and ‘unacceptable’ tenders and, in particular, the different outcomes when those types of tenders are received, then this section of the narrative will need to be adapted to reflect local provisions.

- **Technical or artistic reasons [article 32(2)(b)(i)] or protection of exclusive rights, including intellectual property rights:** A derogation may be granted where for technical or artistic reasons or for reasons connected with the protection of exclusive rights the contract can only be awarded to a particular economic operator. The exceptions for technical reasons or protection of exclusive rights only apply when no reasonable alternative or substitute exists and when the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement [article 32(2)(b)].
- **Extreme urgency:** A derogation may be given in the case of events that were unforeseeable by the contracting authority, where the time limits available for the open or restricted

procedure or for competitive procedures with negotiation cannot be complied with, or where the derogation is judged to be strictly necessary [article 32(2)(c)].

Derogations for public supplies contracts:

- **Products manufactured for research and development purposes only:** when the products involved are manufactured purely for the purpose of research, experimentation, study or development – and not where there is quantity production to establish commercial viability or to recover research and development costs [article 32(3)(a)]
- **Additional deliveries from an original supplier:** for additional deliveries from an original supplier that are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations and where (1) a change of supplier would oblige the contracting authority to acquire material having different technical characteristics, which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; and (2) provided that the length of such contracts as well as any recurrent contracts does not, as a general rule, exceed three years [article 32(3)(b)]
- **Supplies quoted and purchased on a commodity market** [article 32(3)(c)]
- **Purchase of supplies on particularly advantageous terms:** where supplies can be purchased on particularly advantageous terms from (1) a supplier that is winding up its business; or (2) the receivers or liquidators of a bankruptcy for arrangements with creditors or similar procedures under national laws or regulations [article 32(3)(d)]

Derogations for public services contracts:

- **Following a design contest:** Where the contract concerned is to be awarded, in accordance with the rules of a design contest, to the successful candidate(s), provided that, where there is more than one successful candidate, the negotiation is undertaken with all successful candidates [article 32(4)]

Derogations for public works and public services contracts:

- **Additional requirements:** for additional works or services that were not included in the project that was originally considered or in the original contract.

Note: Under the 2014 Directive, an adapted version of this provision is included in article 72(1) on the modification of contracts during their term, and it applies to works, supplies and services contracts. See Module G1 for further information on the provisions on contract modification in article 72 of the 2014 Directive.

- **Repetition of works or services:** for new works or services consisting of the repetition of similar works or services entrusted to the same economic operator under the original contract, provided that:
 - the award is made within three years of the original contract award;

- the repeated works or services are provided in conformity with a basic project for which the original contract was awarded;
- the original contract award followed the open or restricted procedure;
- when original project was put out to tender the possible use of this procedure was disclosed;
- the total estimated cost of the repeated works or services were taken into consideration by the contracting authority when calculating thresholds for the original project [article 32(5)].

How easy is it to qualify for these derogations?

The case law of the European Court of Justice (ECJ) makes it clear that the availability of these exceptions is narrowly interpreted. The onus is on the contracting authority to demonstrate compliance with the conditions justifying this approach.

Case note: Commission v Italy

C-199/85 Commission v Italy

The municipality of Milan awarded a contract for the construction of a waste recycling plant. The contract was not advertised in the *OJEU*, and the European Commission argued that this was in breach of the procurement directive*.

Italy argued that it was not necessary to advertise the contract since certain derogations from the Directive applied.

Italy relied first of all on the derogation for circumstances where for technical reasons or reasons connected with exclusive rights the contract could be performed by only one economic operator. Italy argued that this derogation applied for both technical reasons and for reasons connected with exclusive rights, and therefore there was only one economic operator that could construct the plant.

Italy also sought to rely on the derogation allowing for an exemption from competition where, for reasons of extreme urgency that were unforeseen by the contracting authority, the usual time limits could not be met.

The ECJ rejected these arguments and laid down two important general principles:

1. The derogations must be strictly construed.
2. The burden of proof that the circumstances justifying the derogation are met is on the party seeking to invoke that derogation.

(*the relevant directive at that time was Directive 71/305, a predecessor to the current Directive

These principles have been followed in numerous ECJ cases where the urgency derogation has been invoked. These cases provide useful examples of real situations faced by contracting authorities. Here are a few examples:

Case notes

Waste treatment: The *La Spezia* case (Commission of the European Communities v Republic of Italy 194/88R) involved a proposed contract for the renovation of a solid waste incinerator. The case concerned the award interim measures, but the issue of the availability of the derogation was also considered.

The contract had not been advertised on the grounds of the derogation permitting an award without prior publication of a contract notice for circumstances of 'extreme urgency' that were unforeseen by the contracting authority. (These were grounds under the old Directive, but they have been transposed into the provisions of Directive 2004/18). Health and safety grounds were the basis for reliance on this derogation, as it was argued that the incinerator had to be closed down until the renovation was complete and that this closure constituted a threat to public health and safety.

The ECJ took the view that this health and safety argument would not succeed because the events leading to the urgent requirement were not unforeseeable since the need for renovation of the plant had been known for some time.

Avalanche barriers: In the case of the *Commission for the European Communities v Italian Republic C-107/92* Italy argued that it was entitled to rely on the extreme urgency derogation because it was necessary to complete avalanche barrier works before the start of winter.

The ECJ emphasised that all of the conditions set out in the derogation were cumulative and had to be complied with – therefore use of the derogation had to be 'strictly necessary', there had to be genuine extreme urgency, the circumstances had to have been unforeseeable by the contracting authority, and the circumstances had to signify that the time limits under the open, restricted or negotiated procedures could not be complied with.

In this case the ECJ concluded that the grounds of urgency could not be met, as the works could have been completed before the threat of avalanche came into existence by using the accelerated restricted procedure.

Student accommodation: In the case of *Commission of the European Communities v Republic of Spain C-24/91*, the University of Madrid awarded a contract for the construction of new student accommodation without publication of a contract notice on the grounds of urgency.

The ECJ again referred to the cumulative nature of the conditions and the availability of the accelerated restricted procedure as a means of meeting an urgent requirement.

The ECJ rejected the arguments of the Republic of Spain that the need to provide accommodation for the start of the academic year to cater for increased student numbers constituted justified grounds of

urgency.

In the following case the ECJ also considered the issue of whether the award without competition could be justified for technical reasons:

Case note

Conveyor belt system: The case of *Commission v Greece C -394/02* concerned the award by the Greek public electricity company of a contract for the construction of a conveyor belt system for the transport of ashes and solids from an electricity generation plant. The electricity company did not run a competitive process; it simply invited two companies to bid.

The ECJ rejected claims by Greece that this award without competition was justified on the grounds of (1) extreme urgency, and (2) 'technical reasons' since only the recipient of the contract was capable of performing the works.

On the issue of the technical reasons, the ECJ was not persuaded that there was only one potential economic operator. The Greek Government had argued that only one economic operator could deliver the requirements because there were technical difficulties relating to the nature of the ashes to be transported, the unstable nature of the subsoil, and the need to attach new conveyor belts to existing ones. The fact that the company had originally invited two companies to bid also indicated that another enterprise was capable of delivering the contract.

Comment

It is sensible to assume, despite the lack of ECJ case law on the application of each of the derogations, that the other derogations will be interpreted in accordance with the principles laid down in the Milan case (above case concerning avalanche barriers) and therefore will only be available in very limited and narrowly restricted circumstances.

Utilities – Procurement procedures and tools

Utilities

This short note highlights some of the major differences and similarities in the advertising requirements applying to utilities.

Adapt all of this section for local use – using relevant local legislation, process and terminology.

The main legal requirements relating to the choice and conduct of competitive procedures and the

use of purchasing tools are set out in the 2014 Utilities Directive. It also comprises five competitive procedures. The procedures are the same as those listed in the 2014 Directive except for the third procedure, which in the 2014 Utilities Directive is still referred to as the "negotiated procedure with prior call for competition", as in the 2004 Utilities Directive. The ways in which some of the procedures in the 2014 Utilities Directive can be used are more flexible than under the 2014 Directive, which was also the case under the 2004 directives.

Procedures

- **Article 44** confirms that contracting entities may use the open, restricted or negotiated procedure with a prior call for competition. Member States must also ensure that contracting entities have the freedom to use the competitive dialogue or innovation partnership procedures. No conditions apply to the use of these competitive procedures, where negotiation is permitted.
- **Article 66** sets out the time limits for receipt of requests to participate and for the receipt of tenders and covers the time limits applying to the provision of additional documents and information during the course of a procurement procedure.
- **Article 74** governs the issuing and content of invitations to submit a tender or to negotiate.
- **Articles 76 to 83** set out rules relating to the conduct of the procurement procedure, including rules on selection and tender award criteria as well as life-cycle costing.
- **Article 89** covers the modification of contracts during their term.
- **Articles 95 to 98** set out the rules on the conduct of design contests.

Purchasing tools

- **Framework agreements:** Article 51 permits contracting entities to set up and operate framework agreements.
- **Dynamic purchasing systems:** Article 52 covers the establishment and operation of dynamic purchasing systems.
- **Electronic auctions:** Article 53 contains the provisions relating to the conduct of electronic auctions.
- **Electronic catalogues:** Article 54 contains the provisions relating to electronic catalogues.

Qualification systems: In addition, contracting entities may set up and operate qualification systems; this provision is covered by article 77 of the Utilities Directive.

A qualification system is a system in which economic operators interested in contracting with the contracting entity may apply to be registered as potential providers. The contracting entity then registers some or all of those economic operators in the system. The registered economic operators form a pool from which the contracting entity may draw those operators that are invited to bid or negotiate on contracts.

Choice of advertising: Contracting entities have a free choice between five main forms of

competitive procedure: the open procedure, restricted procedure, negotiated procedure with a prior call for competition, competitive dialogue, and innovation partnerships. Contracting entities generally have more flexibility in terms of how they advertise, which is referred to in the Utilities Directive as a 'call for competition'. See Module E2 for details of advertising requirements.

Conduct of the procurement process: The provisions in the Utilities Directive covering the conduct of the procurement process are generally less detailed and less proscriptive than the rules applying to the public sector. For example, there is no exhaustive list of selection stage criteria, and there are provisions allowing for the time limit for receipt of tenders to be set by mutual agreement.

Design contests: There are special provisions governing the conduct of design contests, which in the case of utilities apply to service contracts only. The rules of conduct are similar to those that apply to the public sector.

Framework agreements: Utilities may set up framework agreements. The process is regulated less strictly than for the public sector, and there are no detailed provisions covering the way in which framework agreements are to be set up.

Dynamic purchasing systems: Utilities are also permitted to set up dynamic purchasing systems. The provisions covering the setting up and operation of dynamic purchasing systems are similar to those applying to the public sector.

Section 3 Exercises

Adapt all of this section for local use – using relevant local examples, legislation, processes and terminology

Exercise 1: Choice of Procedures

A new procurement officer has joined the local authority procurement team where you work. She has previously worked as a procurement officer for a large private company and has never worked in the public sector before.

She has been asked to assist with the procurement of three different contracts:

- A contract for stationery supplies
- A contract for motor vehicles
- A contract for the construction of a new school

She asks for a short meeting with you to discuss which procurement procedure should be used for each of the three contracts.

Please prepare some short notes in advance of the meeting, explaining which procedure is appropriate and why. In each case consider whether the open or restricted procedure should be used, and also whether any other procedure may be justified.

Exercise 2: Choice of procedure

You work in the procurement team at a large local authority. You receive the following email:

To: procurementteam@bigtown.gov
From: directorofsocialservices@bigtown.gov

1 September

Dear Procurement Team leader,

I have just been appointed as Director of Social Services here at Bigtown Council. Prior to that I worked as an Assistant Director at another, smaller council.

I have been told by a junior member of your team that we have to use a competitive tender process for a number of our procurement projects. I have always tried to avoid this sort of approach because in social services we tend to find that we get the best deal by talking directly with suppliers whom we know and trust.

We have two requirements that we know about now:

(1) Procurement of cleaning services in 8 residential care homes for the elderly. We have not run a tender process yet, as the current contract will expire early next year. We have already prepared a specification and we know the three best local contractors, so we would like to negotiate with them and don't really see the point of advertising.

(2) A contract for the construction of a new daycare centre. This contract has already been tendered before using a restricted procedure, I understand. We received 5 tenders but there were problems with all of them. All of the tenders were too expensive, none of the tenders met all of our technical specification requirements, and all of the tenderers wanted to change one or more of the contract conditions. We would like to go ahead and discuss the project with some construction companies we know, using the same designs and contract documents. Those companies were not involved in the original procurement.

I just want to check with you. Do we really do have to use a competitive tender process?

Your colleague also told me that we are not permitted to negotiate with the suppliers. If we are obliged to run a competitive process then please can you confirm that we will be able to negotiate?

With many thanks,

Director of Social Services

Please assume that in each case the value of the contract will exceed the EU financial threshold.

Please consider each of the proposed procurements and answer the following questions:

(1) Can the Director of Social Services go ahead and negotiate in the way suggested in the email or is a competitive process required?

(2) If a competitive process is required, will it be possible to use the negotiated procedure with prior publication of a notice, and what conditions will apply?

Exercise 3: Timetable and Tender Preparation Exercise – Part 1

The Social Service procurement committee has decided to go ahead with a competitive procurement process for the contract for cleaning services for the 8 residential care homes for the elderly. They plan to use the restricted procedure.

They ask for your support in preparing the tender timetable for this process.

Using the attached sheet as a starting point, prepare a tender timetable for this procurement process.

Tips:

You need to include statutory time limits, but you also need to discuss in your group how much time is required for preparation, administration of the process and decision making.

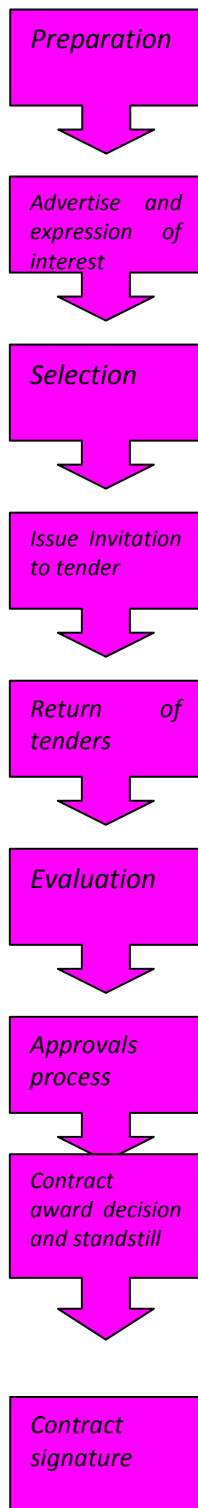
Please add or delete stages –  – as you feel necessary.

Please assume that:

- (1) No prior information notice is published.
- (2) The contract notice will be despatched electronically.
- (3) The tender and specification documents will be not available electronically on the date of despatch of the contract notice.
- (4) The date for despatch of the OJEU notice is 1 December.

Exercise 3: Procurement timetable: Contract for cleaning services

Restricted procedure



Exercise 4: Timetable and Tender Preparation Exercise – Part 2

Using the timetable you have discussed, prepare a list of the documents that you think are needed for each stage of the process.

Exercise 5: Negotiated Procedure without Prior Call for Competition (C2.3)

To: procurementteam@bigtown.gov
From: directorofsocialservices@bigtown.gov

10 September

Thank you for your assistance on my previous questions. I am writing to ask you for some further advice.

An extremely urgent requirement has arisen for 20 new vehicles for our staff – the current vehicles are so old that they may not last the winter. We need to sort this out immediately. Can we do this without advertising and running a lengthy procurement process please, as there are obviously health and safety issues involved?

By the way, we have also been planning to upgrade some of our IT equipment. We have just learned that the firm we were dealing with is in liquidation and the liquidators are selling off PCs that meet our requirements at a significantly discounted price. We have a service contract with an IT services company so we don't need to worry about maintenance. I assume we can just go ahead and buy these?

Please advise the Director of Social Services.

Please assume that in each case the value of the contract will exceed the EU financial threshold.

(1) Can they go ahead and purchase the 20 new vehicles without advertising? On what grounds do you base your advice? Is there an alternative approach you could adopt?

(2) Can they go ahead and purchase the PCs from the liquidators? On what grounds do you base your advice?

Section 2. Procurement Techniques (C2.2)

Framework agreements

Exercise 1: Group Discussion

The head of procurement from the local hospital has come to you for advice. He has recently been on a training course where he has learned about framework agreements. He is interested in using these agreements, and he and his team have identified a number of purchases where the total requirements will exceed the EU financial thresholds and where they think framework agreements may be suitable. These are:

1. Contract for laptop computers
2. Contract for support services for laptop computers
3. Minor works contracts for repairs to roads where each of the individual contracts is expected to be below the EC threshold
4. Major works contracts where each of the individual contracts is expected to be above the EC threshold
5. Pharmaceuticals
6. Ambulances
7. Management consultancy for human resources advice and support
8. Specialist medical equipment

The head of procurement explains that he understands there are three broad types of framework agreement: a single-supplier framework, a multi-supplier framework with direct award of contracts, and a multi-supplier framework with a mini-competition.

He asks for your advice on:

- (1) whether the purchases identified are suitable for frameworks agreements, and
- (2) where a framework agreement is suitable, what type of framework would be best.

Exercise 2: Group Discussion (2.2)

The head of procurement has another question: the hospital is obliged to appoint a number of quality assessors to evaluate the clinical services that the hospital provides. The assessments are part of a five-year clinical services improvement project and needs to be conducted at least every six months for the duration of the project.

Question: The head of procurement asks for your advice on whether or not they can set up the framework agreement for five years.

He also explains that the final audit will need to take place close to the expiry of the five-year period, and that the time required for collating the information and preparation of the final reports means that the contracts they award may have to last beyond the end of the framework agreement.

Please advise the head of procurement on these two issues.

Exercise 3 – Group discussion (2.2)

The hospital has set up a multi-supplier framework for computers. The value of the contracts to be awarded under the framework will vary widely, and a number of different types and brands of desktop computers and laptops are already in use in the hospital. The framework includes six different suppliers, which reflects the diversity of the hospital's requirements.

All the framework suppliers can offer the three types of computers specified (low/middle/high performance), but the price and delivery terms of each differs. The suppliers have been chosen on the basis of the most economically advantageous tender, taking into account price, delivery time and performance against "ComputerMark", a standard benchmarking tool provided and operated by an independent test laboratory. This provides an overall score for each supplier's computer.

The weighting applied by the framework manager to assess tenders for the framework was as follows:

Price 40%

Delivery time 20%

ComputerMark score 40%

Purchasing of computers is undertaken at a departmental level at the hospital. The framework details are made available to department-based purchasers by means of a "virtual catalogue" that allows them to compare the scores of each successful supplier against these three criteria as well as their total score.

The head of procurement is trying to formulate suitable advice for purchasers to decide how to award each contract under the framework. He seeks your advice on the following points.

The cascade method – One method is to always award the contract to the supplier that scored the most points, provided that it could deliver the computers by a certain time. If that supplier could not deliver the computers, the user would seek computers from the next-highest scoring supplier, and so on. By this means the purchaser would obtain the best-value computers currently available.

Rotation – The head of procurement is concerned that this might lead to the 5th and 6th most competitive supplier receiving no business at all, even though they might have planned their production on the basis of winning a certain portion of the business. He wonders if instead the "rotation" principle could be applied, where the catalogue software would indicate which supplier was to be preferred – thus the 1st ranked supplier would become the 6th ranked after it had been awarded a contract by a user. By the end of the year, all six suppliers would have received some business.

Quotas – Another possibility is that each supplier is awarded one-sixth of the business and is effectively barred from further contracts under the framework once its quota has been fulfilled.

Question: Do you think that these approaches are permissible under EC procurement legislation? If not, what rules would you suggest to the user for awarding contracts under the framework?

Exercise 4: Electronic Auctions

Exercise on electronic auctions to involve review of the electronic auction system used locally (if used).

Section 4 The Law

Important Note: This section was not updated in 2015 to reflect the changes in the 2014 Directive. See below for general information on where relevant provisions can be found in the 2014 Directive.

In this context it is helpful to look at the following recitals and articles of Directive 2014/24/EU:
Recitals 42 to 50 and Article 26: choice of procedure
Recitals 42 and 43 and Article 30: competitive dialogue
Articles 78 to 82: design contests
Recitals 60 to 62 and Article 33: framework agreements

The following structure and layout can be used but this section will need significant adaptation to reflect local requirements - using relevant local legislation, standard format contract notices, processes, websites and terminology.

This section provides further detail on issues raised in earlier sections Section 2 – Narrative

Section 2.1 Procurement procedures

When can the competitive dialogue procedure be used?: In order to use the competitive dialogue procedure there are two conditions which must both be met. These are set out in Article 29:

Condition 1: The contract to be awarded must fall within the definition of a “particularly complex contract”. The definition of a particularly complex contract is set out in Article 11(c):

..... a public contract is considered to be “particularly complex” where the contracting authorities:

- are not objectively able to define the technical means... capable of satisfying their needs or objectives, and/or
- are not objectively able to specify the legal and/or financial make-up of a project.

Condition 2: The contracting authority must consider that the use of the open procedure or the restricted procedure will not allow for award of the contract.

For further information see section 4 The Law.

Condition 1 requires the contract to fall within the definition of a “particularly complex contract” as defined. The definition is not cumulative so only one of the two elements of the definition needs to be satisfied.

Comment on the definition of a particularly complex contract

There is uncertainty about how the definition is to be interpreted. For example, in order to meet the definition the contracting authority must be “objectively” unable to define the technical means capable of satisfying its objectives, or to specify the financial or legal make-up of the project.

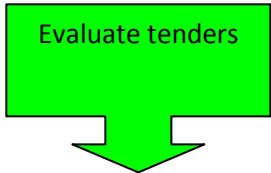
What does this mean in practice? One view which is not overly restrictive is that this refers the situation in which a contracting authority is unable to find the *best* solution itself, since the purpose of the dialogue is stated to be to enable the authority to identify the best solution. If a narrower interpretation is applied then the condition could be read as requiring the contracting authority to be entirely unable to specify the means of meeting its requirements and this would significantly reduce the circumstances where the competitive dialogue procedure can be used.

Careful consideration should be given to this condition and a clear written audit trail prepared demonstrating by reference to the particular project why the open or restricted procedures will not allow for award of the contract.

Condition 2 requires the contracting authority to be of the view that use of the open procedure or the restricted procedure will not allow for award of the contract.

Comment: In practice, if the projects meets the definition of a particularly complex contract and the contracting authority needs to use the competitive dialogue to explore solutions with the economic operators then the open or restricted procedures, where no negotiation is permitted, are unlikely to allow for award of the contracts. This should not, however, be assumed and so careful consideration should be given to this condition and a clear written audit trail prepared demonstrating by reference to the particular project why the open or restricted procedures will not allow for award of the contract.

Competitive dialogue – what discussions are permitted after receipt of tenders?

	<p>Contracting authority evaluates the tenders on the basis of the most economically advantageous tender, using the pre-disclosed evaluation criteria and weightings.</p> <p>Following conclusion of the competitive dialogue phase there are limits on any further discussion with tenderers. See Section 4 the Law for further information.</p>
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Article 29 distinguishes two stages after close of dialogue. The first stage is when tenders have been received from the tenderers which participated in the competitive dialogue phase. The second stage is when the successful tenderer has been identified. There are specific provisions covering the extent to which the information received from tenderers can be checked and changed.

After receipt of all tenders: Article 29(6) provides that:

“These tenders may be clarified, specified and fine-tuned at the request of the contracting authority. However, such clarification, specification and fine-tuning or additional information may not involve changes to the basic features of the tender of the call for tender, variations in which are likely to distort competition or have a discriminatory effect.”

After selection of the successful tender: Article 29(7) provides that:

“ At the request of the contracting authority, the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspect of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender of the call for tender and does not risk distorting competition or causing discrimination.”

The Directive clearly envisages the need for some clarifications and confirmations in the context of these complex projects. In both cases the process is instigated by the contracting authority not the tenderer. In both cases significant caution needs to be exercised in the clarificatory process so as to ensure that those actions do not there is no distort competition or cause discrimination.

Design contests – Articles 66 to 74

Adapt all of this section for local use – using relevant local legislation, processes and terminology including statutory time scales and publication requirements

Scope – Contracting authorities and thresholds (Article 67(1)): The financial thresholds are different for different types of contracting authority, with a lower threshold generally applying for central government authorities. (see Module D1 for explanation of different types of contracting authorities and Module D5 for details of relevant thresholds).

The types of contracting authority and thresholds listed in Article 67 are:

- contracting authorities which are listed as central government authorities in Annex IV to the Directive – to which the lower threshold applies
- contracting authorities not listed in Annex IV – to which the higher threshold applies
- for all contracting authorities for contests concerning specified services (Research and Development *and certain types of Telecommunications (check if now deleted)*) where the higher threshold applies.

Scope – contracts (Article 67(2)): design contests can be used where:

- they are organized as part of a procedure leading to the award of a public service contract; and/or
- they result in the award of prizes or payments to participants

Calculating the financial threshold (Article 67(2)): When calculating the financial threshold the following rules apply:

- For design contests which are organized as part of a procedure leading to the award of a public service contract the threshold is calculated by reference to the estimated net value (i.e. excluding VAT) of the public service contract including any possible prizes or payment to participants
- For design contests which result only in the award of prizes or payments to participants the financial threshold is calculated by reference to the estimated value of the prizes or payment to participants plus the estimated net value (i.e. excluding VAT) of the public service contract which might be concluded with the successful participant (if the contracting authority does not exclude such and award in the contract notice advertising the contest).

Exclusions from the scope of design contests (Article 68): The provisions of Articles 66 to 74 do not generally apply to contests organised by utilities where they are run in pursuit of the activities referred to Articles 3 to 7 of Directive 2004/17. *This is subject to some limited exceptions for postal services* where these provisions do apply.*

For public sector contracting authorities, contracts in the fields of *certain types of telecommunications*covered by Article 13*, secret contracts and contracts requiring special security measures covered by Article 14 and contracts awarded pursuant to international rules covered by Article are excluded.

Advertising design contests (Articles 69 and 70): Contracting authorities are required to advertise design contests in the prescribed manner in the Official Journal of the European Union using the standard form design contest notice (see Module E2 for full details of advertising requirements). The provisions of Article 36 on the form and manner of publication of notices apply to design contests as does Article 37 which allows for non-mandatory (voluntary) publication of notices for contracts not covered by the Directive.

Communication (Article 71): particular emphasis is placed on the requirement for integrity and confidentiality to be maintained. All information communicated by participants must be preserved and the contracting authority must ensure that the jury does not ascertain the contents of the plan and projects until after expiry of the time limits for their submission.

In addition there are rules on electronic availability and receipt of plans and documents with contracting authorities using electronic methods being required to provide the necessary encryption and obligations to ensure that electronic devices receiving plans and projects meet the requirement set out in Annex 10.

Selecting participants (Article 72): A contracting authority may choose to limit participants and where it does so is must lay down clear and non-discriminatory selection criteria. The number of participants must be sufficient to ensure genuine competition.

The jury and conduct of the evaluation (Articles 73 and 74):

- the jury must be comprised of individuals who are independent of the participants in the competition
- the number of people on the jury is not specified
- where the contest requires participants to be from a particular profession then at least a third of the members of the jury must have that qualification or the equivalent of that qualification
- the anonymity of the candidates must be preserved until the jury has reached its opinion or decision
- the jury must
 - be autonomous in its decision making
 - examine the plans and projects submitted by candidates anonymously
 - examine those plans and projects solely on the basis of the criteria indicated in the contest notice
 - record its ranking of projects in a report which is signed by its members. The report must include the jury's remarks and any points which need clarifying.
- where the jury has concluded its report and it has recorded questions or points of clarification then the candidate may be invited to answer those questions or points of clarification and complete minutes must be drawn up of the dialogue between the jury and those candidates.
- when the opinion or decision has been made (*and the successful candidates announced*) the contracting authority must publish a contract award notice in accordance with Article 37 requirements.

Section 2.2 Procurement techniques

Framework agreements

A framework agreement is defined at Article 11(5) as:

“an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged”

In other words, a framework agreement is a general term for agreements with economic operators that set out the terms and conditions under which specific purchases may be made.

The term is normally used to cover agreements which are not, themselves, readily classifiable as a public contract to which the Directive applies. Under such agreements the public contracts are created under the Directive only when a contract is awarded under the framework agreement. See Section 4 The Law.

The European Commission has issued an Explanatory Note on Frameworks (doc CC/2005/03). The Explanatory Note covers a number of issues relating to the establishing and operation of frameworks. In this note, the European Commission it explains its view of the types of contracts which are covered by the definition of frameworks and coverage of the framework provisions. Explanatory Notes are not legally binding but they do provide a useful indicator as to the way in which the Commission will deal with issues arising in respect of framework agreements.

An extract from that Explanatory Note is as follows (with footnotes deleted):

“1.1 Types of framework agreements covered by the Classic Directive

Although the Classic Directive refers exclusively to “framework agreements”, the provisions actually relate to two different situations: framework agreements that establish all the terms and those which do not establish them all. Purely for explanatory purposes, the first kind may be termed **framework contracts** and the second **framework agreements stricto sensu**. It should be stressed that the use of this terminology is not obligatory for implementing the Directive. It is also useful to recall that framework agreements that establish all the terms (framework contracts) are “traditional” public contracts and that consequently their use was possible under the old Classic Directives, provided they were concluded in accordance with the procedural provisions of these Directives.

Framework agreements that establish all the terms (framework contracts) are legal

instruments under which the terms applicable to any orders under this type of framework agreement are set out in a binding manner for the parties to the framework agreement – in other words, the use of this type of framework agreement does not require a new agreement between the parties, e.g. through negotiations, new tenders, etc. Where such framework agreements are concluded with several economic operators, they come under the first indent of Article 32(4), while those concluded with a single economic operator are covered in Article 32(3).

Framework agreements that do **not** establish all the terms (framework agreements *stricto sensu*) are by definition incomplete: this type of framework agreement either does not include certain terms or does not establish in a binding way **all** the terms necessary so that any subsequent orders under the framework agreement can be concluded without any further agreement between the parties. In other words, some terms still have to be established subsequently.”

The Explanatory note goes on to confirm that there are a number of questions which are a question of national law. These include:

- whether or not a term is actually established;
- in the case of a framework agreement that does not establish all the terms and which is concluded with one economic operator whether or not the operator is obliged to supplement its tender
- whether an economic operator that is a party to a framework is obliged to deliver the agreed goods, works or services
- whether an economic operator can oblige a contracting authority to use the framework

Section 5 Chapter Summary

Note on amendments to Self-Test Questions: the Trainer's Manual has not been updated to reflect the amendments below.

Self-test questions

Choice of procedures

- What are the five main types of competitive procedure?
- Which of the five main types of competitive procedure is a single-stage procedure?
- Which procedures involve a separate selection stage and short-listing of economic operators?
- In which procedures is negotiation with economic operators permitted?
- In which procedure is a contracting authority not permitted to use lowest price as the criterion for award of the contract?
- What conditions apply to the use of the open or the restricted procedures?
- Does the contracting authority have a free choice when it decides whether to use the open or the restricted procedure?
- What are the advantages and disadvantages of the open procedure?
- What are the advantages and disadvantages of the restricted procedure?
- Are there conditions that apply to use of the competitive procedure with negotiation?
- If there are conditions, what are they? Which conditions apply to all types of contracts, *i.e.* works, supplies and services?

The open procedure

- What is the statutory period for receipt of tenders? How can this period be reduced? By how many days can it be reduced?
- How quickly must the specification and supporting documents be sent to economic operators? Do these requirements apply if the documents are available electronically?

The restricted procedure

- What is the statutory period for receipt of expressions of interest? How can this period be reduced? By how many days can it be reduced?
- What is the statutory period for receipt of tenders? How can this period be reduced? By how many days can it be reduced?

- How many economic operators must the contracting authority invite to tender?
- How quickly must the specification and supporting documents be sent to economic operators? Do these requirements apply if the documents are available electronically?

The competitive dialogue procedure

- When can the competitive dialogue procedure be used? What conditions must be satisfied? Think of some examples of the types of projects and circumstances where this procedure may be used.
- What is the statutory period for receipt of expressions of interest? How can this period be reduced? By how many days can it be reduced?
- What is the statutory period for receipt of tenders?
- How many economic operators must the contracting authority invite to participate in the dialogue?
- What can the contracting authority discuss with economic operators during the dialogue phase?
- When does the contracting authority declare the competitive dialogue phase closed?
- What discussions are permitted between the contracting authority and the economic operators after tenders are received but before the successful tenderer is appointed?
- What discussions are permitted between the contracting authority and the successful tenderer?

The competitive procedure with negotiation

- When can the competitive procedure with negotiations be used? What conditions must be met? Think of some examples of the types of projects and circumstances where this procedure may be used.
- What is the statutory period for receipt of expressions of interest? How can this period be reduced? By how many days can it be reduced?
- What is the statutory period for receipt of tenders?
- How many economic operators must the contracting authority invite to negotiate?
- What can the contracting authority discuss with economic operators during the negotiation phase?
- What discussions are permitted between the contracting authority and the economic operators after tenders are received but before the successful tenderer is appointed?
- What discussions are permitted between the contracting authority and the successful tenderer?

Reducing statutory periods – accelerated procedures

- What two types of accelerated procedures are available?
- In what circumstance can accelerated procedures be used?
- What are the statutory time limits in accelerated procedures?

Design Contests

- What is a design contest?
- What types of contract is a design contest used for? Think also about the value of the contracts.
- How is a design contract advertised?
- What principles apply to the selection of participants?
- What is the composition of the jury?
- What are the outcomes of a design contest?

Procurement techniques

Framework agreements

- What is a framework agreement (as defined by the Directive?)
- For what sort of purchases is a framework agreement suitable?
- Who can set up a framework agreement?
- How is a framework agreement advertised?
- What sort of procurement procedure can you use to set up a framework agreement?
- Where the framework agreement is with a single economic operator, on what terms are contracts awarded under the framework?
- How many operators do you need to have on a multi-supplier framework agreement?
- Can new economic operators join a framework after it has been set up?
- For a multi-supplier framework agreement, what are the two ways in which contracts can be awarded under the framework?
- What are the rules for running a mini-competition in a multi-supplier framework agreement?
- How long should a framework agreement generally last?

Electronic auctions

- In what types of procurement procedures can an electronic auction be used?
- At what stage in the procurement process is an electronic auction used?
- What sorts of purchases are suitable for electronic auctions?
- What sorts of purchases are specifically excluded from electronic auctions?
- What must the invitation to participate in an electronic auction contain?
- How is an e-auction closed?

Dynamic purchasing systems

- What is a dynamic purchasing system?
- What sorts of purchases are suitable for a dynamic purchasing system?
- For how long may dynamic purchasing be set up?
- Can new economic operators join a dynamic purchasing system after it has been set up?

Negotiated procedure without prior publication

- In which article can you find the derogations that set out the very limited circumstances where the negotiated procedure without publication of a contract notice can be used?
- What conditions apply to circumstances where a contracting authority wishes to use the negotiated procedure without publication of a contract notice where:
 - no tenders or no suitable tenders are received for a works contract?
 - extreme urgency applies for a services contract?
 - an additional delivery of supplies from an original supplier is required?
 - additional works are required?
 - repeat services are required?
- What two important principles did the European Court of Justice lay down in the Milan case (Commission v Italy C199/85)?

Useful sources of further information – guidelines, explanatory notes and Directives

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

Module C5 Social and Environmental Considerations

Section 1 Introduction

1.1. Objectives

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

1. What the social and environmental considerations are
2. When and how social and environmental considerations can be used in procurement
3. When social and environmental considerations cannot be used in procurement

1.2. Important issues

The most important issues in this chapter are understanding:

- When social and environmental considerations are specifically provided for in the Directive
- How social and environmental considerations may be incorporated into the procurement process when they are not explicitly provided for
- The limitations on use of social and environmental considerations derived from EC Treaty principles, general law principles, the Directive and guidance
- That different stages in the procurement process offer different opportunities for the incorporation of social and environmental consideration

This means that it is critical to understand fully:

- How the opportunities and limitations apply to each of the stages in the procurement process

If this is not properly understood, opportunities to incorporate social and environmental considerations may be missed. Social and environmental considerations may be incorporated inappropriately or at the wrong stage, and so risk being in breach of Treaty principles, the Directive or EC law.

1.3. Links

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

- Module C1 on procurement planning
- Module E1 on preparing tender documents
- Module E2 on advertisement of contract notices
- Module E3 on selection (qualification) of candidates
- Module E4 on setting contract award criteria
- Module E5 on contract evaluation and contract award
- Module G1 on contract management

1.4. Relevance

This information will be of particular relevance to those procurement professionals who are responsible for procurement planning, specifically in the preparation of contract notices and the preparation of selection and award criteria, as well as to those involved in the selection process and tender evaluation process.

It will also be of particular relevance to those persons that, within the line management of a contracting authority, have the responsibilities and decision-making powers – including delegation powers – with regard to procurement (*e.g.* to decide on the subject matter and packaging of the procurement).

1.5. Legal information helpful to have at hand

Adapt for local use

The legal requirements relating to the type of procedures are set out in **Directive 2014/24/EU**. In this context, it is helpful to look at both the recitals to the Directive and the relevant articles:

- Recital 2 and Article 18: context for the new Directive - enabling procurers to make better use of public procurement in support of the common societal good
- Recitals 37 to 40 and Article 58: integration of environmental, social and labour protection requirements into public procurement procedures and observance at the relevant stages of the procurement process
- Recital 74 and Article 42: technical specifications, environmental characteristics and accessibility criteria for people with disabilities
- Recital 74 and Article 43: use of labels such as the European eco label
- Recitals 97, 98 and 104 and Article 70: conditions for the performance of contracts
- Recital 101 and Article 57: possibility to exclude economic operators that have proven unreliable, for instance due to the violation of environmental or social obligations, including rules on accessibility for disabled persons and provisions relating to taxes, environmental protection, employment protection provisions and working conditions
- Article 60(4) and Annex XII, Part II(g): evidence of an economic operator's technical abilities – environmental management measures
- Recital 97 and Article 67(2): contract award criteria, including qualitative environmental and social characteristics linked to the subject matter of the contract (for instance, design for all users, innovative characteristics, trading and its conditions, qualifications of staff assigned to the contract performance, and production process)
- Article 68: life-cycle costing
- Recitals 113 to 117 and Articles 74 to 76: particular procurement regimes for "services to the person", such as certain social, health and educational services
- Recital 118 and Article 77: contracts reserved for specific services

Additional information

SIGMA Procurement Briefs:

No. 30: *2014 EU Directives: Public Sector and Utilities Procurement*

Utilities

A short note on the key similarities and differences applying to utilities is set out at the end of Section 2.

Section 2 Narrative

Note: Except where specified otherwise, the narrative in this Module C5 discusses the rules applying to contracts that are of a type and value subject to the full application of Directive 2014/24/EU (“the 2014 Directive”), and the term “contract” should be interpreted accordingly. For commentary on contracts falling outside the application of the Directive or only partially covered by the Directive, see Module D3. For low-value (sub-threshold) contracts, see below.

2A Introduction and overview

1 Introduction

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology.

1.1 This section provides an introduction to and discussion of the extent to which social and environmental considerations can be incorporated into procurement processes. It does not contain a detailed analysis of all of the academic debate and diverse views on this issue. Nor does it provide an exhaustive analysis of all current case law or guidance.

Part 2A:

- introduces the concept of social and environmental considerations;
- discusses some terminology;
- Addresses the issue of local preference provisions – which are not permitted under the EU *acquis*.

Part 2B looks at environmental considerations and:

- outlines where the Directive deals specifically with environmental considerations;
- highlights the key European Court of Justice (ECJ) cases;
- provides an overview of what the European Commission (EC) says about the use of environmental considerations;
- looks at the procurement process in detail and provides comments and good practice guidance on when environmental considerations may be most effectively incorporated into the process.

Part 2C looks at social considerations and:

- outlines where the Directive deals specifically with social considerations;
- highlights the key ECJ cases;
- provides an overview of what the EC says about the use of social considerations;

- looks at the procurement process in detail and provides comments and good practice guidance on when social considerations may be most effectively incorporated into the process.

Part 2D looks at some suggested measures to facilitate participation in procurement processes by small and medium-sized enterprises (SMEs), which are often regarded as a form of social consideration.

1.2 It is important to bear in mind that although environmental and social considerations are dealt with separately in this module, the principles applying to the incorporation of both types of considerations are broadly similar. Some provisions in the Directive apply to both social and environmental considerations. Principles derived from a decision of the European Court of Justice often apply to both social and environmental considerations, even if the case itself related to only one of these sets of considerations. In addition, some of the guidance from the European Commission on social considerations can only be properly understood by reading the guidance on environmental considerations.

1.3 Public procurement is not conducted in a vacuum. It involves purchasing by contracting authorities or utilities operating in the public sector. Public sector bodies are subject to a wide range of internal and external pressures and influences, including local and national expenditure decisions and policies. These can impact on all aspects of the procurement process. Public procurement is also used to promote particular policies, as the purchasing power of the contracting authorities can be considerable. This can create tensions between (1) what is permitted under the EU *acquis* and (2) the aims of local and national governments and contracting authorities.

What is permitted under the EU *acquis* is not always entirely clear, due to a number of reasons, including the following:

- the Directive contains some specific provisions but is not comprehensive in addressing this issue;
- the ECJ case law is not always consistent;
- the European Commission (EC) has traditionally held a more restrictive view of what is permissible than some EU Member States;
- this is an area of considerable ongoing debate in terms of practice, policy and academic discussion;
- this is currently an area of rapid change within the EU and in EU Member States.

Note on 2014 directives and Europe 2020: The 2014 directives place much greater emphasis than previous procurement directives on the ability to incorporate social and environmental considerations into procurement. This development reflects the increasing importance of these issues at an EU level as well as the targets and priorities of Europe 2020. Public procurement is one of the tools that can be used to meet the aims of Europe 2020.

Europe 2020 is the European Union's ten-year jobs and growth strategy. It was launched in 2010 to create the conditions for smart, sustainable and inclusive growth. Five headline targets for the EU to achieve by the end of 2020 were agreed. These targets concern employment, research and development, climate/energy, education, social inclusion and poverty reduction. For further information, see: <http://ec.europa.eu/europe2020/>

2 What are social and environmental considerations?

2.1 There is no fixed definition of what a social or environmental objective is. The concept is most easily understood by way of examples:

Examples of social considerations:

- Reducing unemployment
- Preventing the use of child labour
- Preventing discrimination on the grounds of race, religion, disability, sex or sexual orientation
- Encouraging good employment practices
- Reducing local unemployment
- Reducing social exclusion
- Promoting training opportunities for the young or disadvantaged
- Encouraging access to work for people with disabilities

Examples of environmental considerations:

- Minimising the impact of a construction project on the environment
- Encouraging environmentally sensitive working practices by economic operators
- Increasing the energy efficiency of buildings
- Reducing wastage of natural resources
- Encouraging the development of alternative energy sources
- Reducing transport costs by sourcing products locally
- Reducing the carbon footprint

Contracting authorities have often used public procurement to further these types of broader policy objectives. Some examples of how contracting authorities do this are set out below:

2.2 Examples of social considerations – *and how contracting authorities try to incorporate these into procurement processes:*

- Reducing unemployment – *by requiring economic operators to recruit a specified percentage of the workforce from unemployed people*

- Preventing the use of child labour – *by disqualifying economic operators who are known to use child labour*
- Preventing discrimination on the grounds of race, religion, disability, sex or sexual orientation – *by including contract conditions that require compliance with all relevant legislation*
- Encouraging good employment practices – *by requiring economic operators to pay the national minimum wage*
- Reducing local unemployment – *by requiring economic operators to recruit a specified percentage of their work force from unemployed people*
- Reducing social exclusion – *by locating a community facility in a place where the socially excluded are more likely to use it*
- Promoting training opportunities for the young or disadvantaged – *by obliging economic operators to provide training opportunities*
- Encouraging access to work for people with disabilities – *by specifying that a contract can only be delivered by workshops or schemes that are run for the benefit of people with disabilities*

2.3 Examples of environmental considerations – and how contracting authorities try to incorporate these into procurement processes:

- Minimising the impact of a construction project on the environment – *by deciding to build a tunnel rather than a road*
- Encouraging environmentally sensitive working practices by economic operators – *by requiring an economic operator that is building a road through an area of natural beauty to meet specified environmental management measures*
- Increasing the energy efficiency of buildings – *by requiring architects to design a building to meet the highest energy efficiency standards*
- Reducing wastage of natural resources – *by requiring operators to recycle and re-use products*
- Encouraging the development of alternative energy sources – *by purchasing green energy*
- Reducing the carbon footprint – *by purchasing electric vehicles*

2.4 Some of the ways in which contracting authorities try to incorporate social and environmental considerations into procurement processes (including some of the examples above) are not legally permitted under the EU *acquis*. Others are permitted provided that certain conditions are met. Some are specifically permitted in the Directive.

The key questions from a procurement perspective are:

(1) Is it legally permitted under the EU *acquis* to incorporate social and environmental considerations into the procurement process? and

(2) If it is legally permitted to do so, when and how can this be done?

As already indicated, the answers are not straightforward and sometimes there is a conflict between general policy and what is achievable under the EU *acquis*.

Comment on terminology: Environmental and social considerations are quite often referred to as “secondary objectives”. Why is this?

The “primary” objective of procurement by a contracting authority is the acquisition of works, goods (supplies) or services on the best possible terms.

Environmental and social objectives, such as those outlined above, are not necessarily connected with this primary objective but are often motivated by policy, economics or politics. Objectives that are unconnected to the primary objective of the procurement are often referred to in the EU, by the European Commission and in academic debate as “secondary” objectives or considerations. In the United States the term “collateral” objectives or considerations is used.

The distinction between what is a primary objective and what is a secondary objective is not always clear.

In practice a contracting authority will make purchases in order to carry out its own functions, which may themselves be social or environmental in nature. For example, an education authority may procure contracts to build a school, purchase equipment and stationery and procure cleaning services, all of which are required to fulfil its own functions that satisfy a social requirement for education for all children of school age. Procurement undertaken to deliver these types of core functions of a contracting authority is not a “secondary objective” for the purpose of this discussion.

However, a decision on a contract to build a school to select only economic operators that recruit a specified percentage of their work force from among the long-term unemployed – in order to satisfy a policy to encourage the long-term unemployed to return to work – may well be a “secondary objective”.

Contracts below the EU financial thresholds

Adapt all of this section for local use – using relevant local legislation, standard format contract notices, processes and terminology. Briefly set out the requirements of the local legislation for sub-threshold contracts.

This module describes the requirements for contracts of a particular type and/or value, which means that they must be advertised using a contract notice published in the *Official Journal of the European Union* (see Module D for more information on the types of contract concerned and the financial thresholds).

The Directive does not set out specific provisions that apply to the award of these types of contract, but the basic principles, including the requirements of transparency and equal treatment, do apply to the procurement process that the contracting authority follows in procuring these contracts.

In the specific context of social and environmental considerations, contracting authorities remain free to define and apply in their procurement procedures selection and award criteria of a social or environmental nature, provided that these criteria comply with national legislation and the general rules and principles of the EC Treaty. This implies, among other things, an appropriate degree of transparency and compliance with the principle of equality of treatment of economic operators.

Particular care must be taken to ensure that practices such as reserving contracts for specified persons, e.g. disabled persons working in sheltered workshops or the unemployed, do not constitute direct or indirect discrimination.

Local preferences, price preferences and offer-back provisions – not permitted under the EU *acquis*

Procurement has traditionally been an important tool for national industrial development policy in many countries. Procurement has been used, for example, in the past to support businesses in depressed regions, encourage business development in a particular sector, favour economic operators who may otherwise struggle to succeed in procurement processes, and implement “buy national” policies.

Some examples of the measures used are outlined below for illustration purposes, but it should be noted that these types of measures are not permitted under the EU *acquis*. They have been held to be in breach of both EC Treaty provisions and procurement law.

Procurement methods supporting national industrial policies vary but most commonly these take the form of:

- **Set aside:** where specific types of contract or a given percentage of contracts are set aside so that only a specified group of economic operators may tender. Those groups may comprise, for example, only small and medium-sized enterprises, economic operators based in a particular region, or economic operators with particular expertise or structures, such as workers’ and artisans’ co-operatives.
- **Regional or national price preference (domestic preference schemes):** where a financial advantage is given to particular types of contractor or to products produced in a specified region or country. A common example is a percentage price preference given to economic operators based in the region where the contracting authority is based. When tenders are evaluated, the price submitted by an economic operator based in the region is discounted by 10%. A similar approach is sometimes used for assessing tenders for products where a price advantage is given to products produced in the country where the contracting authority is located.
- **Offer back:** where a competitive tender process is conducted but when tenders are received, the best performing tenderer from a favoured group is awarded the contract if it can match the best tender overall.

These types of measures create direct discrimination and are in breach of the EC Treaty. EU Member States are not permitted to use these types of measures. The European Court of Justice (ECJ) has upheld this principle on numerous occasions. For example, regional preferences were considered in case C360/89 and found to be in breach of Treaty principles (see below). In the case of Commission v Italy C 263/85 the ECJ held that measures requiring Italian public authorities to purchase motor vehicles manufactured in Italy in order to qualify for subsidies was in breach of article 28 of the Treaty.

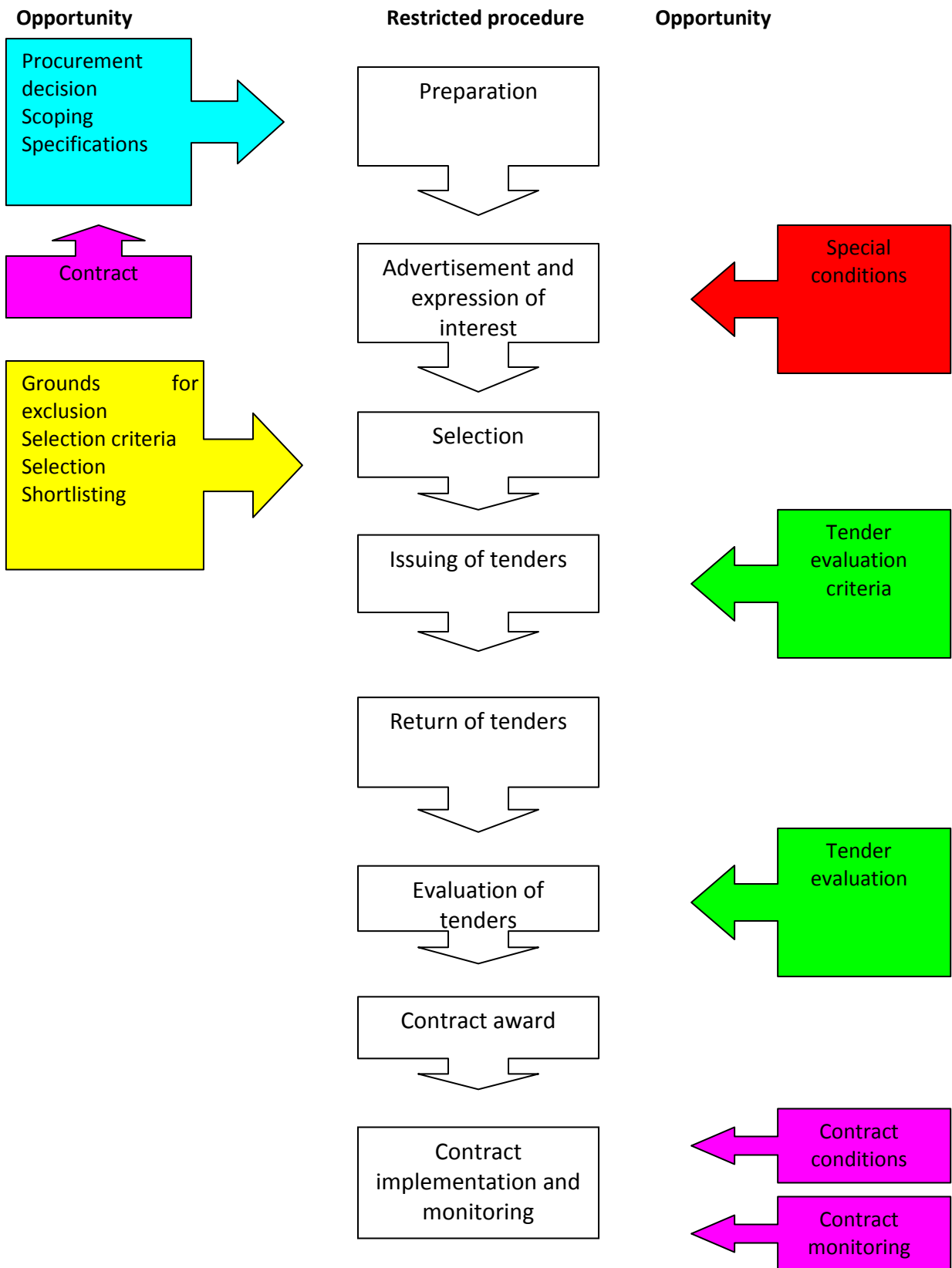
3 Opportunities to incorporate social and environmental considerations into the procurement process

Before going on to look in more detail at what the Directive, the European Court of Justice and the European Commission say about the incorporation of environmental and social considerations into procurement processes, it is sensible to take a quick look at a procurement process, as a reminder of the different stages.

This is because the combined impact of the Directive, case law and guidance makes it clear that the opportunities for incorporating environmental and social considerations, and the ease with which that incorporation can be done, differ according to the stage in the procurement process. As a general rule it is easier, and often more effective, to incorporate social and environmental criteria at the planning stage than at the selection and evaluation stages of a procurement process.

The flow chart below shows a restricted procedure process and illustrates when and how social and environmental considerations may be taken into account. The restricted procedure has been used as it can illustrate both the selection and shortlisting of economic operators.

Opportunities for social and environmental considerations in procurement



Part 2B

Change of approach in the 2014 directives: As has already been explained, public procurement was seen as a market-based instrument for the achievement of Europe 2020, a strategy for smart, sustainable and inclusive growth, while ensuring the most efficient use of public funds. Some of the provisions in the 2014 directives are aimed at enabling procurers to make better use of public procurement in support of common societal goals, including the consideration of environmental aspects.

What does the 2014 Directive say about environmental considerations?

The following section provides an overview of where environmental considerations are addressed in the Directive.

The Directive contains a number of provisions that refer specifically to the incorporation of environmental considerations into the procurement process. In this context it is helpful to look at the recitals to the Directive as well as the articles. The recitals are not operative parts of the Directive, but they do provide some explanation and place the specific provisions in context. The relevant recitals and articles are listed below.

- **Recital 2:** context for the 2014 Directive
- **Recitals 37 to 40:** integration of environmental protection requirements
- **Recital 74 and Article 42:** technical specifications and environmental characteristics
- **Recitals 97, 98 and 104 and Article 70:** conditions for performance of contracts
- **Recital 101 and Article 57:** information to economic operators about provisions relating to taxes and environmental protection, including reference to the potential for non-compliance with environmental legislation amounting to an offence involving the professional misconduct of the economic operator or grave misconduct
- **Article 60(4) and Annex XII, Part II(g):** evidence of the economic operator's technical abilities – environmental management measures
- **Recital 97 and Article 67(2):** contract award criteria, including qualitative environmental characteristics linked to the subject matter of the contract
- **Article 68:** life-cycle costing

These provisions are explained in more detail in the following paragraphs:

Context for the new Directive:

Recital 2 provides some background on the reasons why the new 2014 Directive was prepared. The recital refers specifically to the modernising of public procurement rules "in order to increase the efficiency of public spending, facilitating in particular the participation of SMEs and to enable procurers to make better use of public procurement in support of common societal goals. There is also need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case law of the Court of Justice of the EU." .

Comment

When considering the incorporation of environmental considerations, it is always necessary to consider whether the proposed approach is in compliance with the fundamental Treaty principles. This is the case even where there are specific provisions in the Directive permitting the use of these considerations.

The 2014 Directives make this clear, as does the case law and guidance.

Integrating environmental protection requirements:

Recital 40 confirms that "control of the observance of the environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure, when applying the general principles governing the choice of participants and the award of contracts, when applying the exclusion criteria and when applying the provisions concerning abnormally low tenders".

The specific provisions in the 2014 Directive are as follows:

Technical specifications – environmental characteristics:

Recital 74 provides that technical specifications "need to allow public procurement to open competition as well as to achieve objectives of sustainability. To that end, it should be possible to submit tenders that reflect the diversity of technical solutions, standards and technical specifications in the marketplace, including those drawn up on the basis of performance criteria linked to the life cycle and sustainability of the production process of the works, supplies and services".

Article 42 sets out the relevant provisions. Article 42(3)(a) states that technical specifications may be formulated in terms of performance or functional requirements, which may include environmental characteristics.

These parameters must be sufficiently precise to allow economic operators to determine the subject matter of the contract and to allow contracting authorities to award the contract.

Article 43(1) sets out some further provisions.....

- The label requirements only concern criteria that are linked to the subject matter of the contract and that are appropriate to define the characteristics of the works, supplies or services that are the object subject matter of the contract.
- The requirements for the label are drawn up on the basis of objectively verifiable and non-discriminatory criteria.
- The eco-labels are adopted using an open and transparent procedure in which all relevant stakeholders, such as government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, can participate.
- The label requirements are accessible to all interested parties.
- The label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

Contracting authorities must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body (recognised bodies are defined in article 44(1)).

See section 4 (The Law) and Module E5 for further information on eco-labels, test reports, certification and other means of proof.

Conditions for performance of contracts:

Recitals 97 to 99 and 104 state that “with a view to the better integration of social and environmental considerations in the procurement procedures, contracting authorities should be allowed to use award criteria or contract performance conditions relating to the works, supplies or services to be provided under the public contract in any respect and at any stage of their life cycles from extraction of raw materials for the product to the stage of disposal of the product, including factors involved in the specific process of production, provision or trading and its conditions of those works, supplies or services or a specific process during a later stage of their life cycle, even where such factors do not form part of their material substance” ...and

"Contract performance conditions might also be intended to favour the implementation of measures for the promotion of equality of women and men at work,... the protection of the environment or animal welfare...".

The recitals confirm that contract performance conditions are "compatible with this Directive provided that they are not directly or indirectly discriminatory and are linked to the subject matter of the contract, which comprises all factors involved in the specific process of production, provision or commercialisation...the contract performance conditions should be indicated in the contract notice, the PIN used as a means of calling for competition or the procurement documents".

Article 70 sets out the relevant provision:

“Contracting authorities may lay down special conditions relating to the performance of the contract provided that:

- they are linked to the subject matter of the contract, and
- they are indicated in the contract notice or in the procurement documents”.

These conditions “may include economic, innovation-related, environmental, social or employment-related considerations”.

However, the condition of a link with the subject matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production or provisions of the purchased works, supplies or services.

Evidence of an economic operator’s technical abilities - Environmental management measures:

Article 60(42) and Annex XII Part II(g) provide that contracting authorities may ask for environmental management measures as evidence of an economic operator’s technical abilities in delivering a public works and public services contract.

Article 44 refers to the bodies and schemes that contracting authorities may refer to in these cases, where they require the production of certificates drawn up by independent bodies attesting compliance with certain environmental management standards.

Environmental characteristics as evaluation criteria:

Recital 97 refers to economic and qualitative criteria for the award of the contract and mentions as examples the use of criteria “such as meeting environmental requirements”.

Article 67(2) sets out a non-exhaustive list of criteria on which a contracting authority may base its award for the most economically advantageous tender, as redefined in the 2014 Directive. This list refers specifically to “environmental and/or social characteristics”. The criteria used must be “linked to the subject matter of the contract”.

What does the European Court of Justice (ECJ) say about environmental considerations?

The ECJ has considered a number of different aspects relating to the incorporation of environmental considerations into procurement processes and the extent to which that is permissible under the Treaty of Rome principles and under the procurement directives.

A key case is outlined below. This case was decided before the introduction of Directive 2004/18 and it influenced the drafting of that directive.

ECJ case concerning environmental considerations at the tender evaluation stage

Facts: The “Concordia Buses” case (C-513/99 Concordia Bus Finland v Helsinki) relates to a tender process for the contract for the operation of bus networks in Helsinki. The City of Helsinki published a call for tenders and confirmed that the award of the contract would be on the basis of the most economically advantageous tender.

One category of criteria was the economic operator’s quality and environmental management. Within this category points were awarded for a number of issues, including the levels of nitrogen oxide emissions below a defined level and external noise below a defined level.

One of the unsuccessful tenderers challenged the use of these environmental criteria as tender award criteria. The Finnish review body referred several questions to the ECJ, including whether it was permitted to use the environmental criteria in question.

Decision: The ECJ ruled that the permitted award criteria were not limited to those that were “purely economic in nature” and confirmed that the list of award criteria was illustrative and therefore not exhaustive.

The ECJ went on to state that it was permitted to use criteria relating to the “preservation of the environment” provided that certain conditions were met. The criteria:

- had to be related to the subject matter of the contract; and
- could not give the contracting authority an unrestricted freedom of choice.

Unfortunately, the ECJ did not explain what an “unrestricted freedom of choice” meant. It did indicate that, in this case, the two criteria concerning emissions and noise levels above certain pre-stated levels were sufficiently “specific and objectively quantifiable” to comply with the requirement that the criteria were not to give the contracting authority an unrestricted freedom of choice.

The principles in the Concordia buses case also apply to social considerations.

Impact on Directive 2014/24/EU: Article 67(2) of the Directive lists “environmental characteristics” among the non-exhaustive list of award criteria. It also includes the requirement for linkage between the criterion and the contract referring to the criteria as “linked to the subject-matter of the public contract in question”.

What does the European Commission say about environmental considerations?

History: The European Commission has, historically, been reluctant to encourage the use of procurement as a means for the implementing of environmental policy. This approach is now changing and the Commission has provided a lead in demonstrating how environmental issues can be incorporated into the procurement process. See the Commission’s website on Green Public Procurement at: <http://ec.europa.eu/environment/gpp>.

There has in the past been a particular concern that the unfettered use of environmental considerations in procurement could result in breaches of Treaty principles: by encouraging discriminatory practices, unequal treatment and restrictions on freedom of movement, and development of the internal market. These concerns are still relevant when considering how best to incorporate environmental considerations into public procurement, but there are now many more examples of how this can be achieved in a manner that complies with the EU *acquis*.

There was very little in the original procurement directives (prior to Directive 2004/18) about the extent to which it was permissible to take into account social and environmental considerations in the procurement process. Contracting authorities were reliant on case law and on the European Commission's Interpretative Communications (which were not legally binding) when exploring possibilities for integrating environmental considerations into public procurement and establishing what was and was not permissible.

Interpretative Communication: The Commission’s Interpretative Communication is:

- COM (2001) 274 Final: Commission Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement

The content of this communication is summarised below.

Relevance:

During the negotiations on the draft Directive 2004/18 (2004 Public Sector Directive), there was a considerable amount of debate on this issue. A significant outcome of the negotiations on the 2004 Public Sector Directive was that the position changed, with the incorporation of a number of

provisions addressing environmental issues and the inclusion of a number of principles derived from case law. The 2004 Public Sector Directive was not comprehensive in tackling the issue of when environmental considerations could or could not be used.

The Commission's Interpretative Communication was issued prior to the issuing of the 2004 Public Sector Directive, and further decisions of the ECJ on issues relating to the incorporation of environmental criteria were taken into consideration in the drafting of both the 2004 public procurement directives and the 2014 directives. The Interpretative Communication nevertheless provides a useful background to the Commission's thinking on these issues prior to the issuing of the 2004 directives. It can help to explain some of the changes introduced in the 2014 directives.

Summary of content of the Commission's Interpretative Communication ("IC") on the incorporation of environmental considerations into public procurement

The IC starts by providing some background and context to the issues relating to the incorporation of environmental considerations into public procurement. It then goes on to consider the different stages in the procurement process, providing comments on the relevant provisions of the directives in force at the time and on case law, as well as practical examples.

The stages in the procurement process that are discussed are:

Pre-procurement: referred to as "definition of the subject matter of the contract". This is identified as the first occasion when contracting authorities can take into account environmental considerations. It is pointed out that at this stage contracting authorities have wide opportunities and scope to take into account these types of considerations. Contracting authorities are free to define the subject of the contract subject to requirements to comply with the requirements of the Treaty and European law.

Technical specifications: this emphasises the need to ensure that technical specifications are clearly linked to the subject matter of the contract and are not discriminatory. Environmental considerations may be incorporated into technical specifications where they are relevant to the contract and contract delivery. The possibility of prescribing materials and specific production processes as well as the use of eco-labels are discussed, as is the use of variants to assess the impact of environmental considerations on a tender and the inclusion of requirements to comply with legislation that may be environmental in nature.

Selection: The IC distinguishes between the grounds for exclusion and selection based on technical capacity/ability.

Exclusion: The commentary confirms the possibility of exclusion on the grounds of non-compliance with relevant legislation and discusses the possibility of excluding candidates on the grounds of grave professional misconduct related to environmental issues.

Selection on the basis of technical capacity/ability: The IC refers to the possibility of selection linked to environmental considerations and highlights the requirement for a clear link with the subject matter of the contract.

Award of the contract: The IC discusses how environmental considerations may be incorporated as evaluation criteria when a contract is to be awarded on the basis of the most economically advantageous tender. There is a clear warning about the requirement to ensure that such criteria be related to the subject matter of the contract and concern the nature of the work to be carried out under the contract or the manner in which the work is done. These criteria must also be

measurable.

The IC also discusses **life-cycle costing** and **externalities**.

Additional criteria: The IC also mentions the possibility of using environmental evaluation criteria and refers to this possibility being available only after tenders have been assessed from an economic perspective.

Abnormally low tenders: The IC on social considerations refers to the possible exclusion of abnormally low tenders where they are linked to non-compliance with legal rules on issues such as employment, labour law, and health and safety.

Execution of the contract: The IC comments on the use of contract clauses and emphasises the need to ensure that these are not, in effect, disguised technical specifications or criteria. Contract clauses relating to environmental issues are permissible provided that they are related to the delivery of the contract and are compliant with Treaty principles. The IC on social considerations highlights the wide possibilities for the use of social clauses and provides a number of examples.

Contracts not covered by the public procurement directives:

The IC includes sections on contracts not covered by the Directives, which address the need for compliance with Treaty and European law requirements.

Social provisions applicable to public procurement:

The IC contains some detailed discussion and comments on the implications of Treaty and European law requirements in the specific context of freedom of movement and the protection of workers' rights under the Posted Workers Directive and Transfer of Undertakings Directive.

Other Commission publications:

As mentioned above, there have been several recent developments at EU level in relation to "Green Public Procurement" (GPP).

- "Buying Green! A handbook on environmental public procurement" was published in 2004.

Comment:

The "Buying Green!" handbook was published before the implementation of the Directive. It provides a practically focused commentary on the way in which environmental considerations may be taken into account in the procurement process. Like the ICs, it goes through each of the stages of a procurement process, highlighting relevant legislation and case law. The handbook also provides many real life examples of how contracting authorities have legitimately incorporated environmental issues into procurement processes and provides useful information on issues such as eco-labels, sustainable timber, renewable energy, and environmental management schemes.

This practical approach has been continued in more recent publications, such as the Toolkit referred to above.

This handbook has been followed by a significant range of additional information and documents, all available online at <http://ec.europa.eu/environment/gpp>.

The information includes:

- **Green Public Procurement Training Toolkit:** This toolkit covers how to create an action plan for GPP and includes a legal module on how and where to integrate environmental criteria into the public procurement process. A third module specifically designed for purchasing officers includes concrete examples on environmental criteria that may be used for 10 product and service groups. Work is underway to expand the product and service groups covered.

Incorporating environmental considerations into the procurement process

The next few pages look at the stages in a procurement process and provide comments and some guidance on incorporating environmental considerations into the procurement process.

The restricted procedure and contract award based on the most economically advantageous tender have been used, as they make it possible to illustrate both the selection and shortlisting of economic operators and the greater opportunities available for the consideration of environmental issues when evaluating the tender. The principles apply to all four main competitive procedures.

Preparation

Note on Environmental Impact Assessments:

For certain types of public and private projects it is obligatory to undertake an Environmental Impact Assessment (EIA). This obligation does not derive from the procurement directives but from Directive 85/337/EC (as amended), “the EIA Directive”. Where a project is of a type that is subject to the EIA Directive, then the contracting authority must carry out an EIA in advance so that the authority has all relevant information enabling it to take a decision in the full knowledge of the environmental impact of that decision. The types of project covered are set out in the EIA Directive and can include, for example, oil refineries, power stations, major infrastructure projects and waste disposal installations.

Where an EIA is produced, this may have an effect on the subject matter of the contract and/or on the performance clauses.

For further information on the EIA Directive, see: <http://ec.europa.eu/environment/eia/>.

For additional comments on the practical impact of EIAs on the procurement process, see Module C1.

General comment: Two articles in the 2014 Directive concern specifically the conduct of the pre-advertisement stage. These provisions relate to preliminary market consultation (article 40) and prior involvement of candidates or tenderers (article 41). See Module E6 for further information on these provisions. The 2014 Directive's general focus is on the conduct of the competitive procurement process.

In practice, the preparation stage provides significant opportunities for the inclusion of environmental considerations that will impact on the entirety of the procurement process. This is because it is at the preparation stage that:

- key strategic purchasing decisions are made
- the subject matter of the contract is defined
- the contract notice is drafted
- general and technical specifications are prepared
- the contract terms and conditions are drafted*

Each of these elements can include consideration of environmental issues; these issues are examined further below.

These elements have direct links with later stages in the process and so the decisions made before the start of the procurement can have a major impact. For example, if technical specifications are prepared taking into account relevant environmental criteria, these criteria can then form part of the tender evaluation criteria and therefore impact on the final award decision.

Contract conditions are discussed below under “Contract Conditions”.

Preparation - Purchasing decision: what and how

What to purchase, how to purchase and what type of purchasing method is used: In principle the Directive does not prevent a contracting authority from implementing environmental considerations when deciding what to purchase. Strategic purchasing decisions can therefore be taken with environmental considerations in mind provided that they are not in breach of the Treaty provisions.

See Module A4, “Economic Considerations”, for further discussion of purchasing and packaging decisions.

For example, environmental considerations may legitimately impact on a decision as to what is to be purchased, how the procurement is packaged, and what type of purchasing method is used.

Examples of the impact of environmental issues on the decision as to what to purchase:

(1) A roads authority intends to award a construction contract for the building of a new road through an area of outstanding natural beauty and significant ecological importance. The contracting authority therefore decides that the road will use tunnels wherever possible so as to lessen the long-term environmental impact. The contracting authority is free to take this decision and to require the use of tunnels.

(2) An education authority is buying a new fleet of delivery vehicles. It decides to purchase electric vehicles rather than petrol vehicles so as to reduce the environmental impact. The education authority is free to make this decision.

Example of the impact of environmental considerations on the packaging of a procurement process:

Many innovative, environment-friendly products and solutions are developed by small and medium-sized enterprises (SMEs). SMEs can be disadvantaged if contracting authorities decide to only offer

large-value or large-scale contracts, and as a consequence contracting authorities may reduce opportunities for the most environment-friendly solutions.

Subdivision into smaller lots can facilitate SME participation, as they may correspond better to the production capacities of SMEs. Subdivision into specialist lots may correspond better to the particular expertise of SMEs. A construction contract could be divided into smaller general lots or a contracting authority could choose to award contracts – separately - concerning some specialist aspects, such as solar panels, heating systems, and energy management systems.

Article 46 of the 2014 Directive places a significant emphasis on the importance of considering whether or not a contract should be divided into lots. Contracting authorities are still free to decide how to package a contract, but where they decide not to divide a contract into lots they must provide the reasons for that decision in the procurement documents or in the report required under article 84. This requirement is aimed at encouraging SME participation in procurement processes. See Modules E3 and E4 for further information.

Contracting authorities must keep in mind that they must not use this type of approach in such a way as to impair competition or favour particular economic operators.

Example of the impact of environmental issues on the purchasing method used:

As explained above, SMEs can be disadvantaged by larger, generalised contracts, and a contracting authority may suffer as a result if it does not receive the most environment-friendly tenders. A contracting authority may therefore decide to set up a “multi-supplier” framework agreement with a range of different types of economic operators selected to participate. Framework agreements generally provide wider and more varied opportunities for different types of economic operators.

Variants:

The Commission’s IC on environmental considerations points out that products and services that are less damaging to the environment can be more expensive than other products and services. The “Buying Green!” handbook indicates that it is possible, even after conducting a market analysis (see below), that a contracting authority may still not be sure whether a suitable alternative exists or that there may still be uncertainty about the quality or price of alternative “green” products.

The “Buying Green!” handbook makes the following suggestion:

“If this is the case, it may be interesting to ask potential bidders to submit green variants. This means that you establish a minimal set of technical specifications for the product you want to purchase that will apply to both the neutral offer and its green variant. For the latter you will add an environmental dimension. When the bids are sent in, you can then compare them all (the neutral ones and the green ones) on the basis of the same set of award criteria. Hence you can use variants to support the environment by allowing a comparison between standard options and environment friendly options (based on the same standard technical requirements). Companies are free to provide offers based on the variant or the initial tender, unless indicated otherwise by the contracting authority.”

Comment: In the context of social considerations, a contracting authority may adopt a similar approach when purchasing products. For example, a contract for the supply of office furniture could involve a variant requesting economic operators to submit proposals for furniture that has better ergonomic design features, making it better suited to the needs of people with physical disabilities, such as wheelchair-users.

Decisions may also be taken on issues such as requirements for raw materials and means of production – see below the section, “Preparation - Technical specifications”, for further discussion on these issues.

Comment: Market Analysis

The European Commission’s “Buying Green!” handbook provides some helpful commentary on the use of market analysis (pp. 15-16), to be undertaken before the start of the procurement process:

“In the process of determining what to buy, it is essential to have some understanding of the market. It is very difficult to develop a concept for a product, service or work, without knowing what is available. Green alternatives are not always obvious or well advertised.

So you need to do some research. This research could take the form of a market analysis. A market analysis is a general survey of the potential in the market that could satisfy your defined need. In order to be successful, this analysis has to be conducted in an open and objective manner, focusing on what general solutions are available on the market and not on preferred or favoured contractors. It will then show environment-friendly alternatives, if there are any, and the general price level of options available.”

Preparation - General description

The Directive distinguishes between more general descriptive documents (including broad specifications) and "technical specifications".

The general descriptive documents will reflect the key purchasing decisions, including how the contract is to be delivered and packaged. This may, as we have seen above, include environmental considerations.

Preparation - Technical specifications

Technical specifications are defined in Annex VII to the 2014 Directive and, put simply, they are requirements that relate directly to the characteristics of the subject matter of the contract. Technical specifications cover matters such as design requirements, costings and materials required in a works contract and quality levels, environmental performance levels and safety standards in relation to services and supplies.

Technical specifications have two functions:

- They describe the contract to the market so that economic operators can decide whether the contract is of interest to them. This means that they help determine the level of competition.
- They provide measurable requirements against which tenders can be evaluated and constitute minimum compliance criteria.

As a general rule, contracting authorities can incorporate environmental considerations into technical specifications provided that those requirements relate to the subject matter of the contract and comply with the Directive and Treaty principles.

Incorporating national technical rules: Article 42 provides that technical specifications may be formulated in specified ways “without prejudice to mandatory national technical rules to the extent that they are compatible with Union law.” This means that, provided that national legislation/rules are compatible with EU law, they can include requirements linked to environmental considerations.

For example, national laws or national technical rules may prohibit the use of specific substances that are harmful to the environment and may include provisions relating to product safety. Where national laws or national technical rules are relevant to the particular contract, then those requirements can be incorporated into the technical specifications.

Other methods for incorporation of environmental considerations into the technical specifications:

Characteristics of the contract: Article 42 permits a contracting authority to include environmental and climatic characteristics in the technical specifications. This is provided that

- those characteristics relate to the performance or functional requirements; and
- the parameters are sufficiently precise to allow economic operators to determine the subject matter of the contract and to allow the contracting authority to award the contract.

Specifying basic or primary materials: A contracting authority can specify materials to be used in the delivery of a contract, including product components, provided that the Treaty principles are respected. The definition of technical specifications in Annex VII of the 2014 Directive refers specifically to materials as part of the technical specifications.

Examples of where this specification of materials is permitted are:

- where a contracting authority gives a list of hazardous substances harmful to the environment or to public health and specifies that it does not want these substances present in materials that it is purchasing;
- where a specified percentage of recycled or re-used content in products is required;
- where window frames are required to be made of wood.

Specifying the use of specific production processes: A contracting authority can specify production processes to be used in the delivery of a contract, provided that there is a direct link to the subject matter of the contract and that the Treaty principles are respected. Annex VII of the 2014 Directive refers to means of production as part of the technical specifications.

Examples of where this use of specific production processes is permitted are:

- **Electricity from renewable sources:** requirement for a specified percentage of electricity to come from renewable sources (the economic operator will need to provide clear evidence of the source in its tender, as it is not possible to tell from the product by what means it was generated)
- **Food from organic agriculture:** requirement for a specified percentage of foodstuffs to be organically produced
- **Sustainably logged timber:** requirement for timber for a new building to be obtained from sustainable resources

The following examples are not permitted. A requirement for:

- a supplier of office furniture to use recycled paper in its own offices – as there is no link to the subject matter of the contract;
- timber to be sourced from forests where there are schemes for the protection of indigenous people, as this is not linked to a characteristic of the product itself or to a method of production.

Eco-labels: A number of eco-labels have been developed to communicate information on the environmental credentials of a particular product or service in a standardised way. These eco-labels have been developed with a view to helping consumers and other businesses to select greener products or services. The eco-label criteria cover a range of parameters that assess the environmental impact of the product or the service for its entire lifecycle.

Article 43 permits contracting authorities to use eco-labels when laying down environmental characteristics in terms of performance or functional requirements. This use is subject to a number of conditions (see section 4, “The Law”, for further detail).

Contracting authorities can never oblige economic operators to be registered under a particular eco-label scheme, and the authorities must accept suitable alternative evidence as well, such as a test report from a recognised body or a technical dossier from the manufacturer that demonstrates standards equivalent to those set by the eco-label.

Example – from the “Buying Green!” handbook

The EU eco-label criteria for light bulbs require them to have an average lifespan of 10,000 hours. When reflecting this requirement in a call for tender for light bulbs, 10,000 hours could be set as the technical specification for the minimum lifespan, and a bonus point could be included in the award criteria for every 1,000 hours above 10,000.

Advertising

It is important to identify in advance whether and how environmental considerations are to be incorporated into the process. In some cases, if you wish to use such considerations you must refer to them in advance in the contract notice. If you fail to do so, then you may not be able to incorporate those considerations at a later stage. For example:

- The contract opportunity must be clearly and accurately described and so if, for example, a contracting authority requires a road with tunnels rather than a road that is cut out of the hillside, this should be in the description of the contract so that economic operators are clear about the requirement.
- If you require variants – which could relate to environment-friendly alternatives – then this needs to be provided for in the contract notice.
- Minimum specifications that tenders have to meet must be clearly indicated in the contract notice or in the specification.

- Special contract conditions must be specified in the contract notice or in the specification.
- If the contracting authority is using permitted environmental issues as award criteria, then the award criteria must be specified in the contract notice or in contract documents.

Selection

Following publication of the contract notice, the contracting authority will receive requests from economic operators that wish to participate in the process and tender. The contracting authority will undertake a process in which it selects economic operators that it will then invite to tender.

For the purpose of this illustration, the selection stage is broken down into two distinct phases:

- Phase 1 relates to excluding candidates from the process altogether;
- Phase 2 relates to the selection of candidates that will then move forward in the process.

Selection Phase 1: Exclusion

The Directive sets out in article 57 the grounds on which candidates expressing an interest must be excluded and also grounds on which they may be excluded.

The grounds on which candidates must be excluded are listed in article 57(1) of the Directive. They cover convictions for participation in a criminal organisation, corruption, fraud, money laundering, terrorist offences, child labour and other forms of human trafficking.

The grounds on which a candidate may be excluded from participation are listed in article 57(2). They include bankruptcy/winding-up (and equivalent situations), conviction for an offence related to professional conduct, grave professional misconduct, failure to pay social security contributions, and failure to pay taxes. Article 57(2)(a) provides that candidates may be excluded “where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations.... in Article 18(2)”. Obligations in article 18(2) are those “in the fields of environmental, social and labour law....” (see Module E3 for further information).

It is these non-mandatory grounds for exclusion that are most likely to form the basis for exclusion on issues linked to environmental considerations. The opportunities are limited.

Note: The appropriateness of such an approach will need to be considered carefully to ensure that it is proportionate and relevant to the contract, and economic operators should be made aware of the potential for exclusion on these grounds and of the way in which such a decision will be made. See section 4, “The Law”, for details of the La Cascina case, which looked at this issue.

Exclusion on the grounds of grave professional misconduct: It may be possible to argue that a candidate can be excluded for a past failure to comply with environmental policy, particularly where there was a deliberate and documented breach of contract terms requiring compliance with that policy.

Recital 101 refers to the potential for non-compliance with environmental legislation to amount to an offence involving the grave professional misconduct of the economic operator.

Under article 57(4)(d) an economic operator can be excluded when “the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable”.

This route may also be available where there is an established breach of a code of professional ethics if this code includes environmental requirements. This approach will also be dependent upon effective and accurate contract monitoring, and care has to be taken to ensure that this approach is not conducted or operated in a manner that is discriminatory or creates a "blacklist" type of situation.

Exclusion relating to prior poor performance of a public contract

Under article 57(4)(g) an economic operator can be excluded where it has shown “significant or persistent deficiencies in the performance of a substantive requirement under a public contract... which led to early termination of that prior contract, damages or other comparable sanction”.

It is possible that non-compliance with environmental requirements in a public contract could constitute grounds for exclusion on this basis.

See Module E3 for further information on these and other grounds for exclusion.

Selection Phase 2: Selection of Tenderers

The Directive sets out an exhaustive list of selection criteria that can be used by the contracting authority to select candidates to which an invitation to tender (or invitation to negotiate) will be issued.

The contracting authority applies selection criteria that assess the candidates in terms of:

- "economic and financial standing" [article 58(1)(b)]; and
- "technical knowledge and/or professional ability" [article 58(1)(c)].

There are limits on the extent to which social and environmental selection criteria can be used at this stage. The Directive and case law confirm that:

- the list of selection criteria is exhaustive - it cannot be expanded;
- this limited list of criteria is narrowly constrained, with little room for interpretation or manoeuvre;
- the assessment can only relate to the candidate's ability to deliver the particular contract that is the subject matter of the procurement.

It is very unlikely that environmental considerations can be incorporated into consideration of a candidate's "economic and financial standing". This means that in most cases the only way in which

environmental considerations can be used as grounds for not selecting a candidate if they can be regarded as affecting the candidate's "technical knowledge and/or professional ability".

Technical knowledge and professional ability: social considerations may form part of the evaluation of technical knowledge and professional ability in a number of ways.

As mentioned above, the selection criteria are set out in an exhaustive list. The following examples show how some of the listed criteria could relate to environmental aspects, where the conditions referred to above are satisfied:

- **A statement of the tools, plant and technical equipment** available to the candidate for executing the contract – *information about the economic operator's waste processing plant, for a waste disposal contract*
- **A description of the supplier's technical facilities**, its measures for ensuring quality, and its study and research facilities – *details of the health protection measures an economic operator has in place for a contract for asbestos removal*
- **Specific expertise:** For a particular contract, specific environmental experience may be required and so information about the works carried out or contracts delivered can focus on demonstrating relevant experience.

For example, it is permitted to ask for the following information in the specified circumstances:

Experience of:

- managing hazardous waste, in relation to a waste disposal contract;
- designing buildings to a high environmental quality, in relation to a contract for architectural and design services;
- dealing with the removal and disposal of asbestos, in relation to a contract for the demolition of a building.

Environmental management schemes: In the environmental field, in specified circumstances it may also be possible to ask economic operators to demonstrate their technical capacity to meet requirements set by the contract so as to put into place certain environmental management measures. See section 4, "The Law" for further information about environmental management schemes.

See Module E3 for further discussion of this stage.

Tender evaluation

Overview

Once the economic operators have been selected, the contracting authority moves on to invite tenders from the shortlisted economic operators. The contracting authority evaluates tenders received and awards the contract.

Contracting authorities have to base the award of public contracts on the most economically advantageous tender, as redefined in the 2014 Directive [article 67(1)]. The contracting authority will have decided, at the procurement planning stage, how to identify the most economically advantageous tender.

It is possible to include environmental considerations in tenders to be awarded on the basis of price or cost only (using a cost-effectiveness approach, such as life-cycle costing) by incorporating the relevant requirements into the technical specifications and contract conditions. As the price or cost is the sole award criterion, there is no opportunity to include criteria relating to environmental considerations.

See also Modules E4 and E5 for further information on setting the award criteria.

Where a contracting authority proposes to award a contract on the basis of the most economically advantageous tender, there are more opportunities to incorporate environmental considerations.

See Module E4 for further information on determining which award criteria to apply.

This illustration assumes that the basis of the award will be the most economically advantageous tender. This section looks at the way in which environmental considerations can be used as tender evaluation criteria.

The 2014 Directive

Article 67(2) sets out an illustrative list of tender evaluation criteria:

- "quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics, and trading and its conditions;
- organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
- after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion".

A specific reference is made to environmental criteria.

Setting award criteria

As explained in Module E4, article 67(1) of the 2014 Directive refers to the tender most economically advantageous "from the point of view of the contracting authority", thus putting stress on the contracting authority's discretion in choosing the criteria to be applied. However, this discretion is not unrestricted and has some limitations. All award criteria relating to environmental considerations and used for assessing the most economically advantageous tender must meet four conditions:

- Award criteria must have a link to the subject matter of the contract
- Award criteria must be specifically and objectively quantifiable
- Award criteria must have been advertised/notified previously
- Award criteria must respect Community law – and thus must comply with the fundamental principles of equal treatment, non-discrimination and transparency

The award criteria must also be distinct from the selection criteria. See Modules E3 and E4 for discussion on this point.

What does this mean for contracting authorities that wish to use award criteria relating to environmental and social considerations?

The following paragraphs provide short comments on these four conditions in the specific context of environmental criteria as well as examples of the sort of criteria that may be permitted.

When are criteria linked to the subject matter of the contract?

Article 67(3) states that the criteria chosen must be "linked to the subject matter of the public contract in question".

Comment:

As pointed out in Module E4, the requirement for the criteria to be linked to the subject matter of the contract means that a contracting authority cannot determine the criteria to be applied in an abstract way. The criteria chosen must be directly linked to the specific contract that is the subject matter of the tender and must therefore apply to the supplies, works and services to be provided.

This requirement prevents a contracting authority from choosing criteria relating to secondary policies, such as social and environmental policies, if these criteria are chosen simply to promote and foster such policies in general and are not linked to the subject matter of the contract.

Examples from case law:

In the Concordia Buses case relating to the purchase of a bus fleet, one category of criteria was the economic operators' quality and environmental management measures. Within this category, points were awarded for a number of issues, including the levels of nitrogen oxide emissions below a defined level and external noise below a defined level. The European Court of Justice (ECJ) considered that there was sufficient linkage between the criteria and the subject matter of the contract.

The Wienstrom case (EVN AG and Wienstrom GmbH v Republic of Austria C-448/01) concerned the award of a contract for the supply of electricity. The contracting authority included as an award criterion with 45% weighting the requirement for the electricity supplied to be from renewable energy resources. The ECJ held that the public procurement legislation did not preclude the contracting authority from setting this criterion*.

*The ECJ did state that all such requirements had to be effectively verified – see section 4, "The Law", for further information about this case.

Compliance with technical specifications: Where environmental requirements are legitimately incorporated into the technical specification, then there is a clear link with the subject matter of the contract. It should be possible to translate all technical specifications into award criteria.

How can award criteria be specifically and objectively quantifiable?

In the *Concordia Buses* case the ECJ ruled that award criteria must never confer unrestricted freedom of choice on contracting authorities. In practice this has been interpreted as a requirement to set specific, product-related and measurable criteria – which will limit a contracting authority's discretion when undertaking the evaluation.

In the *Concordia Buses* case, the contracting authority had specified and published the system for awarding extra points for certain levels of noise and emissions. The ECJ considered that this system was specific and objectively quantifiable.

In the *Wienstrom* case, the ECJ held that in order to give tenderers equal opportunities in formulating the terms of their tenders, the contracting authority would have to formulate its criteria in such a way that “all reasonably well-informed tenderers of normal diligence [would] interpret them in the same way”. The ECJ also required that the contracting authority only set criteria against which the information provided by tenderers could actually be verified.

How does the contracting authority comply with the requirement to have previously advertised the award criteria?

The contracting authority complies with its basic obligations by completing the standard form contract notice and publishing it in accordance with the requirements of the Directive. Detailed criteria and weightings must be included in either the contract notice or the contract documents.

How does the contracting authority ensure that the award criteria respect Community law?

Before a contracting authority sets an award criterion it must consider, in particular, whether the criterion ensures equal treatment and is transparent or, on the other hands, whether it is directly or indirectly discriminatory and has the potential of distorting trade. This is the case for all criteria, including criteria incorporating environmental considerations.

Additional criteria

It may be possible to use environmental conditions as “additional criteria”, which can be used to decide a “tie-break” situation. This is provided that:

- the contracting authority has fully evaluated the tenders and has a tie-break situation between two or more tenders;
- the condition (or conditions) is in line with Community law;
- the condition(s) is explicitly mentioned in the contract notice.

See the information below on the “Nord Pas-de-Calais” case, where this issue was considered in the context of social conditions.

Other possibilities for the incorporation of environmental considerations at the evaluation stage:

In the specific context of environmental considerations, the Commission's IC on environmental issues refers to possibilities of:

Taking into consideration all costs incurred during the whole life cycle of the product (See Module E4 for further comments on life-cycle costing. See also the European Commission's Fact Sheet on Lifecycle Costings in Green Public Procurement at the website referred to above.)

Examples of where life-cycle costing can be used to promote environmental considerations include:

- **Savings on use of water and energy:** for example, in the design of energy-efficient buildings where the initial building costs may be higher but the life-cycle costs are lower than for a traditionally designed building due to better insulation, air circulation systems rather than air conditioning, and the re-use of rain water.
- **Savings on disposal costs:** these may relate to the physical costs of removal to pay for secure disposal, for example by re-using materials in road construction or by requiring the handling and disposal of hazardous waste as part of the building demolition process.

Taking into account externalities: externalities are damages or benefits that are not paid for by the polluter or beneficiary under normal market conditions but are borne by society as a whole. The IC contains some warnings about this approach, which should only be taken into account where the external costs are due to the execution of the contract and where at the same time the costs are borne directly by the purchaser of the product or the service. The IC also refers to the possibility of such a measure having the potential of favouring a preferred tender or of disguising discrimination, neither of which is permitted.

Abnormally low tenders: Article 69 of the Directive permits a contracting authority to reject abnormally low tenders. A contracting authority that is concerned about what it regards as an abnormally low tender must first of all request in writing the details of constituent elements of the tender that it considers relevant. Only after proper consideration of that information may it reject a tender as being abnormally low.

Article 69(2) sets out an illustrative list of the details that a contracting authority may request. These details include information on the technical solutions and also, according to article 69(2)(d), "compliance with the provisions relating to environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X".

Where the requirements set by the contracting authority comply with the provisions of EU law and the Directive, non-compliance with these requirements may then provide grounds for rejection on the basis of an abnormally low tender.

This approach is raised as a possibility in the context of the IC on social issues, but it will be equally applicable to environmental issues incorporated into technical specifications.

Contract conditions

Incorporating environmental contract conditions

Contract conditions can include contract performance clauses, which are used to specify how a contract is to be carried out.

Article 70 of the Directive specifically states that "contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject matter of the contract within the meaning of article 67(3) and indicated in the call for competition or the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations".

Recital 97 provides further guidance and states that contract performance conditions are compatible with the Directive "provided that they are not directly or indirectly discriminatory and are indicated in the call for competition or in the procurement documents".

Summary: Environmental considerations can therefore be included as contract conditions provided that they:

- relate to the performance of the contract;
- are published in the contract notice or contract documents; and
- comply with Community law.

Restrictions on the use of these conditions during the procurement process

Contract conditions should not be disguised technical specifications, selection criteria or evaluation criteria; they should be able to be met by whoever is awarded the tender as from the time that the contract starts. Proof of compliance with contract conditions should not be requested during the procurement procedure. Economic operators must accept the conditions in order to be awarded the contract.

Contract conditions should be used carefully and they should be supported by the costs and benefits that they accrue.

Contract conditions do still need to be set out clearly so that economic operators that are tendering are aware of all of the obligations in the contract and are able to price accordingly.

Examples of possible contracts with conditions incorporating environmental considerations are:

- A works contract for construction of a new office building, which includes a contract condition requiring the use of re-usable containers to transport materials to a construction site and efforts to reduce waste generation on site and to increase recycling rates
- A cleaning contract requiring the use of dosage indicators to ensure that an appropriate quantity of cleaning product is used and obliging the contractor to recycle packaging wherever possible
- A contract for the supply of photocopier paper requiring delivery in appropriate quantities so as to keep the number of deliveries to a minimum and delivery outside peak times to reduce petrol consumption by the delivery vehicles.

Contract Management

An important part of contract management is monitoring to ensure that the contract is being carried out as agreed. Careful drafting of specifications and of contract conditions to incorporate environmental conditions is a waste of time if the contracting authority fails to check whether those requirements are complied with and fails to take action if it establishes that the requirements are not being met.

See Module G on contract management.

Utilities

Utilities

To a large extent the same legal rules apply under the 2014 Directive (2014/24/EU) and the 2014 Utilities Directive (2014/25/EU). These directives have many similar or parallel provisions. The European Court of Justice (ECJ) has tended to apply the same interpretation to both public sector contracting authorities and utilities.

The key difference relates to the rules on the exclusion and selection of economic operators, where the provisions in the Utilities Directive are much less detailed and less prescriptive than those in the Public Sector Directive. These provisions are discussed further below under the heading “incorporating environmental considerations into the procurement process”.

What does the Directive* say about environmental considerations?

*References to the Directive are to the 2014 Utilities Directive, unless indicated otherwise.

The Directive contains a number of provisions that refer specifically to the incorporation of environmental considerations into the procurement process. In this context it is helpful to look at the recitals to the Directive as well as its articles. The recitals are not operative parts of the Directive, but they do provide some explanation and place the specific provisions in context. The relevant recitals and articles are listed below.

- **Recitals 52 and 96:** integrating environmental protection requirements (recital 37 in the 2014 Directive)
- **Recital 42 and Article 60:** technical specifications and environmental characteristics (recital 74 and article 42 in the 2014 Directive)
- **Article 61:** use of labels, including eco-labels
- **Article 62:** use of test reports, certification and other means of proof
- **Article 76:** general principles for the choice of participants and award of contracts
- **Recital 55 and Article 80:** potential for non-compliance with environmental legislation amounting to an offence involving the professional misconduct or grave misconduct of the economic operator (recital 101 and article 57(4)(c) in the 2014 Directive)
- **Recital 93 and Article 81:** evidence of an economic operator’s technical abilities – environmental management measures (article 60(4) and Annex XII, Part II(g) in the 2014 Directive)
- **Recital 102 and Article 82:** environmental characteristics as award criteria (recital 97 and article 67(2) in the 2014 Directive)
- **Recital 109 and Article 87:** conditions for performance of contracts (recital 97 and

article 70 in the 2014 Directive)

For detailed commentary on these provisions, please see the main narrative on environmental considerations.

What does the European Court of Justice say about environmental considerations? The ECJ has tended to apply the same interpretation to both public sector contracting authorities and utilities, and so the discussion above in the main narrative is also relevant to utilities.

What does the European Commission say about environmental considerations? The EC's views on this issue, which are set out in the Commission's Interpretative Communication and other publications, applies to utilities to the extent to which the same or parallel rules apply to both public sector contracting authorities and utilities.

Incorporating environmental considerations into the procurement process: stages in the procurement process

Preparation – Purchasing decision: what and how

What to purchase, how to purchase and what type of purchasing method is used: In principle the Directive does not prevent a contracting authority from implementing environmental considerations when deciding what to purchase. Strategic purchasing decisions can therefore be taken with environmental considerations in mind provided that they are not in breach of the Treaty provisions. See examples in the main narrative.

Preparation - General description

The Directive distinguishes between more general descriptive documents (including broad specifications) and "technical specifications".

The general descriptive documents are to reflect the key purchasing decisions, including how the contract is to be delivered and packaged. This may include environmental considerations.

Preparation - Technical specifications

The 2014 Utilities Directive contains parallel provisions to those in the 2014 Directive on the incorporation of environmental considerations into the technical specifications. The same legal principles also apply.

Advertising

It is important to identify in advance whether and how environmental considerations are to be incorporated into the process. In some cases, if you wish to use such considerations you must refer to them in advance in the contract notice. If you fail to do so, then you may not be able to incorporate those considerations at a later stage. The same principles apply when advertising a qualification system. For example:

- The contract opportunity must be clearly and accurately described and therefore if, for example, a utility requires an energy-efficient facility designed in a manner that is sympathetic to the local environment, then this should be incorporated in the

description of the contract so that economic operators are clear about the requirement.

- If you require variants – which could relate to environment-friendly alternatives – then this should be set out in the contract notice.
- Minimum specifications must be set out in the contract notice or in the specification.
- Special contract conditions must be specified in the contract notice or in the specification.
- If the utility is using permitted environmental issues as award criteria then the award criteria must be specified in the contract notice or contract documents.

Selection – Phase 1: Exclusion

This is one of the main areas where the legal provisions in the directive applying to utilities are different to the legal provisions in the 2014 Directive applying to public sector contracting authorities. There is also a distinction between utilities that are public sector contracting authorities and those that are not.

Grounds for obligatory exclusion: Article 80 stipulates that a utility that is a contracting authority must comply with the provisions of article 57(1) and (2) of Directive 2014/24/EU. Article 57(1) obliges contracting authorities to exclude candidates from participation in the procurement process where these candidates have been found guilty of specified offences. The offences cover convictions for participation in a criminal organisation, corruption, fraud and money-laundering. The grounds for obligatory exclusion do not specifically cover social or environmental issues.

Utilities that are not contracting authorities are not obliged to exclude candidates from participation in the procurement process under the provisions of article 57(1) of the 2014 Directive. However, they may choose to do so.

Grounds for discretionary exclusion: All utilities may choose to exclude candidates on the discretionary grounds set out in article 57 of the 2014 Directive, but they are not obliged to do so. The discretionary grounds include exclusion on the grounds of grave professional misconduct.

Recital 106 refers to non-compliance with environmental legislation as potentially constituting an offence concerning the professional misconduct or grave misconduct of the economic operator.

See the main narrative section for more information on the grounds for obligatory exclusion and discretionary exclusion.

Selection – Phase 2: Selection of tenderers

The Utilities Directive does not set out an exhaustive list of the criteria to be used for the selection of tenderers. This is very different to the position under the 2014 Directive, where

there is a detailed and exhaustive list of the criteria that can be used and the information that can be requested.

Under article 78 utilities are required, when selecting economic operators, to use “objective rules and criteria”. Those objective rules and criteria must be available to the interested economic operators. Utilities probably, therefore, have more flexibility to incorporate environmental considerations into this stage of the procurement, provided that the criteria relate to the subject matter of the contract, relate to the economic operator’s ability to deliver the particular contract that is the subject matter of the procurement, and do not breach Treaty principles.

The same principles of selection apply to the selection of economic operators to participate in qualification systems (see article 77).

Tender evaluation

Once the economic operators have been selected, the utility moves on to invite tenders from the shortlisted economic operators. The contracting entity evaluates tenders received and awards the contract.

The contracting entity will have decided, at the procurement planning stage, how it would award the contract on the basis of the most economically advantageous tender, as redefined in the 2014 Directive. The most economically advantageous tender shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing, in accordance with article 83, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative environmental and/or social aspects, linked to the subject matter of the contract in question. The basis for the award must be stated in the contract notice.

Where a qualification system is used, the utility is still required to invite tenders by way of a call for competition. The same principles will apply to the use of tender evaluation criteria.

The 2014 Utilities Directive: Article 82(2) sets out an illustrative list of contract award criteria: "quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions..., after-sales services, technical assistance, delivery date and delivery period or period of completion". The 2014 Utilities Directive makes a specific reference to environmental criteria.

The same principles set out in the main narrative apply to the setting of award criteria for utilities tender evaluations. See the main narrative for further discussion on this point.

Contract conditions

Contract conditions can include contract performance clauses that are used to specify how a contract is to be carried out.

Article 87 of the 2014 Utilities Directive specifically states that "contracting entities may lay down special conditions relating to the performance of a contract, provided that these conditions are linked to the subject matter of the contract, within the meaning of article 82(3), and indicated in the call for competition or in the procurement documents. The

conditions governing performance of a contract may include economic, innovation-related, environmental, social or employment-related considerations".

Recital 102 provides further guidance and states that contract performance conditions are compatible with the Directive "provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents".

Importantly, this recital explains that contract conditions "may, in particular, be intended to favour the protection of the environment".

Summary: Environmental considerations can therefore be included as contract conditions provided that they:

- relate to performance of the contract;
- are published in the contract notice or contract documents; and
- comply with Community law.

Contract conditions should be used carefully, and they should be supported by the costs and benefits that they accrue.

Contract Management

An important part of contract management is monitoring to ensure that the contract is being carried out as agreed. Careful drafting of specifications and contract conditions to incorporate social conditions is a waste of time if the utility fails to check whether those requirements are complied with and fails to take action if it establishes that the requirements are not being met.

See Module G on contract management.

2C Social considerations

Change of approach in the 2014 Directives: As has already been explained, public procurement was seen as a market-based instrument for the achievement of Europe 2020, a strategy for smart, sustainable and inclusive growth, while ensuring the most efficient use of public funds. Some of the provisions in the 2014 Directives are aimed at enabling procurers to make better use of public procurement in support of common societal goals, including social considerations.

What does the 2014 Directive say about social considerations?

The following section provides an overview of where social considerations are addressed in the Directive.

The Directive contains a number of provisions that refer specifically to the incorporation of social considerations into the procurement process. In this context it is helpful to look at the recitals to the Directive as well as the articles. The recitals are not operative parts of the Directive, but they do provide some explanation and place the specific provisions in context. The relevant recitals and articles are listed below.

- **Recital 2:** context for the 2014 Directive
- **Recital 36 and Article 20:** reserved contracts
- **Recital 74 and Article 42:** technical specifications and accessibility criteria for people with disabilities
- **Recitals 97, 98 and 104 and Article 70:** conditions for performance of contracts
- **Recital 101 and Article 57:** informing economic operators about provisions relating to taxes, employment protection provisions and working conditions and referring to the potential for non-compliance with the Directive's provisions relating to equal treatment to amount to an offence involving the professional misconduct or grave misconduct of the economic operator
- **Recitals 94 and 97 to 99 and Article 67(2):** contract award criteria, including qualitative social characteristics linked to the subject matter of the contract
- **Recital 36 and Article 20:** reserved contracts
- **Recitals 113 to 117 and Articles 74 to 76:** particular procurement regimes for "services to the person", such as specific social, health and educational services
- **Recital 118 and Article 77:** reserved contracts for specific services

These provisions are explained in more detail in the following paragraphs.

Context for the 2014 Directive:

Recital 2 provides some background on the reasons for the preparation of the 2014 Directive. The recital refers specifically to the modernising of public procurement rules "in order to increase the efficiency of public spending, facilitating in particular the participation of SMEs, and to enable procurers to make better use of public procurement in support of common societal goals".

Repeated references are made in the recitals and in the operative provisions of the 2014 Directive to the aims of meeting environmental and social goals. Integration of social considerations into procurement can be regarded as supporting those societal goals.

Recital 40 confirms that "control of the observance of the environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure, when applying the general principles governing the choice of participants and the award of contracts, when applying the exclusion criteria and when applying the provisions concerning abnormally low tenders".

Technical specifications – accessibility criteria for people with disabilities:

Recital 74 provides that technical specifications "need to allow public procurement to open competition as well as to achieve objectives of sustainability. To that end, it should be possible to submit tenders that reflect the diversity of technical solutions, standards and technical specifications in the marketplace, including those drawn up on the basis of performance criteria linked to the life cycle and sustainability of the production process of the works, supplies and services".

Article 42 sets out the relevant provisions and states that contracting authorities should, whenever possible, lay down technical specifications "so as to take into account accessibility criteria for persons with disabilities or design for all users".

Conditions for the performance of contracts:

Recitals 97 to 99 state that "with a view to the better integration of social and environmental considerations in the procurement procedures, contracting authorities should be allowed to use award criteria or contract performance conditions relating to the works, supplies or services to be provided under the public contract in any respect and at any stage of their life cycles, from extraction of raw materials for the product to the stage of disposal of the product, including factors involved in the specific process of production, provision or trading and its conditions of those works, supplies or services or a specific process during a later stage of their life cycle, even where such factors do not form part of their material substance"...

"Contract performance conditions might also be intended to favour the implementation of measures for the promotion of equality of women and men at work, the increased participation of women in the labour market and the reconciliation of work and private life, the protection of the environment or animal welfare and to comply in substance with fundamental International Labour Organisation (ILO) conventions, and to recruit more disadvantaged persons than are required under national legislation."

Importantly, Recital 99 explains that contract performance conditions may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, and the fight against unemployment.

The recital goes on to refer to examples of measures for the recruitment of long-term job-seekers, provision of training for the unemployed and young persons, compliance with the International Labour Organisation Conventions, and the recruitment of more handicapped persons than is required under national legislation.

Recital 104 states that “contract performance conditions should be compatible with this Directive, provided that they are not directly or indirectly discriminatory and are linked to the subject matter of the contract, which comprises all factors involved in the specific process of production, provision or commercialisation...the contract performance conditions should be indicated in the contract notice, the PIN used as a means of calling for competition or the procurement documents”.

Article 70 sets out the relevant provision:

“Contracting authorities may lay down special conditions relating to the performance of the contract, provided that:

- they are linked to the subject matter of the contract, and
- they are indicated in the contract notice or in the procurement documents.”.

These conditions “may include economic, innovation-related, environmental, social or employment-related considerations”. However, the condition of a link with the subject matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production or provisions of the purchased works, supplies or services.

Social characteristics as evaluation criteria:

Article 67(2) sets out a non-exhaustive list of criteria on which a contracting authority may base its award for the most economically advantageous tender, as redefined in the 2014 Directive.

Directive 2014 mentions, for the first time expressly, social (and innovative) considerations alongside environmental characteristics as possible award criteria.

Recital 97 refers to economic and qualitative criteria for the award of the contract and mentions as examples the use of “criteria aiming to meet social requirements”. Examples of social considerations can be found in recitals 98 and 99: e.g. social aspects of the production process (including the protection of the health of the staff involved), social integration of disadvantaged persons or members of vulnerable groups (including the employment of long-term unemployed and training measures for young people).

Since the 2014 Directive, the organisation, qualification and experience of staff assigned to perform the contract have also expressly been referred to as permissible award criteria. According to recital 94, the quality of staff assigned to perform a contract may affect the overall level of performance of the contract and has consequently an impact on the economic value of the tender. This is especially the case for contracts involving intellectual services, such as consultancy or architectural services (see also Module E4, Lianakis case).

Contracts reserved for sheltered workshops or sheltered employment programmes for people with disabilities:

Recital 36 explains that employment and occupation are key elements in guaranteeing equal opportunities for all and contribute to integration into society. Sheltered workshops and sheltered employment programmes help facilitate this integration, but they may not be able to obtain contracts under normal conditions of competition. EU Member States may therefore limit participation in competition for certain “reserved contracts” to sheltered workshops and other social

businesses whose main aim is to support the social and professional integration or reintegration of disabled and disadvantaged persons, such as the unemployed, members of disadvantaged minorities, or otherwise socially marginalised groups.

Article 20 permits EU Member States to have “reserved contracts”, which are to be performed by sheltered workshops and sheltered employment programmes where at least 30% of the employees concerned are disabled or disadvantaged persons who, by reason of the nature or seriousness of their disabilities, cannot exercise occupations under normal conditions.

The contracting authority is still required to advertise in the *Official Journal of the European Union* by publishing a contract notice and to follow the usual competitive procedures, but it may reserve the right to participate in the competition reserved for sheltered workshops and sheltered employment programmes.

The contract notice must indicate that the contract is a reserved contract, and the standard form contract notice includes a section covering this requirement in III.2.4. [\(amend or delete cross-reference for local advertisements\)](#)

Good practice note

The provisions in the Directive allow for social considerations to be taken into account at different stages in the process. Careful thought needs to be given, before the contract is advertised, to how those considerations will be incorporated into the process because early action may be required.

For example:

Article 20 on Reserved Contracts will be linked to a decision by the contracting authority to limit the contract opportunity to sheltered workshops/programmes. This is a decision that will be made at a very early procurement stage before advertisement and will then be picked up in the contract notice.

Article 42 on technical specifications must also be considered early on in the process, as technical specifications should be prepared prior to advertisement.

Article 70 relating to social conditions in the contract, needs to be considered before the contract conditions are drafted and issued. If they are “special contract conditions” (see 13.1), they will need to be referred to in the contract notice.

What does the European Court of Justice (ECJ) say about social considerations?

The ECJ has considered a number of different aspects relating to the incorporation of social considerations into procurement processes and the extent to which that is permissible under the Treaty of Rome principles and the procurement directives.

Three key cases are outlined below.

The first case was decided before the introduction of Directive 2004/18 and it influenced the drafting of that Directive.

The second and third cases show how the ECJ has responded to national policies or laws that have been linked to social considerations.

Case 1: Social conditions as criteria for exclusion

Facts: The “Beentjes” case (Case 31/87 Gebroeders Beentjes BV v The Kingdom of the Netherlands) arose from a decision of a local committee to exclude Beentjes from the tendering procedure for a public works contract for land consolidation, even though Beentjes’ tender was the lowest tender. The contract was awarded to the next lowest tenderer.

One of the reasons for this exclusion was that Beentjes did not seem to be in a position to employ long-term unemployed persons. This requirement had been expressly set out in the invitation to tender.

Decision: The ECJ looked at the way in which this criterion (and other disputed criteria) could be used. It commented on whether and how the criterion was compatible with the directive and Treaty principles and whether the criterion would have to be specifically mentioned in the contract notice.

The ECJ found that the requirement for tenderers to demonstrate that they were in a position to employ long-term unemployed persons was a condition that had no relation to either checking the economic operators’ suitability on the basis of their economic and financial standing and their technical knowledge (selection) or to the criteria for award of the contract (tender evaluation).

The ECJ commented that this type of condition could be permitted if it were compatible with the relevant provisions of European Community law, including Treaty principles.

The ECJ classified the requirement as an “additional specific condition” relating to suitability. It ruled that if a contracting authority wished to include “additional specific conditions”, then those conditions would have to be referred to in the contract notice.

Impact on Directive 2004/18 and the 2014 Directive: Article 26 incorporated this last point into the 2004 Public Sector Directive. These provisions are now included in article 70 of the 2014 Directive. Contracting authorities can lay down “special conditions” that are compatible with Community law provided that they are referred to in the contract notice or in the procurement documents. Article 70 confirms that these conditions may include “social or employment-related considerations”.

What does this mean in practice?

The ruling itself is somewhat ambiguous and does not specifically state that social conditions cannot be used to exclude economic operators. The Commission, in interpreting this case, aligned itself with the view of the Advocate General in Beentjes as meaning that:

- (1) special conditions can be laid down, including in the contract; but
- (2) economic operators that accept the condition cannot be excluded just because the contracting authority thinks that the economic operator will not meet that condition.

Comment: This interpretation is set out in the Commission’s interpretative communication (see below.) It is based on the view that the list of selection criteria in the Directive is exhaustive and that the ability to meet conditions is not one of the listed selection criteria.

Directive 2004/18 was drafted after the Beentjes decision and article 26 of the Directive does now specifically permit the inclusion of “special conditions” provided that they relate to the performance of the contract. The Directive does not, however, address the issue of whether non-compliance with special conditions can provide grounds for exclusion.

Non-compliance with technical specifications can provide grounds for exclusion, but it is argued that

as special conditions are not the same as technical specifications and do not address the issue of technical capacity, non-compliance with special conditions* do not provide grounds for exclusion.

Case 2: Regional preferences in works contracts

The case of the Commission of the European Communities v Italian Republic (C-360/89) concerned a challenge by the European Commission in relation to Italian legislation that had created regional preferences in works contracts.

Facts: The Commission challenged a number of provisions of the law, including:

- (1) a provision requiring the main contractor for certain types of works contracts to reserve a percentage of the work to an undertaking whose registered office was in the region where the works were to be carried out; and
- (2) a provision requiring contracting authorities, in deciding to invite to tender, to give preference to consortia and joint ventures, which included undertakings that carried out their main activities in the area where the works were to be carried out.

Decision: The ECJ ruled that both of these provisions were in breach of the Treaty requirement to uphold the freedom to deliver services.

The Commission also claimed that the second provision was in breach of the articles set out in the procurement directive in force at the time, relating to the selection of economic operators. (These were very similar to the provisions in the current Directive relating to selection, requiring the selection to be based on the grounds for exclusion and selection listed in the Directive.)

The ECJ ruled that the provisions of the Directive required the contracting authority to make its selection based only on the grounds for exclusion and selection listed in the Directive.

See part 2A for comments on local preferences, prices preferences and offer-back provisions.

Case 3: Local law requiring government contractors to comply with local collective agreement on wages

Facts: The “Ruffert” case (C-346/06 Ruffert v Land Niedersachsen) concerned a public contract for construction work on a prison roof. The procurement law of Lower Saxony required economic operators (1) to adhere to the minimum wage set under local collective agreements in the areas where the work was to be carried out, (2) to impose the same obligation on their sub-contractors, and (3) to monitor for compliance. Under the law non-compliance could result in a 1% compliance penalty. A Polish subcontractor to the successful tenderer was alleged to have violated these provisions in the wages paid to Polish workers on the project.

The German court referred the question of whether this local law was lawful under the EC Treaty. The ECJ also considered the application of this law to the Posted Workers Directive.

Decision: The ECJ ruled that the provision of the law was in breach of the Treaty requirement to uphold the freedom to deliver services (and also in breach of the Posted Workers Directive). EU Member States may not in general require contractors for government contracts to adhere to wage

levels set in collective agreements that are only in force locally and that only apply to government contracts.

Comment: This case potentially casts doubt on the possibility of imposing conditions that relate to workers on public contracts where the conditions do not apply to workers more generally, i.e. to both the public and private sectors.

Award criteria:

Article 67 of the 2014 Directive sets out a non-exhaustive list of award criteria and specifically mentions social considerations as a possible award criterion.

Comment:

In practice, however, social issues are more difficult to take into consideration in a procurement process than environmental issues.

It is relatively easy to find a direct link between the goods, works and services that are being procured and environmental factors – such as less toxic emissions from buses, the purchase of recycled paper or low-energy light bulbs, and compliance with environmental standards for waste disposal services.

For works and supplies, the linkage between social considerations and the subject matter of the contract is often harder to establish. For service contracts, particularly where direct contact with users is required, the social issues are often easier to incorporate into the procurement process.

What does the European Commission say about social considerations?

History: The European Commission has, historically, been reluctant to encourage the use of procurement as a means for the implementation of social policy. This approach is changing.

There is a particular concern that the unfettered use of social considerations in procurement could result in breaches of Treaty principles by encouraging discriminatory practices, unequal treatment and restrictions on the freedom of movement and development of the internal market.

There was very little in the original procurement directives (prior to Directive 2004/18) about the extent to which it is permissible to take social considerations into account in the procurement process. Contracting authorities were reliant on case law and on the European Commission's interpretative communications (which are not legally binding) when exploring possibilities for incorporating social considerations into public procurement and establishing what is and is not permissible.

Interpretative Communications: The interpretative communication on environmental considerations has been referred to above. The Commission has also issued an interpretative communication on social considerations.

The two interpretative communications need to be read together as the interpretative communication on social considerations refers to discussion and commentary contained in the interpretative communication on environmental considerations.

The two Commission Interpretative Communications are:

- COM (2001) 566 Final: Commission Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement
- COM (2001) 274 Final: Commission Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement

The content of the interpretative communication on social considerations is summarised below.

Relevance:

During the negotiations on the draft Directive 2004/18 (2004 Public Sector Directive), a considerable amount of debate focused on this issue. A significant outcome of the negotiations on the 2004 Public Sector Directive was that the position changed, with the incorporation of a number of provisions addressing social issues and the inclusion of a number of principles derived from case law. The 2004 Public Sector Directive was not comprehensive, however, in tackling the issue of when social considerations could or could not be used.

The Commission's Interpretative Communication was issued before the 2004 Public Sector Directive was issued, and further decisions by the ECJ have been made on issues relating to the incorporation of social criteria, which have been taken into consideration in the drafting of both the 2004 public procurement directives and the 2014 directives. The Interpretative Communication nevertheless provides a useful background to the Commission's thinking on these issues prior to issuing the 2004 directives. It can help to explain some of the changes introduced in the 2014 directives.

Summary of the contents of the Commission's Interpretative Communication ("IC") on the incorporation of social considerations into public procurement

The IC starts by providing some background and context to the issues relating to the incorporation of social considerations into public procurement. It then goes on to consider the different stages in the procurement process, providing comments on the relevant provisions of the directives in force at the time and on case law as well as practical examples.

The stages in the procurement process that are discussed are:

Pre-procurement: referred to as "Definition of the subject matter of the contract". This is identified as the first occasion when contracting authorities can take into account social considerations. It is pointed out that at this stage contracting authorities have wide opportunities and scope to take into account these types of considerations. Contracting authorities are free to define the subject of the contract provided that this is in compliance with the requirements of the Treaty and European law.

Technical specifications: The IC emphasises the need to ensure that the technical specifications are clearly linked to the subject matter of the contract and are not discriminatory. Social considerations may be incorporated into the technical specifications where they are relevant to

the contract and to contract delivery.

Selection: The IC distinguishes between the grounds for exclusion and selection based on technical capacity/ability.

Exclusion: The commentary confirms the possibility of exclusion on the grounds of non-compliance with relevant legislation and discusses the possibility of excluding candidates on the grounds of grave professional misconduct in relation to social issues.

Selection on the basis of technical capacity/ability: The IC refers to the possibility of selection linked to social considerations and highlights the requirement for a clear link with the subject matter of the contract.

Award of the contract: The IC discusses how social considerations may be incorporated as evaluation criteria when a contract is to be awarded on the basis of the most economically advantageous tender. There is a clear warning about the requirement to ensure that such criteria are related to the subject matter of the contract and concern the nature of the work to be carried out under the contract or the manner in which the work is done. These criteria must also be measurable.

Additional criteria: The IC also mentions the possibility of using social evaluation criteria and refers to this possibility being available only after tenders have been assessed from an economic perspective.

Abnormally low tenders: The IC refers to the possible exclusion of abnormally low tenders where they are linked to non-compliance with legal rules on issues such as employment, labour law, and health and safety.

Execution of the contract: The IC comments on the use of contract clauses and emphasises the need to ensure that these clauses are not, in effect, disguised technical specifications or criteria. Contract clauses relating to social issues are permissible provided that they are related to the delivery of the contract and are compliant with Treaty principles. The IC highlights the wide possibilities for the use of social clauses and provides a number of examples.

Contracts not covered by the public procurement directives:

The IC includes sections on contracts not covered by the public procurement directives. These sections address the need for compliance with Treaty and European law requirements.

Social provisions applicable to public procurement:

The IC contains some detailed discussion and comments on the implications of Treaty and European law requirements in the specific context of the freedom of movement and the protection of workers' rights under the Posted Workers Directive and the Transfer of Undertakings Directive.

Other Commission publications: The Commission has also published other documents on this issue. Helpful documents include how to facilitate access to public procurement contracts for small and medium-sized enterprises (SMEs):

The “European code of best practices facilitating access by SMEs to public procurement contracts” is a Commission Staff working document published in 2008 (SEC(2008) 2193).

Comment:

The European code of best practices facilitating access by SMEs to public procurement contracts is intended to provide general guidance on how to apply the legal framework in such a way as to enable SMEs to participate in contract award procedures. The code highlights a number of national rules and practices that facilitate access and provides useful practical examples.

This code is covered in more detail in part 2D on SMEs.

Incorporating social considerations into the procurement process

In the next few pages we look at the stages in the procurement process and provide comments and some guidance on incorporating social considerations into the procurement process.

The restricted procedure and contract award based on the most economically advantageous tender have been used as they make it possible to illustrate both the selection and shortlisting of economic operators and the greater opportunities available for the consideration of social and environmental issues when evaluating the tender. The principles apply to all four main competitive procedures.

Preparation

General comment: Two articles in the 2014 Directive specifically concern the conduct of the pre-advertisement stage. These provisions relate to preliminary market consultation (article 40) and prior involvement of candidates or tenderers (article 41). See Module E6 for further information on these provisions. The general focus of the 2014 Directive is on the conduct of the competitive procurement process.

In practice, the preparation stage provides significant opportunities for the inclusion of social considerations that will impact on the entire procurement process. This is because it is at the preparation stage that:

- key strategic purchasing decisions are made;
- the subject matter of the contract is defined;
- the contract notice is drafted;
- general and technical specifications are prepared;
- the contract terms and conditions are drafted*.

Each of the above steps can include consideration of social considerations.

These steps are directly linked with later stages in the process, and therefore the decisions made before the start of the procurement can have a major impact. For example, if technical specifications are prepared taking into account relevant social considerations, these specifications can then form part of the tender evaluation criteria and thus impact on the final award decision.

* Contract conditions are discussed under “Contract Conditions”.

Preparation – Purchasing decision: what and how

What to purchase, how to purchase and what type of purchasing method is used: In principle the Directive does not prevent a contracting authority from implementing social considerations when deciding what to purchase. Strategic purchasing decisions can therefore be taken with social issues in mind provided that they are not in breach of the Treaty provisions.

For example, social issues may legitimately impact on a decision on what is to be purchased, how the procurement is packaged, and what type of purchasing method is used.

Examples of the impact of social issues on the decision on what to purchase:

(1) A housing authority wishes to award a contract for double-glazed windows for social housing. It is aware that there are a number of sheltered workshops across the EU that produce double-glazed window units. It decides to classify this as a “reserved contract” under article 19 and thereby limit the competition for this contract to operators of sheltered workshops/programmes. This limitation of the competition is specifically permitted in the Directive.

(2) A local authority has funds available to build one new community care centre in the current financial year. It intends to go to tender for a construction contract to carry out that work. It has a choice between two different sites in the local authority area. It chooses to build the new community care centre in an area of urban deprivation where there are high levels of social need. The local authority is free to make this decision.

Example of the impact of social considerations on the packaging of a procurement process:

Encouraging small and medium-sized enterprises (SMEs) to participate in procurement processes may be regarded as a social consideration. SMEs can be disadvantaged if contracting authorities decide to only offer large-value or large-scale contracts. SMEs are often not in a position to meet the selection criteria.

Subdivision into smaller lots can facilitate SME participation, as they may correspond better to the production capacities of SMEs. Subdivision into specialist lots may correspond better to the particular expertise of SMEs. A contract for catering services could be divided into smaller lots, or a contracting authority could choose to award contracts separately for some specialist aspects separately so as to encourage participation by SMEs.

Article 46 of the 2014 Directive places significant emphasis on the importance of considering whether or not a contract should be divided into lots. Contracting authorities are still free to decide how to package a contract, but where they decide not to divide a contract into lots they must provide the reasons for that decision in the procurement documents or in the report required under article 84. This requirement is aimed at encouraging SME participation in procurement processes. See Modules E3 and E4 for further information.

Example of the impact of social issues on the purchasing method used:

As explained above, SMEs can be disadvantaged by larger, generalised contracts. A contracting authority may therefore decide to set up a multi-supplier framework agreement with a range of different types of economic operators selected to participate. Framework agreements generally provide wider and more varied opportunities for different types of economic operators.

Variants:

The Commission points out in its publications the potential use of variants as a way of assessing the benefits of tenders that incorporate relevant social considerations.

General description

The Directive distinguishes between more general descriptive documents (including broad specifications) and "technical specifications".

The general descriptive documents are to reflect the key purchasing decisions, including how the contract is to be delivered and packaged. As we have seen above, this may include social considerations.

Technical specifications

Technical specifications are defined in Annex VII to the 2014 Directive and, put simply, are requirements that relate directly to the characteristics of the subject matter of the contract. Technical specifications cover matters such as design requirements, costings and materials required in a works contract and quality levels, performance levels and safety standards in relation to services and supplies.

Technical specifications have two functions:

- They describe the contract to the market so that economic operators can decide whether the contract is of interest to them. This means that they help to determine the level of competition.
- They provide measurable requirements against which tenders can be evaluated and constitute minimum compliance criteria.

As a general rule, contracting authorities can incorporate social considerations into technical specifications provided that those requirements relate to the subject matter of the contract and comply with the Directive and with Treaty principles.

Incorporating national technical rules: Article 42 provides that technical specifications may be formulated in specified ways "without prejudice to mandatory national technical rules to the extent that they are compatible with Union law." This means that, provided that national legislation/rules are compatible with EU law, they can include requirements linked to social considerations.

For example, national laws or national technical rules require disabled access to public buildings. Where national laws or national technical rules are relevant to the particular contract, then those requirements can be incorporated within the technical specification.

Other methods of incorporating social considerations into the technical specifications:

Accessibility: Article 42(1) of the directive requires contracting authorities, whenever possible, when considering technical specifications to define these specifications so as to take into account accessibility criteria for people with disabilities or to design them for all users.

Good examples of where technical specifications can be defined in this way include specifying buses with good disabled access or requiring the design of a new library to specifically address the needs of those with limited or no eyesight.

Characteristics of the contract: Article 42(1) permits a contracting authority to define characteristics in the technical specifications, which "refer to the specific process or method of production or

provision of the requested works, supplies or services or to a specific process for another stage of its life cycle, even where such factors do not form part of their material substance, provided that they are linked to the subject matter of the contract and are proportionate to its value or its objectives”.

This is provided that

- those characteristics relate to the performance or to functional requirements; and
- the parameters are sufficiently precise to allow economic operators to determine the subject matter of the contract and to allow the contracting authority to award the contract.

Although not specifically referred to in the Directive, the same principles apply to the incorporation of social characteristics into technical specifications.

Examples include specifications requiring:

- computer equipment adapted to the needs of the visually impaired;
- school meals that include options for students with special dietary requirements.

Advertising

It is important to identify in advance whether and how social considerations are to be incorporated into the procurement process. In some cases, if you wish to use such considerations you must refer to this in advance in the contract notice. If you fail to do so, then you may not be able to incorporate those considerations at a later stage. For example;

- If the contract is reserved under article 20 to sheltered workshops/employment programmes, it must be indicated in the contract notice.
- The contract opportunity must be clearly and accurately described and so if, for example, a contracting authority requires special design requirements ensuring easy access to a building for people with disabilities, then this should be in the description of the contract so that economic operators are aware of the requirement.
- If you require variants – which could relate solutions with social benefits – then this needs to be provided for in the contract notice.
- Minimum specifications that tenders have to meet must be specified in the contract notice or in the specification.
- Special contract conditions must be specified in the contract notice or in the specification.
- If the contracting authority is using permitted social considerations as award criteria, then these award criteria must be specified in the contract notice or in the contract documents.

Selection

Following publication of the contract notice, the contracting authority will receive requests from economic operators that wish to participate in the process and tender. The contracting authority will undertake a process in which it selects economic operators that it will then invite to tender.

For the purpose of this illustration, the selection stage is broken down into two distinct phases:

- Phase 1 relates to excluding candidates from the process altogether
- Phase 2 relates to the selection of candidates that will then move forward in the process.

Selection – Phase 1: Exclusion

The 2014 Directive sets out in articles 57(1) and 57(2) the grounds on which candidates expressing an interest must be excluded and in article 57(4) the grounds on which they may be excluded.

The grounds on which candidates must be excluded cover convictions for participation in a criminal organisation, corruption, fraud, terrorist offences, money laundering, child labour, human trafficking and, in certain cases, non-payment of taxes or social security contributions.

The grounds on which a candidate may be excluded from participation are listed in article 57(4). These grounds include bankruptcy/winding-up (and equivalent situations), violation of applicable obligations in the fields of environmental, social and labour law, grave professional misconduct, prior poor performance of a contract and, in certain cases, failure to pay social security contributions or taxes.

It is these non-mandatory grounds for exclusion that are most likely to form the basis for exclusion on issues linked to social considerations. The opportunities are limited.

Note: The appropriateness of such an approach will need to be considered carefully to ensure that it is proportionate and relevant to the contract and economic operators should be made aware of the potential for exclusion on these grounds and of the way in which such a decision will be made. See section 4, “The Law”, for details of the La Cascina case, which looked at this issue.

Exclusion on the grounds of grave professional misconduct: It may be possible to argue that a candidate can be excluded for a past failure to comply with social policy, particularly where there was a deliberate and documented breach of contract terms requiring compliance with that policy.

Recital 101 refers to the potential for non-observance of social obligations amounting to an offence concerning the grave professional misconduct of the economic operator.

Under article 57(4)(d), any economic operator can be excluded where “the authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct that renders its integrity questionable”.

This route may also be available where there is an established breach of a code of professional ethics if this code includes social requirements. This approach will also be dependent upon effective and accurate contract monitoring, and care has to be taken to ensure that this approach is not conducted or operated in a manner that is discriminatory or that creates a “blacklist” type of situation.

Exclusion relating to prior poor performance of a public contract

Under article 57(4)(g), an economic operator can be excluded where it has shown “significant or persistent deficiencies in the performance of a substantive requirement under a public contract... which led to early termination of that prior contract, damages or another comparable sanction”.

It is possible that non-compliance with social requirements could constitute grounds for exclusion on this basis.

See Module E3 for further information on these and other grounds for exclusion.

Selection – Phase 2: Selection of Tenderers

The Directive sets out an exhaustive list of selection criteria that can be used by the contracting authority to select candidates to whom an invitation to tender (or invitation to negotiate) will be issued.

The contracting authority applies selection criteria that assess the candidates in terms of:

- "economic and financial standing" [article 58(1)(b)]; and
- "technical knowledge and/or professional ability" [article 58(1)(c)].

There are limits on the extent to which social selection criteria can be used at this stage. The Directive and case law confirm that:

- the list of selection criteria is exhaustive - it cannot be expanded;
- this limited list of criteria is narrowly constrained, with little room for interpretation or manoeuvre;
- the assessment can only relate to the candidate's ability to deliver the particular contract that is the subject matter of the procurement.

It is very unlikely that social considerations can be incorporated into consideration of a candidate's "economic and financial standing". This means that in most cases the only way in which social considerations can be used as grounds for not selecting a candidate is if they can be regarded as affecting the candidate's "technical knowledge and/or professional ability".

Technical knowledge and professional ability: social considerations may form part of the evaluation of technical knowledge and professional ability in a number of ways.

As mentioned above, the selection criteria are set out in an exhaustive list. The following examples show how some of the listed criteria could relate to social aspects, where the conditions referred to above are satisfied:

- **A description of the supplier's technical facilities**, its measures for ensuring quality and its study and research facilities – *details of the health protection measures an economic operator has in place for a contract for asbestos removal*

- **Details of the educational and professional qualifications** of the service provider or contractor and/or those of the undertaking's managerial staff and, in particular, those of the person or persons responsible for providing the service or managing the work – *details of the relevant qualifications in child care which the manager of a crèche has for a contract for the provision and operation of a crèche.*
- **Specific expertise:** For a particular contract, specific environmental or social experience may be required and so information about the works carried out or contracts delivered can focus on demonstrating relevant experience.

For example, it is permitted to ask for the following information in the specified circumstances:

Experience of:

- working with children with disabilities, in relation to a contract for the management of a crèche;
- production of food for people with special dietary requirements, in relation to a contract for the provision of pre-cooked meals to a hospital.

See Module E3 for further discussion of this stage.

Tender evaluation

Overview

Once the economic operators have been selected, the contracting authority moves on to invite tenders from the shortlisted economic operators. The contracting authority evaluates tenders received and awards the contract.

Contracting authorities must base the award of a public contract on the most economically advantageous tender, as redefined in the 2014 Directive [article 67(1)]. The contracting authority will have decided, at the procurement planning stage, how to identify the most economically advantageous tender.

It is possible to include social considerations in tenders to be awarded on the basis of lowest price or cost (using a cost-effectiveness approach, such as life-cycle costing) by incorporating the relevant requirements into the technical specifications and contract conditions, as appropriate.

See Modules E4 and E5 for further discussion on setting the award criteria.

Where a contracting authority proposes to award a contract on the basis of the most economically advantageous tender, there are more opportunities to incorporate social considerations.

See Module E4 for further information on determining which award criteria to apply.

This illustration assumes that the basis of the award will be the most economically advantageous tender. This section looks at the way in which social considerations can be used as tender evaluation criteria.

The 2014 Directive

Article 67(2) sets out an illustrative list of tender evaluation criteria:

- "quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics, and 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; or
- after-sales service and technical assistance as well as delivery conditions, such as delivery date, delivery process and delivery period or period of completion".

There are specific references to environmental criteria and social criteria.

Setting award criteria

As explained in Module E4, article 67(1) of the 2014 Directive refers to the tender most economically advantageous "from the point of view of the contracting authority", thus putting stress on the contracting authority's discretion in choosing the criteria to be applied. However, this discretion is not unrestricted and has some limitations. All award criteria relating to environmental considerations and used for assessing the most economically advantageous tender must meet four conditions:

- Award criteria must have a link to the subject matter of the contract
- Award criteria must be specifically and objectively quantifiable
- Award criteria must have been advertised/notified previously
- Award criteria must respect Community law – and thus must comply with the fundamental principles of equal treatment, non-discrimination and transparency.

The award criteria must also be distinct from the selection criteria. See Modules E3 and E4 for discussion on this point.

What does this mean for contracting authorities that wish to use award criteria relating to social considerations?

The following paragraphs provide short comments on these four conditions in the specific context of social criteria as well as examples of the sort of criteria that may be permitted.

When are criteria linked to the subject matter of the contract?

Article 67(3) states that the criteria chosen must be "linked to the subject matter of the public contract in question".

Comment:

As pointed out in Module E4, the requirement for the criteria to be linked to the subject matter of the contract means that a contracting authority cannot determine the criteria to be applied in an abstract way. The criteria chosen must be directly linked to the specific contract that is the subject matter of

the tender and must therefore apply to the supplies, works and services to be provided.

This requirement prevents a contracting authority from choosing criteria relating to secondary policies, such as social policies, if these criteria are chosen simply to promote and foster such policies in general, and are not linked to the subject matter of the contract.

Compliance with technical specifications: Where social requirements are legitimately incorporated into the technical specification, then there is a clear link with the subject matter of the contract. It should be possible to translate all technical specifications into award criteria.

How can award criteria be specifically and objectively quantifiable?

In the Concordia Buses case discussed earlier in the context of environmental considerations, the ECJ ruled that award criteria must never confer the unrestricted freedom of choice on contracting authorities. In practice this has been interpreted as a requirement to set specific, product-related and measurable criteria – which will limit a contracting authority’s discretion when undertaking the evaluation.

How does the contracting authority comply with the requirement to have previously advertised the award criteria?

The contracting authority complies with its basic obligations by completing the standard form contract notice and publishing it in accordance with the requirements of the Directive. Detailed criteria and weightings must be included in either the contract notice or the contract documents.

How does the contracting authority ensure that the award criteria respect Community law?

Before a contracting authority sets an award criterion it must consider, in particular, whether the criterion ensures equal treatment and is transparent or, on the other hand, is directly or indirectly discriminatory and has the potential of distorting trade. This is the case for all criteria, including criteria incorporating social and environmental considerations.

Additional criteria

It may be possible to use environmental or social conditions as “additional criteria”, which can be used to decide a “tie-break” situation. This is provided that:

- the contracting authority has fully evaluated the tenders and has a tie-break situation between two or more tenders;
- the condition (or conditions) is in line with Community law;
- the condition(s) is explicitly mentioned in the contract notice.

Nord Pas-de-Calais case

Case C-225/98 (Commission v French Republic (Nord Pas-de-Calais)) concerned the award of a

number of works contracts for construction, modernisation and maintenance of schools.

The ECJ considered a number of issues, including the possibility of social considerations being taken into account as part of the evaluation process.

In the contract notices the contracting authorities had referred to the fact that a condition relating to the project for combatting local unemployment would constitute an “award criterion” for the contract.

The European Commission in its IC on environmental issues commented as follows:

“...the ECJ held that the awarding authorities could apply a condition relating to the campaign against unemployment, provided that this condition was in line with all the fundamental principles of Community law, but only where the said authorities had to consider two of more economically advantageous bids. Such a condition would be applied as an accessory criterion once the bids had been compared from a purely economic point of view. As regards the campaign against unemployment the Court made it clear that it must not have any direct or indirect impact on those submitting bids from other Member states of the Community and must be explicitly mentioned in the contract notice so that potential contractors were able to ascertain that such a condition existed.

This could be equally applicable to conditions relating to environmental practice.”

Comment: It is debatable whether a condition that relates to local unemployment issues will be in line with Community law principles, as it may have a discriminatory effect.

Abnormally low tenders: Article 69 of the Directive permits a contracting authority to reject abnormally low tenders. A contracting authority that is concerned about what it regards as an abnormally low tender must first of all request in writing the details of constituent elements of the tender that it considers relevant. Only after proper consideration of that information may it reject a tender as being abnormally low.

Article 69(2) sets out an illustrative list of the details that a contracting authority may request. These details include information on the technical solutions and also, according to article 69(2)(d), “compliance with the provisions relating to environmental, social and labour law established by Union law, national law, and collective agreements or by the international environmental, social and labour law provisions listed in Annex X”.

Where the requirements set by the contracting authority comply with the provisions of EU law and the Directive, non-compliance with these requirements may then provide grounds for rejection on the basis of an abnormally low tender.

Contract conditions

Incorporating social contract conditions

Contract conditions can include contract performance clauses, which are used to specify how a contract is to be carried out.

Article 70 of the Directive specifically states that "contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject matter of the contract within the meaning of article 67(3) and indicated in the call for competition or the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations".

Recital 97 provides further guidance and states that contract performance conditions are compatible with the Directive "provided that they are not directly or indirectly discriminatory and are indicated in the call for competition or in the procurement documents".

Summary: Social considerations can therefore be included as contract conditions provided that they:

- relate to the performance of the contract;
- are published in the contract notice or contract documents; and
- comply with Community law.

Restrictions on the use of these conditions during the procurement process

Contract conditions should not be disguised technical specifications, selection criteria or evaluation criteria; they should be able to be met by whoever wins the tender as from the time that the contract starts. Proof of compliance with contract conditions should not be requested during the procurement procedure. Economic operators must accept the conditions in order to be awarded the contract.

Contract conditions should be used carefully, and they should be supported by the costs and benefits that they accrue.

Contract conditions still do need to be set out clearly so that economic operators that are tendering are aware of all of the obligations in the contract and are able to price accordingly.

Examples of possible contracts with conditions incorporating social considerations are:

- A works contract for the refurbishment of a community centre, with a condition that 5% of the work is to be delivered by new entrants who have an apprenticeship or training contract with the economic operator
- Contract for a catering service in a day-care centre for the elderly, with a condition that all staff are to have training on various dietary requirements for the elderly and for people with disabilities

Contract implementation and monitoring

An important part of contract management is monitoring to ensure that the contract is being carried out as agreed. Careful drafting of specifications and contract conditions to incorporate social conditions is a waste of time if the contracting authority fails to check that those requirements are complied with or fails to take action if it establishes that the requirements are not being met.

See Module G on contract management.

Utilities

Utilities

To a great extent the same legal rules apply under the 2014 Directive (2014/24/EU) and under the 2014 Utilities Directive (2014/25/EU). These directives have many similar or parallel provisions, and the European Court of Justice has tended to apply the same interpretation to both public sector contracting authorities and contracting entities.

The key difference relates to the rules on excluding economic operators and selection, which are discussed further below.

What does the 2014 Utilities Directive say about social considerations?

The 2014 Utilities Directive 2014/25/EU contains a number of provisions that refer specifically to the incorporation of social considerations into the procurement process.

- **Recital 52:** integrating social and labour requirements (recital 37 of the 2014 Directive)
- **Article 60(1):** defining technical specifications and accessibility criteria for people with disabilities (recital 74 and article 42 of the 2014 Directive)
- **Recital 55 and Article 80:** potential for non-compliance with environmental, social and labour law provisions amounting to an offence involving the professional misconduct or grave misconduct of the economic operator (recital 101 and article 57(4)(c) of the 2014 Directive)
- **Recital 102 and Article 82:** social characteristics as award criteria (recital 97 and article 67(2) of the 2014 Directive)
- **Recital 51 and Article 38:** contracts reserved for sheltered workshops (recital 36 and article 20 of Directive 2014/24/EU)
- **Recitals 102 to 104 and Article 87:** setting up conditions for the performance of contracts (recital 97 and article 70 of the 2014 Directive)
- **Articles 91 to 94:** award of light regime services

For detailed comments on these provisions, please refer to the main narrative on social considerations.

What does the European Court of Justice say about social considerations? The European Court of Justice has tended to apply the same interpretation to both public sector contracting authorities and utilities, and therefore the discussion in the main narrative is relevant to utilities.

What does the European Commission say about social considerations? The European Commission's views on this issue, which are set out in the Commission's Interpretative Communication and other publications on social considerations and SMEs, apply to utilities to the extent to which the same or parallel rules apply to both public sector contracting authorities and utilities.

Incorporating social considerations into the procurement process: Stages in the procurement process

Preparation – Purchasing decision: what and how

What to purchase, how to purchase and what type of purchasing method is used: In principle the Utilities Directive does not prevent a contracting authority from implementing social considerations when deciding what to purchase. Strategic purchasing decisions can therefore be taken with social considerations in mind provided that they are not in breach of the Treaty provisions. See examples in the main narrative.

Preparation - General description

The Utilities Directive distinguishes between more general descriptive documents (including broad specifications) and "technical specifications".

The general descriptive documents are to reflect the key purchasing decisions, including how the contract is to be delivered and packaged. This may include social considerations.

Preparation - Technical specifications

The 2014 Directive contains parallel provisions to those in Directive 2014/24/EU on the incorporation of social considerations into the technical specifications. The same legal principles also apply.

Contracts reserved for sheltered workshops or sheltered employment programmes for people with disabilities:

Recital 51 explains that employment and occupation are key elements in guaranteeing equal opportunities for all and contributing to integration into society. Sheltered workshops, sheltered employment programmes and other social businesses help to facilitate this integration, but they may not be able to obtain contracts under normal conditions of competition. EU Member States may therefore limit the participation in competition for certain “reserved contracts” to sheltered workshops and sheltered employment programmes.

Article 38 permits EU Member States to have “reserved contracts” that are to be performed by sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or who may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

The utility is still required to advertise in the *Official Journal of the European Union* and to follow the usual competitive procedures, but it may reserve the right to participate in the competition to sheltered workshops and sheltered employment programmes.

The contract notice must indicate that the contract is a reserved contract, and the standard form contract notice includes a section covering this limitation of competition. (amend or delete cross-reference for local advertisements)

Advertising

It is important to identify in advance whether and how social considerations are to be incorporated into the procurement process. In some cases, if you wish to use such considerations, you must refer to this in advance in the contract notice. If you fail to do so, then you may not be able to incorporate those considerations at a later stage. The same principles apply when advertising a qualification system. For example;

- The contract opportunity must be clearly and accurately described, and so if, for example, a utility requires a service that meets the diverse social needs of a particular community, this should be included in the description of the contract so that economic operators are aware of the requirement.
- If you require variants – which could relate to alternatives including social considerations – then this should be set out in the contract notice.
- Minimum specifications must be set out in the contract notice or in the specification.
- Special contract conditions must be specified in the contract notice or in the specification.
- If the utility is using permitted social issues as award criteria, then these award criteria must be specified in the contract notice or in the contract documents.

Selection – Phase 1: Exclusion

This is one of the main areas where the legal provisions in the Directive that apply to contracting entities differ from the legal provisions in the 2014 Directive applying to public sector contracting authorities. There is also a distinction between contracting entities that are public sector contracting authorities and those that are not.

Grounds for obligatory exclusion: Article 80 provides that a contracting entity that is a contracting authority must comply with the provisions of article 57(1) and (2) of Directive 2014/24/EU. Article 57(1) and (2) obliges contracting authorities to exclude candidates from participation in the procurement process if they have been guilty of specified offences.

Contracting entities that are not contracting authorities are not obliged to exclude candidates from participation in the procurement process under the provisions of article 57(1) of the 2014 Directive, but they may choose to do so.

Grounds for discretionary exclusion: All contracting entities may choose to exclude candidates on the discretionary grounds set out in article 57(1) and (2) of the 2014 Directive, but they are not obliged to do so.

Recital 106 refers to non-compliance with social and environmental legislation as potentially constituting an offence involving the grave professional misconduct of the economic operator.

See the main narrative section for more information on the grounds for obligatory exclusion and discretionary (optional) exclusion.

Selection – Phase 2: Selection of tenderers

The Utilities Directive does not set out an exhaustive list of the criteria to be used for the selection of tenderers. This is very different to the position under the 2014 Directive, where there is a detailed and exhaustive list of the criteria that can be used and of the information that may be requested.

Under article 78 of the Directive, contracting entities are required, when selecting economic operators, to use "objective rules and criteria". Those objective rules and criteria must be available to the interested economic operators.

Contracting entities therefore probably have more flexibility to incorporate social considerations into this stage of the procurement, provided that the criteria relate to the subject matter of the contract, relate to the economic operator's ability to deliver the particular contract that is the subject matter of the procurement, and do not breach Treaty principles.

The same principles of selection apply to the selection of economic operators to participate in qualification systems (see article 77).

Tender evaluation

Once the economic operators have been selected, the contracting entity moves on to invite tenders from the shortlisted economic operators. The contracting entity evaluates tenders received and awards the contract.

The contracting entity will have decided, at the procurement planning stage, how it would award the contract on the basis of the most economically advantageous tender, as redefined in the 2014 Utilities Directive (in the same terms as in the 2014 Directive). The basis for the award must be stated in the contract notice.

See the main narrative section for more information on the opportunities for incorporating social considerations into tender awards based on the most economically advantageous criterion, as redefined by the 2014 Utilities Directive.

Where a qualification system is used, the contracting entity is still required to invite tenders by way of a call for competition.

The 2014 Utilities Directive: Article 82(2) sets out an illustrative list of contract award criteria: "quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions..., after-sales services, technical assistance, delivery date and delivery period or period of completion". In the 2014 Directive, for the first time a specific reference is made to social (and innovative) criteria alongside with environmental criteria.

Since the issuing of the 2014 Directive, the organisation, qualification and experience of staff assigned to performing the contract have also been referred to expressly as permissible award criteria.

Contract conditions:

Contract conditions can include contract performance clauses, which are used to specify how a contract is to be carried out.

Article 87 of the 2014 Utilities Directive specifically states that "contracting entities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject matter of the contract within the meaning of article 82(3) and indicated in the call for competition or in the procurement documents. The conditions governing performance of a contract may include economic, innovation-related, environmental, social or employment-related considerations".

Recital 102 provides further guidance and states that contract performance conditions are compatible with the Directive "provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents".

Importantly, this recital explains that contract performance conditions "may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment".

The recital goes on to refer to examples of measures for the recruitment of long-term job-seekers, provision of training for the unemployed and young persons, compliance with the International Labour Organisation Conventions, and the recruitment of more handicapped persons than is required under national legislation.

Summary: Social considerations can therefore be included as contract conditions provided that they:

- relate to the performance of the contract;
- are published in the contract notice or contract documents; and
- comply with Community law.

Contract conditions should be used carefully, and they should be supported by the costs and benefits that they accrue.

Contract Management

An important part of contract management is monitoring to ensure that the contract is being carried out as agreed. Careful drafting of specifications and contract conditions to incorporate social conditions is a waste of time if the utility fails to check that those requirements are complied with and fails to take action if it establishes that the requirements are not being met.

See Module G on contract management.

2D Small and medium-sized enterprises (SMEs)

Small and medium-sized enterprises (SMEs) that wish to participate in public procurement processes face many practical challenges. These challenges relate to basic issues, such as the lack of understanding of procurement documents and processes and the shortage of resources and expertise to prepare tenders. They may also face difficulties in meeting selection requirements in terms of their size, financial standing and experience. Quite often the contracts advertised are too large or complex for a smaller organisation to deliver. These and other factors create barriers to the entry of SMEs into the public sector marketplace.

The position of SMEs in public procurement has been the subject of specific attention from the European Community. This attention has been given in the context of the wider single-market policy and of Treaty provisions encouraging support for business undertakings, including SMEs.

In 2008 the European Commission issued the “European code of best practices facilitating access by SMEs to public procurement contracts” (SEC(2008)2193). This code is a Commission Staff working paper and it therefore has no legal standing. It does, however, provide very useful comments and practical suggestions on how best to facilitate SME participation in public procurement. It includes many examples of best practice from a number of EU Member States. The following summary of the content of the code should provide helpful pointers to contracting authorities that are concerned with encouraging SME participation in the procurement process.

The code starts by highlighting the main problems faced by SMEs and emphasising that what is most needed is not a change in the Directive but a change in the procurement culture of contracting authorities. It then goes on to make suggestions and to provide practical examples of how changes can be achieved within the current legal framework:

Overcoming difficulties with the size of contracts: One issue commonly faced by SMEs is that the size of contracts is too large for them to deliver. The code therefore suggests that contracting authorities:

- **divide contracts into lots** as smaller lots are more likely to appeal to SMEs. Dividing contracts into lots should not be done in such a way that it impairs competition, and so the code recommends leaving the opportunity to tender open for any number of lots;
- **encourage groupings of SMEs** so that at the selection stage SMEs can rely on collective experience, financial information, etc.;
- **set up “multi-supplier” frameworks;**
- **ensure more visibility for sub-contracting opportunities** and ensure equal terms for subcontractors.

Ensuring access to relevant information: SMEs also face problems with accessing information about procurement opportunities and processes. The EC code refers to three practical ways of facilitating access:

- **e-procurement**, which provides easy and cheap access and communication and reduces copying and mailing costs. The Directive includes measures to encourage e-procurement. Particularly helpful elements are a single, centralised website, online publication of contract

notices available free of charge, an alert service, direct downloading of contract notices and tender documents, and electronic tendering facilities;

- **Information centres** to provide personalised assistance to SMEs, for example through a telephone help-line service;
- **Feedback to tenderers:** constructive and informative feedback would help SMEs understand the strengths and weaknesses of their tenders and enable them to learn lessons for the future.

Improving the quality and understanding of information provided: Economic operators do not always find it easy to understand the needs of contracting authorities because of a lack of sufficient, relevant and clear information. The EC code suggests:

- **Training and guidance for contracting authorities** on how to design contract award processes in a way that ensures the participation of SMEs on an equal footing with larger enterprises;
- **Training and guidance for SMEs on drawing up their tenders:** SMEs usually lack large and/or specialised administrative capacities and do not understand procurement language and procedures, which results in greater difficulties in participating in procurement processes, and increased training and guidance is therefore required.

Setting proportionate qualification levels and financial requirements: SMEs can be disadvantaged by qualification levels and technical requirements that are set too high. The EC code encourages contracting authorities to think carefully about their requirements and to:

- keep selection criteria proportionate;
- require proportionate financial guarantees.

The code reminds both contracting authorities and SMEs of the possibility of taking advantage of the provisions in the Directive that permit groups of economic operators to act jointly and to rely on the economic and financial standing and technical capacity of other undertakings.

Alleviating the administrative burden: time-consuming paperwork is among the most common complaints voiced by SMEs. The code suggests a number of tactics to keep administrative requirements to a minimum. It suggests that member states consider carefully whether they require full documentary evidence for information relating to exclusion or whether, for example:

- a declaration by tenderers may be sufficient (subject to later verification);
- a waiver may be permitted where evidence has been submitted recently;
- short and simple standardised forms may be used.

Placing emphasis on value-for-money rather than price: SMEs can often provide “added-value” to the contracting authority, for example by providing innovative, environment-friendly solutions, or advantageous life-cycle costs. As a contract award based on the lowest price will not allow a wider value-for-money assessment, the code recommends the award of contracts on the basis of the most economically advantageous tender.

Providing scope for innovative solutions through technical specifications: SMEs are often at the forefront of developing innovative solutions, and technical specifications that are defined in terms of performance or functional requirements can encourage a range of innovative proposals.

Allowing sufficient time to draw up tenders: The lack of administrative capacity and expertise in procurement of many SMEs means that they may need a lot of time to prepare tenders. The EC code therefore encourages contracting authorities to use Prior Information Notices, which are sufficiently detailed, so that the market is pre-warned of the opportunities and can therefore start to prepare well in advance.

Ensuring that payments are made on time: cash flow is an issue for all businesses but can be particularly critical for SMEs. The EU already has legislation (Directive 2000/35/EC) requiring prompt payment by contracting authorities. SMEs are encouraged to make full use of these provisions. Contracting authorities are also reminded of the potential to include the prompt payment clause in their contracts, requiring economic operators to pay their subcontractors and suppliers promptly.

Comment:

It should be noted that any measures taken to encourage the participation of SMEs in procurement must be in accordance with Treaty principles and, in particular, must not distort competition or be directly or indirectly discriminatory.

SME-friendly approach in the 2014 Directive

Recital 78 of the 2014 Directive clearly indicates that "public procurement should be adapted to the needs of SMEs. Contracting authorities should be encouraged to make use of the Code of Best Practices set out in the Commission Staff Working Document of 25 June 2008, entitled "European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts", which provides guidance on how they may apply the public procurement framework in a way that facilitates SME participation. To that end and to enhance competition, contracting authorities should ... be encouraged to divide large contracts into lots" (see also article 46).

Recital 124 recognises the potential of SMEs for job creation, growth and innovation and emphasises the importance of the encouragement of SME participation in public procurement.

Article 46(1) encourages contracting authorities to divide contracts into lots as one of the means of facilitating SME participation in public procurement. It obliges contracting authorities to provide an indication of the main reasons for their decision not to subdivide into lots. According to article 46(2), contracting authorities must indicate in the contract notice or in the invitation to confirm interest, whether tenders may be submitted for one, several or all of the lots. Even where tenders may be submitted for several or all lots, contracting authorities may limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest.

SMEs often participate as subcontractors in public procurement contracts. Fair and transparent provisions on subcontracting are therefore of vital importance for SMEs, and this consideration is reflected in the 2014 directives. Article 71 contains provisions on subcontracting that require the main contractor to provide details on subcontractors and their changes as well as on the compliance of subcontractors with obligations set out under environmental, social and labour law and on the optional provision for Member States to make direct payments to subcontractors.

Section 3 Exercises

For localisation: Adapt all of this section for local use – using relevant local examples, legislation, processes and terminology

Exercise 1: Planning the Procurement

You are advising a local education authority that is planning to run a procurement process for a contract for the design and construction of a new primary school in Smalltown. The contract will also include the demolition of the existing buildings on the site.

Smalltown is located in an area of outstanding natural beauty in the mountains and so the new school will need to be designed in a manner that is in harmony with its surroundings.

The local education authority has a green purchasing policy – which means that, wherever possible, all of its buildings are constructed in an environmentally friendly manner and to a high level of energy efficiency.

Exercise: Working as a group, please identify at least 8 ways in which the local education authority can incorporate environmental considerations into its requirements for the design and construction of the school. Think about issues such as location, detailed design requirements, how the school will be constructed and what materials will be used.

Exercise 2: Grounds for Exclusion and Selection of Economic Operators

Consider and discuss the following scenarios and answer the questions. In each case please assume that the purchasing organisation is a contracting authority subject to the Directive and that the value of the contract is above the EU financial thresholds.

A local authority is planning to run a restricted procedure tender process for a contract for waste disposal services. This contract will involve the collection of household waste, and the processing and disposal of that waste. You are advising the local authority on the preparation of the documents and the conduct of the process.

The local authority team wants to ask the economic operators to provide the following information, which will be used to assess the suitability of the economic operators (*i.e.* at the selection stage):

- (1) Details of the economic operator's experience of sorting and recycling household waste;
- (2) Information on the technical equipment available to the economic operator to maximise the recycling of paper and plastic;
- (3) A copy of the economic operator's internal policy on how it recycles its own waste at its offices.

Question 1: For each of the three examples above please consider (a) whether this information can be requested; and (b) if it can be requested, which of the grounds set out in articles 47 or 48 applies.

The local authority sends a contract notice to the Official Journal of the European Union. When the contract notice is published the local authority receives requests to participate from six economic operators. All six economic operators submit the information required for qualitative selection by the prescribed deadline.

Just before the local authority starts to evaluate the information submitted by the economic operators, a local newspaper publishes claims that economic operator "X" has been dumping waste illegally, in breach of the environmental laws.

Question 2: Can the local authority exclude economic operator "X" from participating in the procurement process? On what basis? What further information might you need to make this decision?

The local authority goes ahead and evaluates the information submitted by the economic operators. Economic operator “Y” discloses that in a recent court case it has been found guilty of breaches of environmental protection laws relating to illegal reprocessing of waste.

Question 3: Can the local authority exclude economic operator “Y” from participating in the procurement process? On what basis? What further information might you need to make this decision?

Exercise 3 – Award Criteria: Social and Environmental Considerations

In your groups:

- (1) List the key principles that apply to the use of social and environmental award criteria.
- (2) Applying the principle that the award criteria must be linked to the subject matter of the contract, look at the list below and identify which criteria can be used for which contract. Note that some of the criteria can be used for more than one contract.

Exercise 3 - List

Contract for the purchase of

A. Computers

B. Vehicles

C. Cleaning products and services

D. Paper

E. Furniture

Criteria

1. Energy consumption
2. End-of-life disposal costs
3. Low carbon emission levels during use
4. Staff training on equal opportunities issues
5. Avoiding use of hazardous products harmful to health
6. Noise emissions
7. Ease of use for people with disabilities
8. Materials that are from environmentally sustainable sources
9. Reduced levels of packaging and use of recycled materials in packaging
11. Minimising air pollution
12. Training staff on health and safety issues

Section 4 The Law

Important Note: This section was not updated in 2015 to reflect the changes in the 2014 Directive. See below for general information on where relevant provisions can be found in the 2014 Directive.

2014 Directive

In this context it is helpful to look at both the following recitals and articles of Directive 2014/24/EU:

Recital 74 and Article 43: eco-labels

Recital 78 and Article 46: lots

Recital 101 and Article 57: social conditions as criteria for exclusion

Recitals 97 and 98 and Article 67: award criteria

For localisation: The following structure and layout can be used but this section will need significant adaptation to reflect local requirements - using relevant local legislation, standard format contract notices, processes, websites and terminology.

This section provides further detail on issues raised in earlier sections

Eco-labels

The “Buying Green” handbook explains that the Directive explicitly allows a contracting authority to use the underlying specifications of eco-labels when defining performance based requirements or functional environmental requirements.

This is provided that:

- The specifications are appropriate for defining the characteristics of the supplies or services which are the subject matter of the contract
- The requirements for the label are based on scientific information
- The eco-labels are adopted with the participation of all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations
- They are accessible to all interested parties

It is important to understand that it is not permitted to set a requirement for economic operators to possess or be compliant with a particular eco-label. A contracting authority must always accept other suitable evidence as well.

See Article 23

Social conditions as criteria for exclusion

Social conditions as criteria for exclusion

The “Beentjes” case (Case 31/87 Gebroeders Beentjes BV v The Kingdom of the Netherlands) arose from a decision of a local committee to exclude Beentjes from the tendering procedure for a public works contract for land consolidation. This was even though Beentjes’ tender was the lowest tender. The contract was awarded to the next lowest tenderer. This case related to the previous works directive, now replaced by Directive 2004/18. The principles decided in Beentjes were incorporated into Directive 2004/18.

The 3 reasons for rejection of Beentjes’ tender were that the contracting authority considered that:

- (1) Beentjes had insufficient experience for the work in question,
- (2) its tender appeared to be less acceptable and
- 3) it did not seem to be in a position to employ long term unemployed persons.

The first two reasons were criteria which were listed in the Uniform Rules on Invitations to Tender. The last reason was expressly set out in the invitation to tender.

The European Court of Justice looked at the way in which each of the three criteria could be used. The ECJ commented on whether and how this was compatible with the directive and Treaty principles and whether it must be mentioned specifically in the contract notice.

- (1) **insufficient experience of the work** – used to assess the technical knowledge and suitability of tenderers (selection).

This was a legitimate criterion for checking suitability and was provided for in the directive (selection criterion).

There was no need to refer to this requirement (selection criterion) in the contract notice

- (2) **tender less acceptable** –used to evaluate the tender to establish which is the most advantageous tender(tender evaluation).

This was an evaluation criterion.

This provision would be incompatible with the directive if it conferred unrestricted freedom of choice on contracting authorities as regards awarding the contract. It was not incompatible with the directive if it was interpreted as giving contracting authorities discretion to compare the different tenders and to accept the most economically advantageous tender on the basis of objective criteria.

Evaluation criteria should be set out in the contract notice or the contract documents

- (3) **employment of long term unemployed persons** – this was a condition which had no relation to checking the tenderers’ suitability (selection) or to the criteria for award of the contract (tender evaluation).

This Court classified the requirement as an “additional specific condition” relating to suitability.

This condition could be incompatible with the Treaty provisions on the right of establishment and freedom to provide services. This would be on the basis of discrimination on the grounds of nationality where such a condition could only be satisfied only by tenderers from the state concerned (direct discriminatory effect) or that tenderers from other Member States would have difficulty complying with it (indirect discriminatory effect).

Even if these conditions are not incompatible with the Treaty they must be applied in conformity with all the provisions of the directive including the rules on advertising.

Additional specific conditions must be referred to in the contract notice.

These principles are now reflected in Directive 2004/18. Evaluation criteria must now be listed either in the contract notice or in the contract documents (see Module E4) and “special conditions” must be referred to in the contract notice.

Section 5 Chapter Summary

Self-test questions

12. What general Treaty principles apply to the incorporation of environmental considerations into the procurement process?
13. Which articles in the Directive cover the incorporation of environmental characteristics into technical specifications?
14. What principles did the “Concordia Buses” case establish?
15. Which articles cover the issue of when and how eco-labels can be specified?
16. When can economic operators be excluded from a procurement process on environmental grounds?
17. When can environmental conditions be used as “additional criteria”?
18. When can environmental contract conditions be included in the terms of a contract?
19. Do the same general Treaty principles applying to the incorporation of environmental considerations into the procurement process also apply to the incorporation of social considerations?
20. Under the EU procurement rules, can a contracting authority use local price preference provisions or regional preferences that favour locally based contractors?
21. What key principles did the “Beentjes” case establish? Where is this principle incorporated into the Directive?
22. Can a contracting authority specify that a contract can only be awarded to economic operators of sheltered workshops/programmes? On what basis?
23. What approaches can a contracting authority adopt to ensure that opportunities for small and medium-sized enterprises are maximised? Think of 3 examples.

Additional resources

The Narrative refers to the extensive information available at the European Commission’s website on green purchasing: http://ec.europa.eu/environment/gpp/index_en.htm

See also the book:

Arrowsmith, Sue and Peter Kunzlik, 2009, *Social and Environmental Policies in EC Procurement Law*, Cambridge University Press.