



**Public Procurement**

# Division of Contracts into Lots

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## Introduction

One of the main choices in public procurement is to determine whether the works, supplies or services that are the subject matter of the procurement are to be acquired by using one contract or by using a number of separate contracts or “lots”, which may be awarded and performed by different economic operators. The decision is not an easy one, as savings derived from economies of scale may promote the use of a single contract, while the diversity resulting from multiple contracts or lots can enhance competition and increase efficiency.

In a 2015 OECD survey<sup>1</sup>, respondent countries put forward a number of reasons, some of which are interrelated, for the adoption of a procedure to divide a contract into lots. These reasons include:

- promoting small and medium-sized enterprises (SMEs) and new entrants to the market
- promoting tender participation
- fostering competition in the market
- avoiding single-supplier dependency
- spreading risk.

The 2014 Public Sector Directive (the Directive)<sup>2</sup> obliges contracting authorities to *consider* at the planning stage whether or not to divide a contract into lots. This provision is included in the Directive as one of the measures intended to facilitate SME participation in public procurement. The Directive also includes rules requiring the aggregation of requirements, in many cases, and stipulates that contracts must not be artificially split in order to avoid the application of the public procurement rules. It is therefore important to consider and clearly record the reasons for a decision to split a contract into lots.

Decisions on whether and how to split a contract into lots must be made on a case-by-case basis. There is no “one size fits all” solution because the decision on lots depends, to a large extent, on the specific characteristics of the market concerned and on the object of the contract. The specific market characteristics that may impact on the decision include the number and type of economic operators in that market, technical and quality aspects, speed of technological change, and risk of dependency on a sole supplier. Mistakes when deciding whether to divide a contract into lots or how to divide the lots can have a number of negative consequences. These consequences may include lack of competition, with poor value or low quality tender outcomes; failure to encourage SME participation or new entrants; and even collusive behaviour by economic operators.

A contracting authority must have a thorough understanding of how the specific market works before it makes a decision on whether and how to split a contract into lots. To this end, a comprehensive market analysis, involving the collection and analysis of market data, must be carried out. SIGMA Public Procurement Brief 32, *Market Analysis, Preliminary Market Consultations and Prior Involvement of Candidates/Tenderers*, includes information on effective market analysis procedure.

A contracting authority also needs to understand the potential practical impact on economic operators and on the procurement process of a decision to split a contract into lots and the way in which those lots are structured.

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<sup>1</sup> Survey conducted as part of the work of the OECD Working Party No. 2 on Competition and Regulation, reported DAF/COMP/WP2 (2015)1 on 19 June 2015. See OECD website for details of meetings, hearings, papers and submissions: <http://www.oecd.org/daf/competition/tenders-and-auctions.htm>

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

In this context, a contracting authority may benefit from key insights gained from literature on economic theory. In 2015, the OECD Working Party No. 2 on Competition and Regulation prepared a paper<sup>3</sup> analysing the literature and highlighting the following key points with regard to the division of contracts into lots:

- **Relevance of the number of economic operators in the market to the number of lots:** The ratio between the number of economic operators expected to submit bids and the number of lots is an important consideration when deciding on how to divide a contract.
- **Role of new entrants:** When dividing a contract into lots, the possibility of new entrants is also a relevant factor. New entrants can increase the competition for lots and weaken the conditions for collusion.
- **Relative size of lots and risk of collusion:** Creating lots of different sizes (heterogeneity) within the same procurement process may play a role in reducing the scope for market-sharing arrangements between economic operators.
- **Trade-off between potential competition gains and “efficiency losses”:** A balance needs to be achieved. Potential benefits may result from the use of lots, such as an increased level of participation, keener competition, promotion of new entrants, and reduction of single-supplier dependency. These advantages need to be weighed against the potential disadvantages, such as higher costs arising from the loss of economies of scale, such as reductions in administration or in overheads.

These four key points emphasise the importance of a thorough market analysis to ensure that the contracting authority may assess the number of actual and potential economic operators in the market. Careful market analysis is also required to ensure that lots are structured and packaged in a way that is appealing to economic operators and encourages competition.

The economic aspects of the division into lots are discussed more fully in SIGMA Public Procurement Brief 2, *Economic Issues in Public Procurement*.

### What the Directive says about the division of contracts into lots

Article 46 and Recitals 78 and 79 of the Directive cover the division of contracts into lots. The key provisions in Article 46 follow.

**Freedom to decide whether or not to divide a contract into lots and the nature of lots:** Article 46(1) provides that contracting authorities are free to decide whether or not to divide a contract into lots. However, where a contracting authority decides not to divide a contract into lots, it must provide the reasons for its decision (see below, “Divide or explain”).

There is an important exception to this general principle. Member States are specifically permitted to make the division of contracts into lots obligatory (see below).

Where a contracting authority decides to divide a contract into lots, it is free to determine the size of the lots and the object of the contracts.

**Obligatory division of contracts into lots under national law:** Article 46(4) contains the optional provision permitting Member States to make the division of contracts into lots obligatory, under conditions that are specified in national law. For example, the German

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<sup>3</sup> OECD Working Party No.2 on Competition and Regulation, DAF/COMP/WP2 (2015)1, 19 June 2015. [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/wp2\(2015\)1&doclang=ue=de](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/wp2(2015)1&doclang=ue=de)

Procurement Regulation for Public Works<sup>4</sup> includes a requirement to divide contracts into lots, with exceptions for economic or technical reasons.

National law requiring the division of contracts into lots must have regard to EU law. Where a Member State makes the division into lots obligatory, then it must indicate, either in the contract notice published in the *Official Journal of the European Union (OJEU)* or in the invitation to confirm interest<sup>5</sup>, whether a tender may be submitted for one, several or all lots. Where appropriate, the provisions concerning the award of combined lots also apply.

**Divide or explain:** Article 46(1) specifies that where a contracting authority decides not to divide a contract into lots, it must give the “main reasons” for its decision. This explanation must be included in the procurement documents or in the individual report, which contracting authorities are required to prepare in accordance with Article 84. This provision is best understood when read in conjunction with Recital 78, which encourages contracting authorities to divide contracts into lots in order to encourage SME participation. Recital 78 provides some illustrations of how contracts may be divided into lots, either on a quantitative basis, with the lots structured to appeal to SMEs, or on a qualitative basis, so that the content of the lot corresponds to the capacity or skills of SMEs. Recital 78 also includes some examples of where it may not be appropriate to divide a contract into lots. Dividing a contract into lots may:

- result in excessive technical difficulties or expenses;
- risk undermining the proper execution of the contract, as a result of the need to co-ordinate the different contractors for the lots.

**Transparency about how many lots an economic operator can bid for:** Article 46(2) obliges a contracting authority to indicate, in the contract notice or in the invitation to confirm interest, whether a tender may be submitted for one, several or all lots.

**Limitation on the number of lots an economic operator can bid for:** Article 46(2) confirms that contracting authorities can limit the number of lots for which an economic operator can bid. This limitation is permitted, provided that the maximum number of lots for which an economic operator can bid is stated in either the contract notice or the invitation to confirm interest.

**Limitation on the number of lots an economic operator can be awarded:** Article 46(2) also confirms that a contracting authority is permitted to limit the number of lots that a single economic operator can be awarded. Where the application of the award criteria would result in one economic operator being awarded more lots than the maximum number of lots permitted, the contracting authority must then apply “objective and non-discriminatory criteria or rules” to determine which lots are to be awarded to that economic operator. The maximum number of lots that one economic operator can be awarded must be stated in the contract documents or in the invitation to confirm interest. The objective, non-discriminatory criteria or rules to be applied by the contracting authority to determine which lots are to be awarded to that economic operator must be set out in the procurement documents.

Recital 79 explains that the provisions permitting contracting authorities to limit the number of lots that an economic operator can bid for or be awarded are intended to preserve competition or to ensure supply reliability.

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<sup>4</sup> 2016 Vergabe - und Vertragsordnung für Bauleistungen – VOB/A Article 5(2)  
<https://dejure.org/gesetze/VOB-B>

<sup>5</sup> An invitation to confirm interest is used where the procurement procedure is advertised in a Prior Information Notice as a call for competition. See SIGMA Public Procurement Brief 6, *Advertising*, for further information.

**Combined lots:** An optional provision is available to Member States concerning the evaluation of combined lots. Where more than one lot may be awarded to the same tenderer, Article 46(3) permits Member States to allow contracting authorities to award contracts that combine all or several lots.

Combined lots are permitted where the contracting authority has specified in the contract notice or in the invitation to confirm interest 1) that it reserves the possibility of awarding the contract(s) by combining all or several lots, and 2) which lots or groups of lots might be combined.

Recital 79 explains that the intention of the above provision is to ensure that contracting authorities are not obliged to award contracts on a lot-by-lot basis where such contracts would be a substantially less advantageous solution than the award of a single contract combining several or all of the lots.

## Worked example – some issues to consider

### Whether and how to divide contracts into lots

The next section of this brief provides a worked example showing the practical impact of some of the key provisions outlined above and highlighting some other considerations for contracting authorities when deciding whether and how to divide contracts into lots.

#### Scenario

Central Housing (CH) is a contracting authority that provides public housing in a large geographical region in an EU Member State. It is responsible for the provision and maintenance of 200 000 homes in the region. CH plans to go to tender to procure a range of housing maintenance services that will include: general planned repairs and maintenance; emergency repairs; and more specialised services, such as electrical installation and maintenance, gas appliance installation and maintenance, window replacement and repairs, roof repairs and maintenance, and decorating. The proposed length of the contract(s) is three years.

**Is there an obligation under national law to divide a contract into lots?** The Directive does not oblige a contracting authority to divide a contract into lots. As indicated above, Member States are permitted, however, to make it “obligatory to award contracts in the form of separate lots under conditions to be specified in accordance with their national law and having regard for Union law” [Article 46(4)]. CH therefore needs to consider whether a relevant national law obliges it to divide the contract into lots.

**Should it be a single contract or should the contract be divided into lots?** The Directive does not require a contracting authority to *consider* whether or not to divide the contract into lots. The Directive states that contracting authorities are encouraged to divide the contract into lots in order to facilitate SME participation and to enhance competition.

In some cases, however, it may not be practical or appropriate to divide a contract into lots, for example where dividing the contract between different economic operators would create unacceptable operational risks. Where a contracting authority decides not to divide the contract into lots, it must record the reasons for its decision. Those reasons must be set out either in the procurement documents or in the individual procurement report prepared in accordance with Article 84.

CH will need to undertake a thorough market analysis. This analysis is likely to be quite complex, as it will require the consideration of the market for a single contract and also the consideration of other more specialised markets, such as the markets for electrical or gas-related services. Many issues will need to be considered and weighed. For example, it is likely that the number of economic operators that are able to deliver a single contract of this size would be limited and so competition might be less acute. However, there might be economies

of scale, and day-to-day management and service delivery might be easier and less costly in terms of time and resources. The procurement process for a single contract would probably be more straightforward, as it would only involve one contract, but it would result in dependency on a single economic operator operating a complex contract. A single contract would be highly likely to involve subcontracting. Dividing the contract into lots might reduce some of these advantages, but would probably result in more competition and the participation of a wider range of economic operators.

**How should the contract be divided into lots?** If CH decides that it will divide the contract into lots, then it must consider how to do so. The contract could be divided in a number of ways, which could possibly be combined, for example:

- Geographical – divide the contract into four sub-regions, with each sub-regional lot covering all of the services required in the sub-region.
- Service type – divide the contract by type of service, with each service being provided across the whole region. With six lots, the services could be divided as follows: Lot 1 – general planned repairs, maintenance and emergency repairs; Lot 2 – electrical installation and maintenance; Lot 3 – gas appliance installation and maintenance; Lot 4 – window replacement and repairs; Lot 5 – roof repairs and maintenance; Lot 6 – decorating.
- Value – create a “low-value” lot, using a multi-supplier framework agreement to award contracts below EUR 20 000, perhaps also divided by service type.

#### “Small-lot” exemption

The Directive provides a special “small-lot” exemption, which permits a contracting authority to award a lot, or lots, directly to an economic operator without a competitive process. This exemption is set out in Article 5(10).

The direct award is permitted only in limited circumstances, where the total aggregated value of all of the lots exceeds the relevant EU financial threshold. It is permitted where the value of each of the “small” lots or the lots to which the exemption will apply is less than EUR 80 000 for supplies and services or less than EUR 1 million for works, and where the total value of the lot or lots to which the exemption will apply does not exceed 20% of the aggregated value of all of the lots.

For further information, see SIGMA Public Procurement Training Manual – Module D5

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

The size and object of each lot determines which of the potential economic operators can deliver the requirements and therefore participate in the procurement process. In general, an economic operator will participate in a procurement process if its expected profit, in the event that it is awarded the contract, is large enough in relation to its bidding cost and the other options available to it.

The impact on the economic operator will differ depending on its position in the market. If CH wishes to promote a competitive market, it must consider how best to split a contract into lots in order to increase the expected profit of potentially new economic operators while at the same time retaining the incentives that will encourage incumbent economic operators to participate. It must also consider the impact of potentially higher costs for economic operators that may have to prepare bids for several lots rather than one bid for a single contract.

Highly specialised smaller firms are often more efficient than larger firms in executing at least certain parts of the project. They increase the competition for the lots that they bid on, which lowers the expected cost. The existence of smaller economic operators may also hamper

collusive strategies among larger players on the market. In this regard, refer to the short note on the division into lots and collusion at the end of this brief.

In this case, CH may learn from its market analysis that several smaller firms are interested in providing specialised services, such as gas maintenance. This information points towards dividing the contract into lots by service type.

CH may also be keen to support new entrants into a market where it has identified only a few economic operators and limited competition. This may be the case, for example, for window replacement and repairs. Again, this information points towards dividing the contract into lots by service type. Another option would be to set up a low-value, multi-supplier framework agreement, which would provide opportunities for new entrants to bid for smaller contracts that reflect their more limited resources.

Contracting authorities must ensure that decisions on the division into lots do not favour national suppliers, are non-discriminatory, and ensure equal treatment of all participants in the tendering process.

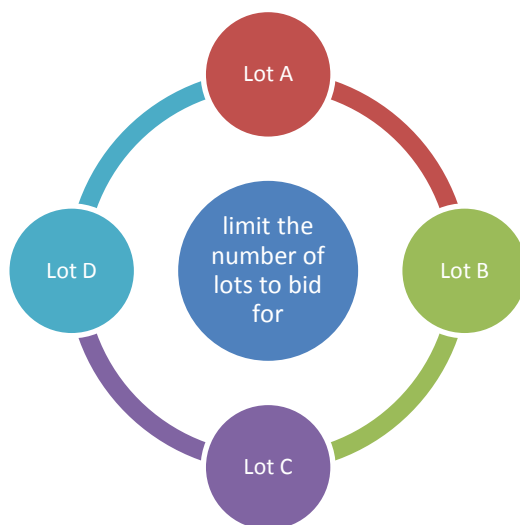
### Management of lots

The Directive permits contracting authorities to manage lots in the following ways:

- 1: Limitation on the number of lots that an economic operator can bid for

A contracting authority can limit the number of lots that an economic operator can bid for.

Where a contracting authority plans to use this approach, it must state, in either the contract notice published in the *OJEU* or the invitation to confirm interest, whether economic operators can bid for one, several or all lots.



**Worked example:** CH decides to split the contract for housing repair and maintenance services into four regional lots (Lots A, B, C and D), with each lot covering all services. CH is permitted to limit the number of lots for which economic operators can bid. It wishes to encourage competition and to avoid relying on a single economic operator, and it therefore decides to limit the number of lots for which an economic operator can bid to two lots in total. CH is aware that as a result of this decision it risks receiving a small number of bids, or even no bids, for some lots.

- 2: Limitation on the number of lots that an economic operator can be awarded

A contracting authority can limit the number of lots that an economic operator can be awarded.

Where a contracting authority plans to use this approach, the contract notice published in the *OJEU* must specify the maximum number of lots that can be awarded to a single economic operator. In addition, “objective and non-discriminatory criteria or rules” for determining which lots are to be awarded must be set out in the procurement documents.

Where the application of the contract award criteria results in the award to a single economic operator of more than the maximum number of lots specified, the contracting authority must apply the “objective and non-discriminatory criteria or rules” to decide on the award of those lots.

The “objective and non-discriminatory criteria or rules” will depend to a great extent on the particular procurement. In practice, the criteria or rules are likely to be closely linked to the evaluation criteria and scoring scheme that are applied to determine the most economically advantageous tender for a particular lot.



**Worked example:** In this scenario, CH decides to split the contract for housing repair and maintenance services into four regional lots (Lots A, B, C and D), with each lot covering all services. CH is permitted to limit the number of lots that an economic operator can be awarded. It wants to avoid a situation where a single economic operator is awarded all four contracts, which would result in over-dependency on a single economic operator.

CH states in the procurement documents that the maximum number of lots that a single economic operator can be awarded is two. It confirms that in the event that an economic operator is ranked first for the award of more than two lots, then that economic operator will be awarded the two lots for which it received the highest scores. A consistent scoring methodology is used for all four lots, and the methodology is disclosed in advance in the procurement documents. The other two lots will be awarded to the economic operator ranked second in each case.

- Economic operator X was ranked first for Lots A, B, C and D. Economic operator X’s total score for each lot was: Lot A - 93, Lot B - 89, Lot C - 95, Lot D - 90.
- Economic operator Y was ranked second for Lot B.
- Economic operator Z was ranked second for Lot D.
- CH applies the objective criteria and awards Lots A and C to economic operator X (the two lots for which economic operator X obtained the highest scores), Lot B to economic operator Y, and Lot D to economic operator Z.
- The worked example above is only one possible, simplified example of criteria/rules to be applied when deciding whether and how to award lots to economic operators.



Other approaches that CH could use include asking economic operators to indicate their preferred two lots, in the event that they obtain the highest scores for more than two lots, or even drawing lots at random. The most suitable approach will be highly dependent on the nature of the procurement and the analysis of the market place.

- Contracting authorities need to consider the range of possible outcomes and impacts of a particular approach. See below for an example of the impact on the price to be paid for each lot where the award to the winning economic operator is limited to two lots.

#### Prices offered by each tenderer for lots A, B, C and D

Economic operators	Lots			
	A	B	C	D
X	93 000	89 000	95 000	90 000
Y	95 000	92 000	96 000	93 000
Z	94 000	93 000	97 000	92 000

#### Possible mixes

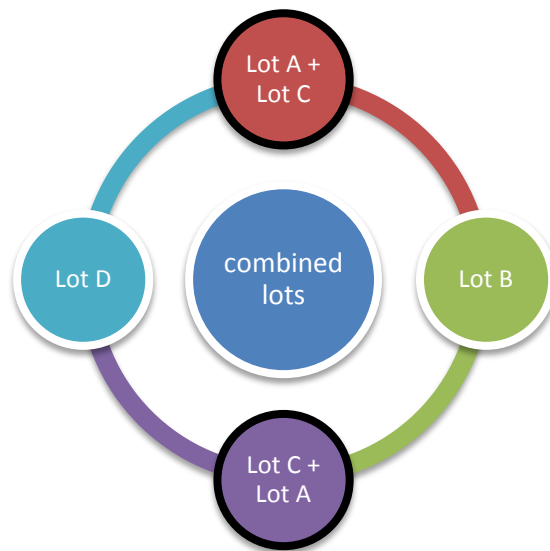
<p><b>Mix 1</b>  <b>X:</b> A + B, 93 000 + 89 000 = 182 000  <b>Y:</b> C = 96 000  <b>Z:</b> D = 92 000  <b>Total cost for CA = EUR 370 000</b></p>	<p><b>Mix 4</b>  <b>X:</b> B + C, 89 000 + 95 000 = 184 000  <b>Z:</b> A = 94 000  <b>Z:</b> D = 92 000  <b>Total cost for CA = EUR 370 000</b></p>
<p><b>Mix 2</b>  <b>X:</b> A + C, 93 000 + 95 000 = 188 000  <b>Y:</b> B = 92 000  <b>Z:</b> D = 92 000  <b>Total cost for CA = EUR 372 000</b></p>	<p><b>Mix 5</b>  <b>X:</b> B + D, 89 000 + 90 000 = 179 000  <b>Y:</b> C = 96 000  <b>Z:</b> A = 94 000  <b>Total cost for CA = EUR 369 000</b></p>
<p><b>Mix 3</b>  <b>X:</b> A + D, 93 000 + 90 000 = 183 000  <b>Y:</b> B = 92 000  <b>Y:</b> C = 96 000  <b>Total cost for CA = EUR 371 000</b></p>	<p><b>Mix 6</b>  <b>X:</b> C + D, 95 000 + 90 000 = 185 000  <b>Y:</b> B = 92 000  <b>Z:</b> A = 94 000  <b>Total cost for CA = EUR 371 000</b></p>

For the contracting authority, the most advantageous mix from a cost perspective is Mix 5, but the prices for Lots A and C are not the lowest prices offered.

Contracting authorities also need to think carefully about the impact of the chosen approach on the responses and behaviours of economic operators, including the possibility of collusive practices (see below).

- 3: Combined lots

Member States have the option of permitting a contracting authority to combine several or all lots. Where combined lots are permitted under national law and a contracting authority plans to use this approach, the contract notice published in the *OJEU* must state that the contracting authority reserves the possibility of combining lots and indicate which lots or group of lots may be combined.



**Worked example:** In this scenario, CH decides to split the contract for housing repair and maintenance services into four regional lots (Lots A, B, C and D), with each lot covering all services. CH is permitted to reserve the possibility of combining several or all lots. It considers that the locations of lots A and C would offer significant potential for economies of scale and efficiency if these lots were combined. The contract notice states that CH reserves the possibility of combining lots and confirms that Lot A and Lot C may be combined.

CH will need to consider very carefully how it will invite and evaluate bids for a combined lot. It must disclose its evaluation criteria and be transparent in its approach. The process of structuring an evaluation in this context raises difficult questions. For example, will CH require all economic operators that wish to bid for the combined lot (Lot A plus Lot C) to also submit separate bids for Lot A and Lot C, so that CH can verify the advantages of a combined lot over separate lots? How will CH evaluate separate bids for lots A and C from economic operators that do not submit a combined bid as well? How will CH decide whether a combined bid is the most economically advantageous compared to separate bids for individual lots?

The most suitable approach will be largely dependent on the nature of the procurement and the analysis of the market place. Contracting authorities also need to consider carefully the impact of the chosen approach on the responses and behaviour of economic operators, including the possibility of collusive practices.

## Division into lots and collusion

This note is a short summary of issues that are discussed more fully in SIGMA Public Procurement Brief 2, *Economic Issues in Public Procurement*.

When a contract is split into lots, it can potentially make it easier for economic operators to arrange implicit or explicit collusive agreements and to operate together as a “cartel” for the purpose of manipulating competition and inflating prices.

Successful collusive co-operation between economic operators operating a cartel requires three main ingredients:

- agreement between the cartel members on prices/quantities;
- effective monitoring of actions within the cartel by cartel members;
- enforcement, i.e. ability to punish any anomalous behaviour by cartel members.

A contracting authority that is designing lots can take various measures to reduce the likelihood of effective collusion, such as those proposed under the following four key pointers:

- **Number of participants:** Generally, the larger the number of participants, the lower the risk of collusion, as the difficulty in reaching agreement within a cartel on how lots are to be “awarded” increase with the number of participants. Contracting authorities concerned with collusion therefore need to choose the optimal number of lots to ensure as many participants as possible.
- **Symmetry:** Symmetric economic operators (i.e. economic operators of similar capacity/dimension/market shares) find it easier to split symmetric lots of a similar economic value. In contrast, they find it more difficult to split asymmetric lots. To prevent collusion, the contracting authority should therefore split the contract in such a way as to create some asymmetries between economic operators and between lots.
- **Number of lots:** Where the number of lots is greater than the number of participants, the collusive allocation of lots generally becomes more difficult for a cartel. Principles of rotation or multi-procurement collusion may nevertheless be agreed within a cartel where procurement procedures are repeated, thus negating the advantages of a large number of lots. In a more predictable market, a contracting authority may decide to split a contract into a greater number of lots than the number of expected tenderers in order to reduce the possibility of collusion.
- **Timing of award:** It is also important to consider whether lots will be awarded simultaneously or sequentially. Sequential awards, with a time delay between the awarding of lots, may facilitate collusion, and in general simultaneous awards are therefore preferable

## Utilities

Article 65 of the Utilities Directive<sup>6</sup> covers the division of contracts into lots. The provisions in the Utilities Directive are similar, but not identical, to the provisions in Article 46 of the Directive.

Unlike the Directive, the Utilities Directive includes no obligation for a contracting entity to *consider* whether or not to divide a contract into lots and to record the reasons for its decision.

As is the case under the Directive, under the Utilities Directive:

- Contracting entities may limit the number of lots for which an economic operator may bid or the number of lots that an economic operator may be awarded. The same provisions outlined above in the context of the Directive apply.
- Member States have the option of permitting a contracting authority to combine several or all lots. Where combined lots are permitted under national law and a contracting authority plans to use this approach, the contract notice published in the OJEU must state that the contracting authority reserves the possibility of combining lots and must indicate which lots or group of lots may be combined.
- Member States are also permitted to make it “obligatory to award contracts in the form of separate lots under conditions to be specified in accordance with their national law and having regard for Union law” [Article 64(4), Utilities Directive].

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<sup>6</sup> Directive 2014/25/EU on procurement by entities in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, 26 February 2014.

## Further information

### Publications

SIGMA (2015), *Public Procurement Training Manual* – Modules A4, E4 and E5, OECD Publishing, Paris, <http://www.sigmaweb.org/publications/public-procurement-training-manual.htm>

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SIGMA (2016) Public Procurement Brief 33, *Small and Medium-sized Enterprises in Public Procurement*, OECD Publishing, Paris