Public Procurement
Guidance and Checklists*

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SIGMA

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* The Guidance and checklist material was developed by SIGMA as part of The SIGMA Public Procurement Training Manual which first published in 2010. In February 2014, three new public procurement Directives were adopted by the European Union, leading to the manual being revised and updated. The material in this document is from three training modules from the manual, Module C on preparation of procurement , Module E on conducting the procurement process and Module G on contract management. The whole manual can be accessed here: http://www.sigmaweb.org/publications/public-procurement-training-manual.htm

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Specification writing guidance and template

Introduction
This section provides some basic guidance for writing specifications and a simple specification template. An Internet search will reveal a number of alternative templates of varying complexity, which procurement officers may download.

Guidance on writing specifications
These notes aim at summaries guidance on writing a successful specification.

1. Use simple language.

2. Avoid words or phrases that are not specific or that may lead to ambiguity, *e.g.*:
   a. Should
   b. High
   c. Maybe
   d. Normal
   e. Reasonable
   f. Approximately
   g. Could
   h. Possible
   i. Not likely to

3. Do not use jargon.

4. Define terms, symbols and acronyms.

5. Write in layman's terms. Do not expect the specification to be read only by experts.

6. Use an attractive format. This will reflect your professionalism and encourage potential economic operators to read the specification.

7. Use a logical structure.

8. Be as concise as possible without reducing understanding.

9. Aim to define each aspect of the requirement in one or two paragraphs.

10. Do not explain the same requirement in more than one section.

11. Number each section and paragraph using a logical and consistent numbering method, *e.g.* 5.6.3 representing the fifth section, sixth paragraph, third sub-paragraph.

12. Ask someone who is not familiar with the specification to read it to gauge its readability and effectiveness.

13. Discuss drafts with stakeholders, colleagues and users.

3. Simple specification template

SPECIFICATION

For

Insert title

Issue no.	Date	Prepared by	Approved by

Content

- Introduction
- Scope of work
- Definition of responsibilities
- Key performance indicators and service levels
- Detailed and technical requirements
- Reference to other documents
- Timescales
- Any other information

Specification of Works

Specifications and requirements must afford equal access for candidates and tenderers and not have the effect of creating unjustified obstacles to competitive tendering. They define the specific characteristics required of a product, service or material or works with regard to the purpose for which they are intended by the contracting authority. The "technical specifications" as covered by the Directives may refer to physical characteristics or quality levels, to designs or to functional or performance requirements.

For works contracts, they thus indicate – where applicable, lot by lot – the nature and performance characteristics of the works. Where applicable, they also specify delivery conditions and installation, training and after-sales service.

Specifications and requirements may be determined by reference to standards. However, the contracting cannot reject offers that do not comply with the standards in question if the tenderer can prove to the satisfaction of the contracting authority that the offer will satisfy the requirement in an equivalent manner.

Works contracts, specifications and requirements are drawn up rather differently depending on the method to be used.

Traditional approach – In the traditional approach, with the contracting authority in charge of detailed design, the specifications and requirements in the tender documents typically comprise:

- the location of the site
- the scope of the works
- details of how each part of the works is required to be constructed (including construction drawings and specifications of materials, etc.); and
- possibly, a programme of work, *e.g.* if the contractor will be required to phase refurbishment work in order to allow the continuing operation of an existing facility.

Among the documents issued with the tender documents, and typically to be complemented by the tenderer in its submission (*i.e.* offering a price for the items concerned), are also:

- a bill of quantities: and
- a daywork schedule

The bill of quantities must closely reflect the design worked out by the contracting authority, with item descriptions and quantities corresponding to the drawings and other specifications. The bill of quantities must also indicate the principles and methods for measurement of the works, possibly by reference to another publication specifying them. These principles also indicate, by defining what is to be measured, the basis for valuing each item in the bill of quantities, either as a "rate" or "unit price" (say, euros per cubic metre), or as a lump sum for an item which is either provided or not but is not specifically measured.

A daywork schedule for minor or contingent work may be appropriate under any form of contract. Such a schedule, to be priced by the tenderers and included in the contract, would typically comprise a time charge rate for each category of resource used (workers, equipment, etc.) and the payment due for each category of materials (possibly on a cost-plus basis).

Design-build approach: In the design-build approach, the tender documents state the client's precise requirements for the completed works. These would typically include:

- the location of the site
- the definition and purpose of the works (note that it is typically the design-build contractor, not the contracting authority, who has the obligation to ensure that the completed works are fit for the intended purpose)
- quality and performance criteria
- arrangements for testing
- special obligations, such as training of operations and maintenance staff.

Note that there is normally no place for a bill of quantities in tender documents for design-build.)

The specifications and requirements may well include outline drawings; however, it should then be indicated to what extent the works would have to comply with them. If at all, any design aspects should be included only after very careful consideration of the consequences, especially for the responsibilities related to such a design.

It is essential that performance requirements and other characteristics correspond to the intended purpose of the works. The crucial element in drafting specifications and requirements for a design-build contract is thus to make sure that the quality and characteristics of the works are specified in terms that are not so detailed as to reduce the contractor's design responsibilities; not so imprecise as to be difficult to enforce; and not reliant on the future opinions of the contracting authority or his representative (which tenderers may consider impossible to forecast).

For describing its requirements in the tender under the design-build approach and defining the works to be offered by tenderers, the contracting authority may work out a conceptual design. In response, tenderers would be required to work out preliminary designs, both for evaluation purposes and for incorporation as obligations under the contract. Some of these designs may need to be complemented later by more final designs (possibly in several stages, as general arrangement drawings and detailed construction drawings). The latter point may be regulated by and enforced under the terms of the contract, but the requirements for the nature and level of detail of the designs to be submitted with the tenders have to be defined in the instructions to tenderers, so that it can be determined if tenders are responsive or not in this respect.

For similar purposes, as a complement to the specifications and requirements described above, the contracting authority may issue questionnaires, tables or lists, requiring certain information from the tenderer to be included in the tenders.

Variants
Contract notices must indicate whether or not tenderers may submit tenders for variants. They may be taken into account both where the award criterion is most economically advantageous tender, and where it is the lowest price. If allowed, the contracting authority must clearly state in the tender documents the minimum specifications to be respected by the variants and any specific requirements for their presentation. They cannot be taken into account if they do not meet those specifications and requirements.

Sharing information about the site etc.
The contracting authority must recognise that both the contracting entity and prospective tenderers require information in order to prepare requirements and tenders, in addition to the information

gathered (*e.g.*) during a feasibility study, and that there are always costs to be paid for this information.

The contracting authority would typically have carried out a number of site investigations and the like in advance of tendering, at its own cost. It is normally in the best interests of all parties concerned to make their results available to tenderers, together with other such data as may be available from other studies or public sources and are in the contracting authority's possession. Such information should be included in the tender documents. The contract may require that certain information has been submitted by the contracting authority and received by the contractor.

When the contracting authority takes responsibility for and carries out detailed design, such information is required specifically for this purpose. However, in a design-build approach, tenderers will require data of similar nature, quantity and precision for carrying out their own pre-contract designs, and determine the details of the works for which a price has to be submitted. In fact, such tenderers may collectively require even more data, since they may each have a different preference, *e.g.* for the layout of a plant or the location of bridge piers.

In these circumstances they must be given sufficient time as well as access to the site for this purpose before and during tendering. Even if the contracting authority has carried out investigations and made their results available, the typical responsibilities of an economic operator under a design-build contract mean that it will need to be able to verify the validity, precision and reliability of the data provided. This is particularly the case of turnkey projects contracts, where the economic operator takes full responsibility for the accuracy of such site data.

Contracting authorities should bear in mind that the money which economic operators collectively find themselves obliged as tenderers to spend on pre-tender investigations will ultimately have to be recovered from the contracting authority through the prices charged for the works actually carried out. If the required investigations or verifications are very extensive, time-consuming, difficult or costly (*e.g.* for tunnelling or similar works), it may thus be advantageous for the contracting authority to carry them out itself and rather not use the design-build approach, or to consider taking on relatively more responsibility for subsoil conditions or the like than stipulated in the standard form of contract used.

A particular reason for this is that the most qualified and experienced design-build contractors may well choose not to spend any resources on pre-tender investigations (meaning that they will simply refrain from participating at all, with the effect of diminishing competition to the detriment of the contracting authority), or to raise their prices to cater for this cost and uncertainty, including the risk of having wasted the money if they are not awarded the contract. (It is interesting to note that in this case, the effect may be that the lowest price tenders received could be those submitted by tenderers having spent too little resources on their own investigations and possibly underestimating real costs. The contracting authority that accepts such low tenders then runs a higher risk of getting an inadequately designed facility or suffering delays and other problems, or of the contractor going bankrupt because the costs for meeting their contractual obligations may become far too high relative to the agreed price for completing the works).

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 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

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.

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.

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.

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.

Planning for the procurement of works

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.

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.

Technical feasibility studies

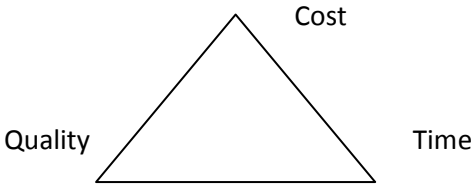
A technical feasibility study may be necessary to ascertain whether the project is technically feasible, even if the time, resources and budgets are available. A city may wish to build a bridge over a river at a given point, but geological surveys may reveal that the underlying land is too marshy to 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.

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!

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).

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

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.

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.

Completing the procurement plan

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.

Box	Recommended contents	Notes on contents	To be completed by
1	Contracting authority name, name of requirement, requirement reference number, author's name and contact details, date of plan, version number, budget, target date of procurement and other basic information as necessary in your contracting authority	This box needs adapting and probably breaking down into subheadings or a table to reflect **your** contracting authority, your department names and your style of operation. Budget and cost information could be included here, although actual cost information may also be an output of market research. The key point about this box is that it contains all of the relevant basic information to allow anyone reading the plan to understand the essence of the document that follows.	The procurement officer running the procurement
2	This table indicates who the key stakeholders are in this procurement exercise and their department(s). It also includes a space for them to 'sign off' the plan when it is completed.	Identifying stakeholders is an important part of preparing a procurement plan. The stakeholders identified in this table will include: ° heads of department, who will use the requirement once it is procured ° budget-holders ° heads of finance ° technical specialists ° legal representatives These stakeholders are the decision-makers who will approve the plan once it has been completed. They may second other people who work for them to complete the plan, but they will sign the document allowing the project to go ahead.	The procurement officer running the procurement in conjunction with the persons named in the boxes The persons named to sign off the document
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
	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.	• If they see that a specific person or department has not been included, they may want this person or department to be involved and to sign off the plan before they themselves sign it off. • If a named person who was involved in preparing the document has not signed the document, a senior person may refuse to sign the document until that other person has signed it. The contents of this box should include the name of every person who has a responsibility to be involved in the procurement.	people named in the boxes The persons named to sign off the document
4	Names of others consulted	This area of the document can be used to demonstrate that the core team involved in the requirement have consulted others in the contracting authority. Any external consultants or experts consulted would be noted here.	The procurement officer running the procurement in conjunction with the other persons
5	Requirement summary	This box should summarise the requirement being purchased. It needs to contain enough detail to describe the requirement and convey its essence, but should not be unnecessarily long. Where the budget is a real issue, it could be referred to here.	The technical specialist stakeholder and/or the other members of the team
6	Areas affected by this requirement	This box is used to record the names of persons in areas of the contracting authority who are affected by the requirement. It acts as a reminder to the team that it needs to consult these areas.	The procurement officer running the procurement in conjunction with the other persons

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 other persons
8	Market analysis	Procurement officers should make an attempt to ascertain the state of the market for their requirement and inform the team. It may be competitive or monopolistic, or it may be suspected that the market is controlled by a cartel. This information will assist in planning the procurement. Market research may be conducted using a variety of sources. One output of market research is the determination of likely costs and the relation of those costs to the budget.	The procurement officer running the procurement in conjunction with the other persons
9	SWOT analysis (Strengths, Weaknesses, Opportunities and Threats) – from the point of view of the contracting authority	The box invites the team to attempt to identify the strengths, weaknesses, opportunities and threats that it faces in carrying out this procurement. The strengths and weaknesses are normally internal to the contracting authority and the opportunities and threats are usually external. • Strengths could include the fact that there is a purchase to make that will attract economic operators. • Weaknesses could include not having the desired budget size or suspecting that persons from the economic operator have good contacts in the	The procurement officer running the procurement in conjunction with the other persons

Box	Recommended contents	Notes on contents	To be completed by
		° contracting authority and know about the requirement. • Opportunities could include the shortage of work that some economic operators may currently have. • Threats could include the busy state of the market and the unattractiveness of the requirement. Be honest when completing these entries; do not pretend that a situation is better than it is!	
10	SWOT analysis – from the point of view of the economic operator	The box invites the team to attempt to identify the strengths, weaknesses, opportunities and threats that economic operators may face in submitting a tender for this procurement. The strengths and weaknesses are normally internal to the economic operator and the opportunities and threats are usually external. • Strengths could include the fact that the economic operator team knows the contracting authority and its staff well, and feels that it understands the way in which the authority works. Equally, it could be that the economic operator team is convinced that it offers the best solution. • Weaknesses could include neither knowing the contracting authority and its staff well nor knowing how it works or having failed previously when working for the contracting authority.. Equally, it could be that the team believes that it does not have the best solution to offer here. • Opportunities could include the fact that this business is placed in competition when other economic operators are not competing for the work.	The procurement officer running the procurement in conjunction with the other persons

Box	Recommended contents	Notes on contents	To be completed by
		• Threats could include the fact that there will be several competitors competing for this work and that the economic operator team must be sharp in quoting this requirement. Be honest when completing these entries; do not pretend that a situation is better than it is!	
11	Knowledge gaps to fill and actions taken to fill the gap	This is an area where poor procurement officers will assume that there is nothing to find out and prudent procurement officers will realise that there are things that they don't know and need to find out. Be honest when completing these entries; do not pretend that a situation is better than it is! These gaps may be apparent from the SWOT and market analyses or from questions that the team may consider. Typical gaps can include: • Stakeholder requirements and priorities • Requirement characteristics, features, and possible variations with the requirement • Technologies involved – possible choices and options • Supply market characteristics • Supply chain characteristics and cost-drivers • Economic operators' pricing policies (which impact on the cost for the contracting authority) • Economic operators' roadmaps • Current economic operator's capabilities • Current economic operator's performance for similar contracts	The procurement officer running the procurement in conjunction with the other persons

Box	Recommended contents	Notes on contents	To be completed by
		• Other (be inventive!!) At the start of the plan there may be many gaps, but as the plan develops the gaps should be closed. Some contracting authorities make this area in the plan a separate task, assigning responsibilities to the team members and then presenting a summary in the document.	
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 other persons
13	Deliverables	Deliverables can be an early version of the tender award criteria, but at this stage they do not have to be specific. The vital action here is to oblige the team to make a statement about what the benefit of procuring this requirement will be. In the final version of the plan it may be that the award criteria are included. Delivering within the iron triangle may be referenced here (see notes below for information on the “iron triangle”).	The procurement officer running the procurement in conjunction with the other persons
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 other persons

Box	Recommended contents	Notes on contents	To be completed by
		This strategy should state: • 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 other persons

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

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.

- 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.

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.

The four main competitive procedures"

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

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.

When can each of the main competitive procedures be used?

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.

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.

Open procedure

Advertising and requests to participate	Advertising at the start of contract-specific procurement marks the formal commencement of the procurement process. The contracting authority must use the standard form contract notice and dispatch this to the *Official Journal of the European Union* in accordance with the procedures set out in the Directive. 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. 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: • **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. • **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].
Issuing of tender documents	**Comment:** Tender documents issued to economic operators will often include: instructions to tenderers, the specification and supporting documents, together with contract documents as well as the request to submit a tender. Where the specification and supporting documents are not available by electronic means on the date of publication of the contract notice, then they must be sent to economic operators within six days of receipt of the request

	to participate, provided that the request was made in good time prior to the date of submission of tenders [art. 53(2)]. 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).
Return of tenders	Economic operators return all documents and forms fully completed by the specified date.
Evaluation of suitability and tenders	The information received from tenderers is evaluated. Firstly, the selection-related information is evaluated against the set selection criteria in order to determine the economic operators that are qualified to perform the contract. Secondly, the tender information is evaluated on the basis of the most economically advantageous tender as redefined in the 2014 Directive, using the pre-disclosed award criteria and weightings.
Contract award	Where the evaluation process results in the decision to award the contract to the successful economic operator, the decision is notified in accordance with statutory requirements, including compliance with the statutory standstill period. Article 50 requires the contract award notice to be sent within 30 days of the conclusion of the contract.

Restricted procedure

Advertising and requests to participate	Advertising at the start of the contract-specific procurement marks the formal commencement of the procurement process. The contracting authority must use the standard form contract notice and dispatch this to the *Official Journal of the European Union* in accordance with the procedures set out in the Directive. 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. 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. In case of **urgency**, the 30-day period for receipt of requests to participate can be reduced to a **minimum of 15 days.**
Pre-qualification	
Selection	Economic operators provide selection stage information to the contracting authority, as requested in the advertisement. The contracting authority may choose to use a pre-qualification questionnaire (PQQ) to request the selection stage information. The contracting authority evaluates the selection stage information against the set selection criteria to determine the economic operators that are qualified to perform the contract, and it may then select a limited number of economic operators. The contracting authority must invite a minimum of five economic operators to submit tenders, provided that there are five suitably qualified candidates (article 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.
Issuing of tender documents	The contracting authority issues the invitation to tender to the selected economic operators. **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). **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. 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**. 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)]. According to article 54, the invitation to tender must be in writing and issued simultaneously to the selected candidates. It must include, at least: • a reference to the contract notice published; • the deadline for receipt of tenders; • the address to which tenders must be sent; • • the language of the tender; • • a reference to any adjoining documents to be submitted in support of declarations provided at the selection stage or to supplement that information; • • the weighting of criteria for the award of the contract (and, in practice, the criteria as well) or, where appropriate, the descending order of importance of those criteria if they are not set out in the contract notice or specification (although it is good practice to repeat the information in the invitation to tender if the information was provided in the contract notice or specification); • • a copy of the specification(s) plus any supporting documents or a reference to where those documents can be accessed by electronic means.
Return of tenders	Economic operators return tenders within the specified time limits and in the format specified by the contracting authority. **Comment:** Tender documents issued to economic operators often include: the specification and supporting documents, together with contract documents, and a request for qualification information as well as a request to submit a tender. Where the specification and supporting documents are not available by electronic means on the date of publication of the contract notice, then they must be sent to economic operators within six days of the date of receipt of the request to participate, provided that the request was made in good time before the date for the submission of tenders [article 53(2)].

	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).
Evaluation of tenders	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.
Contract award	Where the evaluation process results in the decision to award the contract to the successful economic operator, the decision is notified in accordance with statutory requirements, including compliance with the statutory standstill period. Article 50 requires the contract award notice to be sent within 30 days of the conclusion of the contract.

Competitive dialogue procedure

Advertising and request to participate	Advertising at the start of the contract-specific procurement marks the formal commencement of the procurement process. The contracting authority must use the standard form contract notice and dispatch this notice to the *Official Journal of the European Union* in accordance with the procedures set out in the Directive. 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. 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. In cases of **urgency**, the 30-day period for receipt of requests to participate can be reduced to a **minimum of 15 days**.
Pre-qualification	
Selection	Economic operators provide selection stage information to the contracting authority, as requested in the advertisement. The contracting authority may choose to use a pre-qualification questionnaire to request the selection stage information. The contracting authority evaluates the selection stage information against the selection criteria to determine the economic operators that are qualified to perform the contract and selects a limited number of economic operators. The contracting authority must invite a minimum of three economic operators to participate in the negotiation, provided that there are three suitably qualified candidates [article 65(2)]. n each negotiation the number of candidates invited to participate must be sufficient to ensure genuine competition, and so it may be necessary to invite more than three economic operators to participate.
Issuing of competitive dialogue phase	The contracting authority issues an invitation to participate in the competitive dialogue and provides the related documents to the selected economic operators. There are no statutory time limits for the period from the issue of the invitation to participate in the dialogue to the return of tenders.

	According to article 54, the invitation to tender must be in writing and issued simultaneously to the selected candidates. It must include, at least: • 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.
Competitive dialogue phase and invitation to tender	The contracting authority can discuss all aspects of the proposed solutions with the economic operators. The numbers of solutions can be reduced during this phase. Once the contracting authority is satisfied that it will receive suitable tenders, it formally declares the dialogue phase closed and invites tenders. Article 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). The contracting authority is responsible for deciding how the competitive dialogue phase is to be conducted, subject to ensuring that the process is conducted in a manner that complies with the general law and Treaty principles, in particular by ensuring that it is an open, fair and transparent process, with all tenderers treated equally. The following specific requirements apply to the competitive dialogue phase. Contracting authorities must: • ensure equal treatment and in particular not provide information in a discriminatory manner; • not reveal solutions; • set out in advance the award criteria, weightings or order of importance in the contract notice or the descriptive document. The competitive dialogue phase must continue until the contracting authority identifies a solution or solutions capable of meeting its needs. The invitation to tender must be in writing and must include, at least: • the deadline for receipt of tenders; • the address to which tenders must be sent; • the language of the tender.

Return of tenders	Economic operators return tenders within the specified time limits and in the format specified by the contracting authority.
Evaluation of tenders	The contracting authority evaluates the tenders on the basis of the most economically advantageous tender, as redefined in the 2014 Directive. 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.
Contract award	Where the evaluation process results in the decision to award the contract to the successful economic operator, the decision is notified in accordance with statutory requirements, including compliance with the statutory standstill period. Article 50 requires the contract award notice to be sent within 30 days of the conclusion of the contract.

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.

Competitive procedure with negotiation

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

Advertising and request to participate	Advertising at the start of the contract-specific procurement marks the formal commencement of the procurement process. The contracting authority must use the standard form contract notice and dispatch this notice to the *Official Journal of the European Union* in accordance with the procedures set out in the Directive. Economic operators that wish to participate in the process and to submit a tender are required to inform the contracting authority by means of a request to participate. Statutory time limits apply for the period from the dispatch of the contract notice to the return of requests to participate. 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.
Pre-qualification	
Selection	Economic operators provide selection stage information to the contracting authority, as requested in the advertisement. The contracting authority may choose to use a pre-qualification questionnaire

	to request the selection stage information. The contracting authority evaluates the selection stage information against the selection criteria to determine the economic operators that are qualified to perform the contract, and it selects a limited number of economic operators. The contracting authority must invite a minimum of three economic operators to participate in the negotiation, provided that there are three suitably qualified candidates [article 65(2)]. In each negotiation the number of candidates invited to participate must be sufficient to ensure genuine competition, and it may therefore be necessary to invite more than three economic operators to participate.
Issuing of invitation to negotiate documents	The contracting authority issues the invitation to negotiate and related documents to the selected economic operators. There are no statutory time limits for the period starting with the issue of the invitation to negotiate and ending with the return of tenders. According to article 54, the invitation must be in writing and simultaneously issued to the selected candidates and must include, at least: • a reference to the contract notice published; • the deadline for receipt of tenders; • the address to which tenders must be sent; • the language of the tender; • a reference to any possible adjoining documents to be submitted in support of declarations provided during the selection stage or to supplement that information; • the weighting of criteria for the award of the contract (and, in practice, the criteria as well) or, where appropriate, the descending order of importance of those criteria if they are not set out in the contract notice or specification (although it is good practice to repeat the information in the invitation to tender if the information was provided in the contract notice or specification); • a copy of the specification or of the descriptive document, as well as any supporting documents or a reference to where those documents can be accessed by electronic means.
Negotiation phase	See note above on the conduct and purpose of the negotiation phase where the procedure is being used because of a prior failed competitive procedure [article 26(4)b]. 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. 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. 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. 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)]. No negotiations are permitted after the receipt of the final tenders.
Return of tenders	Economic operators return tenders within the specified time limits and in the format specified by the contracting authority. **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. **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. In the case of **urgency** the time limit for the receipt of tenders can be reduced from 30 to a **minimum of 10 days**. 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)].
Evaluation of tenders	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.
Contract award	Where the evaluation process results in the decision to award the contract to the successful economic operator, this decision is notified in accordance with statutory requirements, including compliance with the statutory standstill period. Article 50 requires the contract award notice to be sent within 30 days of the conclusion of the contract.

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”.

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.

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

Defining the overall strategy concerning the award criteria to be applied: checklist of the *main* points to be addressed

The overall strategy concerning the award criteria to be applied should be determined before a tender is launched. Listed below is a checklist of the *main* points that, in general terms, a contracting authority is advised to address when it defines its overall strategy:

- Choose which award criterion to apply, i.e. the price-only criterion or the best price-quality ratio

- Whenever the best price-quality ratio has been chosen:

  - Identify the individual criteria that will be applied and their relative weighting (or their descending order of importance in the case where weighting cannot be applied for demonstrable reasons).

  - Where it has been decided to break each criterion down into sub-criteria, identify these sub-criteria and their relative weighting within the weighting given to that individual criterion.

  - Where it has been decided to apply a more detailed evaluation methodology, define it in a clear way.

  - Identify, in accordance with the requirements of the applicable law, *where and how* the following elements should be disclosed:

    - use of the price-only criterion or the best price-quality ratio , as the case may be;

    - whenever the best price-quality ratio has been chosen:

      - the individual criteria that will be applied and their relative weighting (or their descending order of importance if weighting cannot be applied for demonstrable reasons);

      - any sub-criteria into which each criterion to be applied is broken down and their relative weighting within the weighting given to that individual criterion;

      - any evaluation methodology that has been developed.

N.B. *When determining this strategy it must also be taken into account whether the tender will be divided into lots and how lots will be awarded.*

Exhaustive list of evidence that you may request from economic operators

As a proof of the technical and/or professional ability of economic operators, a contracting authority may request only the references listed in Article 48(2). These references are as follows:

1. **For works:**

    - a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where appropriate, the competent entity shall submit these certificates to the contracting authority direct (Article 48(2)(a)(i))

2. **For supplies and services**:

    - a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, whether public or private, involved. Evidence of delivery and services provided shall be given:

        - where the recipient was a contracting authority, in the form of certificates issued or countersigned by the competent authority,

        - where the recipient was a private purchaser, by the purchaser's certification or, failing this, simply by a declaration by the economic operator (Article 48(2)(a)(ii)

    - a description of the technical facilities and measures used by the supplier or service provider for ensuring quality and the undertaking's study and research facilities (Article 48(2)(c))

    - where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authorities or on their behalf by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, on the production capacities of the supplier or the technical capacity of the service provider and, if necessary, on the means of study and research which are available to it and the quality control measures it will operate (Article 48(2)(d))

3. **For products to be supplied:**

    - samples, descriptions and/or photographs, the authenticity of which must be certified if the contracting authority so requests (Article 48(2)(j)(i))

    - certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to specifications or standards (Article 48(2)(j)(ii))

N.B: *It should be noted that in case contracting authorities required the production of certificates drawn up by independent bodies attesting the compliance of economic operators with certain quality assurance standards, they must refer to the quality assurance systems based on the European*

standards series certified by bodies conforming to the European standard series concerning certification. They must also recognise equivalent certificates from bodies established in other Member States and accept evidence of equivalent quality assurance measures from economic operators (Article 49 of the Directive).

4. For works and services

- the educational and professional qualifications of the service provider or contractor and/or those of the undertaking's managerial staff and, in particular, those of the person or persons responsible for providing the services or managing the work (Article 48(2)(e))

- for public works contracts and public services contracts, and only in appropriate cases, an indication of the environmental management measures that the economic operator will be able to apply when performing the contract (Article 48(2)(f))

N.B. *It should be noted that if contracting authorities require the production of certificates drawn up by independent bodies attesting the compliance of the economic operators with certain environmental management standards, they shall refer to the Community Eco-Management and Audit Scheme (EMAS) or to environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification. They must also recognise equivalent certificates from bodies established in other Member States and accept other evidence of equivalent environmental management measures from economic operators (Article 50 of the Directive).*

- a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last three years (Article 48(2)(g))

- a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract (Article 48(2)(h))

5. **For services**

- an indication of the proportion of the contract which the service provider intends possibly to subcontract (Article 48(2)(i))

6. **For all contracts**

- an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work (Article 48(2)(b))

N.B. *The above mentioned list of references is exhaustive. Therefore a contracting may not require other means of proof/references that those listed above. However, a contracting authority is not obliged to request all the above listed references. On the contrary, the contracting authority must choose from the above mentioned list of references only those (one or more) that are strictly necessary to assess the economic operators' technical and/or professional ability taking into account the nature, quantity, or importance, and use of the works, supplies or services.*

Comment

The evidence listed above is divided depending on the subject-matter of the contract (i.e. supplies, works or services). It must be noted, however, that Article 48(2) does not take into account the situation where there are mixed contracts (for example, services are provided under a supply contract or where supplies are provided under a service contract etc.). The prevailing interpretation is that appropriate evidence may be requested taking into account the specific nature of the mixed contract. Therefore, a contracting authority may request, for example, the educational and professional qualifications of the persons responsible for the provision of a specific service to be provided under a supply contract.

EUROPEAN SINGLE PROCUREMENT DOCUMENT (ESPD)

Recital 84 of the 2014 Directive recognises that "many economic operators, and not least SMEs, find that a major obstacle to their participation in public procurement consists in administrative burdens deriving from the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria".

For the purposes of simplification and limitation of administrative burdens for the benefit of both contracting authorities and economic operators, the 2014 Directive introduced the European Single Procurement Document – ESPD (article 59).

At the time of submission of requests to participate or tenders, contracting authorities shall accept the ESPD from economic operators. The ESPD is an updated self-declaration by economic operators, providing preliminary evidence in replacement of certificates issued by public authorities or third parties and confirming that the relevant economic operator fulfils the following conditions:

a) it is not in one of the situations referred to in article 57 in which economic operators shall or may be excluded;
b) it meets the relevant selection criteria that have been set out pursuant to article 58 (see sub-sections;
c) where applicable, it fulfils the objective rules and criteria that have been set out pursuant to article 65.

Where the economic operator relies on the capacities of other entities, the ESPD shall also contain the information referred in (a) to (c) above in respect of such entities.

The ESPD shall:

- consist of a formal statement by the economic operator that the relevant grounds for exclusion do not apply and/or that the relevant selection criterion is fulfilled;
- provide the relevant information as required by the contracting authority;
- identify the public authority or third party responsible for establishing the supporting documents;
- contain a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents;
- contain the information, such as the Internet address of the database, any identification data and, where applicable, the necessary declaration of consent, where the contracting authority can obtain the supporting documents directly by accessing a database.

The ESPD shall be drawn up on the basis of a standard form established by the Commission. The ESPD shall be provided exclusively in electronic form. Contracting authorities must use an electronic format for the ESPD as from 18 April 2017 . All language versions of the ESPD shall be available in e-Certis.

Note
When preparing procurement documents for a given procurement procedure, contracting authorities must also prepare the ESPD that is to be used for that procedure. They do so by filling in beforehand the standard form indicating which information they will require from economic operators.

In the case of groups of economic operators, including temporary associations, a separate ESPD shall be completed for each of the participating economic operators.
Economic operators may reuse an ESPD that has already been used in a previous procurement procedure, provided that they confirm that the information contained therein remains correct. They must complete a new ESPD in respect of the information that is no longer correct or did not appear in the previous ESPD.

It is important to note that the contracting authority may ask any tenderer or candidate at any moment during the procurement procedure to submit all or part of the required certificates and supporting documents in order to ensure the proper conduct of the procedure. This request might be the case in particular in two-stage procedures, in which the contracting authority uses this possibility to limit the number of candidates to be invited to submit a tender. Requiring the submission of the supporting documents at the moment of selection of the candidates to be invited could be justified by the fact that contracting authorities could then avoid inviting candidates that later on, in the award stage, might prove to be unable to submit the supporting documents, thereby depriving qualified candidates of an opportunity to participate.

Before awarding the contract, except in relation to certain contracts based on framework agreements, the contracting authority must require the tenderer to which it has decided to award the contract to submit up-to-date supporting documents. The contracting authority may invite economic operators to supplement or clarify the certificates received.

Note
Economic operators shall not be required to submit supporting documents:

- where and in so far as the contracting authority has the possibility of obtaining the certificates or the relevant information directly by accessing a national database in any Member State that is available free of charge (such as a national procurement register, a virtual company dossier, an electronic document storage system or a prequalification system);*

- where the contracting authority, having awarded the contract or concluded the framework agreement, already possesses these documents.

**Member States shall ensure that databases containing relevant information on economic operators that may be consulted by their contracting authorities may also be consulted, under the same conditions, by contracting authorities of other Member States. Member States shall also make available and update in e-Certis a complete list of databases containing relevant information on economic operators that can be consulted by contracting authorities from other Member States. Upon request, Member States shall communicate to other Member States any information related to such databases.*

Economic operators may be excluded from the procurement procedure or be subject to prosecution under national law in the case of serious misrepresentation in completing the ESPD or, generally, in supplying the information required for the verification of the absence of grounds for exclusion or for the fulfilment of the selection criteria, or where such information was withheld or the economic operators were unable to submit the supporting documents.

Definition of the overall strategy for the selection of economic operators: checklist of the *main* points that should be addressed

The overall strategy for the selection of economic operators should be determined before the tender is launched. Its definition goes hand in hand with the definition of the tender requirements and the choice of the particular procurement procedure to be used. *It must be established in a manner that respects national laws and general law principles, including the relevant Treaty principles.*

Listed below is a checklist of the *main* points that, in general terms, a contracting authority should address when defining the overall strategy for the selection of economic operators:

- Have you identified the category of selection criteria that you will apply?
- Have you defined the specific criteria that you will apply within each category of selection criteria chosen?
- Do you consider it appropriate to fix minimum capacity levels with regard to any economic and financial standing criteria or to any technical and/or professional capacity criteria to be applied? If so, have you defined these minimum capacity levels?
- Have you identified the evidence/references to be required from economic operators to prove that they satisfy the set selection criteria?
- In the case of restricted procedures, competitive procedures with negotiation, competitive dialogue procedures, and innovation partnerships, the contracting authority should address the following issues:

    - Have you set the minimum number of economic operators to be invited to tender/negotiate/conduct a dialogue?

    - Do you consider it appropriate to fix the maximum number of economic operators to be invited to tender/negotiate/conduct a dialogue? If so, then:

        - have you fixed this maximum number?

        - Have you determined the objective and non-discriminatory criteria or rules and methodologies to be applied in order to choose the economic operators that are to be invited to tender/negotiate/conduct a dialogue from among the economic operators that are qualified?

- Have you identified, in accordance with the requirements of the applicable law, when, where and how you should disclose:

    - the selection criteria that you will apply?
    - any minimum capacity level that you will apply?
    - the evidence/references that you will request?
    - the minimum number of economic operators that you intend to invite to tender/negotiate/conduct a dialogue?*
    - any maximum number of economic operators that you will invite to tender/negotiate/conduct a dialogue?* and
    - any criteria or methodologies that you will apply in order to choose the economic operators to be invited to tender/negotiate/conduct a dialogue from among the economic operators that are qualified?*

Process of selection of economic operators (selection stage): some general principles and considerations

The process of selection of economic operators (selection stage) takes place before the process for the award of the contract (award stage). As an exception, in open procedures the examination of tenders in terms of award criteria may take place before the selection of economic operators. The selection process may also take place at different times of the procurement process, depending on whether an open procedure or a two-stage procedure is used.

Steps that should be followed in the process of selection of economic operators
The 2014 Directive sets out the steps that a contracting authority should follow in carrying out the process of selection of economic operators. These steps are as follows [see article 56(1)]:

First – Economic operators are to be checked against the grounds for mandatory exclusion and any grounds for optional exclusion.

Second – Only those economic operators that have not been excluded from the procurement process, after having being checked against the above-mentioned criteria, are to be checked against any criteria of suitability to pursue the professional activity, economic and financial standing, or technical and/or professional ability.

Third – In the case of restricted procedures, competitive procedures with negotiation, competitive dialogue procedures, and innovation partnerships, *where appropriate and applicable*, only those economic operators that are qualified are to be checked against the set criteria or rules (methodologies) in order to reduce the number of economic operators to be invited to tender/negotiate/conduct a dialogue.

Basic general law and Treaty principles that must be applied in the process of selection of economic operators
The process of selection of economic operators must be conducted in accordance with the general law and Treaty principles of equal treatment, non-discrimination and transparency. The requirement of confidentiality must also be respected (i.e. the confidentiality of the information acquired by those involved in the process of selection of economic operators must be guaranteed).

The "team" in a contracting authority responsible for carrying out the process of selection of economic operators
The Directive is silent as to who is responsible within a contracting authority to carry out the process of selection of economic operators. This issue is left to member states to regulate.

In principle, the process of selection of economic operators is carried out by a suitably competent evaluation team, which may be either the relevant unit of the line organisation of the contracting authority or a specially established evaluation panel/tender committee

In this context, the role of the evaluation team is to assess whether the economic operators that have submitted an expression of interest/application (in the case of the restricted procedure, competitive procedure with negotiation, competitive dialogue procedure or innovation partnership) or a tender are qualified to perform the contract on the basis of the set selection criteria.

Evaluation report/qualitative selection report
In accordance with the principle of transparency, a contracting authority must ensure that the whole process of selection of economic operators is documented in writing in the form of a report.

In cases where restricted procedures, competitive procedures with negotiation, competitive dialogue procedures or innovation partnerships are used (where a pre-qualification takes place), a qualitative selection report must be prepared. Conversely, in procedures where a pre-qualification does not take place, such as the open procedure, the selection process is normally documented in the evaluation report itself.

Through the qualitative selection report, the evaluation team makes a recommendation to the contracting authority on the list of economic operators to be invited to tender/negotiate/conduct a dialogue. The qualitative selection report must be approved in writing by the authorised officer of the contracting authority (with clear indication of the officer's full name and position and the date) before the invitation to tender, negotiate or conduct a dialogue may be issued.

N.B. *The written approval of the authorised officer is a very important element, which will be checked by the auditors and/or other control bodies as a necessary authorisation to proceed with the invitation to tender/negotiate/conduct a dialogue.*
In broad terms, the qualitative selection report or the evaluation report, as the case may be, will include, *inter alia,* the following information with regard to the process of selection of economic operators:

- an accurate assessment of each economic operator's qualifications;

- a summary of any requests for clarification, submission, supplementation or completion and the corresponding responses (with indication of dates of expedition, deadlines for reply, dates of receipt of the responses, and indications as to whether the responses received were satisfactory or not and if not, then the reasons why);

- a list of those economic operators that meet the qualitative selection criteria and of those selected to proceed to the next stage in the case of the restricted procedure, competitive procedure with negotiation, competitive dialogue, and innovation partnership;

- a list of those economic operators that have not been selected, with clear indications of the reasons for non-selection/rejection;

N.B. *It is very important that the reasons for non-selection of economic operators are clearly and exhaustively explained and documented so that if they are challenged or in the event of debriefing these reasons are backed up by full documentary evidence showing that the process of selection was properly conducted.*

- names and functions of those involved in the process of selection of economic operators and their signatures.

REMINDER of the number of economic operators to be invited to tender/negotiate/conduct a dialogue in two-stage procedures

- Where the number of economic operators meeting the selection criteria is *below the set minimum number*, a contracting authority may continue the procedure with the economic operators that qualify (in any event, the number of economic operators to be invited must be sufficient to ensure genuine competition). However, it may not include other economic operators that did not request to participate or that did not have the required capabilities (article 65(2).

- Where the number of economic operators meeting the set selection criteria is *higher than the minimum number of the set maximum number*, the contracting authority shall apply the criteria or rules (methodologies) set in advance in order to choose the economic operators that it will invite to tender/negotiate/conduct a dialogue.

Obligation to inform unsuccessful economic operators of the reasons for their rejection

A contracting authority must ensure that unsuccessful economic operators are *promptly* informed of the reasons for their rejection, upon their request (article 55(2)).

Design of tender

The Directives include detailed rules on the selection and award process as well the elaboration of technical specifications, but for the most part leaves it to the member states to regulate the detailed content of the documentation for the pre-qualification and the tender award process.

The basic requirements laid down in the Directives are that an invitation to submit a tender, to participate in the dialogue or to negotiate must contain at least:

A reference to the contract notice published; the deadline for the receipt of the tenders, the address to which the tenders must be sent, the language or languages in which the tenders must be drawn up, a reference to any possible adjoining documents to be submitted, support of verifiable declarations, the information on personal suitability, and technical and professional ability for the selection process and the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria.

Some countries also have regulations or laws requiring contracting authorities to use certain model documentation for these processes. Another aspect of interest is whether there are any rules in terms of costs on the provision of tender documentation. Localisation required to highlight local requirements.

The majority of the regulatory instruments of the member states as well as in SIGMA partner countries include, in varying degree, the main content of the tender documentation in terms of invitation to tenders, instructions to tenderers, specifications and draft contracts.

The tender documents are the focal point in the tendering process and shall furnish all information necessary for a prospective tenderer to prepare a responsive tender for the supplies, services and works to be provided. While the detail and complexity of these documents may vary with the size and nature of the contract, they generally should include:

(a) Invitation to tender;
(b) Instructions to tenderers;
(c) General and special conditions of contract;
(d) Technical/services specifications;
(e) Tender form;
(f) Contract form;
(g) Appendices (model financial offers, forms for guarantees, etc., as applicable)

The tender documents shall be drafted so as to permit and encourage the widest possible competition. They shall clearly define the scope of supplies and associated services, the services and works to be supplied, the rights and obligations of the contracting authority and of suppliers, service providers and contractors, and the conditions to be met in order for a tender to be declared responsive, and they shall set out fair and non-discriminatory criteria for selecting the winning tender.

Guiding principles for the design of the tender documents

It is the responsibility of the contracting authority to:

- prepare thoroughly drawn up tender documentation that would allow optimal competition and make it possible, generally, to make an award decision without prior negotiations;

- ensure that all legal formalities in connection with the tender proceedings will be met; announcement of tender, submission and opening of tenders, presentation of award criteria and recording of the process;

- include technical, commercial, environmental and other requirements that correctly will balance and optimally reflect the character and size of the contract.

In particular, the following areas are of importance in the preparation of the tender documents (instructions to tenderers):

- Based on the size and duration of the contract, determine the qualification or selection criteria for participation in the tender, which shall be disclosed in the contract notice and tender documents when applicable;

- Determine how qualifications shall be evidenced by tenderers without imposing unnecessary formal conditions that could negatively affect the participation;

- Decide on the appropriate packaging of the tender and whether to allow tendering for lots or variants;

- Decide whether groups or joint ventures will be required to take a specific legal form for performance of the contract;

- Decide on the award criteria and their relative weighting, or if necessary their descending order of importance, for listing in the contract notice or tender documents;

- Determine and indicate all important aspects of the tender evaluation methodology and procedure, including the rules regarding minor and major deviations, correction of arithmetical errors, and rules for rejection of tenders;

- Decide on instruments for the invitations to participate or for tenders in addition to the publication of a contract notice in the OJEU, such as the government website or procurement bulletin of the member state, national and local newspapers;

- Determine the appropriate time limits for the preparation and submission of tenders, which shall respect the minimum time limits but be sufficiently extended when required in order to correctly reflect the size and complexity of the tender;

- Indicate the rules and procedure for submission and opening of tenders;

- Determine the length of the tender validity period, which should be set to enable an effective and correct tender evaluation, including the award and conclusion of contract, but not so long as to affect prices and costs negatively.

- Consider the need for a pre-bid conference, which could be necessary in the case of complex technical specifications or contract conditions;

- Indicate the procedure and rules for clarification of the tenders submitted;

- Indicate the rules for cancellation of the tender procedure;

- Decide on the need for requesting tender and performance securities;

- Determine the appropriate contract model, taking into account the size, type and duration of the contract;

- Indicate the procedures for debriefing and lodging of a complaint.

Design of specifications

Introduction
The purpose of technical and service specifications is to give instructions and guidance to tenderers at the tendering stage about the nature of the tender they will need to submit, and to serve as the economic operator's mandate during contract implementation. The technical specifications will be included in the tender documents and will become an annexe of the eventual contract awarded as a result of the tender.

They should reflect correctly the needs of the contracting authority and the budget estimations made for the acquisition. Incorrect or unrealistic specifications are a common reason for many of the problems that later frequently occur during the tender and award process, such as the need for issuing amendments to the tender dossier, cancellation of tender proceedings, lodging of complaints and contract problems.

Furthermore, a set of precise and clear specifications is a prerequisite for tenderers to respond realistically and competitively to the requirements of the contracting authority. They must be drafted to permit the widest possible competition and, at the same time, present a clear statement of the required standards of workmanship, materials, performance and other factors of relevance related to products and services to be procured.
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Technical specifications must afford equal access for candidates and tenderers, and not have the effect of creating unjustified obstacles to competitive tendering.

Thorough preparation of technical specifications is extremely important for the ultimate success of the contract implementation. It is most likely to ensure that the contract has been properly conceived, that the work is carried out on schedule, and that resources will not be wasted. Therefore, greater effort during the preparation phase will save time and money in the later stages of the project cycle.

The Directives provide that the technical specifications should be defined by the contracting authorities by reference to national standards implementing European standards, or by reference to European technical approvals, or by reference to common technical specifications.

Definitions
(1) *Technical specifications* means the totality of the technical requirements contained in particular in the contract documents, defining the characteristics required of a service to be provided, a material or product to be supplied or works to be constructed, and thus permitting these to be described in a manner such that it fulfils the use for which it is intended by the contracting authority;
(2) *Standard* means a technical specification approved by a recognised standardising body for repeated and continuous application, compliance with which is in principle not compulsory;

(3) *European standard* means a standard approved by the European Committee for Standardization (CEN) or by the European Committee for Electrotechnical Standardization (Cenelec) as “European standards (EN)” or “Harmonization documents (HD)” according to the common rules of these organisations;

(4) *European technical approval* means a favourable technical assessment of the fitness for use of a product, based on fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use. The European approval shall be issued by an approval body designated for this purpose by the member state;

(5) *Common technical specification* means a technical specification laid down in accordance with a procedure recognised by the member states to ensure uniform application in all member states, which has been published in the Official Journal.

Exceptions:

- where there are legally binding national technical rules that are compatible with the Treaty;
- where the standards etc. do not include any provision for establishing conformity, or the technical means to do so do not exist;
- where use of the standards etc. would result in incompatibility with equipment in use, disproportionate costs or disproportionate technical difficulties;
- for genuinely innovative projects.

The justification for invoking an exception must be given in the contract notice or the tender dossier.

Technical specifications must not refer to services, goods or works of a specific make or source, or process, in particular to trademarks, patents, types or a specific origin if that would favour certain service providers, suppliers, products or contractors. Such an indication is permitted, however, where it would otherwise be impossible to describe the subject of the contract with sufficient precision, but only if accompanied by the words “or equivalent”.
With the **2014 Directive and the 2014 Utilities Directive,** a modern approach has been adopted:

Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:

- in terms of performance or functional requirements, including environmental characteristics...

- by reference to technical specifications and, in order of preference to national standards transposing European standards, European technical assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies, or
- national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words "or equivalent

The 2014 Directives further provide that where a technical specification is based on standards, the contracting authority cannot reject offers that do not comply with the standards if the tenderer can prove to the satisfaction of the contracting authority that the offer will satisfy the requirement in an equivalent manner. Similarly, a contracting authority cannot reject an offer that conforms with a standard etc. if the offer also meets a required functional or performance requirement.

Key principles

Non-discrimination

As mentioned above, there is a general ban on technical specifications that mention goods of a specific make or source, or of a particular process, and that have the effect of favouring or eliminating certain enterprises or products. Among the specifications that can have such a discriminatory effect and are therefore prohibited, the Directive mentions in particular the indication of trademarks, patents, and types or a specific origin or production.

An exception to this general ban is allowed where the subject matter of the contract cannot otherwise be described by specifications that are sufficiently precise and intelligible to all concerned. Reliance on this derogation should not, however, have discriminatory effects; to that end, the Directives require that such indications be accompanied by the words “or equivalent”. Contracting authorities relying on this or other derogations must always be able to provide evidence that they are necessary.

Principle of equivalence and mutual recognition

Contracting authorities must presume that products manufactured in accordance with the standards drawn up by the competent standards bodies conform to the essential requirements laid down in the Directive concerned. They may not refuse products simply because they were not manufactured in accordance with such standards, if evidence is supplied that those products conform to the essential requirements established by Community legislative harmonisation.

If there are no common technical rules or standards, a contracting authority cannot reject products from other member states on the sole grounds that they comply with different technical rules or standards, without first checking whether they meet the requirements of the contract.

In accordance with the mutual recognition principle, a contracting authority must consider on equal terms products from other member states manufactured in accordance with technical rules or standards that afford the same degree of performance and protection of the legitimate interests concerned as products manufactured in conformity with the technical specifications stipulated in the contract documents.

Design of specifications in practice

This section describes the process and practicalities of specifying a requirement in such a way that economic operators can understand what is needed. This will allow them to tender in the required format and deliver a solution to meet the needs of the contracting authority, stakeholders and users of the purchase.

- The role of the procurement officer at this stage of the process is to ensure that the specification is drawn up by appropriately qualified people in such a way that any number of economic operators can successfully tender for the requirement.

- The role of specialist technical stakeholders within a contracting authority is to use their knowledge and expertise, consulting with others in the contracting authority to construct a specification that is fit for the intended purpose.

- Specifying a requirement is a fundamental and early stage in the procurement process. Simply put, if the specification is lacking in some way, what is delivered will also be lacking.

A procurement practitioner's definition
For a procurement practitioner, a useful definition of a specification is "a generic description of the required attributes fundamental to the need of the prime user of the requirement, which includes an indication of how fitness for purpose will be measured".

Unpacking that definition leads to:

1. A realisation that the specification must be generic. This means that specifications need to be developed in such a way that the requirement described can be met by any number of economic operators who supply the works, goods or services identified.

2. Defining fundamental attributes is key. An attribute is an "inherent characteristic", or "a word ascribing a quality". The specification must describe what is fundamental to the prime user of the works, goods or services being purchased.

3. The specification must include text about how those who have written the specification and users will compare the goods, works and services delivered with their aspirations. Simply put, the specification must indicate "what a job well done will look like". If the writer and prospective user of the requirement cannot determine what success looks like, what chance has the economic operator of delivering success?

In summary: procurement officers must in all cases ensure that requirements are specified in a way that is non-discriminatory; they must provide equal access to the specification for all tenderers; and the way in which the specification is prepared must not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

Good practice note – Specifications

The objective of a specification is to promote competition for a requirement. The specification must not therefore favour one economic operator; it must allow as many economic operators as possible to tender for the work.

Definitions from the 2014 Directive – goods and services

The main governing definitions are found in the 2014 Directive, which uses the following definition of technical specification [Annex VII 1(b)]:

> "Technical specification", in the case of public supply or service contracts, means a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental and climatic performance levels, ……, production processes and methods, at any stage of the life cycle of the supply or service, and conformity assessment procedures."

Definitions from the Directive – works

As above, the Directive uses the following definition of technical specification for works [Annex VII 1(a)]:

> "Technical specification", in the case of public work contracts, means 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 that they involve."

Good practice note – Time

Specifying is an upstream procurement process. Invest time in getting the specification right in relation to your requirement. The investment will pay dividends during the delivery of the requirement downstream. Contract management is less problematic if the specification meets the needs.

Types of specification

1. Generic specifications
2. Conformance specifications
3. Detailed design specifications
4. Performance specifications

Unacceptable design of specifications

Frequently, stakeholders in contracting authorities who are involved in preparing specifications use information from previous purchases, or information from one economic operator, to specify a requirement. There is a significant danger in this approach, as by doing so the requirement can end up being written in such a way as to favour the economic operator whose information is used. This result may, or may not, be deliberate. Favouring a particular economic operator when drafting a specification may take the form of, for example:

- Using a brand name or a title
- Reading the part number of the item
- Looking up the details in an economic operator's catalogue and replicating them
- Using information prepared for them by an economic operator, to meet the need in question

There *are* certain limited circumstances provided for in the Directive where further purchases from an economic operator may be permitted where that economic operator is already providing works, supplies or services to the contracting authority.

Apart from the limited circumstances permitted under the Directive, use of a specification that favours a single economic operator will lead to reducing the options available to ensure that the best overall value is provided through the procurement process. In addition, it could lead to a legal challenge on a number of grounds, including unequal treatment and/or breach of specific provisions of the Directive providing that a contracting authority:

shall not lay down technical specifications which refer to materials or goods of a specific make, or service, or a particular process or trademark, patents, types, origin or means of productions that discriminates in favour of or against particular economic operators.

Comment: Potential for corruption

While recognising the fundamentals of the EU Directive, some economic operators will try to work with their contracting authority customers to develop the specification in a way that best allows their own equipment or service to be selected by the contracting authority, perhaps by stressing one unique feature of their product. This may be an overt or covert process, and economic operators refer to it as "creating a need". Some economic operators even offer to help busy procurement officers write the specification; however, it is frequently the technical specialist or stakeholder who is easiest to influence, and procurement officers must warn their colleagues against accepting such "assistance".

Generic specifications
A generic specification aims to describe the requirement in a way that does not restrict the number of economic operators that the contracting authority may attract. It can be based on national, European or international standards (provided that equivalents are accepted) as a means of clearly opening the market.

In the context of procurement, specifications need to be developed in such a way that the requirement described can be met by any number of organisations that supply the goods or services identified. A generic specification:

- makes economic operators responsible for proposing and delivering the requirement, meeting the contracting authority's needs
- can be used to stimulate competition
- can be used where there is no need to be specific

An example of a generic specification would be a mid-range four-door saloon car. Localisation to provide an equivalent generic description of a Renault Megane.

Conformance specifications
A conformance specification lays down unambiguously the requirements that economic operators must meet. It allows no room for manoeuvre. The specification describes the product or service required in great detail and can be based on national, European or international standards (or equivalent) as a means of clearly specifying what is needed.

- For goods it may specify weight, size, finish, volume, circumference, and use with other goods.

- For services it may describe duration, number of people required, what will be done by the people, where they will do it and when they will do it.

The economic operator is required to deliver the goods or services that meet this need; they are not encouraged to do better. Conformance specifications are often supported by drawings. While in some contexts conformance specifications can work appropriately, the following dangers exist:

- The economic operator may know of a better or more cost-effective way to meet the need. If discouraged from being concerned with this aspect, economic operators will not pass on the benefit of the experience they have to the contracting authority.

- Doubt may still exist concerning exactly what is required, because the specification is still not "clear".

- Too much detail requiring "conformance" may lead to:
    - additional cost, while preventing economic operators from offering the benefit of their wider experience;
    - confrontational relationships, particularly with services.

However, where for a given reason the specification *has* to be "just so", a conformance specification may be appropriate. Additionally, if the contracting authority has a nationally recognised expert in the field they are specifying, then economic operators may genuinely learn from this expert by attempting to meet the need specified.
If a room were to be air-conditioned, a conformance specification would, among other things and without naming brands, identify the exact position of:

1. The controls on the wall
2. The place of the extractor fans
3. Where the compressor was situated on the roof

It would also identify:

4. The size, capacity and power of the compressor.

An economic operator replying to an invitation to tender may feel that different positions for the controls, fans and compressor may be more advantageous. However, they will be concerned that if they propose the different positions, their tender may be viewed as non-compliant and they may be excluded. Therefore they will not propose the more advantageous option.

Detailed design specifications
This option develops a conformance specification a step further. A design specification defines the technical characteristics of the requirement in great detail. The economic operator has no input into the design process and is not responsible for the benefits available to the contracting authorities. This option can be used where:

- The contracting authority has the nationally recognised expert in the field they are specifying.
- Economic operator innovation is not required.
- Non-experts will be asked to deliver the requirement.
- There is a risk of ambiguity.

If a room were to be air-conditioned, a detailed design specification would, among other things and without naming brands, identify the exact position of:

1. The controls on the wall
2. The place of the extractor fans
3. Where the compressor was situated on the roof

4.
It would also:

5. Identify the size, capacity and power of the compressor
6. Provide an electrical wiring diagram
7. Provide a flow diagram for the refrigerant
8. Provide a site diagram for the location of all of the components required.

As with conformance specifications, an economic operator may feel that different positions for the components will be more advantageous but not offer the preferable solution, for fear that non-compliance may result in their exclusion.

Performance specifications

Performance specifications are sometimes called functional or output specifications because they focus on the functionality or output to be delivered.

Performance specifications provide a clear indication of the purpose for which the item is required and this requirement is fully communicated to economic operators. The difference here is that economic operators are then encouraged to use their expertise to offer solutions (products and/or services) which, in the expert view, best meet the need as specified by the contracting authority.

If a room were to be air-conditioned, a performance specification would indicate that the requirement was that the room, containing 20 people with a computer each and two printers, should be kept at a temperature of 20 degrees centigrade when the temperature outside was between minus 10°C and 32°C. In this sense, commonality and conformity are achieved because all economic operators can attempt to provide a cost-effective solution to the requirement, without the requirement being prescriptive.

Good practice note – Performance specifications

Use of a performance specification can lead to wider competition being stimulated than with a conformance specification. EU directives encourage the use of performance specifications.

It may not always be possible to use a generic performance specification. However, for many procurement officers, they are the preferred option because they:

- encourage alternative and innovative solutions
- minimise the contracting authority's risk if performance is poor
- discourage bias
- reduce resources required by economic operators to prepare detailed responses
- minimise time, resources and effort to prepare the specification within the contracting authority

The minimum sought by a procurement officer should be a non-discriminatory specification that fully describes the need.

Using standards to specify

It is a basic requirement under EC law that contracting authorities refer to EU or international standards where those exist. This is an excellent way of promoting competition:

- in a given industry
- when delivering a given good or service

- nationally
- in Europe
- internationally

An example is the accounting standard IFRS1 (International Financial Reporting Standard 1), to which economic operators should prepare their sets of accounts for examination by customers and regulatory bodies. Localisation – check IFRS 1 applies and/or finds a more commonly understood standard

The term "standard" means a technical specification approved by a recognised standardising body (in the above case, the International Accounting Standards Board) for repeated or continuous application. Compliance may or may not be compulsory with the standard, which falls into one of the following categories:

- International standard: a standard adopted by an international standards organisation and made available to the general public
- European standard: a standard adopted by a European standards organisation and made available to the general public
- National standard: a standard adopted by a national standards organisation and made available to the general public

Equally, a simpler standard may be the weight of photocopying paper which could be specified as 80 gsm (grams per square metre) or an EDIFACT, an electronic data interchange standard. These last two are examples of industry standards. A contracting authority needing to photocopy onto heavier paper would specify that the photocopiers it needs to purchase must be able to cope with paper of 130 gsm.

Allowing an opportunity for an alternative solution
Specifications should also leave room for economic operators to provide an alternative solution. As explained below, the Directive requires contracting authorities to accept equivalent standards where economic operators can demonstrate, to the contracting authority's satisfaction, that they are equivalent. Frequently this is achieved by reference to the words "or equivalent". While it is therefore not good practice to say "Renault Megane", Localisation by using the statement "Renault Megane or equivalent vehicle", potential tenderers know that they can offer a vehicle from a different manufacturer without being considered non-compliant.

The Directive provides that where a contracting authority defines technical specifications, it should not reject a tender on the basis that the materials, goods or services offered do not comply if an economic operator proves to the satisfaction of the contracting authority, by any "appropriate means", that one or more solutions proposed meet the requirements in an equivalent manner. Note that:

> "Appropriate means" (above) includes a technical dossier of a manufacturer or a test report from a recognised body.
>
> "Recognised bodies" within the terms of this Directive are "test and calibration laboratories and certification and inspection bodies which comply with applicable European standards".

Considering the concept of total cost of ownership (TCO)

The total cost of ownership principle
Where a requirement like a machine, vehicle or building will not be consumed within a short time of its arrival at the contracting authority, consideration should be given to specifying elements of the lifetime cost.

The concept of total cost of ownership (TCO), also known as whole life costing, takes into account the owning, operating and disposal costs of a requirement over its whole life. It can be that a lower purchase price incurs a higher operating cost over its life. Therefore the total cost of owning that theoretically low-cost purchase is greater than it otherwise would have been.
The 2014 directives prescribe the use of the most economically advantageous tender. The most economically advantageous tender, as redefined in the 2014 directives, is now the sole criterion for award, comprising a number of different approaches which can be interpreted as:

- price,
- cost only – using a cost-effectiveness approach, and
- best price/quality ratio.

The major changes in the 2014 Directive in this context are the requirement to use a "cost-effectiveness approach" in the evaluation of cost and the new requirements in article 68 concerning life-cycle costing.

This allows contracting authorities the opportunity to take advantage of the TCO concept. The table below provides an example of a bus purchase. The figures used are for illustrative purposes only.

TCO element	Element description	Cost from economic operator A	Cost from economic operator B	Cost from economic operator C
Purchase price	Actual purchase price	1 000 000	1 100 000	1 400 000
Cost of owning	Cost of loans, insurances, taxes, depreciation	200 000	210 000	205 000
Cost of operating	Cost of fuel, spares, number of people to operate the equipment. Length of service interval, tyres, replacement seats when broken over 25 years	6 500 000	6 345 000	6 001 000
Cost of disposal	Residual value upon disposal of equipment	(75 000)	(80 000)	(92 000)
Total cost	Total cost	7 625 000	7 575 000	7 514 000

Impact upon specifications
The impact of the TCO principle on specifications is that procurement officers and contracting authorities should not only consider the purchase cost within the specification, but also specify their requirements in terms of operating costs. This may lead economic operators to propose:

- a package reducing the cost of spares
- an option including servicing
- a lease option rather than a purchase option

- a version of the item that has a longer life
- a buy-back option at the end of the effective life of the equipment

One consideration that must be remembered is that the leverage that the contracting authority has over the economic operator is greatest when the initial procurement is being made. Once the equipment is bought, it may well be that the contracting authority has to purchase spares, consumables and ancillary equipment from the economic operator in question at the highest price. Including the whole requirement in the package can bring savings.

Drafting a specification

Introduction
Many of the statements made in this part of the narrative may seem obvious. However, in dealing with documents purporting to specify requirements, it is the experience of many procurement officers that one or more of the following are often omitted by technical specialists and other stakeholders. These notes will therefore benefit procurement officers working with stakeholder specialists to draft a specification, and it is anticipated that the majority of the activity in this section will be completed by the stakeholder.

In some cases the whole requirement may be specified accurately in the form of an engineering drawing, a service specification or a chemical recipe. The following steps assume that no such specification exists, although the text indicates the appropriate place to use such references. To draft a generic performance specification, it is necessary to:

- understand the nature of the requirement
- examine the detail of that requirement
- state the performance required from the goods or service
- communicate and test the requirement with stakeholders

A standard format for specifications and enquiries is usually found most appropriate.

Understand the requirement
Before it is possible to ask anyone to deliver a work, supply or service, the requirement itself must be understood. This will involve asking *and answering* questions, including:

- What is the name of our requirement? It must not be assumed that economic operators will know. Equally, the name itself will send a message to economic operators. It is necessary to ensure that both the name and the message will convey the essence of the requirement to potential economic operators.

- What do we plan to do with the requirement? In some cases the use we have in mind for the item may make the offerings of some economic operators inappropriate. Our specification must leave the economic operator in no doubt as to how we intend to use the item, or what we want from the service.

- Who is going to use the requirement? Our specification needs to indicate this key fact. Economic operators will articulate their ITT differently if the requirement is for training experienced people than if it is for novices.

Examining the detail of the requirement
Even the simplest requirements have a detail that belies their image. "Bolt", "pencil" and “sandwiches” are simple ordinary requirements, yet they have almost endless variations. The following list is not exhaustive; however, it identifies typical detail variations which can include:

- Applicable standards
- Unit of measurement: size, length, height, width, volume, capacity, diameter, watt, volt, gram
- Value of unit of measurement: per 2 metres; 120 grams per square metre
- Base material: steel, brass
- Material content: a specific grade of steel: EN316
- Other key characteristics: *e.g.* hexagonal head, surface finish
- Method of operation: centrifugal, reciprocating
- Which area of the equipment the item is to be used on, in, or with other items
- Power source requirements: electrical, diesel, atomic
- Orientation: portrait, landscape, vertical, horizontal
- Language
- Duration
- People required
- Safety requirements
- Fuel
- Colour
- A modification or generation number

State the performance required from the goods and/or service
Having examined and stated the detail of the requirement, it is necessary to consider the performance criteria. This area is often assumed to be the same as the detail specification, and although sometimes it may be found within this information, it is highlighted here because of its importance.

The objective of including performance is to:

- Describe the level of effectiveness required
- Set the standard against which to measure the specified requirement once it is operating
- Ensure that the service or equipment meets the performance level of other elements with which it must interact
- Relate the requirement to legislative and other standards. Specifically this may be health and safety standards – Localisation here. However, the policy of the contracting authority may also dictate standards here
- Form part of the selection process

Performance will seek to link a number of the points in the specification to criteria by which to measure them. The following are examples:

- A restaurant service contract should specify the number of meals per day the economic operator may expect to supply (*e.g.* 240 meals per day). Further, it should indicate that a large number of staff use an alternative to the restaurant on a Friday if that is the case

- The contracting authority may require stationery delivered to a specific location at its premises or to the desks of individuals directly. This will impact economic operators' costs

- Electric fork-lift trucks would have a range, *i.e.* a number of kilometres, before they need to re-charge

- Pumps or compressors will have an indication of a volume dealt with per second or minute

Specification of performance allows economic operators to offer their most appropriate product, or construct a service proposal most relevant to the needs of the requirement as specified.

The link to contract terms and conditions
Elements of the specification will form key terms and conditions within the contract. The performance requirements used as examples just above could become provisions in the contract. For example, the contract between the contracting authority and the economic operator may:

- Require the economic operator to provide 240 meals per day, except on Friday when the number is only 180
- Make the names and locations of people to whom stationery is delivered formal delivery points in the contract. Wise procurement officers will have these in an amendable table at the end of the contract, but they will be a provision nonetheless
- Where a fork-lift truck does not complete 'x' number of kilometres before a recharge, the contracting authority might seek redress from the economic operator
- A pump failing to pump the required volume of water per hour may be returned as not fit for purpose, or the economic operator asked to replace it free of charge

The specification is at the heart of the contract, and key performance indicators and service level agreements will originate from the specification.

Communicate and test the requirement with stakeholders
This area too may appear obvious. However, communications often fail, and one or more of the elements do not represent the needs of everyone who has a stake in the requirement. This can lead to downstream costs when changes need to be made. Specifications should be sent to all key stakeholders for agreement before they are issued.

A standard format for a specification should be agreed. This could include the following items as appropriate to the need being specified:

- The reference number of the item being specified – this may be different from its part number
- A version number, a date of the version and an approval of the change; in some cases, a reason for the change
- A summary description of the item
- A full description of the item
- An indication of what the item will be used for
- Quantitative details of the item (size, capacity)
- Details of other characteristics of the item (thread, finish, coating)
- Qualitative aspects of the item
- Specific performance characteristics, possibly "where used"

Differences in specifying goods, services and works

Goods, works and services all have different aspects to consider with regard to specification.

Specifying goods
Goods and materials can literally be counted, touched, weighed and tested to see whether they fit, both before specification and after delivery. If 1 000 sheets of pink A4 size, 80 gsm photocopier paper are specified in two packs of 500 sheets, then it is possible to:

1. See whether two packs have been delivered
2. Understand whether the paper has been delivered to the correct organisation and place
3. Monitor the time of delivery
4. Look at the packaging to see if it is photocopier paper
5. Count all 1 000 sheets
6. Weigh the paper to establish the gsm
7. Check that the colour is pink

The physical nature of goods means that specification and measurement can be visualised and described with less difficulty.

Specifying services
There is nothing inherent in a service – consultancy, for example – that prohibits it from being defined in functional or performance terms. Services, like goods, are required to satisfy specific needs, and specifications should be written so that the output provided by the service is measurable. However, a service has an intangible nature, which makes it more difficult to specify and even more difficult to measure.

The service of cleaning an office can provide an example here. The view of what is “clean” to one person may result in a complaint from another person that the office is not clean.

Services differ from goods in several ways – for example:

- Services are intangible
- Services involve the performance of activities or tasks
- Services cannot be owned like a product
- Services cannot be stored
- Samples of services cannot be seen prior to purchase
- Some services cannot be performed remotely
- Services are provided by people

These differences have implications for specifications, and to overcome the difficulties that arise, service specifications must not only lay down parameters for economic operator performance, but also act as a quantifiable basis by which the people working for the economic operator can be measured. They will cover such aspects as:

- Details of services to be provided
- Time and point of service provision
- Names of people authorised to provide the service
- Required response times, both under normal circumstances and in emergencies
- Support and back-up arrangements
- Required documentation

- Supervision and sign-off of acceptance

Frequently, the service requirement is expressed in a service-level agreement incorporated within the contract, often as a schedule, relating to the specific nature of the service being provided.

Specifying works
Specifying works can be time-consuming and will require the expertise of architects, surveyors and other specialists who have specific experience of the construction being undertaken. Different works – for example bridges, buildings, airports, motorways and harbours – will all present different difficulties and require different sets of expertise. In addition to the design of the works, specifications will need to include aspects like:

- Gaining access to the site
- Defining the site facilities available and what is being done by the contracting authority and the economic operator
- Access to the facilities of the contracting authority during the construction of the works
- The off-loading and storage facilities available
- What is required in terms of installation and commissioning, when will the handover be considered complete
- Where risk and liability starts and stops for the economic operator and the contracting authority
- Issues around sustainability and ongoing maintenance of the structure when it is complete

Managing the process of responding to questions from economic operators about specifications during the tender process

The following outlines some areas of good practice when dealing with questions from economic operators about specifications during the tender process.

The words “management” and “control” are key ones here. It must not be the case that different people from the same and different economic operators contact a number of people within the contracting authority using different communication channels. To allow this to happen is to risk different messages about the same aspect of the specification being sent to different people. A formal process is therefore required.
Good practice is that the process focuses on one or two people within the contracting authority; however, a number of options are available. Whichever option is chosen, in order to maintain transparency and equal treatment, all economic operators must receive information on all of the questions and answers asked by all of the economic operators unless it relates to commercially confidential issues. Options include:

1. Asking economic operators to channel all questions, in writing, about a given requirement through a nominated procurement officer. This means that questions can arrive via email, fax or letter. The procurement officer then seeks answers to the questions from technical stakeholders and circulates all of the questions and all of the answers to all of the economic operators.

2. Asking economic operators to channel, in writing, all technical questions about a given requirement through a nominated technical stakeholder, and all commercial questions about the requirement to a procurement officer. This means that questions can arrive via email, fax or letter. The people within the contracting authority then seek answers to the

questions and circulate all of the questions and all of the answers to all of the economic operators.

3. Asking economic operators to email questions to a website. Different people from the contracting authority can then access the website and all economic operators can see the questions and the answers. Alternatively the procurement officer downloads and emails all of the questions and all of the answers to all of the economic operators. This option could be viewed unfavourably as discriminatory against countries and situations where it is not normal for all economic operators to have broadband access

Good practice note – answering questions

People from some economic operators will use a small ambiguity in a specification to start a discussion process where they aim to get the people from the contracting authority in detailed conversational discussion about the requirement or even negotiation. These situations must be refuted.

MOST ECONOMICALLY ADVANTAGEOUS TENDER ON THE BASIS OF PRICE ONLY

When a contracting authority chooses to apply the most economically advantageous tender on the basis of price only, the contract is awarded to the tenderer offering the lowest price for a compliant tender. The price is the only factor that is taken into consideration when choosing the best compliant tender. Tenders received are evaluated against the set specifications on the basis of a pass or fail system, and no quality considerations can come into play in this choice.

Example – Procurement of Plastic Ballpoint Pens

Specifications Quantity:200	Offered specifications Name of Manufacturer: Name of Model (if applicable):	Evaluation Pass/Fail
Click pens ballpoint		
Plastic barrel		
Colour of ink: black		

Column 1 is completed by the contracting authority and shows the required specifications (not to be modified by the tenderer).

Column 2 is to be filled in by the tenderer and must indicate in detail what is offered. It must also contain a clear indication of the name of the manufacturer and the name of the model offered, if applicable.

Column 3 is completed by the evaluation team during the evaluation process, whereby the evaluation of the items offered is made on a pass or fail basis.

***N.B.** The tenders that comply with the set specifications are compared only on the basis of the prices offered.*

***N.B.** When the price only criterion applies, a contracting authority would normally use detailed specifications. This type of specifications, in fact, allows tenders that are technically compliant to be easily compared on the basis of the price only.*

Price only and cost-analysis – The price-only criterion refers to the situation where a contract is awarded on the basis of the *tendered price,* i.e. the price indicated in each tender submitted. The price-only criterion cannot be used when a contracting authority intends to apply cost-analysis. In that case, the most economically advantageous tender based on cost only, using a cost-effectiveness approach or the best price-quality ratio, must be applied.

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

- It does not allow the contracting authority to take into account qualitative considerations. Apart from the quality requirements built into the specifications, which must be met by all tenders, the quality of the items being procured is not subject to evaluation

N.B. *A tender that exceeds the set specifications (and offers a better quality) but is set at a slightly higher price than a tender that simply meets (but does not exceed) the set specifications cannot be chosen as the winning tender.*

- It does not allow the contracting authority to take into account innovation and innovative solutions. Tenders that meet the set specifications are compliant.

- For requirements that have a long operating life, it does not allow the contracting authority to take into account the life-cycle costs (i.e. costs over the duration of the life cycle) of the requirement procured. When the lowest-price criterion is used, only the direct cost of the purchase (or the initial purchase price) within the set specifications can be taken into consideration.

Some cases where it may be considered appropriate to use the price-only criterion

Procurement of goods – For the procurement of simple, standardised off-the-shelf products (for example, stationery), the price is normally and typically the only relevant factor on which the contract award decision is based.

Procurement of works – For works where the designs are provided by the contracting authority or for works with a pre-existing design, it is common to use the lowest price as the award criterion to be applied.

Procurement of services – For some services (for example, cleaning services for buildings and publishing services), a contracting authority is often in a position and may prefer to specify in detail the exact contract and specification requirements and then select the compliant tender that offers the lowest price.

N.B*. The above-mentioned cases are examples only. It is the sole responsibility of the contracting authority to make an informed decision as to whether or not to use the lowest-price criterion, taking into account the nature and the specific characteristic of the contract concerned.*

N.B. *Normally, the price-only criterion is not suitable for the assessment of complex service, supply and work tenders*

Use of specific templates to be included in tender documents to obtain the quotation of tendered prices from tenderers

The Directive is silent as to whether tender documents should contain specific templates to obtain the quotation of tendered prices from tenderers. This issue is left to national legislation to regulate.

In practice, a contracting authority may want to include in the tender documents a specifically designed table listing all of the elements to be quoted as part of the tendered price. Such a table is normally referred to as a "breakdown of the tendered price" or "schedule of prices" or, in the case of works, as a "bill of quantities" (different names are also used in practice). The breakdown of tendered price/schedule of prices/bill of quantities has to be completed by the tenderers and submitted to the contracting authority as part of their tender offers.

Good practice note

The use of a breakdown of tender prices/schedule of prices/bill of quantities allows a contracting authority to set out in a clear and unequivocal way all of the elements that must be quoted as part of the tendered price. This reduces the possibility of mistakes or omissions by tenderers when quoting their prices and enhances the chances of obtaining responsive tenders.

MOST ECONOMICALLY ADVANTAGEOUS TENDER ON THE BASIS OF THE BEST PRICE-QUALITY RATIO

When the most economically advantageous tender on the basis of the best price-quality ratio is used, a contracting authority can take into account other criteria in addition to the price, such as the quality, delivery time, and after-sales service. The contracting authority gives a relative weighting to each chosen criterion, which reflects the relative importance that it has with respect to the other criteria. The purpose of the best price-quality ratio is to identify the tender that offers the best value-for-money (recital 89 of the 2014 Directive).

Value-for-money – The term value-for-money means the optimum combination between the various criteria (cost-related and non-cost related criteria) that together meet the contracting authority's requirements. However, the elements that constitute the optimum combination of these various criteria differ from procurement to procurement and depend on the outputs required by the contracting authority for the procurement exercise concerned.

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

Advantages of the best price-quality ratio – The best price-quality ratio, as opposed to the price-only criterion, presents numerous advantages, including in particular the following:

- It allows contracting authorities to take into account qualitative considerations. The best price-quality ratio is typically used when quality is important for the contracting authority.

- It allows contracting authorities to take into account innovation or innovative solutions. This is particularly important for small and medium-sized enterprises (SMEs), which are a source of innovation and important research and development activities.

- For those requirements with a long operating life, it allows the contracting authority to take into account the life cycle costs (i.e. costs over the life cycle) of the requirement purchased and not only the direct cost of the purchase (or initial purchase price) within the set specifications.

Some cases where it may be considered appropriate to use the best price-quality ratio

Procurement of goods – For public supplies contracts that involve significant and specialised product installation and/or maintenance and/or user training activities, it is usual for the award to be made

on the basis of the best price-quality ratio. For this type of contract, in fact, the quality of the above-mentioned services is normally of particular importance.

Procurement of works – For works designed by the tenderer, the best price-quality ratio is often used.

Procurement of services – For the procurement of consultancy services and more generally intellectual services, the quality is normally very important. Experience has shown that when procuring this type of services, best results in terms of best value-for-money are achieved when the best price-quality ratio is used rather than the price only criterion.

N.B*. The above-mentioned cases are examples only. It is the sole responsibility of the contracting authority to make an informed decision as to whether or not to use the best price-quality ratio, taking into account the nature and the specific characteristic of the contract concerned.*

Comment: The best price-quality ratio is typically used for complex supplies, services and works contracts, where there are various products/solutions available and where it would therefore not be appropriate to evaluate the tenders on the basis of price only.

Criteria that may be taken into account to determine the most economically advantageous tender, as redefined in the 2014 Directive

A contracting authority may take into account various criteria to determine the most economically advantageous tender, as redefined in the 2014 Directive. Article 67(2) of the directive contains an *illustrative* list of these criteria, which are:

- "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".

N.B. *However, since the above list is only illustrative, it is left to the contracting authority to establish the criteria to be applied in order to determine the most economically advantageous tender from its point of view, taking into account the specific circumstances of each case and within certain specified limitations.*

The criteria that may be taken into account by a contracting authority to determine which tender is the most economically advantageous, as redefined in the 2014 Directive, may be divided into two broad categories: **cost-related criteria** and **non-cost-related criteria**.

Cost-related criteria – The cost-related criteria (also referred to as economic criteria) allow the contracting authority to determine the cost - in monetary terms - for the acquisition of the object of the procurement and also, for example, for using and operating it.

Examples of cost-related criteria

price - the initial purchase price stated in each individual tender
running costs - costs related to the use of the object of the procurement, which may include the cost of spare parts and consumables, maintenance costs, licences, etc.
costs for after-sales services - costs related to the technical support required with regard to the object of the procurement

In this context, it is important to examine the concept of **life-cycle costs**. Life-cycle costs are the costs of the goods, works or services that are being procured through the duration of their life cycle.

Where a requirement is, for example, a machine, vehicle or building that has a working life over several years, there may be a need to ensure that it is cost-effective over its whole working life. This means looking not only at the lowest purchase price but taking a long-term view in order to guarantee long-term value-for-money. In these cases, in fact, it may be the case that the direct cost of purchase is only a small proportion compared to the total cost of the requirement procured through the duration of its life cycle.

In broad terms, the life-cycle costs comprise all costs to the contracting authority relating to the:

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

of the goods, works or services being procured. It should be noted, however, that for certain assets there are no end-of-life costs since there is no disposal but, for example, instead there may be a resale value. The type of life-cycle cost is linked to and depends on the different types of goods, services or works being procured.
N.B. *Directive 2014, for the first time, explicitly regulates life-cycle costing in article 68; the life-cycle costs must include the costs to the contracting authority or other users.*

Example of life-cycle costs related to the construction of a school
- Construction costs as indicated in the tender

- Maintenance costs (major replacement, minor replacement, redecoration, etc.)

- Operation costs (energy consumption, etc.)

- End-of-life costs (disposal, reinstatement, continued value, etc.)

The life-cycle costs can be either “one-off” costs or “recurrent” costs.

- **One-off costs** are those that are paid only once with the acquisition of the requirement being procured.

Examples of one-off costs
- Initial price
- Delivery and installation
- Acceptance
- Initial training
- Documentation

- Disp

- **Recurrent costs** are those that are paid throughout the life cycle of the requirement being procured. They depend on its longevity and they normally increase with time (for example, the maintenance and repair costs normally increase with the ageing of the object of the procurement).

Examples of recurrent costs

-Retraining
-Service charges
-Maintenance and repair
-Consumables
-Spare parts
-Energy consumption

Life-cycle costing (also known as total cost of ownership – TCO) means the methodology for the economic evaluation of the life-cycle costs over a period of time, as defined in the agreed scope.

Life-cycle costing is therefore:

- an economic evaluation method;
- a methodology that accounts for all relevant costs;
- an evaluation of costs over a defined period of time.

With regard to life-cycle costing concerning the procurement of a specific requirement, a contracting authority should ask itself the following questions:

- What do I need now and how much will it cost me?
- What will I need to do in the future and how much will that cost me?
- How long is the 'future'?
- How do I evaluate future costs against current costs?

Life-cycle costing in the 2014 Directive: Life-cycle costing is one of the cost-effectiveness approaches that a contracting authority may use to evaluate the cost criterion.

Article 68 describes life-cycle costing as covering "part or all of the following costs over the life cycle of a product, service or works":

- costs borne by the contracting authority or other users, such as costs relating to acquisition, costs of use such as consumption of energy and other resources, maintenance costs, and end-of-life costs such as collection and recycling costs;
- "costs imputed to environmental externalities linked to the product, service or works during its life cycle", but only where "their monetary value can be determined and verified".
    - Recital 96 explains that the methods for assessing costs imputed to environmental externalities should be established in advance in an objective and non-discriminatory manner and should be accessible to all interested parties.

Transparency is a very important principle where life-cycle costing is used. Contracting authorities using a life-cycle costing approach must indicate in the procurement documents:

- the data to be provided by the tenderers; and

- the method that will be used to determine the life-cycle costs on the basis of those data

There are strict rules on the method used to determine the life-cycle costs in order to ensure that the method is not discriminatory. The method must fulfil all of the following conditions, set out in article 68(2):

> "(a) It is based on objectively verifiable and non-discriminatory criteria. In particular, where it has not been established for repeated or continuous application, it shall not unduly favour or disadvantage certain economic operators.
> (b) It is accessible to all interested parties.
> (c) The data required can be provided with reasonable effort by normally diligent economic operators, including economic operators from third countries party to the GPA or other international agreements by which the Union is bound."

Where there is an EU standard methodology for calculating life-cycle costs then that methodology must be used. As at 30 March 2015 only one standard methodology is listed in Annex XIII to the 2014 Directive, concerning road transport vehicles. The elaboration of other standard methodologies is planned. The Commission has the power to adopt delegated acts to update the list in Annex XIII when updating is necessary due to new or amended legislation.

Non-cost related criteria - The non-cost related criteria concern key performance requirements and adherence to specifications.

Examples of non-cost related criteria

- **quality** - the quality characteristics that the object of the procurement must satisfy (for example, the number of pages per minute of a printer or its durability)
- **technical merit** - if the object of the procurement is fit for purpose and how well it performs
- **aesthetic and functional characteristics** - how the object of the procurement looks and feels and how easy it is to use
- **delivery date** - the guaranteed turnaround time from order to delivery and the ability to meet the set deadline
- **after-sales services** - what support is required and available to the contracting authority after the contract has been signed

Sub-criteria – A contracting authority may also decide to sub-divide the criteria that are chosen into sub-criteria to determine the best price-quality ratio. The sub-criteria indicate the specific factors that are taken into account by the contracting authority within a specific criterion.

Example of sub-criteria

In the case of a works tender for the construction of a bridge, the contracting authority may want to sub-divide the "technical merit" criterion into sub-criteria, which may include, for example, elasticity and stability.

Good practice note

The identification of the criteria (and any sub-criteria) to be applied must be carried out with due care. Failure to include relevant criteria or mistakenly including inappropriate ones may mean that the tender offering best value-for-money is not selected.

Also, the criteria chosen to determine the best price-quality ratio must be clearly formulated so that tenderers have a clear common understanding of these criteria and are in a position to prepare their tenders in an appropriate way.

The criteria will generally be scored by using a scoring system or a "scoring rule", which assigns weightings to the criteria used.

Limitations to the contracting authority's discretion when establishing the criteria to be applied to determine the best price-quality ratio

Article 67(1) of the 2014 Directive refers to the tender that is the most economically advantageous *"from the point of view of the contracting authority",* ….. However, this discretion is not unrestricted and has some limitations [article 67(4)]:

- The criteria chosen must be linked to the *subject matter* of the public contract in question (this is explicitly stated in article 67(1); article 67(5) defines what "linked to the subject matter" means).

  N.B. *Thus a contracting authority cannot determine the criteria to be applied in an abstract way. The various criteria chosen must be directly linked to the specific contract that is the subject of the tender and therefore to the supplies, works and services being procured.*

- The criteria chosen must be aimed at identifying the most economically advantageous tender, i.e. the tender that offers the best value-for-money, and they cannot be aimed at other purposes. This has been repeatedly stressed by the European Court of Justice in its case law.
-
- The criteria chosen must be objective and objectively quantifiable.

Thus, in order to guarantee the objectivity of the criteria to be applied and to prevent the unrestricted freedom of choice being conferred on the contracting authority, these criteria must be formulated in a precise and (as far as possible) measurable way, i.e. in a way that allows tenderers to plan their tenders and to take account of the way in which the assessment/evaluation of the tenders would be made.

N.B*. The more objective, precise and quantifiable the criteria are, the more difficult it is to conceal arbitrary and discriminatory decisions. This effect is further reinforced by the disclosure obligation of the criteria to be applied.*

Selection criteria and award criteria: can selection criteria be used as criteria to determine the most economically advantageous tender, as redefined in the 2014 Directive?

The selection of economic operators and the award of a contract are two different operations in the procedure for the award of a public contract; they are governed by different rules and are distinct from a conceptual point of view.

Selection criteria – are applied to determine *which economic operators (tenderers or candidates)* are qualified and able to perform the contract. They therefore relate to the *economic operators (tenderers or candidates)* as such.

Award criteria – are applied to determine which *tender* meeting the set specifications and requirements is the best one. These criteria therefore relate to the *tenders*.
The difference between selection criteria and award criteria for the award of the most economically advantageous tender has been specifically dealt with in *Beentjes'* Advocate General Opinion (but this issue has not been addressed by the ECJ itself).

Can selection criteria be used as criteria to determine the most economically advantageous tender, as redefined in the 2014 Directive?

As explained above, conceptually, the distinction between selection criteria and award criteria is clear. These two types of criteria serve different purposes. Thus selection criteria cannot be used as criteria for determining the most economically advantageous tender, as redefined in the 2014 Directive?

However, in practice, there may be overlaps between these two types of criteria.

Examples of selection criteria that may also be relevant as criteria for determining the most economically advantageous tender, as redefined in the 2014 Directive

- ***Educational and professional qualifications of the persons responsible for providing the services*** – this criterion is particularly important as a criterion for determining the best price-quality ratio in the case of consultancy services

- ***Past experience in similar contracts*** – on the use of past experience as an award criterion

Comment: Both of the criteria mentioned above are selection criteria under the Directive. As selection criteria, they may be used to establish whether economic operators have the capability of performing the contract according to the set minimum standards. However, in some cases, these criteria may also affect the quality of the performance and its cost.

Article 67(2)(b) now explicitly mentions the organisation, qualification and experience of staff assigned to perform the contract as a permissible award criterion. These criteria are especially important for the award of intellectual services, such as consultancy and architectural services.

Comments on consultancy services
(**N.B.** *The Directive does not specifically address the particularity of consultancy services.)*

The issue of whether the qualifications and experience of the persons responsible for providing the services may be used to determine the most economically advantageous tender is particularly important for consultancy services where the criteria that are to be applied to determine the MEAT are price and quality.

In the case of consultancy services, in practice the quality measures that contracting authorities will be concerned about are, on the one hand, the methodology and organisation proposed for delivering the services (which could also probably be covered under technical merit) and, on the

other hand, the qualifications and experience of the individual experts /consultants who will be providing the services in accordance with the requirements contained in the specifications/terms of reference (see example provided below).

Example of a simplified evaluation grid/matrix for assessing quality in consultancy services (based on the requirements of the specifications/terms of reference) Maximum points

	Maximum points
Organisation and methodology	
Rationale	20
Strategy	20
Timetable of activities	10
Total score for Organisation and methodology	**50**
Individual experts/consultants	
Individual expert/consultant 1 (Max 30 points)	
Qualifications	5
Specific professional experience	25
Individual expert/consultant 2 (Max 20 points)	
Qualifications	2
Specific professional experience	18
Total score for individual experts/consultants	**50**
Overall total score	**100**

The equation price/quality is fundamental in consultancy services: a contracting authority may choose to pay more for higher quality performance or less for lower quality performance. This is the whole point of the MEAT criterion.

The reverse situation: can criteria for determining the best price-quality ratio be used as selection criteria?

There is no doubt that award criteria cannot be used as selection criteria. The ability of economic operators to perform a contract cannot be established on the basis of the merits (for example, quality and price) of their offers.

Best price-quality ratio and contract specifications: some important considerations

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

N.B. *The preparation of the specifications and of the criteria to be applied to determine the best price-quality ratio goes hand in hand. The contract specifications cannot be prepared without taking into account the criteria to be applied and, vice versa, the criteria to be applied cannot be determined without taking into account the contract specifications.*

When the best price-quality ratio is used, in general terms, a contracting authority may decide to operate in particular in one of the following manners:

- Fix the minimum mandatory specifications that all tenders must meet, which will be evaluated on the basis of a pass or fail system, and then award scores to those tenders that have achieved a pass. The scores will reflect the degree to which a tender exceeds the minimum specifications.

  N.B. *Usually a contracting authority is not interested in scoring tenders' compliance with all minimum specifications that are exceeded but only with some of them, depending on the circumstances of each case.*

- Fix, in addition or as an alternative to mandatory specifications, specifications that do not entail the application of a minimum "threshold" and that will be scored on the basis of the level of compliance of tenders with the contracting authority's requirements. In this case, some variability with regard to the level of compliance is acceptable.

Methods that may be used to identify the most economically advantageous tender

The methods or methodologies for applying the chosen criteria are the 'systems' that a contracting authority may use to identify the most economically advantageous tender.

Weighting

The 2014 Directive requires the contracting authority to specify the relative weight that it gives to each criterion chosen in order to determine the most economically advantageous tender [article 67(5)].

N.B*. Through the weighting system, the contracting authority makes potential tenderers know the relative importance that it attaches to each criterion chosen and it allows them to prepare more appropriate tenders. At the same time, through the weighting system, the contracting authority structures its discretion and restricts the possibilities for arbitrary decisions during the process of evaluation of tenders.*

The contracting authority may express the relative weighting of the criteria used by providing for a range with an 'appropriate' maximum spread [article 67(5)].

Example

The contracting authority may state that criterion X will be weighted between 1% and 10%, while criterion Y will be weighted between 10% and 20%.

N.B. *The spread must be appropriate in the sense that it cannot be so broad (for example between 10% and 90%) that it would result in a breach of the transparency principle and that it would not provide any valuable indication to potential tenderers of the actual relative importance that the contracting authority attaches to each criterion used.*

Good practice note

The weighting of the various criteria to be applied in order to determine the most economically advantageous tender must be carried out with due care. Inappropriate weighting would cause problems when carrying out the evaluation of tenders, and could mean that the tender offering the best value-for-money would not be selected.

Descending order of importance

The 2014 Directive explicitly states that where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority must indicate the criteria applied, in descending order of importance [article 67(5)].

Good practice note

It is good practice to avoid indicating the criteria to be applied in descending order of importance. This system, in fact, does not allow tenderers to know in advance the relative importance that the contracting authority attaches to each criterion applied. As a result, this system makes it more difficult for potential tenderers to prepare appropriate tenders, while at the same time making it easier for a contracting authority to conceal arbitrary or discriminatory decisions during the process of evaluation of tenders.

Evaluation of tender

The evaluation of tenders is the stage in the procurement process during which a contracting authority identifies which one of the tenders meeting the set requirements is the most economically advantageous (as redefined in the 2014 Directive), on the basis of the pre-announced award criteria. The qualified tenderer whose tender has been determined to be the most economically advantageous is awarded the contract.

The evaluation of tenders must be carried out by a suitably competent evaluation panel and in accordance with the general law and Treaty principles of equal treatment, non-discrimination, and transparency. Also, the confidentiality of the information acquired by those involved in the evaluation process must be preserved.

The 2014 Directive provides the various options for setting the criteria that are to serve as the basis for the award of contracts, and it also specifies that the award of contracts is to take place only if the following conditions have been fulfilled:

- The tender complies with the requirements, conditions and criteria set out in the contract notice or in the invitation to confirm interest and in the procurement documents.
- The tender is submitted by a tenderer that is not excluded on the basis of the mandatory exclusion grounds or on the basis of non-compliance with applicable obligations in the fields of environmental, social and labour law established by European Union law, national law, collective agreements or by international environmental, social and labour law provisions.
- The tender is submitted by a tenderer that meets the selection criteria set by the contracting authority.

In open procedures, the contracting authority may decide to examine tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection criteria. In all cases, the tenderer to which the contracting authority has decided to award the contract must nevertheless be required to provide the relevant evidence, and the contracting authority must not conclude a contract with a tenderer that is unable to do so. The contracting authority is also entitled to request all or part of the supporting documents at any moment that it considers this verification to be necessary in order to ensure the proper conduct of the procedure.

However, the 2014 Directive does not contain detailed rules on how the process of evaluation of tenders should be structured, and it also does not contain specific rules on the organisation and responsibilities of the evaluation panel. These issues are left to EU Member States to regulate. However, the directive clearly states that the content of tenders shall be examined only after the time limit set for submitting them has expired. It also sets out general rules on how variants should be treated during the process of evaluation of tenders as well as rules regarding abnormally low tenders.

This section examines in general terms the process of evaluation of tenders and the resulting contract award, mainly by referring to what is considered to represent good practice. References to the few relevant provisions of the Directive will also be made.

Contracts below the EU thresholds

The Directive does not apply to public procurement procedures relating to contracts that are below certain financial thresholds set in the Directive itself.

Generally speaking, with regard to contracts below the EU thresholds, it is left to EU Member States to introduce their own rules. Individual contracting authorities may also be permitted or required to publish and follow their own internal purchasing rules.

However, the general law and Treaty principles, including the requirements of transparency, equal treatment and non-discrimination, must also be respected in the context of the process of evaluation of tenders and contract award for contracts below the thresholds set in the Directive. The same requirement applies concerning the principle of confidentiality.

Key principles governing the process of evaluation of tenders

The process of evaluation of tenders must be demonstrably based on the general law and Treaty principles of:

- non-discrimination
- equal treatment and
- transparency

Non-discrimination on the grounds of nationality – This Treaty principle means that any discrimination with regard to tenderers on the basis of nationality is forbidden. During the process of evaluation of tenders, tenderers from other member states must not be discriminated against in favour of domestic tenderers.

Equal treatment (equality of treatment) – This general law principle means that all tenders submitted within the set deadline are to be treated equally. They shall be evaluated on the basis of the same terms, conditions and requirements set in the tender documents and by applying the same pre-announced award criteria.

It follows from settled case law of the European Court of Justice (ECJ) that the principle of equal treatment requires that comparable situations not be treated differently and that different situations not be treated similarly, unless such treatment can be justified objectively.

Transparency – This general law principle means that detailed written records must be kept (normally in the form of reports and minutes of the meetings held) of all actions of the evaluation panel. All decisions taken must be sufficiently justified and documented. In this way, any discriminatory behaviour can be prevented and if not prevented, then monitored.

Confidentiality – Apart from any public tender opening, the process of evaluation of tenders must be conducted *in camera* and must be confidential. During the process of evaluation, the tenders should remain in the premises of the contracting authority and should be kept in a safe place under lock and key when not under review by the evaluation panel. This safeguard is recommended in order to avoid any leaking of information. Information concerning the process of evaluation of tenders and the award recommendation is not to be disclosed to the tenderers or to any other person who is not officially concerned with the process, until information on the award of the contract is communicated to all tenderers.

According to the new 2014 Directive, fully electronic communication, meaning communication by electronic means at all stages of the procedure, including the transmission of requests for participation and, in particular, the **transmission of tenders (electronic submission)** will be mandatory. In all communication, exchange and storage of information, the contracting authority must ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved. The level of security required for the electronic means of communication in the various stages of the specific procurement procedure must be clearly defined (e.g. advanced electronic signatures is required), and it must be proportionate to the risks attached.

Evaluation panel, panel or tender committee

In general terms, the process of evaluation of tenders is carried out by a suitably competent evaluation panel, which may be either the relevant unit of the line organisation of the contracting authority or a specifically established evaluation panel/tender committee. For the purposes of this narrative, the term "evaluation panel" is used.

As a general rule and depending on national legislation, a chairperson with non-voting powers is appointed to lead, co-ordinate, give guidance and control the process of evaluation of tenders. The chairperson is responsible, *inter alia*, for ensuring that the process of evaluation of tenders is carried out in accordance with the general law and Treaty principles examined above and for the purpose of producing, amongst others, the evaluation report. A secretary to the evaluation panel, also with non-voting powers, is normally appointed for the purposes of providing support to the chairperson, carrying out all administrative tasks linked to the evaluation process, and keeping the minutes of each meeting.

The members of the evaluation panel (also referred to in this text as evaluators) evaluate the tenders independently. They may also be requested to evaluate only the parts of the tenders that relate to their speciality. The way in which the members of the evaluation panel operate depends, however, on the provisions set down in national legislation.

In principle, the evaluation panel normally has only the mandate to identify the best tender and to make a recommendation as to the award of the contract. It is the authorised officer of the contracting authority who normally announces the formal and final award decision.

Good practice note

It is good practice for all of the evaluation panel's members, including the chairperson and secretary, to sign a declaration of impartiality and confidentiality or a similar kind of declaration before they start to evaluate the tenders.

By signing such a declaration, each evaluation panel member:

-declares in an explicit way that he/she is not associated in any way with any of the tenderers (or their proposed sub-contractors, etc.) that have submitted a tender;

-commits himself/herself in an explicit way not to disclose any information acquired during the process of evaluation of tenders to tenderers or to other persons not officially involved in the evaluation process.

Preparatory and planning work

Preparatory work and advance planning are very important for a timely and proper conduct of the process of evaluation of tenders.

The evaluation panel under the leadership of the chairperson, just before the deadline for submission of tenders has expired, holds a preparatory/planning meeting. The objectives of this preparatory/planning meeting normally include, but are not limited to, the following:

- Presentation by the chairperson, *inter alia,* of:
  - rules governing the process of evaluation of tenders and the steps to be followed;
  - exclusion grounds and selection (qualification) criteria to be applied;
  - individual criteria and their relative weighting, including the scoring system/rationale to be applied and any more detailed and pre-announced evaluation methodology;
  - the exact role and responsibilities of the members of the evaluation panel.

N.B. *The evaluation panel must have a clear understanding of the above-mentioned issues. This understanding is essential for ensuring a consistent approach in the evaluation of tenders and a meaningful evaluation. Otherwise, the process of evaluation of tenders may lead to the choice of a tender that is not the most economically advantageous one, based on the pre-announced award criteria.*

- Opportunity for the evaluation panel members to ask any questions regarding the process of evaluation of tenders and their responsibilities in that process;

- Establishment of a clear work plan, with all steps to be followed within the set time frame for the completion of the process of evaluation of tenders;

  N.B. *The process of evaluation of tenders is to be completed within the tender validity period specified in the tender documents. Only in duly and objectively justified circumstances, which must be in line with the provisions contained in the tender documents, may tenderers be requested to extend the tender validity period.*

- Scheduling as far as possible of the evaluation meetings so as to ensure the availability of the members of the evaluation panel.

Good practice note

It is good practice to complete the process of evaluation of tenders as soon as possible, in accordance with the pre-established procurement plan and corresponding tender evaluation timetable, which are normally included in the tender documents.

Process of evaluation of tenders: its main stages

The process of evaluation of tenders is characterised by various stages. In general terms, these stages can be summarised as follows:

- receipt and opening of tenders;
- evaluation of tenders *strictu sensu,* which normally results in the recommendation of the contract award made by the evaluation panel to the contracting authority.

These stages are strictly linked to the procurement procedure used. To assist in the evaluation of the tenders, the evaluation panel may, at its discretion and at any time during the process of evaluation, ask tenderers for clarifications of their tenders.

This sub-section now examines the various main stages in the process of evaluation of tenders and assumes that an e-procurement system is not used. However, some particularities of the use of electronic means are also covered.

Receipt of tenders
On receiving the tenders, the contracting authority must register them.

Normally, a summary of tenders received is used to record the names of the tenderers as well as the exact date and time of reception of the tenders. The summary of tenders received is then annexed to the tender opening report.

The envelopes containing the tenders must remain sealed and must be kept in a safe place under lock and key until they are opened, and afterwards they must be kept in a safe place under lock and key until the contract award.

Good practice note

It is good practice to group the tenders received as follows:

- tenders received prior to the deadline;
- modifications to tenders received prior to the deadline;
- withdrawals of tenders received prior to the deadline;
- tenders, modifications and withdrawals received after the deadline.

Opening of tenders
The purpose of the opening of tenders (as its name indicates) is to open the tenders received in order to start with their evaluation. Late tenders must be rejected. Normally, late tenders are returned to the tenderers concerned unopened, unless provided otherwise by national legislation.

Good practice note

It is good practice to open the tenders are opened and start the evaluation soon after the deadline for their submission has expired. This practice aims to reduce the risk that unauthorised persons have access to the tenders received.

The opening of tenders may be either public or non-public:

public tender opening – Tenders are opened publicly in the presence of authorised persons and at the time and place indicated by the contracting authority. In the case of open procedures, the persons authorised to be present at the opening of tenders and the time and place for such an opening must be indicated in the contract notice (see Annex V, Part C, item 21 of the 2014 Directive on the information to be included in the contract notice).

- **non-public tender opening** – Tenders are opened *in camera* in the presence of the evaluation panel members only.

Good practice note

In principle, it is considered to be good practice to hold a public opening of tenders because it increases the transparency of the process of evaluation of tenders.

Choice of the most economically advantageous tender on the basis of the pre-announced contract award criteria

The 2014 Directive requires all tenders to be awarded on the basis of the most economically advantageous tender. The most economically advantageous tender is identified on the basis of the price or cost, using a cost-effectiveness approach (such as life-cycle costing) 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.

Choice of the most economically advantageous tender on the basis of price alone

If the sole contract award criterion is the price, the tenders submitted by qualified tenderers:

- meet the set procedural requirements and formalities,
- meet the set specifications and other substantive requirements,
- are compared only on the basis of the tendered prices.

N.B. *Compliance with the set specifications and other substantive requirements must be evaluated on the basis of a pass or fail system. No scoring system is used when the most economically advantageous tender is identified on the basis of price only.*

Some important issues to keep in mind before comparing tendered prices

- Tendered prices must include all price elements in accordance with the requirements set in the tender documents.

- Any arithmetical error must be corrected.

Arithmetical errors are errors linked to miscalculations. The methodology for correction of arithmetical errors should have been described in the tender documents.

Example of how corrections of arithmetical errors may be made

With regard to a supply tender, the tender documents may indicate, for example, that the evaluation panel will correct errors as follows:

a) where there is a discrepancy between the unit price and the line item total amount (which is derived from the multiplication of the unit price by the line item quantities), the unit price as quoted prevails, unless in the opinion of the evaluation panel the decimal point in the unit price has obviously been misplaced. In that event, the line item total amount as quoted prevails and the unit price must be corrected;

b) if there is an error in a total corresponding to the addition of subtotals, the subtotals prevail and the total must be corrected;

c) where there is a discrepancy between the amount in figures and the amount in words, the amount in words prevails unless the amount expressed in words is related to an arithmetical error. In that event, the amount in figures prevails, subject to a) and b) above.

The correction of arithmetical errors is in practice considered to be binding on the tenderer. Therefore, if the tenderer in question does not accept the correction of arithmetical errors made by the evaluation panel, its tender will be rejected. In accordance with the principle of transparency, this provision should be made clear in the tender documents.

- Any discount must be applied

  The tender documents may foresee the possibility for tenderers to offer discounts. In that event, the tender documents must also specify the methodology for the application of such discounts.

  When a tender is divided into several lots, the contract notice or the tender documents may foresee the possibility for tenderers to combine several or all lots and to offer discounts, which are conditional on the simultaneous award of other lots (referred to as cross-discounts). In that case, the evaluation panel selects the optimal combination of awards on the basis of the lowest overall price of the total contract package.

- Tenders that appear to be abnormally low must be duly investigated. The issue of abnormally low tenders is examined in detail in point 2.5 below.

To summarise: The qualified tenderer that has offered the lowest price/cost for a compliant tender that is not abnormally low (and after correction of arithmetical errors and application of discounts) is chosen as having submitted the most economically advantageous tender and is recommended for the award of the contract.

Choice of the best tender on the basis of cost, using a cost-effectiveness approach such as life-cycle costing

As explained above, contracting authorities may choose to evaluate the most economically advantageous tender on the basis of cost, using a cost-effectiveness approach such as life-cycle costing. Various safeguards are put in place to ensure transparency and non-discrimination when contracting authorities use life-cycle costing or another cost-effectiveness approach.

Choice of the most economically advantageous tender on the basis of the best price-quality ratio

If the best price-quality ratio approach is used, tenders submitted by qualified and selected tenderers that:

- meet the set procedural requirements and formalities, and

- meet the set mandatory specifications and other set mandatory substantive requirements

will be evaluated by applying the pre-announced individual criteria and their relative weighting. If a more detailed evaluation methodology was disclosed in the tender documents, this methodology must be followed.

Some important points to keep in mind:

- The pre-announced criteria and their relative weighting, any pre-announced sub-criteria and their relative weighting, as well as any pre-announced more detailed evaluation methodology cannot be changed or waived during the process of evaluation of tenders. Any criteria and methodology must be applied as they stand.

- To obtain a meaningful evaluation, the members of the evaluation panel must take a consistent approach when scoring the tenders, and the same scoring rationale must be used.

- When evaluating and scoring the financial aspects of the tenders, the evaluation panel must beforehand:

    - make sure that all costs are included;
    - correct any arithmetical errors;

      Arithmetical errors are errors linked to miscalculations. The methodology for correction of arithmetical errors must have been described in the tender documents.

    - apply any discount;

      The tender documents may foresee the possibility for tenderers to offer discounts. In that case, the tender documents must also specify the methodology for the application of such discounts.

    - investigate any tender that appears to be abnormally low (see point 2.5 below on this issue).

Good practice note

It is good practice to evaluate the financial aspects of the tenders separately from the non-financial aspects.

- Evaluation grids/matrices should be used to score the tenders. For the purpose of transparency, these grids/matrices must then be attached to the evaluation report.

Good practice note

It is good practice to use evaluation grids/matrices to score the tenders for the following main reasons:
- Listing the elements of the tenders to be evaluated ensures that all issues under evaluation are addressed and that the process of evaluation of tenders is consistent.
- These evaluation grids/matrices constitute an important audit trail.
- The grids/matrices are very important for the debriefing of unsuccessful tenderers.

Also, it is good practice for each member of the evaluation panel to adequately justify in writing the scores given to each tender element that has been evaluated by indicating the shortcomings/weaknesses and advantages/strengths of each of these elements. For transparency reasons, these justifications/explanations must become part of the evaluation report.

Criteria that may be applied for the award of a contract

Article 67(2) of the 2014 Directive provides that "contracting authorities shall base the award of public contracts on the most economically advantageous tender". The most economically advantageous tender, as redefined in the 2014 Directive, is now the sole criterion for the award.

Choice between the price/cost only, using a cost effectiveness approach and the best price-quality ratio

The choice between the price/**cost only, using a cost effectiveness approach and the best price-quality ratio,** is left to the discretion of the contracting authority. This provision was confirmed by the European Court of Justice (ECJ) in the *Sintesi* case (see box below).

Case note: *Sintesi*

(Case C-247/02*, Sintesi SpA vs. Autorita' per la Vigilanza sui Lavori Pubblici* [2004] E.C.R. I-9215. This case is also available on www.curia.europa.eu.)

This case concerned a request of an Italian court to the ECJ for a preliminary ruling. In this case, the subject of dispute was an Italian law that imposed the award of all works contracts launched under an open or restricted procedure to be made on the basis of the lowest price only.

The ECJ held, *inter alia*, that national legislation could not impose such a *general* and *abstract* requirement since it deprived contracting authorities of the possibility of taking into consideration *the nature* and *the specific characteristics* of such contracts and of the possibility of choosing the best tender.

Economic issues and the choice between the price/cost only, using a cost effectiveness approach and the best price-quality ratio

When exercising its discretion over whether to use the price/cost only, using a cost effectiveness approach or the best price-quality ratio, the contracting authority needs to bear in mind the impact of that decision on how and what it can evaluate.

Disclosure obligations with regard to the criteria to be applied for the award of a contract

For those procurement procedures requiring a contract notice, the contracting authority must announce in the contract notice which criteria are to be used for identifying the most economically advantageous tender, as redefined in the 2014 Directive (see Annex V, part C of the 2014 Directive on the information to be included in the contract notice).

N.B. *The contracting authority must award a public contract on the basis of the disclosed award criterion.*

Procedure that must be followed before rejecting a tender that appears to be abnormally low

Article 69(3) of the directive explicitly recognises that a contracting authority may reject a tender that contains prices/costs that are abnormally low in relation to the works, supplies or services. The rejection of the tender is mandatory in the case where the contracting authority has established that the abnormally low price or cost proposed resulted from non-compliance with mandatory European Union law or national law compatible with EU law in the fields of social, labour or environmental law or international labour law provisions.

However, the contracting authority may reject a tender for such a reason only on condition that the following procedure is followed:

- **The contracting authority has previously requested in writing an explanation** of the tender or of those elements of the tender that it considers relevant or that may have resulted in an abnormally low tender [article 69(2)].

  These elements may include (but are not limited to) [see article 69(2)]:
- economic aspects of the construction method, manufacturing process or services provided;
- technical solutions chosen or exceptionally favourable conditions available to the tenderer for the execution of the work or for the supply of the products or services;
- originality of the proposal;
- compliance – ensured by both the main contractor and its subcontractors – with obligations deriving from mandatory European Union law or national law compatible with EU law in the fields of social, labour or environmental law or international labour law provisions;
- possibility that the tenderer would obtain state aid.

and

- **The contracting authority has duly verified those constituent elements** by consulting the tenderer, taking into account the evidence provided [article 69(3)].

Only if the contracting authority, following investigations, can establish that the tender in question is abnormally low, may it reject the tender.

If, however, the investigations carried out show that the price is genuine, the tender in question cannot be considered as abnormally low and it cannot be rejected.

N.B. *The justifications for accepting or rejecting a tender that appears to be abnormally low must, for the purpose of transparency, be explained in detail in the evaluation report.*

Comment

The purpose of the rules on abnormally low tenders is to allow tenderers to prove that their tenders are genuine and realistic before they are rejected. This provision avoids any abusive rejection by contracting authorities of tenders that appear to be abnormally low.

Award approval

It is the chairperson of the evaluation panel who normally issues the evaluation report to the authorised officer of the contracting authority for approval.

The authorised officer is responsible for:

- verifying that the process of evaluation of tenders was conducted properly;
- ensuring that the recommendation of the award is sound and correct; and
- making the final award decision.

It is of utmost importance for the authorised officer of the contracting authority to be knowledgeable about the rules governing the process of evaluation of tenders and more generally about the applicable public procurement rules.

The authorised officer of the contracting authority, before approving the recommendation for the award, may consider it necessary, for example:

- to ask for clarifications about any of the recommendation(s) contained in the evaluation report and about any aspect of the process of evaluation of tenders;
- to ask for evidence supporting any recommendation(s) contained in the evaluation report;
- to ask for a formal presentation of the evaluation report in order to better understand its contents;
- to ask that additional action be taken by the evaluation panel with regard to a specific recommendation made or to any other aspect of the process of evaluation of tenders.

Form of the award approval

The authorised officer of the contracting authority is to give the award approval in writing by indicating his/her full name and position as well as the date, followed by his/her signature. Where the award approval must be provided by a committee or elected representative, for example, rather than by an individual authorised officer, then the correct authorisation process must be followed.

The written approval is to be kept as part of the tender file.

N.B. *The written approval of the authorised officer is a very important element, which will be checked by the auditors and/or other control bodies as a necessary authorisation to proceed with the contract award.*

Contract Management

Contract management can be defined as:

> The steps that enable both the contracting authority and the economic operator to meet their obligations within the contract in order to deliver the objectives set by the contract

When a contracting authority agrees a contract with an economic operator, the arrangement cannot just be left to run itself – it must be managed. Contracts are frequently complex and they may involve many people, may take or last a long time, and may consume many resources. It is therefore vital that they are properly managed.

Key to the process of successful contract management is the recognition that procurement officers must plan, do, check and act. The plan, do, check and act cycle (PDCA) was originated by the 1950s American theorist Edward Deming, who spent considerable time advising Japanese industry on total quality management.

In terms of the procurement process, the 'plan' stage of Deming's cycle refers to the phases prior to the award of the contract and the 'do' stage refers to the activity of the economic operator throughout the life of the contract. Many procurement officers are very careful during 'plan' but they then let the economic operator 'do' and they forget to 'check' and 'act'. In the procurement context, 'check' refers to the checks and controls that are introduced to monitor performance, and 'act' refers to the activities necessary to ensure that any performance that has moved out of line is brought back within the required parameters.

Where economic operators recognise that people from the contracting authority are not monitoring their progress, they may get careless and delivery will be less than acceptable, or they may create and demand variations for items that are already within the contract, thus incurring additional costs for the contracting authority.

Good practice note – effective contract management

Effective contract management is vital to the success of a contract. It involves the procurement officer and other stakeholders in the contracting authority working proactively with people from the economic operator to deliver in accordance with the agreed specification.

Contracts without actively practiced PDCA have much less of a chance of being delivered successfully.

The process of contract management

Contract management activities can be broadly grouped into three areas, which span the do, check and act stages of PDCA. They are:

- Service delivery management
- Relationship management
- Contract administration

Service delivery management ensures that the service is being delivered at the required level of performance and quality, as stated in the contract. Service delivery management considers performance and manages risk through the 'do', 'check' and 'act' stages of PDCA. It involves setting controls and service-level agreements.

Relationship management seeks to keep the relationship between the economic operator and the contracting authority open and constructive, aimed at resolving or easing tensions and identifying potential problems at an early stage, whilst also identifying opportunities for improvement. Relationships must be wholly professional throughout the 'do' stage of PDCA, and they must also include a professional approach to managing issues and to dispute resolution.

Contract administration handles the formal governance of the contract and changes to documentation during the life of the contract. These areas of contract management ensure that the everyday aspects of making the contract run effectively and efficiently are taken care of. They may form activities relating to each stage of PDCA.

The inaugural or initial meeting

For any major contract it is good practice to hold a formal inaugural or initial meeting soon after the contract has officially been awarded. At this meeting people from both the economic operator and the contracting authority will come together for the first time in the context of the agreed contract. They may have met before, but this will have been whilst the parties were going through the procurement process. At this meeting it is vital that both sides (economic operator and contracting authority) move from a competitive to a co-operative approach – they will be working together for the life of the contract and both will want a successful outcome.

Everyone who is to be closely involved in the operation of the contract should be present at the meeting and ideally sitting around the same table. The objectives of the meeting include:

- Understanding the roles and responsibilities of everyone present
- Discussing the implementation and/or project plan
- Discussing issues that impact on the operation of the contract
- Discussing control mechanisms

Other matters can become apparent at an inaugural meeting. These include:

- A perception by people from the contracting authority of the truth and credibility of certain statements and promises made by the economic operator prior to the award of the contract
- An understanding of the keenness of the economic operator for the contract
- Whether the economic operator has fully understood the requirement
- Specific capabilities of the people working for the economic operator
- The extent of flexibility that both sides are prepared to demonstrate within permitted parameters
- The extent to which the economic operator may seek extras or variations
- The extent to which people can work together

Whilst accommodating minor suggestions from both sides, care must be taken to avoid corrupt practices, such as changing the scope of work or becoming too familiar with each other.

Finally, this initial meeting is an important opportunity for the procurement officer managing this contract to establish personal credibility in the eyes of the people from the economic operator. His/her approach should be neither too soft nor too severe:

- An approach that is too soft may be interpreted as weakness, signalling to the economic operator that the procurement officer may be easily exploited. Giving this impression could

lead to many contractual claims and requests for modifications throughout the life of the contract

- An approach that is too severe could alienate the people from the economic operator and hinder the development of a constructive working relationship. Giving this impression could lead to people from the economic operator not being prepared to give and take in the spirit of the contract.

The meeting should be conducted in a serious, firm and polite manner. Remember - you don't get a second chance to make a first impression!

Ongoing contract management

The economic operator will perform the contract within the agreed scope. This may include the delivery of goods and materials or the provision of services or works to the contracting authority. A vital part of the check stage of PDCA is that people in both organisations raise concerns and issues as soon as they identify them and that people on the other side of the relationship treat the issues seriously and promptly. There is nothing worse than an issue that festers between people from two organisations that are supposed to be working together. Ongoing contract management involves the administration of a range of activities, which include:

- Contract maintenance and change control
- Charges and cost monitoring
- Ordering or call-off procedures
- Receipt and acceptance procedures
- Payment procedures
- Budget procedures
- Resource management and planning

Issues log

An issues log is one mechanism for managing issues. It records them as they arise along with the actions taken to attempt to resolve them.

The aim of the issues log is to record the issue and the action taken to resolve it. An escalation procedure must be provided in the contract for issues that cannot be resolved. This procedure will involve people at more senior levels of the organisation in an attempt to resolve the issue. A final use of alternative dispute resolution or court action may be appropriate if the escalation procedure fails.

Review meetings

Review meetings are another practical means of keeping control of a contract, particularly when it is complex or runs over several years. A typical agenda for a contract review meeting is shown below:

1. Introduction
2. Apologies
3. Minutes of last meeting
4. Actions outstanding from last meeting
5. Progress – planned and actual
6. Performance levels achieved
7. Review of issues log
8. Corrective actions required
9. Summary of actions
10. Date of next meeting

11. Circulation of minutes

In some contracts a monthly operational meeting may be part of the contract management process, together with a quarterly management or steering group meeting involving people of a high level in each organisation. These meetings need to be well-run and brief and provide a means of reporting, encouraging and rewarding progress towards the final goal.

In these ways it is possible to successfully manage the do, check and act stages of the contract.

Good practice note – meetings

Review meetings are a productive means of communication during an ongoing contract and not having them can have negative consequences. They must be well-run and not too time-consuming. In one case, an economic operator arrived for a meeting with a senior procurement person only to be told that the person was too busy to attend the meeting as they normally did. Consider the signals that this incident sent to the people from the economic operator.

Managing the relationship

Contractual arrangements may commit the contracting authority to one economic operator or a small number of economic operators to a greater or lesser degree, and for some time. Inevitably this relationship involves a degree of dependency. The costs involved in changing economic operator are likely to be high and, in any case, contractual realities may make it highly unattractive. It is therefore in the contracting authority's own interests to make the relationship work. The three key factors for success are:

- Mutual trust and understanding
- Openness and excellent communication
- A joint approach to managing delivery

There must be mutual trust between the people working in both organisations if the relationship is to work and if the contract is to be delivered successfully. The factors that help to establish the relationship and achieve the right benefits include the following:

- The economic operator gains greater insight into the contracting authority's business and management style, and therefore more often pre-empts changed requirements and/or makes proactive suggestions/contributions with the expectation that this may improve the service and/or provide other sources of mutual benefit. In addition, the economic operator may become more efficient and, therefore, more cost-effective at delivering this type of service.

- The economic operator feels more confident in investing for the longer term – for example, in a more flexible infrastructure, with better systems or staff training.

- The contracting authority gains from knowing the economic operator's strengths and weaknesses and focuses contract and contract management efforts on those areas where they will bring the greatest returns.

Good practice note – Communication

Good communication can be a make or break aspect in managing a relationship. Many cases of mistrust or concern over poor performance in a service relationship result from a failure to communicate.

Contract management controls

The need to be able to measure

In the very first line of his book, *The Fallacies of Software Engineering*, Robert Glass uses the quotation, "You can't control what you can't measure", and the rest of the text, building on that statement, argues that we need metrics to rein in the chaos of software development.
Software is an intangible service and presents its own problems in the area of controls. One government department had 200 controls over its IT systems. This sounds horrendous until it is realised that there are 200 separate systems to control.

Control is vital, and it is true that you cannot control what you cannot measure.

Risk and risk management

Risk is defined as the uncertainty of outcome, whether it be a positive opportunity or a negative threat. In the area of contract management, the phrase 'management of risk' incorporates all of the activities required to identify and control risks that may have an impact on a contract being fulfilled. It is important to note that it is the contracting authority's responsibility to maintain the service wherever possible.

Many risks involved in contract management relate to the economic operator being unable to deliver or not delivering at the right level of quality. These risks could include:

- Lack of capacity
- The economic operator's key staff being redeployed elsewhere, eroding the quality of the service provided
- The economic operator's business focus moving to other areas after the contract award, reducing the added-value for the contracting authority in the arrangement
- The economic operator's financial standing deteriorating after the contract award, eventually endangering its ability to maintain the agreed levels of service
- Demand for the service is much greater than expected and the economic operator is unable to cope
- Demand for the service is too low, meaning that economies of scale are lost and operational costs are disproportionately high
- Staff in the contracting authority with a knowledge of the contract transferring to another department or moving to another organisation, thereby weakening the relationship
- The contracting authority being obliged to make demands that cannot be met, perhaps in response to changes in legislation
- *Force majeure*: factors beyond the economic operator's control disrupting delivery – for example, premises inaccessible due to a natural disaster
- Fundamental changes in the contracting authority's requirements, perhaps as a result of changes in policy, making the arrangement a higher or lower priority or changing the level of demand for the service
- The contracting authority's inability to meet its obligations under the contract

Where risks are perceived or anticipated, the contracting authority and the economic operator must work together to decide who is responsible for the risk, how it can be minimised and how it will be managed should the circumstance occur. Ideally, these issues should have been tackled in advance in the contract documents. The contracting authority will aim for continuity of activity in all possible circumstances, although it is unlikely to be a cost-effective aim. Questions to consider for each individual risk include:

- Who is best able to control the events that may lead to the risk occurring?
- Who can control the risk if the situation occurs?
- Is it preferable for the contracting authority to be involved in the control of the risk?
- Who should be responsible for a risk if it cannot be controlled?

If the risk is transferred to the economic operator:

- Is the total cost to the contracting authority likely to be reduced?
- Will the economic operator be able to bear the full consequences if the risk occurs?
- Could it lead to different risks being transferred back to the contracting authority?

A key point is that in most cases the ultimate responsibility for the service that the contracting authority provides to its own customers and stakeholders (patients in a hospital, passengers of a bus service, or children in a school) cannot be transferred to the economic operator.

> Although the economic operator may be under severe financial pressure for non-fulfilment of its obligations, this pressure will not compensate the contracting authority for its own failure to fulfil its obligations and deliver key outcomes. For example, a critical service or building may fail, endangering the lives of citizens.
>
> Although the economic operator may fail to deliver, the ultimate responsibility remains with the contracting authority. Prudent procurement officials are aware of this responsibility and keep it in mind during specification, economic operator selection and contract management.
>
> It is essential to consider the whole supply chain when analysing the risks to a contract and to examine the organisations supplying an economic operator whenever a major risk is involved.

One factor that can assist the procurement officer when things may start to go wrong is the relationship that the contracting authority people have with the people from the economic operator. Where the relationship is good, open, fair and honest, an early warning of the impending risk becoming a reality may be provided through the normal working relationships and control mechanisms. Where the relationship is poor, people working for an economic operator will attempt to hide the problem, which then normally materialises as an even greater risk.

The need for wisdom when selecting a control mechanism

Control must be tempered with wisdom. The wisdom in setting contract controls starts with the performance measures against which the specification was checked and weighted before the Invitation to Tender (ITT) was issued and against which the tenders were scored. Contract management controls must be:

- highly relevant to the essence of the contract
- understood and accepted by people from the economic operator and from the contracting authority
- capable of measurement
- robust in their operation
- able to provide more value than the cost of the activity related to their collection
- able to reflect soft and hard measures
- useful as an information source

Timely high-level/summary level reporting is much more effective than accurate late information. It is essential for the information obtained to be useful, either intrinsically or because it can be processed to provide knowledge on which to base decisions and activity.

Areas where controls are necessary

Between the award of a contract and its conclusion, controls are necessary at the following steps of the procurement process:

- Acknowledgement – to ensure that the contract terms and conditions are not changed by the later document
- Control to ensure on-time delivery
- Control to test the quality of the work in progress/delivery
- Control to count receipts
- Control to ascertain acceptance of delivery
- Control to ensure that only permitted people withdraw items from stock
- Control to make sure that what has been accepted is paid for
- Control to make sure that lessons are learned from this procurement for the future
- Control to ensure that disposal gives value-for-money and is environment-friendly
- Control to close the contract in accordance with good practice

Service-level agreements

Service-level agreements are one excellent way of ensuring control of a contract. There should be a detailed agreement concerning the required service levels and thus concerning the expected performance and quality of service to be delivered. These service-level agreements are incorporated as part of the contract, often in the form of schedules in the contract. Frequently these agreements are comprised of key performance measures (KPIs). The contract should define the service levels and terms under which a service or a package of services is provided. It should state mutual and individual responsibilities.

By clearly stating the required and agreed quality of services, both the contracting authority and the economic operator know and understand what targets have to be met in the delivery and support of services.

Both parties should pre-agree on the compensation for the contracting authority if agreed service levels are not achieved. Similarly, the contracting authority may receive a benefit if the economic operator exceeds the agreed service levels and it could agree on a regime of bonus payments as a means of incentivising the economic operator.

Service levels and incentivisation must relate to the key criteria on which the specification was based, the ITT weighted, and the contracting authority's tender judged. In that way it can be seen that those issues, which originated in the formative steps of the procurement cycle, are carried through to delivery.

Special conditions relating to the performance of the contract

Special attention must be paid to environmental, social or employment-related considerations. Such considerations must be indicated from the beginning, in the contract notice, in the prior information notice as a call for competition, or in the procurement documents, as mandatory conditions for contract performance.

The obligation to take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by European Union law, national law, collective agreements or by the international environmental, social and labour law provisions is now explicitly provided in the 2014 directives. Such obligations are also extended to the level of subcontractors.

It is for that reason that the contracting authority, at the latest when the performance of the contract commences, shall require the main contractor to indicate the name, contact details and legal representatives of its subcontractors involved in works or in respect of services to be provided at a facility under the direct oversight of the contracting authority, in so far as the information is known at that point in time. The contracting authority shall require the main contractor to indicate any changes in this information during the course of the contract and the required information concerning any new subcontractors that the main contractor might subsequently involve in such works or services.

Contracting authorities may verify whether the subcontractors are subject to any of the situations that are defined as grounds for mandatory exclusion. Where such measures are applied to subcontractors, the main contractor shall be required to replace the subcontractor concerned. Under national rules, such a verification procedure may also be extended to non-compulsory grounds for exclusion.

Modifications of contracts during their term

When is a contract modification necessary?

The contracting authority must conclude a contract with the winning tenderer in accordance with the terms and conditions of that tenderer's offer. In other words, the terms of the concluded contract should reflect the commitments made in the offer that was selected as the most economically advantageous. Ideally, if contracts are well founded, they should be fulfilled without modifications, but in practice contracting authorities may be faced with situations where additional works, supplies or services become necessary.

A modification to a contract may be necessary in the following circumstances:

- When the scope of work changes to become greater or lesser

- Where there is a change in the resources or facilities required
- When the rates charged under the contract change
- Where there is an extension of the duration of the contract
- Where terms and conditions of the contract change
- Where national laws make a change that impacts on the contract

Behind the need for modifications

Behind the need for modifications are circumstances where:

- price indexation is needed;
- the price of the contract is determined based on the unit prices of the estimated quantities;
- obsolescence has occurred;
- adaptations to the contract are rendered necessary by technical difficulties that have appeared during operation or maintenance;
- legislative changes have been made;
- genuine unforeseeable circumstances occur;
- upstream planning has been inadequate;
- assessment and evaluation of economic operators' tenders have been inadequate;
- poor contract management occurs.

Price indexation
In particular when the performance of the contract covers a long period, well-defined price modification mechanisms/methods (provided in the tender documents and regulated in the contract) may serve as useful tools for achieving a reasonable balance in the contract`s economy.

Good practice note – price indexation

A contractual price indexation formula may take the following general pattern:

*Pfinal = Pinitial * (C1 * I1 + C2 * I2 + ... + Cn * In)*
Pfinal = the indexed contract price
Pinitial = the initial contract price

C1, C2, ... Cn = weighting coefficients dependent on the specifications of the contract, as defined and published by the contracting authority

I1, I2, ... In = technical price indexes dependent on the specifications of the contract, as usually computed and published by statistical institutions

Price of the contract is determined based on the unit prices of the estimated quantities
It is rarely possible to perform a large construction project exactly as foreseen in the original proposals and drawings. In practice, marginal variations of the quantities provided for the project have a huge potential to generate difficulties, if this issue is not diligently regulated in the contract. In such cases, payments may be made according to the bill of (real) quantities for approved work executed, multiplied by the relevant unit prices stated in the tender for each item.

Obsolescence

The supply market may have moved on and the equipment as specified in the contract may now be obsolete and unobtainable. Computer hardware and software are classic examples. However, the specification should be forward-looking and anticipate a development roadmap. In this type of situation, a framework agreement, with mini-competitions or a dynamic purchasing system, may be a better approach so as to reflect the changing needs.

Legislative changes

Changes in legislation may entail contract modifications.

Genuine unforeseeable circumstances

With the wide variety of contracts established with contracting authorities, it is inevitable that some contracts will require modifications, either to meet changing requirements or to meet a reasonable request from the economic operator. The notion of unforeseeable circumstances refers to circumstances that could not have been predicted, despite reasonably diligent preparation of the initial award by the contracting authority, taking into account its available means, the nature and characteristics of the specific project, good practice in the field in question, and the need to ensure an appropriate relationship between the resources spent in preparing for the award and its foreseeable value.

Inadequate upstream planning
Inadequate upstream planning is a major cause of modifications. They occur when the people carrying out the procurement process do not devote enough time to upstream activities, such as involving stakeholders, specification, setting performance criteria, and considering terms and conditions. Therefore the specification and the ITT may not contain enough information or the correct information to enable economic operators to make their tender.

Inadequate tender assessment
Modifications may originate from an insufficient analysis of economic operators and of the tenders that they submit to the contracting authority, which results in a different understanding by the economic operator and the contracting authority of vital aspects of the services, works or goods to be provided.

Human beings can be devious (meaning that they deviate from a correct, accepted or common course) and even deceitful. People working for economic operators assess a need, prepare a tender and sign the contract. They may then 'discover' that an extra, but essential, piece of work needs to be done before the main work can start. The procurement officer may have assumed that this work was included, but the wording of the economic operator's tender may clearly exclude the extra work, even though common sense would dictate that such work was necessary.

Good practice note – modifications

Economic operators will sometimes bid low in the tender in an attempt to secure the contract and then afterwards generate increased profits through modifications. If the low-price tender looks too good to be true, then it probably is too good to be true!

Poor contract management
Naïve procurement officers and other stakeholders may be subjected to arguments, from persons working for the economic operator, that a particular part of the service is not within the contract and that a modification is therefore necessary. Care needs to be taken not to pay additionally for items that are already included in the contract.

The wording of the contract may be ambiguous, despite all of the previous attempts at clarity, and a modification may have to be agreed. These cases must be fed back into the learning from this contract in order to avoid such issues in future contracts.

When and how a contract may be modified during its term
The 2014 directives clarify when the modifications to a contract during its performance are possible and how to proceed to make these changes.

Taking into account the relevant case law of the Court of Justice of the European Union, the general rule remains unchanged, namely that **a new procurement procedure is required in case of material changes** to the initial contract (or framework agreement), in particular to the scope and content of the mutual rights and obligations of the parties (including the distribution of intellectual property rights). Such changes demonstrate the parties' intention to renegotiate the essential terms or conditions of that contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.

Compared to the 2004 directives, the 2014 directives provide much more legal certainty with regard to the situations where contracts may be modified without having to start a new procurement procedure. These situations can be divided into two main categories:

- modifications that meet certain conditions that are not necessarily linked with a specific value
- modifications having values that are below certain *de minimis* thresholds

Modifications subject to certain conditions
Contracts and framework agreements may be modified without a new procurement procedure in any of the following cases:

(a) "where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used".

According to the above-mentioned conditions, the contracting authority has the possibility to provide for modifications to a contract by way of review or option clauses. Such clauses should not give unlimited discretion to the contracting authority. "Such clauses shall not provide for modifications or options that would alter the overall nature of the contract or the framework agreement".

Review or option clauses that have been sufficiently and clearly drafted may, for instance, provide for price indexation or ensure that communication equipment to be delivered over a given period will continue to be suitable so that it meets updated communication protocols or other technological changes. It should also be possible, with sufficiently clear clauses, to provide for adaptations of the contract that may be rendered necessary by technical difficulties appearing during operation or maintenance. It should also be recalled that contracts could, for instance,

provide for both ordinary maintenance as well as extraordinary maintenance interventions that may become necessary in order to ensure the continuation of a public service.
(b) “for additional works, services or supplies by the original contractor that have become necessary but were not included in the initial procurement and where a change of contractor:

> (i) cannot be made for economic or technical reasons, such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; and
> (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority.”

However, any increase in price shall not exceed 50% of the value of the original contract (this condition is not applicable for contracts awarded by entities operating in the water, energy, transport, and postal service sectors). Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing the Directive.

> (c) “where all of the following conditions are fulfilled:
> > (i) the need for modification has been brought about by circumstances that a diligent contracting authority could not have foreseen;
> > (ii) the modification does not alter the overall nature of the contract;
> > (iii) any increase in price is not higher than 50% of the value of the original contract or framework agreement. Where several successive modifications are made, that limitation shall apply to the value of each modification (this condition is not applicable for contracts awarded by entities operating in the water, energy, transport, and postal service sectors).”

The situations that may occur due to unforeseen circumstances are regulated by the 2014 directives in a different way than they were by the old 2004 directives. One of the main differences is that the 2004 directives included this type of situation within the cases justifying the use of the negotiated procedure without publication of a contract notice, whilst the 2014 directives do not impose a new procurement procedure for modifying the contract. However, this provision cannot apply in cases where a modification results in an alteration of the nature of the overall procurement, for instance by replacing the works, supplies or services to be procured by something different or by fundamentally changing the type of procurement.

Modifications without particular conditions
Without any need to verify whether the conditions set out above are met, contracts may be modified without a new procurement procedure being necessary where the value of the modification is below both of the following values:

> - below the EU thresholds; and
> - below 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for work contracts.

The 2014 directives address more pragmatically and more efficiently the approach to minor modifications that may be made during the performance of contracts.

In this context, it is worth mentioning that the possibility to make such modifications to an ongoing contract does not depend on the nature of the reasons that may determine the modifications. For instance, certain minor omissions/discrepancies (even errors) of the initial project may generate the need for minor supplementations/changes to some of the work items that have to be performed.

Such omissions/discrepancies may have a disputable predictability/unpredictability nature, but there are no legal impediments to making modifications if their main characteristic remains their non-substantiality – both in terms of value and in terms of the impact on the overall nature of the work contract.

Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications. This provision means that limitations shall not apply to the value of each modification, but to the cumulative value of all of the modifications.
On the other hand, the text of the 2014 directives refers to the **net** value, which means that for calculating the value of the modifications (in relation to the two limitations), **the value of new works minus the value of works waived** should be taken into account. However, it should also be kept in mind that the net impact of the modification must not affect the overall nature of the contract. For these reasons, a net modification of price of 5% (consisting in 40% of new works and 35% of abandoned works) shall be considered as a substantial modification if such changes affect the initial nature of the contract.

When and how the contracting authority may be replaced during the term of the contract
In line with the principles of equal treatment and transparency, the successful tenderer should not be replaced by another economic operator without reopening the contract to competition. However, the successful tenderer performing the contract will be able to make, in particular where the contract has been awarded to more than one undertaking, certain structural changes during the performance of the contract, such as purely internal reorganisations, takeovers, mergers and acquisitions, or insolvency. This approach is logical, since such structural changes should not automatically require new procurement procedures for all public contracts performed by that tenderer.

In accordance with the 2014 directives, contracts and framework agreements may be modified without a new procurement procedure in the case where a new contractor replaces the economic operator to which the contracting authority had initially awarded the contract as a consequence of:

- "an unequivocal review clause or option" in the initial procurement documents; or
- "universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive"; or
- "in the event that the contracting authority itself assumes the main contractor's obligations towards its subcontractors where this possibility is provided for under national legislation".

In any event, for any cases other than those mentioned above, the modification of a contract or framework agreement during its term shall be considered to be substantial where a new contractor replaces the economic operator to which the contracting authority had initially awarded the contract.

The impact of modifications
Modifications can have direct and indirect impacts. Direct impacts can include:

- Increased/decreased cost of the contract
- Contract over/under budget
- Delays and extension of time for supply or works projects

Indirect impacts can include:

- Wasted design work

- Additional design work
- Wasted or unnecessary activity
- Changes to or cancellation of orders that the economic operator may have placed with its own supply base
- Placement of additional orders by the economic operator and its supply base
- Increased/decreased time and delays
- Unproductive labour costs
- Reprogramming of the contract to mitigate the effects of increased/decreased time and costs
- Additional head office time and money spent by the economic operator, which may seek to recover its fixed costs

Managing modifications – minimising the number of modifications
Stated policy should be to avoid modifications wherever possible, and this should be made clear at the inaugural meeting. Another policy must be that only thoroughly investigated modifications, i.e. those that are permissible under the EU *acquis*, will be agreed and then only in writing by the authorised procurement officer.

The inaugural meeting should also be used to advise the economic operator of the modifications procedure.

When an economic operator submits a request for a modification, procurement officers must ask themselves and other stakeholders a number of searching questions:

1. Is this request clearly within the scope of work that was agreed and understood?
2. Is the request a misinterpretation of the existing specifications or of the terms and conditions? Would clarification mean that the need for the modification would disappear?
3. Is this modification really needed, or is it simply "nice to have"? Work out the direct and indirect implications.
4. Is there another way of proceeding that might be more cost-effective?
5. Is the change really a modification to the current contract or is it new work requiring a new contract?
6. Will the modification breach national procurement regulations or conflict with any policy on competitive tendering?

Managing modifications – minimising the impact of modifications that cannot be avoided
If a modification really is necessary and is permissible, the contract should contain a change control provision. The change control procedure should ensure that an authorised person, and only that authorised person, has responsibility for agreeing to a modification. Some contracting authorities invoke a high-level committee to review the need for modifications and to search for alternatives.

To minimise the impact of a modification:
- Use the same diligence in agreeing to a modification as you would in awarding a contract.
- Always obtain a firm quotation for the price of the modification. Remember that economic operators will try to use modifications to maximise the profit of the contract and may very well price high (it is effectively a direct award without competition), so always challenge the price.
- Understand the concept of marginal costing: the economic operator will have built fixed costs into the base contract price, but these costs may not be relevant for extras and should be excluded from the costing of modifications.

- Do not agree to a modification to the contract until both you (as procurement officer) and the person from the economic operator agree in writing to the total consequences of the modification in terms of time and cost (including any secondary effects on other parts of the procurement).
- Do not hesitate to issue a modification for a reduction in price. All too often it is thought that modifications only result in increased cost. Sometimes you may decide to delete something from the work scope, which could result in a reduction in price. Again beware of the possible secondary effects.
- Make sure that full records are kept from the start of the contract. It is a good idea to record in a contract logbook any incidents that could result in modifications.
- Do not be tempted to use an economic operator to get extra work done just because it is already present on your site.
- Keep all relevant stakeholders involved in the consideration of any modifications; these stakeholders may include procurement, contracts, legal, finance, end-users and/or the budget-holder.
- In an emergency, instruct the economic operator orally, but confirm in writing without delay, the same day if possible.

A simple change control procedure

A single change control procedure should apply to all changes in the contract. The various parts of the contract should not have different change control mechanisms. However, flexibility needs to be built into this procedure to make it possible to deal with urgent issues, such as emergencies. A change control procedure should provide a clear set of steps and clearly allocated responsibilities covering:

- Request for change
- Assessment of impact
- Prioritisation and authorisation
- Agreement with economic operator
- Control of implementation
- Documentation of change assessments and orders

Responsibility for authorising various types of changes may rest with different persons in the contracting authority, and documented internal procedures will need to reflect this shared responsibility. In particular, changes in the overall contract, such as changes in prices that are outside the scope of agreed price indexation mechanisms, must have senior management approval. In many cases, however, it will be possible to delegate limited powers to procurement officers to authorise minor changes that affect particular services or service-level agreements using agreed processes.

There should be an agreed procedure for placing additional demands on the economic operator, including the specification of the requirement, contractual implications, charges for the additional goods/works/services, and delivery time frames. This procedure should be used in consultation with those responsible for monitoring the provision of goods/works/services, and where it fits within internal legal guidelines it must be treated as a new purchase.

Appropriate structures need to be established, with representatives of the management of both the contracting authority and the economic operator, to review and authorise change requests. These structures may fit in with existing management committees, or new change advisory roles may be required.