EUROPEAN COMMISSION
Budget
Central Financial Service

VADE-MECUM

ON PUBLIC PROCUREMENT IN THE COMMISSION

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Disclaimer

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Finally, it must be borne in mind that, although the Vade-mecum provides information and explanations that are in strict compliance with the rules and regulations in force, it cannot be relied on in law. The rules and regulations and any clarification provided by Court judgments take precedence.

1.2.3. What procedure to use?

Do you want an "all-in-one" procedure, where any interested economic operators will get all the information they need for preparing a tender and then you will evaluate all the tenders in one go and choose the best one? Then you might opt for an:

3.3 Open procedure

Do you want to pre-select operators who have the economic and technical capacity necessary for implementing your contract and ask only them to send you a tender? Then you might choose a:

3.4 Restricted procedure

You are in a situation where you can negotiate with tenderers, e.g.:
you need a concession contract;
you need training or hotel or restaurant services;
Then you might be interested in a:

3.5 Competitive procedure with negotiation

Do you need a series of similar services or supplies over a period of time and do not yet know exactly when nor all the details, but are sure that the yearly value will be below Directive threshold? Then the best way to deal with this situation might be to launch one of these two procedures:

3.6.3. List of pre-selected candidates

3.6.4 List of vendors

The value of your procurement is below the Directive threshold? Then you may use the:

3.7. Negotiated procedure for middle or low- value contracts

You are in exceptional circumstances, e.g.:
You have received no tender in response to your open or restricted procedure and this is definitely not due to bad timing or imprecise tender specifications.
There is a monopoly situation on the market.
Then you might be interested in a:

3.8. Negotiated procedure without publication

You intend to procure a particularly complex product or service and you want to hold discussions with pre-selected candidates to come up with options for the best solution and then ask them to send you their tender based on the outcome of this dialogue? Then you are entitled to use a:

3.9. Competitive dialogue

You intend to procure something which does not exist so you will finance research services and purchase the end-product. Then you should use an:

3.10. Innovation partnership

You need fresh ideas in a field where creativity is a must and where you have to ask for proposals without previously giving details of every aspect of the future contract? In this case you could go for a:

3.11. Design contest

1.4. What is public procurement?

1.4.1. Basic information about EU public procurement

"Public procurement" means the purchasing of works, supplies and services by public bodies at either national or Union level. **Public procurement within the European Union is governed by Directive 2014/24/EU, while the legal basis for Commission procurement is laid down in the Financial Regulation (FR).**

The goal of procurement rules

EU public procurement plays an important part on the single market and is governed by rules intended to remove barriers and open up markets in a non-discriminatory and competitive way. **The objective of public procurement is to increase the choice of potential contractors to public bodies, thereby allowing achieving a most economically advantageous tender, while at the same time developing market opportunities for companies**. The following rules should be followed:

***Accountability**: effective mechanisms must be in place in order to enable authorising officers of the contracting authority to discharge their personal responsibility on issues of procurement risk and expenditure.*

***Competition:** procurement should be carried out by competition, unless there are justified reasons to the contrary.*

***Consistency**: economic operators should be able to expect the same general procurement policy across the public sector.*

***Effectiveness:** the contracting authority should meet its commercial, regulatory and socio-economic goals in a balanced manner.*

***Efficiency**: procurement processes should be carried out as cost effectively as possible.*

***Equal treatment:** economic operators should be treated fairly and without discrimination, including protection of commercial confidentiality where required. The contracting authority should not impose unnecessary burdens or constraints on economic operators.*

***Informed decision-making:** the contracting authority needs to base decisions on accurate information and to monitor requirements to ensure that they are being met.*

***Integrity:** there should be no corruption or collusion with or between economic operators.*

***Legality:** the contracting authority must conform to European Union law and other legal requirements.*

***Responsiveness:** the contracting authority should endeavour to meet the aspirations, expectations and needs of the community served by the procurement.*

***Transparency:** the contracting authority should ensure that there is openness and clarity on procurement policy and its delivery.*

Advertising the contract

Most contracts covered by the public procurement rules must be subject to a call for tenders in the form of a notice in the OJ S.

Choosing the right award procedure

The notice published in the OJ S must specify the procurement procedure that the contracting authority will follow. There are three main award procedures: **open, restricted** and **negotiated**. The contracting authority has a free choice between the open and restricted procedure, but may use the negotiated procedure only in specific circumstances.

Conclusion

Any contracting authority awarding a contract should remember the following key principles:

Be open and transparent – allow tenderers to understand what you are going to do and how you are going to do it.

Be objective and ensure equal treatment of tenderers – allow all tenderers a fair and equal chance of winning the contract.

Be consistent – do what you said you were going to do.

Tenderers should ensure that they understand the procedure and, if in doubt, seek clarification from the contracting authority.

1.4.2. Legal basis and general principles

The legal basis for EU procurement consists of the relevant articles of the Financial Regulation (FR) and its Annex 1. Please note that all legal references to the FR should point to the initial act only, which include by definition all subsequent amendments (dynamic legal reference)[1].

- Financial Regulation – Regulation (EU, Euratom) No 2018/1046 of the European Parliament and the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union[2], Part One, Title V (Common rules), Title VII (Public procurement and concessions) and Annex 1.
- Judgments, mainly of the General Court in procurement cases.

The FR incorporates the rules from Directive 2014/24/EU[3] on public procurement ("the Directive") and Directive 2014/23/EU on concessions[4].

The provisions of the FR will be described in detail, with examples, in each chapter of this Vade-mecum. At this stage it is important to look at some of the fundamental concepts underlying procurement which contracting authorities must keep in mind throughout the procedure.

⇒ All EU procurement must comply with the principles of **transparency, proportionality, equal treatment** and **non-discrimination** and **sound financial management**.

⇒ The basic rule underlying public procurement is to ensure **competition** between economic operators. Cases where a contracting authority can approach an operator of its choice without launching a competitive procedure are the exception and are reserved for specific, clearly defined situations.

⇒ **Competitive procedures** are based first on a precise definition of the subject and terms and conditions of the contract and, second, on a variety of criteria, of which operators must be notified so that they can draw up their tender accordingly.

⇒ The EU institutions are not legally bound vis-à-vis an economic operator until the contract is signed. This should be made clear in all contacts with candidates/tenderers. Up to the time of signature, the contracting authority may cancel the procedure without the candidates/tenderers being entitled to any compensation. Reasons must, of course, be given for the decision and the candidates/tenderers must be notified.

Complying with the legal requirements relating to public procurement should not be seen as a mere formality or bureaucratic requirement with no real implications, as any economic operator who is eliminated from a procurement procedure can use failure to comply with any one of these requirements as grounds to challenge the decision awarding the contract and possibly have it annulled. Moreover, failure to comply may lead to non-contractual liability (damages) against the contracting authority. Compliance is also essential for administrative and political reasons (scrutiny by the European Parliament's Budgetary Control Committee, the Ombudsman, the Court of Auditors, etc.).

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[1] See the DAP (Drafter's Assistance Package): http://www.cc.cec/wikis/pages/viewpage.action?pageId=167740463 (only Commission access)

[2] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, OJL 193, 30.7.2018, p. 1, see https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.193.01.0001.01.ENG&toc=OJ:L:2018:193:TOC

[3] OJ L 94, 28.03.2014, p. 65, see http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN

[4] OJ L 94, 28.03.2014, p. 1, see http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0023&from=EN

1.6. Conflict of interests in procurement

The term "conflict of interests" is used with different meanings in different contexts. To avoid confusion, four main cases can be distinguished:

(1) conflict of interest for the contracting authority,

(2) grave professional misconduct,

(3) involvement in drafting tender specifications and distortion of competition,

(4) professional conflicting interests.

(1) The notion of **conflict of interests** refers normally to situations where **an agent of the contracting authority** is in one of the cases listed in Article 61 FR, i.e. where the impartial and objective exercise of the function of the person is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other interest with a candidate, tenderer or contractor.

If this situation happens or if there is a risk that this situation may happen, the person has the obligation to inform its hierarchy in writing and the hierarchy will decide the appropriate action. This includes finding that there is no conflict, removing the person from a specific activity, etc.

In procurement, this applies to the persons and authorising officer in charge of the procedure as well as to persons involved in opening and evaluation phases.

The term "**conflict of interests" does not apply to economic operators** and should not be used with reference to them. It can only refer to the contracting authority.

(2) There are specific situations for economic operators which qualify as "**grave professional misconduct**" and not as conflict of interests, e.g.:

- where the operator attempts to unduly influence the decision-making of the contracting authority during a procurement procedure;

- where the operator enters into agreement with other operators in order to distort competition;

- where the operator tries to obtain confidential information that may give it undue advantages in the procedure.

These cases are listed in Article 136(1) (c) FR and are a basis for exclusion of the operator.

(3) There are cases where the contracting authority used a technical assistance contract to help **drafting the tender specifications** of a subsequent procurement procedure. In this case, it is the responsibility of the contracting authority to ensure equality of treatment between the operator involved in the technical assistance and other economic operators. The contractor involved in the preparation of procurement documents can be rejected from the subsequent procedure only if its participation entails a **distortion of competition** and that this cannot be remedied otherwise (Article 141(1) (c) FR).

It is up to the contracting authority to prove the distortion of competition and to prove that it has taken all possible measures to avoid the rejection. Such rejection is subject to a contradictory procedure, so the tenderer must be given the opportunity to prove that its prior involvement cannot distort competition.

In practice, it is strongly recommended to avoid the rejection and to prepare the necessary measures to avoid distortion of competition from the beginning, i.e. from the first contract.

In particular, the information given to the technical assistance contractor during the preparation of the tender specifications should also be communicated to other economic operators in the second procedure.

Besides, the time limit for receipt of tenders of the second procedure should be long enough (well above the legal minimum) to ensure that all operators can absorb the relevant

information. A short time limit would indeed give an undue advantage to the technical assistance contractor.

(4) Finally, there are specific cases where the operator has a **professional conflicting interest** which negatively affects its capacity to perform a contract (Point 20.6 Annex 1 FR). This is treated at the selection stage. This provision is meant to avoid cases where an operator is awarded a contract to evaluate a project in which it has participated or to audit accounts which it has previously certified.

If the operator is in such a situation, the corresponding tender is rejected. These cases often arise in evaluation or audit framework contracts, where the contractor can have a professional conflicting interest for a specific contract.

Part 2. Conceiving the purchase and the contract

2.1. Financing decision

Contracts must be covered by a "financing decision", as provided for by Article 110 FR, in case of operational appropriations. This is not necessary in the case of administrative appropriations including technical support lines (of the form XX 01, also called ex-BA lines).

The financing decision is needed for framework contracts, even if no appropriations are needed at this stage, and for direct/specific contracts.

It must indicate:

- the total budget reserved for the procurements during the year;
- the indicative number and type of contracts envisaged and, if possible, their subject in generic terms;
- the indicative timeframe for launching the procurement procedures.

Further information is available in the circular on financing decisions

2.2. Characteristics of the purchase

For departments considering launching a procurement procedure, the first step is to determine the characteristics of the contract, i.e. its subject, duration and value.

Note that as a matter of principle, to ensure transparency and sound financial management, a framework contract should not be envisaged if the same subject matter is already covered by another existing framework contract (inter institutional or not) to which the contracting authority has access.

Union institutions and bodies are deemed to be contracting authorities except where they conclude service-level agreements (SLAs) with each other. In other words, the Commission and the Parliament or the Commission and an executive or decentralised agency can conclude SLAs. SLAs can also be agreed upon between departments of Union institutions. For instance, two Commission DGs or an Office and an agency can conclude SLAs.

When the JRC participates in a procurement procedure and is awarded the contract, the contract will also take the form of an SLA[6].

2.2.1. Subject matter and type of purchase

It is essential to identify the subject matter in order to select the procurement procedure to be followed and the type of contract. A more detailed description of the various subjects can be found in the reference nomenclature provided by the common procurement vocabulary (CPV) established by Regulation (EC) No 2195/2002[7].

The subject matter must be clear, giving a full and accurate description of what is being procured. The technical content must be clearly set out, indicating the duration, estimated value and type of contract.

Procurement can be used for four different types of purchases:

- **'service'** covers all intellectual and non-intellectual services other than those covered by supply contracts, works contracts and buildings contracts;
- **'supply'** covers the purchase, leasing, rental or hire purchase, with or without option to buy, of goods (it may also include siting, installation and maintenance);
- **'works'** cover either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II to Directive 2014/24/EU or the execution or

[6] Please consult the Commission circular of 9 July 2004 on JRC participation in procurement and grant procedures, available on BudgWeb.

[7] OJ L 340, 16.12.2002, p. 1, as amended by Regulation (EC) No 2151/2003 (OJ L 329, 17.12.2003, p. 1).

both the execution and design of a work corresponding to the requirements specified by the contracting authority. A “work” means the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic or technical function;

- **'building'** covers the purchase, exchange, long lease, usufruct, leasing, rental or hire purchase, with or without option to buy, of land, buildings or other real estate. It covers both existing buildings and buildings before completion provided that the candidate has obtained a valid building permit for it. It does not cover buildings designed in accordance with the specifications of the contracting authority that are covered by works contracts.

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2.2.3. Duration of the contract

The direct contract (see Chapter 2.6.1) stipulates a limited duration for performance (duration of execution of the tasks). It is recommended that this duration includes both the execution of tasks and the approval of interim deliverables if any, since the approval of an interim deliverable usually conditions the continuation of the execution of the tasks by the contractor. In addition, the time taken for the contracting authority to approve a deliverable should not be at the detriment of the time given to the contractor to perform the contract. The period of approval of the final deliverable can be outside that duration since, at that moment, the contractor has finished performance. A direct contract itself does not have a fixed duration; the contract ends when both parties have fulfilled their obligations: the contractor has delivered according to the terms of the contract and the contracting authority has made the final payment; in addition, some conditions linked to confidentiality and access for auditors are still in force long after performance.

[redacted]

[redacted]

2.2.4. Estimating the value of a contract

The contracting authority must estimate the value of a purchase (Point 34 Annex 1 FR) on the basis of previous experience, previous similar contracts and/or on the basis of a preliminary market research. It is possible to consult specialised services (e.g. DG COMM for communication services, DG DIGIT for IT purchases) to obtain information on the value of the purchase.

This estimate is made at the very beginning, in any event before the contracting authority launches the procurement procedure. Indeed, the value is the basis for the choice of procedure.

The estimated value of a contract may not be established in such a way as to avoid the competitive tendering procedure or to circumvent the rules which apply to certain procurement procedures or above a certain threshold. Nor may a contract be split for that purpose.

The estimated value is based on the total volume of the services / supplies /works to be purchased for the full duration of the intended contract including all options, phases or possible renewals. It must be calculated without VAT. It includes the total estimated remuneration of the contractor, including all types of expenses (for instance, travel and subsistence expenses).

As a result, thought must be given to whether the product or service requires a one-off operation or is of a permanent or repetitive nature and will have to be renewed over a given period. For instance, it should be checked whether the contract stands on its own or covers a product or service which forms part, with others, of a technical or financial whole (e.g. the various services which must be ordered when organising a conference) and another question is whether the purchase of a product would also create a need for services (e.g. maintenance).

If the contract is split into lots, the combined value of all lots should be taken into account.

In the case of works contracts, account must be taken not only of the value of the works but also of the estimated total value of the supplies needed to carry out the works and made available to the contractor by the contracting authority.

If the contract includes revenues

The value of the contract takes into account not only the expenses but also the revenues of the contract. In the case of banking or financial services, the fees, commissions, interest and other types of remuneration must be taken into account in the estimation. The same applies to insurance services and design contracts. In practice, the sum of all revenues and all possible expenses (in absolute value) should be used for estimation.

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2.3. Risk Management

Any big project is always exposed to certain risks. In other words, there are many things that could go wrong. The detailed project planning, choosing the procedure and preparing the technical specifications stage is the right time to consider potential risks.

Risk management should be integrated into the normal management and identification process, whereas assessments should be carried out as early as possible at every phase of project management. It is especially important to assess the risks properly at the stage of preparing the tender procedure when it is still possible to include protection mechanisms in the contract or to change the project architecture. This is in line with the *impact/likelihood approach*, which implies focusing on the most significant risks.

Do not forget the two basic risk management methods to be used at the stage of preparing the technical specifications:

- critical analysis of the project (tender) documentation, possibly by a person not involved in the earlier stages of preparation of the project; and

- feedback from implementation of previous projects ("lessons learned").

For more information see the Internal Control and Risk Management website and especially in Guidelines and templates for internal control and risk assessment, there is a Specific Guidance for Procurement.

2.6. Types of contracts

A written contract must be drawn up for each public or concession contract awarded by the contracting authority, except for payments against invoices equal to or less than €1000 (Point 14.5 Annex 1 FR).

The type of purchase (services, supplies, works and buildings) as well as the characteristics of the purchase (one-off, repetitive, long-term exploitation) determine the type of contract to be used.

It should be noted that the Commission (as well as the other institutions like the Council and the EP) is not a distinct legal entity but a European Union institution which acts on behalf of the Union (and possibly of the Atomic Energy Community) (Articles 47 TUE and 335 TFUE). Consequently, the contract should be established in the name of the European Union, represented by the Commission.

The various model contracts are available on Budgweb.

2.6.1. Direct contracts or purchase orders

The subject matter, remuneration and duration of performance of the contract are defined at the outset, as well as all other necessary legal conditions. As such, a direct contract is definitive and self-sufficient in that the contract can be implemented without further formalities.

A purchase order is a simplified form of direct contract which may be used for simple purchases below the Directive threshold. It is not recommended to use it when acquiring intellectual property rights.

Direct contracts can be used for all types of purchases (services, supplies or works) and for buildings although in this last case there are several types of contracts and they are not standard.

2.9. Purchase of studies

A study is the product of intellectual services necessary to support the institution's own policies or activities. A study is financed through the EU budget. It may be produced inside the institution (e.g. JRC) or commissioned from an external provider, generally through procurement procedures.

In most cases the subject of the study is production of a scientific, technical, economic, legal or other analysis of a *de facto* or *de jure* situation in the form of a report. The focus of the study may vary depending on the sector of activities and on the specific objectives of the study.

The EU institutions, although legally and administratively obliged to keep records of contracts and administrative documents for a certain period, have no legal obligation to preserve studies as such. However, in order to avoid overlap and to allocate resources adequately, services should have a clear overview of their study portfolio (completed and planned studies). The planning of intended studies must be provided as part of the Annual Management Plan of each DG/service.

Tender specifications should cover all aspects of the study: scope, background, data needs, analysis, recommendations, final presentation format (abstract, executive summary, electronic format, visual identity, standard disclaimer) and intellectual property rights ("IPR", in the draft contract). Special effort should be devoted to the description of what the contracting authority would like to buy, especially where the results are to be published on paper on internet, or publicly used in any other way, modified or made available to third parties.

Technical specifications should provide information regarding the format of the study deliverables. They should also contain as standard technical requirements an **abstract** of no more than 200 words and, as a separate document, an **executive summary** of maximum 6 pages, both in at least EN and FR.

The purpose of the **abstract** is to act as a reference tool helping the reader to quickly ascertain the study's subject. Using keywords is a vital part of abstract writing, to facilitate electronic information retrieval.

An **executive summary** is a succinct overview of the whole study, which is published in isolation from the main text and should therefore stand on its own and be understandable without reference to the study itself. It should report the latter's essential facts. Its purpose is to act as a reference tool, enabling the reader to decide whether or not to read the full text.

Special attention should be paid to the elaboration of the list of deliverables as well as the definition of their format. **Electronic format** should be considered as standard requirement in order to fulfil obligation of studies preservation.

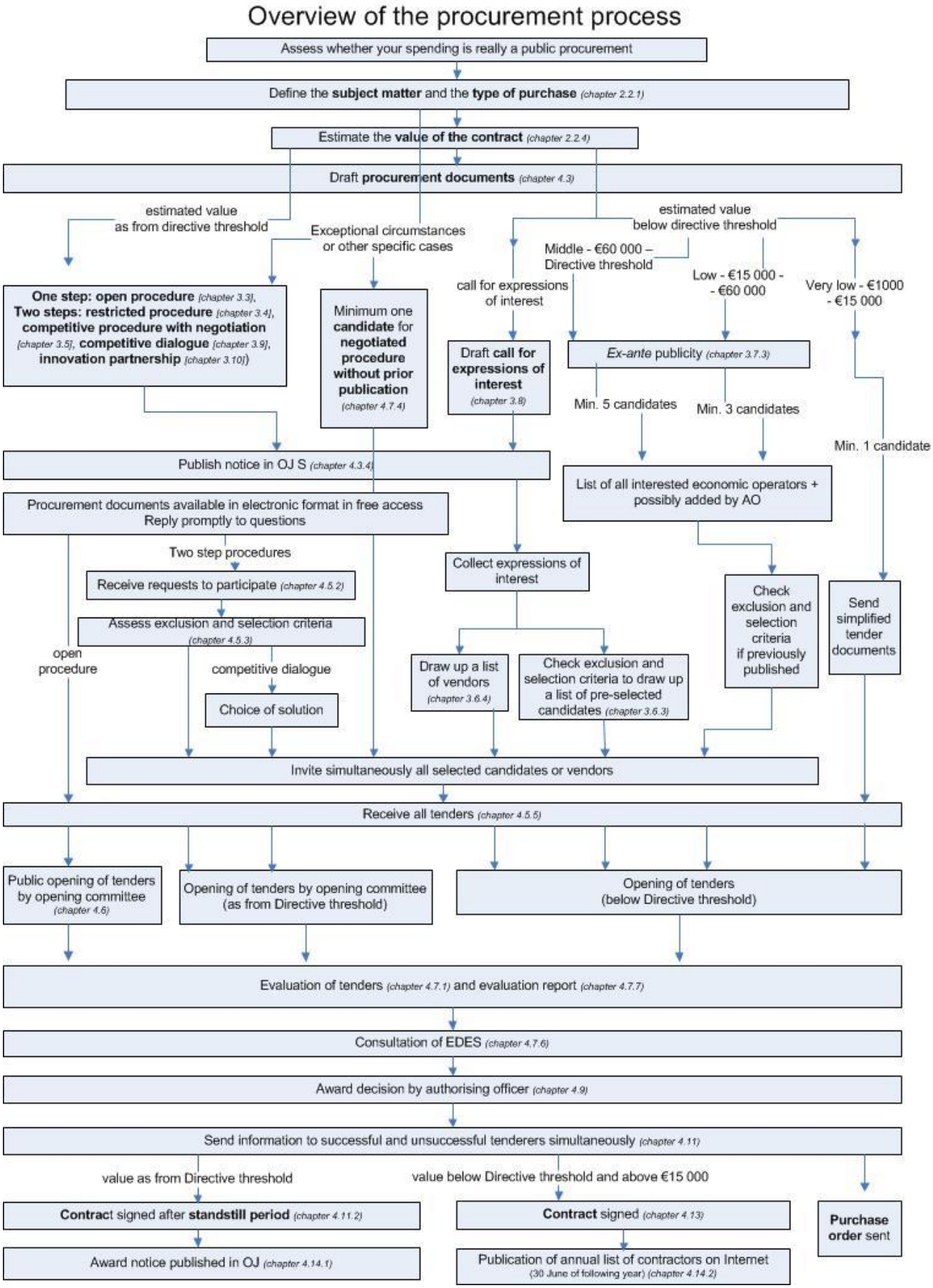
Each study is **uniquely identified** by a catalogue number and other identifiers provided by the Publications Office.

Please note that the "study report" is the main contract "deliverable" and, as a rule, is different from the technical implementation “progress reports” that the service provider may be required to present (in accordance with the model service contract).

All Commission publication including studies shall apply the EC Visual Identity.

For more information see the circular on contracts for studies and the Secretariat General page on managing studies

Part 3. Procurement procedures and systems



3.1. Choice of procedure

Now that the characteristics of the contract are defined, it is possible to identify the procedure to be followed using this table:

Estimated value of contract		Type of standard procedure minimum applicable procedure	Special procedures
Services or supplies	Works		
€0.01 - €1 000		Simple **payment** against invoice *Point 14.5 Annex 1 FR*	Dynamic purchasing system for commonly used purchases *Point 9 Annex 1 FR* **Competitive dialogue** for particularly complex contracts *Point 10 Annex 1 FR* **Negotiated procedure without prior publication of a contract notice** for exceptional cases *Point 11 Annex 1 FR* **Design contest** *Point 8 Annex 1 FR* **Innovation partnership** for research *Point 7 Annex 1 FR*
€1 000.01 - €15 000		**Negotiated procedure with a single tender** *Point 14.4 Annex 1 FR*	
€15 000.01 - €60 000		**Negotiated procedure with at least three candidates**, without a contract notice *Point 14.3 Annex 1 FR*	
€60 000.01 to <€139 000	€60 000.01 < €5 350 000	**Negotiated procedure with at least five candidates**, without a contract notice *Point 14.2 Annex 1 FR*	
		Procedures following a call for expressions of interest (list of pre-selected candidate or list of vendors) *(Procedure useful if a number of contracts are planned over a period of several years.)* *Point 13 Annex 1 FR*	
≥ €139 000*	≥ €5 350 000*	**Open or restricted procedure** with publication of a contract notice in the Official Journal *Article 164(5) (a) FR*	

Services under Annex XIV to Directive 2014/24/EU, concessions, certain research services and certain audio-visual or media services, without limit	**N/A**	Competitive procedure with negotiation *Point 12 Annex 1 FR*	

*The Directive thresholds indicated in the table are the euro equivalents of the amounts laid down in SDR (special drawing rights – a virtual currency made up of a number of currencies (euro, dollar, yen and pound sterling) and used as a unit of account by the International Monetary Fund).

130 000 SDR 5 000 000 SDR	These amounts in euro may be revised every two years; they are applicable from 1st of January of even years.

Notes to the table on choice of procedure

⇒ Use of the open or restricted procedure with publication of a contract notice in the Official Journal is always an option. The other procedures are the minimum[8] to be followed in each case.

⇒ In specific circumstances, the competitive procedure with negotiation may be used.

⇒ In exceptional cases the negotiated procedure without prior publication of a contract notice in the Official Journal may be used.

⇒ The possibility of using a dynamic purchasing system (theoretical at the moment) depends not on the value of the contract but on its subject: commonly used purchases.

⇒ The competitive dialogue is an option available to the contracting authority when a contract is particularly complex.

⇒ The estimated value or type of contract must not be established in such a way as to evade the procedure that would apply if that value or type were defined correctly.

⇒ If there are doubts concerning the estimated value of the contract or if the value is close to a threshold, it is advised to use a procedure for a higher level, as what counts for the validity of the procedure is not the initial estimate but the actual final price.

⇒ In the case of buildings contracts, the negotiated procedure without prior publication of a contract notice after prospecting the local market may be used (Point 11.1 (g) Annex 1 FR).

[8] To be understood as the lowest level of flexibility allowed by the FR as regards the legal basis for the procurement procedure.

3.2. Time limits for receipt of requests to participate and tenders

Legal minimum time limits in days (Point 24 Annex 1 FR)

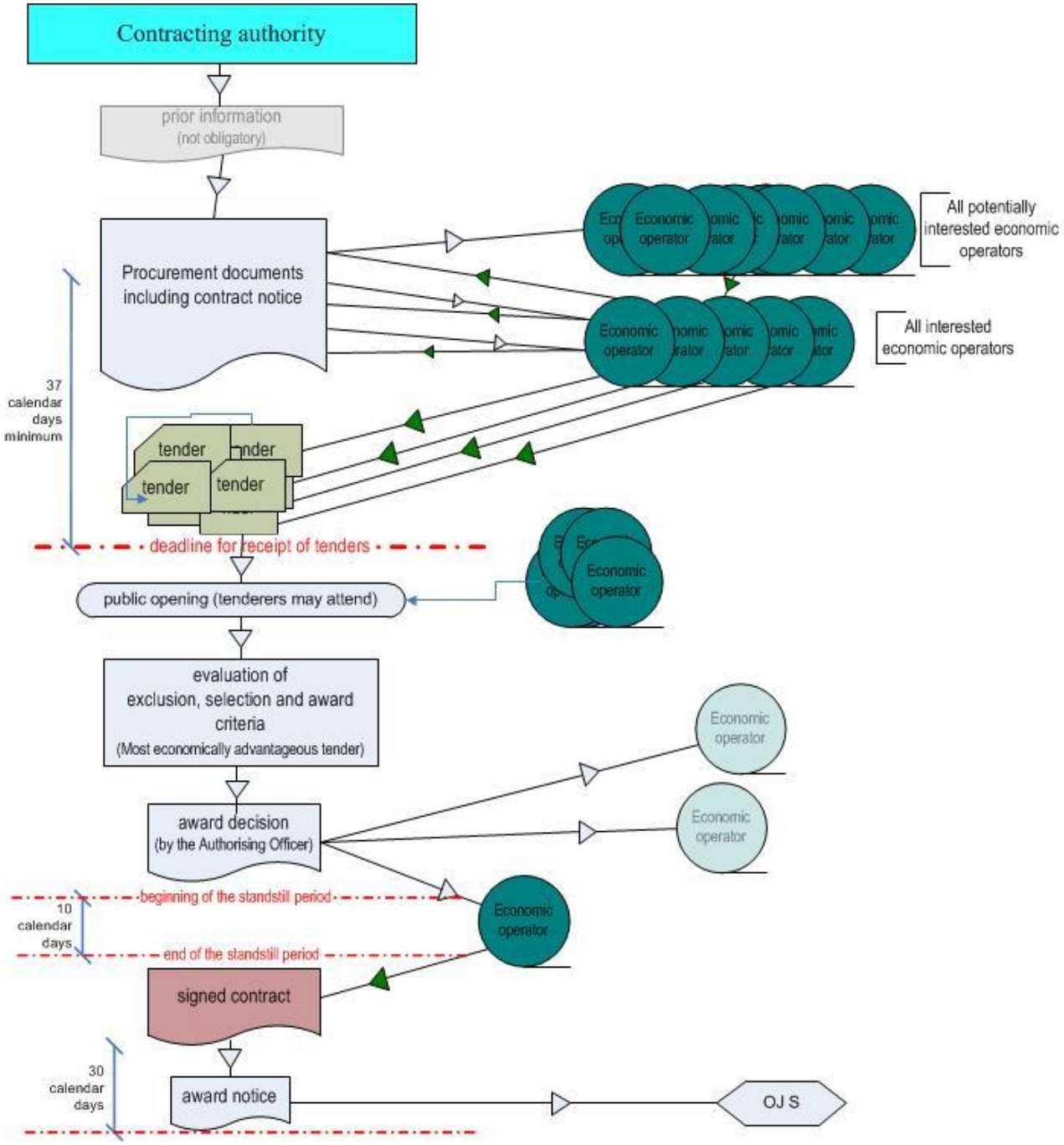
Procedure	Request to participate	Tender
If procurement documents not electronic: + 5 days		
If free text in contract notice is longer than 500 words: + 5 days		
If e-submission of tenders is allowed: - 5 days (only for tenders, for open or restricted procedure)		
Open	-	37 (urgent: 15)
Restricted	32 (urgent: 15)	30 (urgent: 10)
Competitive procedure with negotiation	32	30
Competitive dialogue, Innovation partnership	32	Reasonable time
Dynamic purchasing system	Open for maximum 48 months	10
Call for expressions of interest (one or two steps)	10 (if applicable)	10

Notes on time limits

- Time limits run from the day following the date of dispatch of the contract notice to the Publications Office or the day following the date of dispatch of the invitation to tender to selected candidates and are given in calendar days[9].
- The Publications Office has up to 7 days after dispatch to publish the notice in the Official Journal provided the free text in the contract notice is **less than 500 words**, otherwise it is 12 days and the 5 extra days must be added to the legal minimum.
- If the last day of a time limit falls on a Commission holiday, a Saturday or a Sunday, the period allowed must include the next (Commission) working day.
- The time limits set out above are the **minimum**. The actual limits must be long enough to allow interested parties a reasonable and appropriate time to prepare their tenders and for the contracting authority to receive them, taking particular account of the complexity of the contract. Longer time limits must be allowed where a prior visit to the site is required. Longer deadlines mean wider competition and higher-quality tenders. It is also advisable to take into the account the period of the year and to give proportionally longer time if tender is launched e.g. before Christmas, Easter or summer holidays.

[9] By application of the Regulation (EEC, Euratom) 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits.

3.3. Open procedure



3.3.1. Scope and characteristics

This is a standard procedure in one step that may be used for any contract.

In this procedure, any economic operator who is interested may submit a tender.

The procedure starts with publication of a contract notice in the S series of the Official Journal. The procurement documents are made available in electronic format from publication of the contract notice.

One of the specific features of this procedure is that the opening session is public, i.e. tenderers are invited to attend.

3.3.2. Applicable time-limits

The time-limit for receipt of tenders is minimum 37 days counting from the day after dispatch of the contract notice to the Publications Office.

The time-limit for sending the contract award notice for publication is maximum 30 days after signature of the contract.

Where the urgency of the situation renders the normal time limits impracticable, the contracting authority may use an accelerated procedure. It must duly justify the existence of objective circumstances giving rise to urgency and making it genuinely impossible to comply with the normal time limits. This is announced in the contract notice. Since the time limit is much shorter, there is a fairly high risk of ending up with little or inadequate competition. Indeed, attempting to reduce the time to award the contract could even result in a longer procedure because no application is received.

In cases of urgency, the minimum time limit for receipt of tenders is 15 days from the dispatch of the contract notice to the Publications Office.

Overview of the open procedure

Step of the procedure	Short description, requirements, limitations or remarks	Time requirement	References: Vade-mecum, circulars	Model documents	Legal basis	
					Articles FR	Points Annex 1
Financing decision			Chapter 2.1		110	--
[optional] Prior information notice	To be published in the OJ S or buyer profile	maximum 12 months before dispatch of contract notice	Chapter 4.2	To be submitted via eNotices	--	2.2
Contract notice	Published in the OJ S. Full, direct electronic access to the procurement documents	Publications Office has 7 days for publication	Chapter 4.3.4 Drafting notice	To be submitted via eNotices	163(1)(a)	2.1
Procurement documents available in e-Tendering	Procurement documents consist of: - invitation to tender, - tender specifications, - draft contract, - contract notice	From the time the contract notice is published at least until the deadline	Chapter 4.5.4	Model invitation to tender Model contracts	166(2)	16
[optional] Clarifications, answers to questions, corrigenda	Must be published at the place where the procurement documents are published	Must be published ASAP and no later than six days before the deadline. Requests less than six working days before the deadline do not have to be answered	Chapter 4.5.1		169	25.2, 25.3
Receipt of tenders	The mechanism for registering the exact date and time of receipt should be established.	Not earlier than 37 days after dispatch of the contract notice	Chapter 4.5.5		168(1)	24.2
Opening	Public opening Written record signed by opening committee members	Reasonable time after deadline for receipt of tenders, allowing tenders sent by mail to reach the contracting authority	Chapter 4.6	Model record of opening of tenders	168(3)	28
Checking of exclusion criteria and selection criteria	By an evaluation committee or by other means ensuring there is no conflict of interest		Chapter 4.7		136, 137, 141, 167	29
Evaluation of award criteria	Evaluation report signed by the evaluation committee and if applicable, persons involved in assessing exclusion and selection		Chapter 4.7	Model evaluation report	167	29, 30
[optional] Submission of additional materials or clarifications by tenderer	Request of additional material for exclusion or selection. Correction of clerical errors. In no circumstances may the tenders be altered		Chapter 4.7.4		151, 169	--
Award decision	Taken by the AO on the basis of recommendations of the evaluation report		Chapter 4.9	Model award decision	170(1)	30
Notification of tenderers	By electronic means	ASAP after award decision is taken	Chapter 4.11	Model information letters	170(2) 170(3)	31
Signature of the contract	Only after adoption of the budgetary commitment (except framework contract)	Not earlier than 10 calendar days after electronic dispatch of notification to tenderers	Chapter 4.13	Model contracts	175(2) 175(3)	35
[optional] Release of the tender guarantees	If tenderers were requested to provide guarantees		Chapter 5.6		168(2)	--
Beginning of implementation of the contract	Cannot start before the contract is signed				172(1)	--
Award notice	To be sent to Publications Office for publication in the OJ S	Not later than 30 days after signature of the contract	Chapter 4.14.1	To be submitted via e-Notices	163(1)(b)	2.3, 2.4
Archiving	Proper filing of the documentation of the procedure	To be kept for 10 years following signature of the contract or cancellation of the procedure	Chapter 4.15	Reference file for public procurement	74(6, 75)	--

Part 4. Stages in the procurement procedure

4.1. Preliminary market analysis

The contracting authority may conduct a preliminary market analysis with a view to preparing the procurement procedure (Art. 166(1) FR and Point 15 Annex 1 FR). Gaining prior knowledge and understanding of the relevant market, thereby saving time and efforts by bringing a precise focus to the planned procurement, derives from the principle of sound financial management.

The preliminary market analysis is mandatory in the case of innovation partnerships, considering that it is necessary to ensure that the innovation partnership is used only when the desired product does not exist on the market since its objective is to finance research (Point 7.2 Annex 1 FR).

It is advisable to conduct a preliminary market analysis when envisaging a negotiated procedure without prior publication for a contract that can be awarded only to a particular economic operator (Point 11.1 (b) Annex 1 FR) (see Chapter 3.8).

Purpose

The main purpose is to allow the contracting authority:

- developing general market knowledge (established market - market in development phase - existence of sufficient suppliers to ensure effective competition);
- assessing the capability of the market to deliver what is required, within the required time-limits and on the required scale, and consequently the feasibility of the procurement;
- gaining knowledge of the terms and conditions usually applied to contracts in the relevant market and identifying potential market constraints (for instance, for a specific market the contracting authority's standard terms may deter economic operators from submitting a tender);
- refining and further clarifying its requirements and specifications without, however, having its needs influenced and determined by what the market offers;
- making a correct estimate of the contract value;
- defining appropriate selection and award criteria;
- gaining understanding of potential risks of contract performance
- providing for sufficient time-limit as regards the preparation of tenders

Method

There is no uniform method for consulting the market, but the most commonly used one is the "desk research" (based on internet, mail and phone). Frequent sources of information are:

- catalogues of producers, distributors, dealers
- press publication (specialized journals, magazines, newsletters, etc.)
- trade associations/organizations and/or chambers of Commerce
- market studies prepared by consultancy companies

When relevant or necessary, other more active market prospecting activities can be envisaged, such as:

- participation in conferences, fairs, seminars;
- interviews of market actors or contacts with knowledgeable persons in the relevant market, e.g. seeking advice from independent experts, specialised bodies or economic operators;

General principles

Even though there are no specific rules regulating the process of market consultation, the fundamental principles of non-discrimination, equal treatment and transparency must always be respected. This is particularly important in case the contracting authority undertakes to seek or accept advice from external persons or entities.

Particular care must be taken not to impair fair competition by providing some economic operators with early knowledge of a planned procurement procedure and/or its parameters. Competition could be also impaired if the technical specifications may be perceived as influenced or "mirroring" the specifications of a particular product or service on the market.

In any case, all actions (whether mandatory or not) linked to the preliminary market analysis will have to be properly documented and reported in writing for each procurement file, in order to ensure transparency and auditability.

4.2. Ex-ante publicity

[redacted]

4.2.1.1. Arrangements for publication

There are two methods of publishing a prior information notice:

(a) publication in the Official Journal "S" series (OJ S),

(b) publication on the buyer profile[14] plus information in the OJ S indicating where the prior information can be found.

The eNotice form as indicated in the instruction on drafting notice must be used for publication of a prior information notice. The instruction explains the arrangements for sending the notice to the Publications Office, along with best practices and advice on completing the forms online via eNotices.

In cases where the prior information is published in the buyer profile, a *Notice on a Buyer Profile* must be sent to the Publications Office.

The prior information notice will be published by the Publications Office within 7 days of dispatch.

The contracting authority must be able to provide evidence of the date of dispatch.

Particular care should be taken with the following aspects when drafting the prior information notice:

- provide the most accurate description possible of the subject of each contract;
- give an estimated value for each of the contracts referred to;
- indicate the estimated date of publication of the contract notice within the next 12 months, for each of the contracts in question.

4.2.1.2. Other forms of publicity

In addition, but not as an alternative to publication of the prior information notice, the contracting authority may use any other form of publicity, including electronic.

Such publicity must not precede publication of the prior information notice, which is the only authentic version, and must refer to the notice. Nor must it introduce any discrimination between candidates or tenderers or contain any information other than that in the prior information notice.

[14] Buyer profile must be understood as an internet web site clearly identified as a place where the contracting authority publishes information about its procurement procedures.

This additional publicity might, for example, take the following forms:

– publication on the contracting authority's website;

– publication in the general or specialist press;

– letter to the professional associations or organisations representing businesses, drawing their attention to the prior information notice and asking them to circulate it among their members, etc.,

– mailshot based on transparent and not discriminatory criteria, e.g. list constructed by a webpage subscription mechanism. Mailshots must not be limited to only a few economic

[redacted]

4.2.2.2. Other forms of publicity

In addition to publishing the call for expressions of interest, the contracting authority may use any other form of publicity that it chooses, including electronic. Indeed, it is in its interest to do so, given that the aim is to encourage requests.

Such publicity must not predate publication of the notice in the Official Journal, which is the only authentic version, and must refer to the notice. Nor must it introduce any discrimination between candidates or tenderers or contain any information other than that in the call for expressions of interest.

This additional publicity might, for example, take the following forms:

– publication on other websites;

– publication in the general or specialist press;

– letters to the professional associations or organisations representing businesses, drawing their attention to the call for expression of interests and asking them to circulate it among their members;

– mailshot based on transparent and not discriminatory criteria, e.g. list constructed by a webpage subscription mechanism. Mailshots must not be limited to only a few economic operators known to the contracting authority.

[redacted]

4.3. Preparation of the procurement documents

After defining the type of contract (see Chapter 2.6), possibly conducting a preliminary market analysis (see Chapter 4.1) and choosing the appropriate procedure, and making ex-ante publicity where applicable (see Chapter 4.2) the contracting authority's first task is to draft the procurement documents.

The procurement documents consist of:

- (i) the contract notice published in the Official Journal or other publication if applicable;
- (ii) the invitation to tender;
- (iii) the tender specifications or the descriptive document for a competitive dialogue;
- (iv) the draft contract.

They are designed to achieve a number of distinct and complementary objectives:

– (i) to advertise the procurement procedure

– (ii) to lay down the conditions governing submission of requests to participate or tenders;

– (iii) to provide an exact definition of the characteristics of the supply or service required by the contracting authority and to announce the criteria and method on the basis of which the contracting authority will award the contract;

– (iv) to describe the contractual terms on which the contracting authority is prepared to acquire the supply or service.

Procurement documents are mandatory for all types of public procurement procedures.

[redacted]

The procurement documents must be regarded as a set in which the various elements complement each other to ensure compliance with the rules.

These documents constitute the cornerstone of transparent and competitive procedures. Tenders must be received, opened and evaluated and the contract awarded in accordance with the arrangements set out in these documents. These are the rules which the contracting authority itself has laid down and is therefore bound to comply with.

It is particularly important to ensure total consistency: there should be no divergence between the various documents. The contract notice (or other publication if applicable) should provide an exact summary of the other documents or a link to the other documents where they are accessible on line. It is recommended not to repeat identical information in the tender specifications or descriptive document, the draft contract and the invitation to tender.

It is recommended to prepare the procurement documents in the following order:

The tender specifications (see Chapter 4.3.1) will be prepared first. The draft contract (see Chapter 4.3.2) will then be prepared by filling in the model contract with the appropriate elements in view of the tender specifications. The invitation to tender (see Chapter 4.3.3) will be prepared in the third place as it contains the deadline for receipt which can be set only when the procedure is almost ready for launching. The contract notice or other publication if applicable (see Chapter 4.3.4) will be prepared in the last place as it will essentially refer to the content of the other procurement documents.

> In the case of procedures in one or two steps with publication of a contract notice, the procurement documents must be published on internet from the date of publication of the contract notice (see Chapter 4.5.4).

4.3.1. Tender specifications

4.3.1.1. Title, purpose and context of the procurement

This must include the reference number of the procurement procedure.

Where appropriate, a description of each lot must be given.

This section provides operators with background information including through web links to the departments' activities, ongoing Union's programmes, political events, etc. It helps operators to understand the subject of the contract.

4.3.1.2. Subject of the contract and technical specifications

The technical specifications describe what the contracting authority is going to buy. The quality of the description determines not only the quality it will get, but also the price that it will pay. Therefore, it is essential that sufficient time is spent on drafting the technical specifications.

The technical specifications must be comprehensive, clear and precise. They define, lot by lot where appropriate, the characteristics required of supplies, services or works, taking into account the purpose for which they are intended by the contracting authority.

General requirements concerning technical specifications:

The technical specifications must afford equal access to tenderers and must not have the effect of creating unjustified obstacles to competitive tendering.

They define the characteristics required of products, services, materials or works, considering the purpose for which they are intended by the contracting authority. In particular, save in exceptional cases which must be justified, they may not refer to a specific make or source, or to a particular process, or to trade marks, patents or types, or to a specific origin or production which would have the effect of favouring or eliminating certain products or operators.

In marginal cases where it is not possible to provide sufficiently detailed and intelligible specifications, the description must be followed by the words "or equivalent". For instance, the specifications may ask for a report "on MS Word or equivalent".

The tasks entrusted to contractors may not involve exercising public authority power or budgetary implementation tasks (Art. 62(3) FR). For instance, the task may include administrative tasks such as managing the reimbursement of participants in a conference, but the contractor may not decide the list of guests or the rules for reimbursement.

Opinions may be sought or accepted when drawing up technical specifications. However, the contracting authority must ensure that such advice will not be biased and the resulting tender specifications will ensure equal treatment and as wide competition as possible.

There is no ground for automatically rejecting an operator who was previously involved in the preparation of the technical specifications from the resulting procurement procedure. The economic operator shall only be rejected from the given procedure when there are no other means to ensure compliance with the principle of equal treatment (see Chapter 4.7.5.4 and Chapter 1.6).

The duration of execution of tasks must be specified. It is recommended that this duration includes both the execution of tasks and the approval of interim deliverables if any. Indeed, the time taken for the contracting authority to approve a deliverable should not be at the detriment of the time given to the contractor to perform the contract. The period of approval of the final deliverable can be outside that duration since, at that moment, the contractor has finished performance. A direct contract does not have a fixed duration; the contract ends when both parties have fulfilled their obligations: the contractor has delivered according to the terms of the contract and the contracting authority has made the final payment; in addition, some conditions linked to confidentiality and access for auditors are still in force long after performance. Only framework contracts have an expiry date.

Any conditions for approval of deliverables should be specified (quantitative, qualitative, provisional and/or definitive).

Technical specifications for services may include:

- a full and comprehensive description of the starting-point: the current state of play, information and knowledge already possessed by the contracting authority;
- full and appropriate information in cases where previous contracts have been delivered concerning the same topic; providing tenderers with the fullest possible information is the only way to avoid possible unequal treatment;
- a full description of the tasks;
- a full description of the expected output;
- if appropriate, requirements concerning the methodology;
- requirements concerning the time schedule (imposed or to be proposed); If it is imposed, the time schedule should be relative to start date (i.e. X months after start date) unless an external fixed event (e.g. a Presidency) is relevant to the tender specifications. At the beginning of contract execution, any deadline for delivery should be clarified as fixed date in order to facilitate management and prevent disputes.
- technical and organisational information (e.g. place of delivery);
- information about additional requirements (e.g. in the case of training, if the contractor has to provide participants with materials or organise transport for them and any participant/client satisfaction survey to be conducted);
- the resources required of the contractor and any other requirements;
- the necessary phasing-in, phasing-out and handover requirements in case of recurrent contracts (contracts which are put into competition on a regular basis) for purchases needed on a continuous basis (e.g. IT contracts for exchange information systems).

Technical specifications for supplies may include:

- a full description of the requirements imposed on the product (making sure that this is not discriminatory);
- the required functional characteristics;
- conditions of delivery (packaging, transport, safety, assembly, etc.);
- delivery schedule and destination(s);
- arrangements for receipt of deliveries;
- installation and user training, where appropriate;
- requirements concerning after-sales services and technical assistance;
- requirements concerning the warranty (there may be minimum requirements with which tenderers must comply, but also extra warranty beyond this minimum may be offered and be the subject of an award criterion).

Minimum requirements to be met by the tender

Minimum requirements are the requirements to be met by the tender for considering it compliant with the technical specifications. These minimum requirements must be clearly specified. They may relate to part of or all the technical specifications. It is not obligatory to "list" them as a separate item of the specifications, as they can be included in the text and may be expressed as a minimum, a range, a maximum or an obligation ("the tenderer must…") depending on the context.

Minimum requirements may relate to e.g.:

- the time schedule for the execution of tasks (e.g. final delivery within maximum 10 months);
- the geographic coverage (e.g. at least 8 EU countries);
- the language and format of the deliverable (e.g. must be delivered in English);

- functional characteristics of the supplies;
- the warranty.

The minimum requirements must always include compliance with applicable environmental, social and labour law obligations established by Union law, national legislation, collective agreements or the international environmental, social and labour conventions listed in Annex X to the Directive, as well as compliance with data protection obligations resulting from Regulation (EU) 2016/679[15].

By submitting a tender, the tenderer accepts the terms and conditions set out in the procurement documents and this includes the requirement of compliance with law obligations. It is not necessary to repeat it in a declaration on honour or to require specific confirmation in the tender.

Regarding the evaluation, compliance with law obligations is not subject to systematic ex-ante verification. It is only in case of doubts that it should be verified (e.g. in the case of abnormally low tender – Point 23 Annex 1 FR).

4.3.1.3. Environmental and social aspects

Wherever possible and cost-effective, environmental and social aspects should be taken into account in the technical specifications. These aspects may include:

- environmental performance characteristics;
- climate performance characteristics;
- design for all types of users.

For the latter, where relevant in view of the subject matter of the contract, accessibility criteria for people with disabilities **must** be included. The only exception is for contracts where the subject matter is irrelevant (i.e. not for users, such as printer cartridges or petrol). This obligation includes for instance: for works, accessibility of a future building; for supplies, telephones, printers which include accessibility features; for transport services, the possibility to carry wheelchairs; for IT services, adapted software (for use by partially-sighted or deaf people);, for information (website, documents, publications, multimedia…) the possibility to be used by all users; for event organisation, the conference building should be accessible and the information should be accessible to all (e.g. sign language translator).

Environmental and social specifications may be formulated in any of the following ways (Point 17.3 Annex 1 FR):

(a) in order of preference, by reference to European standards, European technical assessments, common technical specifications, international standards, other technical reference systems established by European standardisation bodies or, failing this, their national equivalents; every reference shall be accompanied by the words "or equivalent";

(b) in terms of performance or of functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject matter of the contract and to allow the contracting authority to award the contract;

(c) by a combination of those two formulation methods.

They can also be formulated by requiring a specific label or the specific requirements from a label under the following conditions (Point 17.6 Annex 1 FR):

(a) the label requirements only concern criteria which are linked to the subject matter of the contract;

(b) the label requirements are based on objectively verifiable and non-discriminatory criteria;

[15] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016, p. 1–88.

(c) the labels are established in an open and transparent procedure in which all relevant stakeholders may participate;

(d) the labels are accessible to all interested parties;

(e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

A tender cannot be rejected if the proposed solution satisfies the requirements defined in the technical specifications in an equivalent manner.

The contracting authority can also determine in the tender specifications certain provisions relating to performance of the contract in relation to the application of environment-friendly management measures (e.g. the means of transport for the goods purchased). These provisions cannot be selection criteria or disguised award criteria. They relate solely to performance of the contract. That means that all tenderers must be in a position, when the contract is awarded, to apply these provisions.

For more information and practical tips, DG Environment provides a website on Green Public Procurement which includes the green public procurement criteria and a toolkit.

4.3.1.4. Site visit

If it is necessary to invite the tenderers for a site visit, it should be announced in the contract notice for the sake of transparency (for instance security contracts that require knowing the disposition of a building to draft the tender). This can in no way replace the obligation to draft the technical specifications in detail. Transparency also requires that a record be produced of the organised site visit and sent to all candidates. Due to the organisation and timing requirements a restricted procedure should be used.

Attention must be drawn to the risk of concerted practices, collusion or distortion of competition, so it is recommended to organise several visits to avoid all competitors meeting each other.

4.3.1.5. Variants

If the contract is awarded to the tender offering the best price-quality ratio, the contract notice must indicate whether or not variants are accepted. If there is no indication, variants will not be authorised.

"Variant" means a solution technically or economically equivalent to a model solution described by the contracting authority. Variants may relate to the whole contract or to certain parts or aspects of it. Variants must be submitted separately and identified as variants.

If variants are accepted, the minimum requirements which they must fulfil must be indicated in a separate section of the technical specifications. The assessment framework that will be used to compare the model solution with the variant must also be specified.

For detailed information see the note on variants.

4.3.1.6. Access to the market

Participation in procurement procedures is open on equal terms to all natural and legal persons falling within the scope of the Treaties. This includes all legal entities registered in the EU and all natural persons having their domicile in the EU. Participation is also open to all natural and legal persons registered or having their domicile in a non-EU country which has an agreement with the European Union in the field of public procurement on the conditions laid down in that agreement. The rules of access to the market do not apply to subcontractors.

For information on supporting documents concerning access to the market (see Chapter 4.3.1.17).

For further information please consult the note on the access of candidates and tenderers from third countries

4.3.1.7. Joint tenders and subcontracting

The principle is that economic operators on the market are free to organise themselves as they so wish. As a rule, groups of economic operators are authorised to submit a tender or request to participate to a joint tender and subcontracting is allowed[16]. A joint tender may also involve subcontracting. The number of entities in a joint tender or the number of subcontractors or the share of subcontracting may be not limited.

Although subcontracting cannot be refused or limited, it is possible to require tenderers to provide information about intended subcontractors. Awarding the contract to a tenderer who included named subcontractors in its tender amounts to agreeing to the listed subcontractors. No separate agreement is necessary or disagreement possible.

Exclusion criteria (see Chapter 4.3.1.9) apply to each entity in a joint tender.

The contracting authority is entitled to demand that exclusion criteria be applied also to any subcontractors proposed (whether during the procedure or during performance of the contract). In some cases, the number of subcontractors may be high for a non-essential part of the contract (e.g. a study with translations, with translation subcontracted to freelancers) so it is possible to apply the exclusion criteria only for subcontractors that are meant to earn a significant proportion of the budget (e.g. 5%, 10%... depending on the case) so as to avoid having to check a very large number of subcontractors.

As for selection criteria (see Chapter 4.3.1.10), they are generally applied on the candidate or tenderer as a whole (one legal entity, several entities submitting a joint request to participate or tender, or one or several entities and subcontractors) and they may apply individually only where it is relevant in view of their nature. For technical and financial capacity, it must be assumed that the very purpose of subcontracting and joint requests to participate or tenders is to come up to the required minimum capacity level. A candidate or tenderer cannot therefore be rejected for the sole reason that a single subcontractor alone is not up to the level set. The combined capacity of the entities participating in the contract has to be considered.

For submission of a tender or a request to participate, contracting authorities may not require groups of economic operators to take any specific legal form, but the selected grouping may be required to adopt a given legal form once it has been awarded the contract if this change is necessary for proper performance of the contract.

The technical specifications have to explain clearly that if the economic operator is relying on other entities (e.g. subcontractors, parent company, other company in the same group, or third party) in order to achieve the required level of economic, financial, technical and professional capacity, it must prove in its tender or request to participate that it will have their resources at its disposal. This obligation may be fulfilled by presenting statements from those entities or the grouping agreement.

If a third party provides the whole or a large part of the financial capacity, the contracting authority may demand that that entity signs the contract, or alternatively, the third party may commit itself to execute the contract jointly and severally with the contractor by providing a letter or intent to that effect.

For detailed information see the circular on subcontracting and joint tenders.

[16] See in particular the Judgements of the ECJ C-314/01 of 18/03/2004, (Siemens AG Österreich und ARGE Telekom & Partner vs. Hauptverband der Österreichischen Sozialversicherungsträger) and C-176/98 of 02/12/1999 (Holst Italia SpA vs. Comune di Cagliari).

4.3.1.8. Criteria

The criteria for choosing the contractor are divided in three categories: exclusion, selection and award. Exclusion and selection criteria are related to the candidate or tenderer, whereas award criteria are related to the tender. Exclusion and selection criteria are verified on a pass/fail basis. Award criteria are meant to rank the tenders according to their merits (most economically advantageous tender) after verifying that the tender complies with the minimum requirements of the procurement documents. These criteria are applicable in all procurement procedures and must be announced. No modification of criteria is allowed during the procedure. In a procedure in two steps, the exclusion and selection criteria will be used to select the candidates who will be invited to tender.

The criteria may be applied in no particular order (e.g. starting with the award criteria in a procedure in one step); if the tenderer or tender does not pass a category, it will not be evaluated under the other categories. The tender specifications must indicate the method for applying the criteria (in no particular order or in a pre-defined order for each of the three categories).

4.3.1.9. Exclusion criteria

The sole purpose of the exclusion criteria is to determine whether an operator is allowed to participate in the procurement procedure or to be awarded the contract.

The exclusion criteria must be included in the tender specifications through a reference to the declaration on honour (which contains the list), except in procedures in two steps following the publication of a notice of call for expressions of interest, in which cases they appear only in the call for expressions of interest and will already have been checked before the invitations to tender are sent out. For procedures involving the publication of a contract notice, the notice will refer to the tender specifications published as from the date of publication of the contract notice.

The only criteria which should be applied are set out in Articles 136 and 141 FR, with nothing added, deleted or altered.

For information on supporting documents concerning exclusion criteria, see Chapter 4.3.1.18.

4.3.1.10. Selection criteria

The sole purpose of the selection criteria is to determine whether a tenderer has the capacity necessary to implement the contract. This includes the legal and regulatory capacity where applicable, the economic and financial capacity and the technical and professional capacity. All selection criteria must be clear, non-discriminatory, appropriate and proportionate in view of the subject, value and possibly other aspects of the contract.

The selection criteria must be included in the tender specifications, except in procedures in two steps following the publication of a notice of call for expressions of interest, in which cases they appear only in the call for expressions of interest and will already have been checked before the invitations to tender are sent out. For procedures involving the publication of a contract notice, the notice will refer to the tender specifications published as from the date of publication of the contract notice.

The contracting authority should opt for selection criteria which enable it to determine whether a tenderer has the capacity required for the contract in question, rather than in general. It should also make sure that it imposes criteria that can be easily verified. The right balance must be struck between the need for targeted selection criteria and the need to attract enough tenders to ensure genuine competition.

Minimum capacity level

A selection criterion must consist in three elements: (i) the criterion, (ii) the minimum level or minimum requirement and (iii) the relevant supporting documents (Point 18.2 Annex 1 FR). It is not sufficient to require "sufficient financial capacity" without any precise criteria, or to require experience with no minimum number of years of experience or without specifying its precise field. Selection criteria are not scored and do not necessitate marking; they are just “pass or fail”.

The minimum capacity level set for each of the criteria defines the capacity below which the candidate or tenderer will not be selected because it is considered as not capable of implementing the future contract. Therefore, below these levels, the candidate will not be invited to submit a tender (procedures in two steps) or the tender will be rejected (procedure in one step).

Where a contract is divided into lots, it is possible to set additional minimum levels of capacity in the case several lots are awarded to the same contractor. The case of a candidate or tenderer not fulfilling the capacity requirements for all the lots for which it requests to participate or submits a tender should be provided for in the tender specifications. The candidate or tenderer should be requested to indicate its order of priority for the different lots. In case it fails to give such order, a pre-defined order applicable in the absence of indication of priority should be set in the tender specifications.

The information requested and the minimum capacity levels demanded should respect the legitimate interests of economic operators, especially as regards protection of companies' technical and business secrets.

Individual vs. consolidated assessment

Selection criteria can be applied:

- to the tenderer as a whole (including all members of a joint tender, subcontractors and third parties on which the tenderer relies to fulfil some selection criteria);
- to each economic operator involved in a request to participate or tender separately;
- to at least one economic operator involved in a request to participate or tender; this includes application of a selection criterion to the entity or entities performing a specific task or part of the contract.

In any case, selection criteria must be proportionate to the subject matter of the contract and not create discrimination among tenderers. The tender specifications must be very precise in this respect.

Selection criteria are generally applied to the candidate or tenderer as a whole and they may apply individually only where it is relevant in view of their nature.

If selection criteria are applied individually to subcontractors, it is recommended to do so only for subcontractors representing a significant part (e.g. 5%, 10%, etc.) of the value of the contract. Otherwise, the criterion may be discriminatory and verification of each subcontractor may lead to a disproportionate workload.

Legal and regulatory capacity

Where relevant in view of the subject matter of the contract, the contracting authority may require economic operators to be enrolled in a relevant trade or professional register or, for service contracts, to hold a particular authorisation proving that it is authorised to perform the contract in its country of establishment or to be a member of a specific professional organisation.

Technical and professional capacity

It is frequent to request past projects carried out by the tenderer (e.g. 2 projects on a specific subject matter of at least X thousand euros covering X countries). Therefore, current contractors may ask the contracting authority for such project reference to use in future calls for tenders. A model for project reference letter is available on BudgWeb.

The rules provide for a long list of possible evidence of technical and professional capacity. In particular, the contracting authority may require the tenderer to explain the environmental measures that it will be able to apply during contract performance and to request a certificate drawn up by an independent body attesting the compliance with certain environmental management systems or standards. In these cases, the contracting authority must refer to the EU Eco-Management and Audit Scheme (EMAS) provided for in Regulation (EC) No 1221/2009 or other standards based on European or international standards. It must also accept other evidence of equivalent environmental management measures from economic operators.

The contracting authority should announce in the tender specifications that any tenderer with a professional conflicting interest which prevents it from performing the contract adequately may be rejected (see Chapter 1.6).

The contracting authority may announce in the tender specifications that it may require that certain critical tasks be performed directly by the tenderer itself or, where a tender is submitted by a consortium of economic operators, a participant in the consortium. This provision is to be used with caution, as it could be interpreted as a restriction to the market. It assumes that all tasks are very well defined and that one or two of them are critical for the contracting authority. In this case, there will be a direct contractual link between the contracting authority and the entity performing these tasks. This provision is not to be understood as the possibility to cap subcontracting.

The selection criteria remain applicable throughout the whole performance of the contract, i.e. the contractor must comply with these criteria at all times. This is used in particular when replacing staff in charge of delivering services. If one expert leaves the project, he/she will have to be replaced with another expert complying with the selection criteria. A contrario, if selection criteria are not precise enough, change of members of the delivery team can cause problems since the minimum profile is not guaranteed.

Economic and financial capacity

The yearly turnover is the most commonly used criterion. The minimum value may not exceed two times the annual value of the contract, except in duly justified cases linked to the nature of the purchase, which must be explained in the procurement documents.

If the economic and financial selection criteria are fulfilled for a large part by relying on a third party, the contracting authority may demand, if that tender wins the contract, that this third party signs the contract (becomes a contractor) or, alternatively, commits itself to execute the contract jointly and severally with the contractor by providing a letter of intent to that effect. Imposing liability of the third party who provides the financial capacity allows better protection of the Union's financial interests. It should be announced in the tender specifications. If the third party chooses to sign the contract, the contracting authority should ensure that it is not in exclusion situation and it has access to the market (see Chapter 4.3.1.6), so this should also be indicated clearly.

Using financial ratios can be done only if one expects the potential tenderers to be homogeneous enough to ensure comparability of their financial statements (and derived ratios). It also implies to have enough internal expertise when analysing the market, defining ratios and setting up relevant minimum thresholds. Ratios and related thresholds must in any case be clearly defined in the tender specifications, for the sake of transparency. In particular, they must specify whether ratios will be applied on each member of the group in case of joint tender, or to at least one of them, to subcontractors or to third parties providing capacity and under which conditions. When the financial capacity is verified using financial ratios, the following conditions should be fulfilled:

- make sure that the necessary expertise in-house is available when drafting the related part of the tender specifications and then when checking the criteria;
- evaluate if the set of ratios fits the expected type of tenderers (sector / size …);
- respect the general principles of non-discrimination and proportionality;
- use as simple, understandable and meaningful ratios and thresholds as possible;
- be ready to justify potential rejection decisions and or to deal with potential challenges / disputes.

Given that a company's economic and financial situation can change rapidly, it could be useful, as part of managing the list of pre-selected candidates produced following a call for expressions of interest, to require the selected candidates to send in updated supporting documents for the economic and financial capacity every year in order to check again their economic and financial situation.

For information on supporting documents concerning selection criteria, see Chapter 4.3.1.19.

4.3.1.11. Award criteria

The award criteria are not related to the tenderer but to the tender. The purpose of the award criteria is to evaluate the technical and financial offer with a view to choosing the most economically advantageous tender (Point 21 Annex 1 FR).

As a rule the contracting authority must announce the relative importance of each of the quality award criteria and of the price (if a weighting between quality and price is applied – see Chapter 4.3.1.12). If exceptionally the weighting is not possible for objective reasons, the criteria must be indicated in decreasing importance. If this exception is used, it must be duly justified and documented in a note to the procurement file.

Quality award criteria must be clear, complete and related to the technical specifications and expected content of the tender. They may be divided into sub-criteria. Criteria and sub-criteria should include the maximum number of points (maximum score) to be awarded for each of them. It is also recommended to include the minimum number of points (minimum level) below which the criterion (or sub-criterion) is considered as failed. They must be sufficiently detailed and fully described with complete sentences: the link with a specific aspect of the technical specifications, the expected input from the tender to pass the award criteria. The number of criteria depends on the level of complexity of the subject matter, and there should be as many as necessary (usually at least 5 of them) because the evaluation is easier when criteria are very precise and targeted. For instance, a criterion such as "quality of the methodology" or "organisation of the work" is vague by itself and requires more precise textual explanation of the specific elements to be addressed in the tender.

Depending on the subject of the purchase, quality criteria may include time for delivery, reaction time, method of communication, after sale service, packaging, etc. In general all elements requested from tenderers in their tenders should be evaluated and weighted according to the needs of the contracting authority. The criteria should encourage elaborating further on the issue and/or proposing more or better solutions; in other words, the criteria should be about the value-added brought by the tender.

In the case of award based on the best quality-price ratio method, the rules provide examples of the type of technical criteria which may be taken into account, but it is for the contracting authority to opt for those best suited to the tender in question.

The technical award criteria generally used for service contracts / studies may cover, for example, the following areas:

- quality and relevance of the methodology set out in the tender (subdivided according to particular elements or tasks of the project);
- management and coordination of the future contract;
- organisation of the work for delivery of the service (i.e. organisation of responsibility for the tasks, contacts with the Commission, etc.);
- balance of profiles and breakdown of tasks (i.e. which profile is going to do which task, and how much time each profile will spend on each task), but only for the purposes of providing the service requested. It is no longer possible to evaluate qualifications and experience of the team at this stage, but the way in which the tenderer plans to use the human resources to provide the service is part of the tender (see Chapter 4.3.1.13);
- efficiency, quality and usefulness of the proposed products or solutions (where the subject of the contract is such that it is for the tenderers to provide the details);
- match between the work programme and the intended completion schedule;
- efficiency and effectiveness of data-collection methods (where the contract involves activities of this type).

The technical award criteria for supply contracts may cover, for example, the following areas:

- efficiency (e.g. speed of printer);
- functional characteristics;

- duration of warranty;
- after-sale service and technical assistance;
- delivery time;
- environmental performance (e.g. possibility of recycling the machine or materials);
- comfort of work (e.g. noise);
- aesthetics.

Award criteria that should not be used:

- "quality of the presentation": this refers to the tender itself, whereas criteria should be about the actual subject matter of the purchase and future performance of the contract;
- "understanding of the tender specifications": if a tender shows no understanding or a misunderstanding of the tender specifications, it can be eliminated for non-compliance with the tender specifications or for insufficient quality when evaluating other quality criteria (e.g. methodology). Indeed, a stand-alone criterion on "understanding" is easy points to get for all tenderers just by copying or rewording the tender specifications, and this will not be helpful for evaluators to make the difference between the various tenders received. So understanding is in fact evaluated via other more precise criteria;
- criteria on items which are fixed in the tender specifications (e.g. a criterion on schedule when all the deadlines for delivery are already fixed: if there is no room for improvement for the tenderer, there should be no corresponding criterion).

These technical criteria must be announced in advance. Please note that it is not appropriate to copy-paste any or all of the above examples. Award criteria must correspond to the technical specifications. The award criteria send a strong message to the tenderers about which aspects are the most important and how their tenders will be judged. Generic, imprecise award criteria are unhelpful or can even be a hindrance.

4.3.1.12. Award methods

The award of contracts is based on the most economically advantageous tender, which consists in one of three award methods: lowest price, lowest cost or best price-quality ratio (Art. 167(4) FR). The method chosen must be announced in the procurement documents. It is not possible to mix the methods.

Lowest price: the contract is awarded to the lowest tender that satisfies the minimum requirements set in the technical specifications.

This method may be used for all types of contracts but in practice is used only for supplies or services whose technical content is defined in full in the specifications, thus ruling out the need to evaluate the quality of the tender but requiring only a check of the conformity of the technical tender.

If the lowest price method is used, no award criterion other than price can be defined.

Lowest cost: the contract is awarded based on a cost-effectiveness approach including life-cycle costing. Life-cycle costing covers costs over the life cycle (acquisition, use, maintenance and end of life costs) as well as costs attributed to environmental externalities.

The tender specifications must include the data to be provided by tenderers and the method that will be used to determine the life-cycle costs on the basis of those data.

The method used for the assessment of costs attributed to environmental externalities must be based on objectively verifiable and non-discriminatory criteria. It must be described in the tender specifications and economic operators should be able to provide the required data with reasonable effort.

Mandatory common methods for the calculation of life-cycle costs are provided for in Annex XIII of the Directive. Each time a new method is approved at EU level for a particular supply or service, the list of Annex XIII will be updated. Currently, the sole method available refers to the Clean Vehicle Directive.

If the lowest cost method is used, no award criterion other than cost can be defined.

Best price-quality ratio: the contract is awarded taking into account the price or cost and other quality criteria.

Best price-quality ratio method

This is the method most frequently used by the EU institutions.

This method entails defining detailed award criteria to determine quality.

The tender specifications (or the descriptive document for a competitive dialogue) must indicate the maximum score that will be applied to each of the quality criteria and possibly sub-criteria.

The tender specifications (or the descriptive document for a competitive dialogue) must indicate the ranking formula to calculate the final score taking into account quality and price. The formula may set a weighting between quality and price.

The formula chosen to calculate the final score must reflect the concept of best price-quality ratio: the method used must not only make it possible to choose a quality tender but also place an obligation on tenderers to compete on price. Accordingly, it is possible to:

- set a minimum score (e.g. 50 % or 65 % of the maximum possible mark) for the whole quality evaluation, as well as for each of the quality criteria and sub-criteria. Tenderers falling below those levels will be eliminated, so their final score is not calculated;
- set a weighting to respectively quality and price. For instance, a 60/40 weighting of quality / price can be set to give a higher importance to quality.

The weighting applied by the contracting authority to each of the criteria set for determining the tender offering the best price-quality ratio must be maintained throughout all stages of the evaluation. A precise definition of the method used must be given in the tender specifications.

In exceptional cases in which weighting is not technically possible, mainly because of the subject of the contract, it is sufficient to indicate the various criteria in descending order of importance. This wording – technical impossibility of establishing a weighting – conveys that this situation is extremely rare and not normally justified for public contracts concluded by the institutions.

In case of procedures with a single tenderer, the award criteria must be defined and applied to evaluate whether:

- the quality of the technical offer is acceptable (based on the weighted quality criteria and minimum scores announced in the tender specifications);
- the price is reasonable in view of the level of quality.

Weighting

If a weighting is applied to price in relation to the other criteria it must not result in neutralisation of price in the choice of contractor. For example, a weighting of less than 30% for price is normally too low to have a significant impact on the result. In addition, it is also not recommended to have at the same time high minimum levels for quality (e.g. 70% of the maximum score) and a high weighting on quality vs. price in the ranking formula (e.g. 65% for quality, 35% for price), as this may neutralise price.

Formula

Unlike technical quality, which is usually evaluated by means of a mark, the price quoted by a tenderer is an objective element and cannot be marked.

The formula used to rank tenders and to calculate which tender offers the best price-quality ratio should incorporate the quality mark and the price, expressed in the form of indices. The method used must be indicated in the procurement documents and must remain unchanged during the whole procedure.

N.B.: The use of formula only makes sense when several tenders have passed the quality thresholds, so that they can be ranked. A single tender cannot be ranked so the formula is not applied.

There is no unique way to define the best price-quality ratio but two formulae are commonly used:

a) the most simple method (no weighting between price and quality):

Score for tender X	=	$\frac{\text{cheapest price}}{\text{price of tender X}}$	*	total quality score (out of 100) for all criteria of tender X

b) the method applying a weighting for quality and price expressed in percentage (e.g. 60%/40%):

score for tender X	=	$\frac{\text{cheapest price}}{\text{price of tender X}}$	*	100	*	price weighting (in %)	+	total quality score (out of 100) for all award criteria of tender X	*	quality criteria weighting (in %)

The weighting factor determines how much extra money the contracting authority is ready to spend in order to award the contract to an economic operator whose tender is of a higher technical value.

Both formulae give a mark out of 100. All tenders passing minimum quality levels are ranked. The tender with the highest mark wins.

The example given below shows the difference in calculation of results and ranking between the 2 methods for the case of 3 valid tenders (A – B – C) with the following prices and having received the following scores (out of 100) for quality:

Tender	Price	Quality	No weighting - formula (a)	Weighting: 40% for price and 60% for quality - formula (b)
A	100	62	100/100*62 = 62 points First	100/100*40 + 62*0,6 = 77,20 points Second
B	140	84	100/140*84 = 60 points Second	100/140*40 + 84*0,6 = 78,97 points First
C	180	90	100/180*90 = 50 points Third	100/180*40 + 90*0,6 = 76,22 points Third

[redacted]

4.3.1.13. Distinction between selection and award criteria

One of the main difficulties encountered by the services when drafting tender specifications consists in finding adequate selection criteria for the evaluation of the capacity of tenderers and quality award criteria for the evaluation of tenders. The distinction must be made at each stage of the procedure: when preparing the tender specifications and when tenders are evaluated. Each type of criteria serves its own specific purpose in the evaluation process. Therefore the criteria must be drafted so that the contract goes to the most economically advantageous tender (as defined by the chosen award method), and not to the tenderer who appears to be best by reason of factors connected with its capacity to potentially perform the contract.

Confusing selection and award criteria constitutes a procedural defect which is likely to result in the procedure being annulled in the event of a dispute. As a matter of fact, the confusion could favour certain economic operators at the detriment of others regardless of the quality of their technical offer. This has been confirmed by the case-law of the Court[17].

The Financial Regulation (Art. 167(2) and (3) FR) is not aligned with the Directive on this point. In particular, qualification and experience of staff assigned to performing the contract should be used as a selection criterion only and not as an award criterion. Indeed, this would introduce a risk of overlap and double-evaluation of the same element. Besides, during contract performance, a change in the staff assigned to performing the contract, even if justified (by e.g. sickness or change of position), would call into question the conditions of award of the contract, thereby creating legal uncertainty.

At the stage of evaluation of award criteria, the contracting authority can no longer review the capacity or ability of the tenderers. Anything to do with experience, expertise, references for past projects, work already done and resources available have already been evaluated since all these are covered by the selection criteria. Only the technical and financial offers must be evaluated at this stage, by reference to the award criteria which are directly related to the tender specifications and which are used to assess their intrinsic quality without reference to the capacity of the tenderer.

The following list of terms should be banned when drafting quality criteria or the evaluation report on award criteria because they refer exclusively to the capacity of the tenderers:

- CVs
- Profiles
- Qualifications (education, background)
- Skills (language, IT, other)
- Experience
- Expertise
- Knowledge (of the subject, of languages…)
- Familiarity (with the subject)
- Resources (human, technical)
- Technical ability
- References (list of previous contracts)
- Examples of previous deliverables

[17] C-31/87 Beentjes, § 15-16; C-315/01 GAT §65-67; C-532/06 Lianakis, §30-32; T-39/08 European Dynamics, § 21-24 and 40-42

4.3.1.14. Value of the contract

The value of the contract in the tender specifications must be consistent with the information published in the contract notice, which only allows for an "estimated total value" of the contract.

It is not possible to publish a range so it is recommended not to use this method in the tender specifications.

If the contracting authority has a limited budget available or in the case of middle or low value contracts to avoid exceeding the threshold for the procedure, it may need to indicate that the "estimated total value" in the contract notice is a maximum and that tenders exceeding it will be rejected. When the estimated value is close to a threshold, it is recommended to use the procedure valid above this threshold.

When indicating a maximum for a direct contract, the contracting authority must be clear about what is included in this maximum budget, i.e. price, renewals, reimbursement of expenses (excluding indexation), so that tenderers can take this into account when defining their financial offer.

Setting a maximum value has disadvantages as it tends to weaken price competition.

4.3.1.15. Price and reimbursement of expenses

An indication should be given of whether the price quoted must be fixed and not subject to revision. Otherwise, the specifications must lay down the conditions and formula for reviewing the price during the validity of the contract, taking account of the nature of the contract and the economic situation in which it will be performed, the nature and duration of the tasks involved and the EU financial interest.

Under Articles 3 & 4 of the Protocol on the Privileges and Immunities of the European Union, the Union is exempt from all charges, taxes and duties, including value-added tax; such charges may not, therefore, be included in the calculation of the price quoted; the amount of VAT must be indicated separately. As regards the relations with Belgian contractors, the Belgian ministry of finance requests that the name of the authorising officer signing the contract be part of the nominative list as maintained by DG HR – Unit B.1 and granting the delegation of signature. The Belgian authorities ask moreover that the contract specifies that the authorising officer acts on behalf and for the account of an EU Institution covered by the PPI for the VAT purpose.

It should also be specified that the price tendered must be all-inclusive and expressed in euros, including for countries which are not in the euro zone. For tenderers in countries which are not in the euro zone, the price quoted may not be revised in line with exchange rate movements. It is up to the tenderer to select an exchange rate and accept the risks or benefits resulting from any variation. However, since payments in some non-EU countries (delegations) cannot be made in euros in certain cases, national currencies may be used on a cash basis if instructions to that effect are given to the accounting officer in ABAC (workflow) or from imprest accounts.

Any ambiguity in the formulation of the financial offer may cause rejection of the whole tender. The financial offer must be clear and in compliance with the tender specifications. In particular, reductions of the offered prices (discounts) based upon conditions not specified in the tender documents (e.g. following ordered quantities) are to be avoided. Indeed, any clarification request on the submitted price may imply a modification of the tender.

If there is a list of unit prices, the tender specifications must clearly state which price will be used if there is a discrepancy between the total of the unit prices (verified during evaluation) and the aggregate price in the financial offer.

As a rule, travel expenses should be included in the global price offered by the tenderer. For that, the contracting authority must indicate precisely the required travel in the tender specifications (e.g. number and location of all meetings). Travel and accommodation should be reimbursed separately from the global price only when necessary, i.e. where it is not possible to identify the amount or place of travel required within the project. In this case, the

contracting authority should provide the reimbursement rates for travel and subsistence, based on the standard Commission rules, and a maximum amount (in euro) for travel and subsistence expenses payable under the whole contract. It should be estimated by using the maximum rates and the estimated necessary travel for performance of the contract.

The same principle applies to any specific expenditure incurred in performance of the contract, which cannot be priced by the tenderer during the procedure, such as the cost of translating various reports of unknown length into the languages indicated in the specifications. In any case, the amount of reimbursable expenses compared to the price of the contract should be minor.

In direct non-renewable contracts, the price is usually fixed and not subject to revision.

In the case of multi-annual contracts (e.g. framework contracts), where a fixed price does not seem feasible, it is best for prices not to be revised before twelve months. The indexes used should be expressed in the same currency as the contract; indexes published by Eurostat should be used where possible.

See the Circular on price revision

4.3.1.16. Contents of the tender

When drafting instructions for tenderers in relation to the presentation and contents of the request to participate or tender, the following points should be considered:

Documents which are not relevant and necessary for the evaluation should not be requested.

All and only the documents necessary for the evaluation (exclusion, selection and award criteria) must be indicated, e.g. in a list.

It is strongly recommended to draw a clear distinction between the documents required under the exclusion, selection and award criteria respectively to avoid the risk of criteria being confused when tenders are evaluated.

Tenderers can be invited to organise their technical offer under headings or to structure it following a template to ensure that it includes the expected contents and meets the requirements set out in the technical specifications as closely as possible. This is likely to favour a straightforward evaluation of tenders in the light of the award criteria.

It is advisable to require that tenderers submitting joint tenders and / or including subcontracting specify the role, qualifications and experience of each entity involved in the tender.

It is also necessary to require an itemised use of human resources per task if there is an award criterion on allocation of resources or organisation of the work.

In case information concerning subcontractors is requested, the scope of this information should be clear. In addition to information on exclusion criteria for identified subcontractors and information about any part intended to be subcontracted, information on selection criteria may be requested as well. Normally, the tenderer provides this as part of the consolidated information for overall assessment of capacity. In any case, it is recommended to limit this requirement to certain overall and/or individual value of subcontracting. For framework contracts, it does not necessarily make sense to request the part intended to be subcontracted (as a percentage) given that there are repetitive purchases and they are not necessarily all identical.

Tenderers should be asked to submit their financial offer as a global price. An itemised budget may be requested to facilitate the management of the contract in case of difficulties in its performance (e.g. detailing the price of the different tasks or per deliverable will make it easier to implement proportionate protective measures if necessary).

In the case of framework contracts, the financial offer takes the form of a list of unit prices which will be applied to the specific contracts implementing the framework contract. The prices of the list are maximum prices in the case of multiple framework contracts with reopening of competition. Care should be taken that all price items to be used when the

framework contract is implemented are incorporated into the price list. It is recommended to attach a template on which to submit the prices to the tender specifications.

It is a good practice to provide tenderers with standard forms for submission of tenders. They may be useful in particular when tenderers are requested to present a set of precise information, e.g. technical parameters or organisational details, price list.

4.3.1.17. Identification, legal status and access to the market

Tenderers should be asked to provide the following information and documents:

Identification and legal status:

Usually, the Commission requests submission of a signed Legal Entity Form and of the relevant evidence listed in the LEF itself. It is recommended to provide the following web address rather than copy the LEF in annex to the tender specifications because there are three different templates, available in all languages:

http://ec.europa.eu/budget/contracts_grants/info_contracts/legal_entities/legal_entities_en.cfm

Access to the market:

Tenderers must indicate the state in which they have their registered office or domicile, providing the necessary supporting documents in accordance with their national law (see Chapter 4.3.1.6).

SMEs

Each tenderer (and each member of the group in case of joint tender) must declare whether it is a Small or Medium Size Enterprise in accordance with Commission Recommendation 2003/361/EC. This should be clearly requested in the tender specifications. This information must be published in the award notice and is used for statistical purposes only.

4.3.1.18. Declaration and evidence on exclusion criteria

The contracting authority must request the candidates or tenderers to provide the European Single Procurement Document (ESPD) or, as long as the ESPD is not available for EU institutions, a declaration on honour, signed and dated, stating that they are not in one of the exclusion situations (see Chapter 4.3.1.9). The contracting authority must provide a link to the ESPD or the model declaration as an annex.

An economic operator may reuse an ESPD or a declaration which has already been used in a previous procedure. In this case, it must confirm that the information contained in the document continues to be correct.

The purpose is to alleviate the workload of tenderers having to submit and of the contracting authority having to check supporting documents for all tenderers. For procedures as from Directive thresholds, the candidates or tenderers must provide evidence confirming the ESPD or declaration upon request of the contracting authority at any time where this is necessary to ensure the proper conduct of the procedure (Art. 137(2) FR).

In practice, for contracts with a value as from the thresholds set in the Directive, the successful tenderer must provide, within the time limit stipulated by the contracting authority and before signature of the contract, evidence confirming the above-mentioned ESPD or declaration. The authorising officer requests this evidence after taking the award decision at the same time as simultaneously notifying the results of the procedure to all tenderers.

In the procurement procedures in two steps with publication of a contract notice, if the contracting authority specified a maximum number of candidates to be invited to tender and some candidates may have to be rejected in order not to exceed this number, all the candidates must provide the evidence on non-exclusion in addition to the ESPD or declaration.

For contracts with a value below the thresholds set in the Directive, the contracting authority may, if it has doubts about whether the tenderer to whom the contract is to be awarded is in one of the situations leading to exclusion, require the tenderer to provide the evidence on non-exclusion.

For contracts with a value up to €15 000, the contracting authorities may decide, depending of their risk assessment, not to require the above-mentioned ESPD or declaration.

The contracting authority must waive the obligation for a candidate or tenderer to submit the documentary evidence if it has already been submitted for another procurement procedure of the same contracting authority and provided the documents were issued not more than one year earlier and are still valid at the date of their request by the contracting authority. In such cases, the candidate or tenderer must declare on its honour that the documentary evidence has already been provided in a previous procurement procedure, provide reference to that procedure and confirm that that there has been no change in the situation. This information must be included in the tender specifications.

The contracting authority must also waive the obligation for a candidate or tenderer to submit the documentary evidence if it can access it on a national database free of charge or in the case of material impossibility to provide such evidence.

The documents to be requested are listed in Art. 137(3) FR and consist mainly in an extract of judicial record, a certificate on payment of social security and a certificate on payment of taxes.

The extract from the judicial record and administrative certificates can be regarded as recent if they are not more than one year old starting from their issuing date and are still valid at the date of their request by the contracting authority.

Lists of certificates issued by the Member States can be found on the e-CERTIS website: http://ec.europa.eu/markt/ecertis. If a certificate is not issued in the country concerned, it may be replaced by a sworn statement (made before a person authorised by law). Failing that, it may be replaced by a solemn statement made by the interested party before a judicial or administrative authority, a notary or a qualified professional body (chamber of commerce, etc.). Normally, solemn statements are not made before an authority; this is a requirement added by the FR.

If contracting authorities have doubts about the personal situation of candidates or tenderers, they may themselves apply to the competent authorities to obtain any information they consider necessary about their situation. The list of these authorities can also be found on the website referred to above.

Depending on the national legislation of the country in which the tenderer or candidate is established, the documents must relate to legal persons and/or natural persons, including company directors or any person with powers of representation, decision-making or control in relation to the candidate or tenderer.

4.3.1.19. Declaration and evidence on selection criteria

The contracting authority must request the candidates or tenderers to provide the European Single Procurement Document (ESPD) or, as long as the ESPD is not available for EU institutions, a declaration on honour, signed and dated, stating that they fulfil the selection criteria (see Chapter 4.3.1.10). The contracting authority must provide a link to the ESPD or the model declaration as an annex.

The purpose is to alleviate the workload of tenderers having to submit and of the contracting authority having to check supporting documents for all tenderers. For procedures as from Directive thresholds, the candidates or tenderers must provide evidence confirming the ESPD or declaration. The contracting authority may request all or part of the documentation at any time to ensure the proper conduct of the procedure (Point 18.4 Annex 1 FR).

[redacted] For one-step procedures, the contracting authority may request all or part of the evidence with the tender or during the evaluation or at award stage. For instance, it may be appropriate to ask for CVs at tender stage; or to request evidence to the successful tenderer and to the second best tenderer to ensure fast contract signature in case of problem with the successful tenderer while not raising legitimate expectations.

The contracting authority must waive the obligation for a candidate or tenderer to submit documentary evidence if such evidence has already been submitted for another procurement procedure of the same contracting authority and provided the documents are up-to-date. In such cases, the candidate or tenderer must declare on its honour that the documentary evidence has already been provided in a previous procurement procedure, provide reference to that procedure, and confirm that there has been no change in the situation. The above-mentioned information must be included in the tender specifications.

[redacted]

Verification of the legal and regulatory capacity:

The authorisation for the tenderer to perform the contract proven by inclusion in a trade or professional register (e.g. the bar for lawyers), membership of an organisation, VAT registration or an express authorisation (e.g. inclusion on a national decree or law for certain professions) as indicated in Point 18.3 Annex 1 FR.

Verification of economic and financial capacity:

Point 19 Annex 1 FR provides a non-exhaustive list of possible documents, but it is not obligatory to request them all. Only the documents necessary to check the criteria (and minimum levels) indicated in the tender specifications should be requested, e.g. financial statements of the past two years (max. three) if there is a criterion on minimum turnover for that period. When requesting professional risk indemnity insurance, the tender specifications must specify the amount to be insured as it constitutes a substantial element of the criterion.

Tenderers who, for exceptional reasons, are unable to produce the references requested can prove their economic and financial capacity by any other means deemed appropriate by the contracting authority. For instance, a company created less than two years before the procedure may only provide financial statements for the past year instead of past two years and a business plan for the current year.

The possibility for economic operators to rely on the capacity of other entities, as provided for in Point 18.6 Annex 1 FR, must be mentioned in the tender specifications. If the tenderer uses this possibility, the contracting authority may request the legal entity providing financial backing to be jointly liable for the execution of the contract, e.g. by requesting it to sign the contract or, failing that, to provide a joint and several first-call financial guarantee.

Verification of technical and professional capacity:

Point 20.2 Annex 1 FR provides an exhaustive list of possible documents, several of which relate to supplies or works contracts, but it is not obligatory to request them all. Only the documents necessary to check the criteria (and minimum levels) indicated in the tender specifications should be requested. Generally, it is recommended to have the following:

- Criteria and minimum levels on services (or supplies) provided in the last three years, and request the list of these projects;
- Criteria and minimum levels of qualifications and professional experience of the person(s) directly involved in delivering the service (usually not applicable for supplies), and request the corresponding CVs.

4.3.2. Draft contract

The draft contract is the third tender document. The model contract available on BudgWeb should be filled in as far as possible, including data on the contracting authority, the subject matter of the procurement, the terms of payment, requirements concerning guarantees if applicable and intellectual property rights. The contractor and the price can only be filled once the successful tenderer is known. All the terms of the contract should generally not be repeated in the tender specifications in order to avoid inconsistencies; it is better to make references to the draft contract.

The contract must stipulate the position (e.g. Head of Unit, Director, etc.) and corresponding organisational entity of the person responsible as data controller for processing of all personal data during the procurement procedure and the contract performance. This can be the authorising officer responsible in charge of the procurement in question or the corresponding authorising officer by Delegation or a specific function that covers all data processing for procurement, e.g. Head of Unit of Unit XXX or Director of Directorate on Resources or Director General of DG XXX. The relevant person can be found by contacting the local Data Protection Coordinator.

For more information see the note on protection of personal data in procurement and the website of the Secretariat General including the list of Data Protection Coordinators:
https://myintracomm.ec.europa.eu/sg/dpo/Pages/index.aspx

The model contracts are on Budgweb:

https://myintracomm.ec.testa.eu/budgweb/en/imp/procurement/pages/imp-080-030-010_contracts.aspx.

4.3.2.1. Use of the DG BUDG model contracts

DG BUDG model contracts are in three parts: special conditions, general conditions and annexes, which form an integral part of the contract.

By definition, the **special conditions** are the variable part of the contract. They consist of a number of blanks which must be filled in carefully, beginning with the particulars of the parties. They also include a number of mandatory clauses, to be chosen from versions proposed in square brackets, and optional clauses which can be kept or discarded. In order to avoid renumbering, it is advised to indicate "not applicable" in the relevant clauses instead of deleting them.

On the other hand, the **general conditions** should not be changed and, in normal circumstances, are incorporated without amendment. In the case of a simplified contract (purchase order), they are to be found on the Europa website indicated on that contract. It is sometimes necessary to modify the general conditions. Extra care should be taken in such cases not to delete an essential guarantee or to create incompatibilities. Generally, derogations to general conditions are listed in the special conditions, with a clause stating "By derogation to Article XX of the general conditions, etc."

Authorising officers can make whatever changes they consider necessary to adapt a contract to the specific subject and circumstances. DG BUDG (Central Financial Service, Unit BUDG.D.2, Financial rules 2 and Programme management) may be consulted on the changes made.

4.3.2.2. Terms of payment

The draft contract includes the payment schedule. It must be in full coherence with the tender specifications, or the tender specifications may only refer to the contract clause to avoid inconsistencies.

Pre-financing is meant to provide a float to the contractor, and normally it is used in grants, not so much in procurement because it is considered as a risk for the Union's budget (payment with nothing in return). It should be exceptional in procurement and be used in justified cases (procurement requiring high start-up costs e.g. for works contracts, or purchase of patents or practice of the sector such as booking of conference rooms).

Interim payments are made in exchange of receiving something of equivalent value (e.g. raw data from a survey, the first draft of a report, the per country situation of 5 out of 28 countries…). In order to facilitate access to SMEs to EU contracts, it is recommended to pay an interim payment fairly early in the payment schedule, but it should still be in exchange of a deliverable of equivalent value. Apart from reducing the risk to the budget, it is also useful in case of termination of the contract, as it ensures that the contracting authority does not pay more than what the deliverable is worth.

The payment schedule should be reasonable, i.e. payments should not be too frequent to minimize workload and should be linked to the milestones of the implementation of the contract.

4.3.2.3. Reimbursement of expenses

Travel and subsistence expenses should, as a rule, be included in the global price of the contract and not be reimbursed separately. Therefore the tender specifications must include in detail all necessary travel (e.g. number and place of meetings) so that tenderers can make their own cost estimates and incorporate them in their all-in financial offer. Separate reimbursement must be foreseen only when the place of performance is not known at the time of drafting the tender specifications (e.g. framework contract for audits in and outside the EU, where the volume of services to be performed in each country is not known). The same argument can be applied to reimbursement of other costs directly linked to performance of the contract (e.g. cost of translations).

4.3.2.4. Guarantees

There are four types of guarantees (Art. 152, 168(2) and 173 FR). In all cases, they must be announced in the procurement documents. The conditions for release of the guarantees should be announced as well. Where contractors are required to submit a guarantee, it must be for an amount and a period that are sufficient for it to be called.

Tender guarantee

The tender guarantee ensures that tenders are maintained until contract signature. It is rarely used in the EU institutions, but if so it must be announced in the tender specifications. The tender guarantee is to be provided with the tender. It is equivalent to 1% to 2% of the total value of the contract. It is called in if the tender submitted is withdrawn before contract signature. The tender guarantee is released after information on the outcome of the procedure for tenders rejected based on the exclusion or selection criteria, and when the contract is signed for tenders ranked for the award of the contract.

Guarantee for pre-financing

In case of pre-financing, a guarantee may be requested on a case-by-case basis if it is justified by a risk assessment documented internally. The assessment will take into account in particular the value of the contract, its subject matter, duration and pace, and the structure of the market. Pre-financing guarantees are not allowed for contracts not exceeding €60 000.

Performance guarantee

On a case-by-case basis and subject to a risk-analysis, a performance guarantee may be required from the contractor in order to ensure compliance with substantial contractual obligations in the case of works, supplies or complex services. The performance guarantee amounts to a maximum of 10 % of the total value of the contract and is to be released after final acceptance of the works, supplies or complex services. It may be released partially or fully upon provisional acceptance. Performance guarantees are not allowed for contracts not exceeding €60 000.

Retention money guarantee

The use of a retention money guarantee is restricted to a particular situation: it may be requested, on a case-by-case basis and subject to a risk analysis, in order to ensure that the works, supplies or services have been fully delivered and when final acceptance according to the terms of the contract cannot be given upon final payment by the authorising officer. In

other words, if all tasks can be finalised and approved before payment of the balance, there is no retention money guarantee. Otherwise, the guarantee will cover the period between provisional acceptance (at payment of the balance) and final acceptance (which can be several months later) and this is referred to as contract liability period. This is used e.g. for software development (the software is delivered but bugs may be detected for a period after final delivery) or for works contracts. It may take the form of a retention on payment of maximum 10 % (which is recommended as it is easy to manage). If 10% is not considered adequate, the authorising officer may set a lower percentage according to the usual commercial terms. It shall be proportionate with regard to the nature of the purchase, its organisation and risk. Retention money guarantees are not allowed for contracts not exceeding €60 000.

If the contractor so requests and subject to approval by the contracting authority, the retention on payment can be replaced by a financial guarantee.

Contractual guarantees, when required, must be provided for in the draft contract.

For financial guarantees, the model guarantee must be provided.

For information on management and release of guarantees see Chapter 5.6.

For further information see the Circular on guarantees.

4.3.2.5. Intellectual property rights

For services, the draft contract should include all the necessary information about intellectual property rights, in particular about the rights to be purchased and the intended use of these rights in the future. It is always necessary to adapt the clause to the specific subject matter of the contract.

More information is available in the Explanatory note on intellectual property rights.

4.3.2.6. Contract phases, renewal or options

A contract with phases includes several steps in a project, whereby one step only begins if specific conditions are fulfilled at the end of the previous step. The value of the contract must be calculated over the whole duration, including all phases, and the financial commitment should include all phases, unless the condition is the availability of budget itself. The award criteria (including the ranking formula) must take account of all phases, and the financial tenders should include prices for each phase. For instance, a contract could include an information campaign with reporting of its impact (phase 1). If the impact is positive, the campaign is pursued with a wider scope (phase 2), otherwise it is stopped. If the condition is fulfilled the second phase starts automatically.

This is different from a contract with renewal because in this case each phase contains different tasks. In a contract with renewal, the tasks described in the tender specifications for the first period are repeated over the second period, with for instance conditionality on budget availability. It is recommended to use automatic contract renewal, i.e. if the condition is fulfilled the contract is renewed with no action by the parties, and if the contract is not renewed, the party refusing renewal should notify the other party at least three months before the anniversary date of the contract. When renewal is not automatic, the renewal must be notified to the contractor, and if it is forgotten then contract terminates automatically. Again, the value of the contract and the award criteria must cover the full duration of the contract including all renewals.

Options are qualitative or quantitative extras, ancillary to the main purchase, and which are optional for the contracting authority - it has the right to buy them or not – but not to the tenderers, who have to include them in their technical and financial tender. For instance, a contract for a study may include the option of translating the main report. Again, the value of the contract and the award criteria must cover the full duration of the contract including all options.

4.3.3. Invitation to tender

An invitation to tender (Point 16.2 Annex 1 FR) is the procurement document giving the administrative details for submitting tenders, outlining the procedural requirements for contacts with the contracting authority (Art. 169 FR) and providing extra-legal clauses. These clauses do not need to be repeated in the tender specifications, and they include:

- Submission of a tender implies acceptance of all the terms and conditions set out in this invitation to tender, in the tender specification and in the draft contract;
- All costs incurred during the preparation and the submission of tenders are to be borne by the tenderers and will not be reimbursed;
- The invitation to tender is in no way binding on the contracting authority. Its contractual obligations commence only upon signature of the contract with the successful tenderer;
- Once the contracting authority has opened the tender, the document shall become its property and it shall be treated confidentially.

In addition, the invitation to tender specifies the duration of validity of the tenders, i.e. the period between receipt of tenders and signature of contracts, during which the tenderers cannot modify their tenders, in particular price. The contract must be signed before the end of this validity, so it is recommended to be realistic with the time needed for evaluation (e.g. about six months for an open procedure).

There is no need for a blue ink signature of the invitation to tender by the authorising officer.

In the case of procedure in two steps, economic operators will be first invited to submit a request to participate. The invitation to tender will be sent in the second step only to the selected candidates.

See model invitation to tender

4.3.4. Contract notice

The purpose of the contract notice is to inform all potentially interested operators that a procurement procedure is launched, providing them with the essential details and all the information required in order to participate.

The contract notice is published in the Official Journal and is designed to attract as many tenders as possible. It can therefore be regarded as the most important form of publicity for public procurement.

A contract notice is published for the following procedures only: open procedures, restricted procedures, competitive procedures with negotiation, competitive dialogues and innovation partnerships.

It is not used for specific contracts based on framework contracts.

Contracting authorities wishing to organise a contest make their intention known by means of a design contest notice (see Chapter 3.11).

4.3.4.1. Content

The contract notice must be drafted in one language using the standard eNotice. The choice of the language version must correspond to the language of the form used. The Publications Office will have the notice translated into all the EU official languages.

The contract notice must be consistent with the prior information notice, if one has been published.

The textual information should be kept to a minimum and must not exceed 500 words. Information already contained in the other procurement documents should not be repeated in the contract notice. Instead of copying such information, the contract notice should use eTendering or, failing that, provide the link to the documents available on line (see Chapter 4.4).

In justified cases, the contracting authority may transmit the procurement documents by other means if direct access by electronic means is not possible for technical reasons. For instance, there would be no direct access if the volume of the tender specifications does not allow for downloading or the format of the document is not generally accessible or if access would require specialised office equipment.

There would also be no direct access to the whole procurement documents if they contain confidential information (e.g. details of security systems); in this case, all non-confidential parts of the procurement documents are provided with a caveat that confidential parts will only be provided to selected candidates.

When it is necessary to repeat information, the contract notice must be fully consistent with the other procurement documents (e.g. the final date for receipt of tenders or requests to participate must be identical in the contract notice and the invitation letter).

In the case of procedures in two steps, the indicative date for sending the invitation to tender to the selected candidates must be calculated with due allowance for the time taken to process the requests to participate.

Under an open procedure, representatives of tenderers may attend the opening session so that they can ensure that their tender arrived closed and they can know their competitors. The contract notice must therefore specify who may attend and the date, time and place of opening. The department concerned must make all the necessary practical arrangements (book a sufficiently large room for a sufficient length of time, give instructions to guards on the door in buildings, prepare a presence list, etc.). Any tenderer who does not attend the opening session can ask for this information and should be given the opening report (without the names of persons in charge of opening).

The instruction on drafting notices sets out the arrangements for sending the notice to the Publications Office, together with advice on completing the forms online via eNotices.

4.3.4.2. Additional publicity

In addition, but not as an alternative, to publication of the contract notice, the contracting authority may use any other form of publicity.

Such publicity must not precede publication of the contract notice, which is the only authentic version, and must refer to the notice. Nor must it introduce any discrimination between candidates or tenderers or contain any information other than that in the contract notice.

This additional publicity might, for example, take the following forms:

– publication on the Directorate-General's website;

– publication in the general or specialist press;

– letter to the professional associations or organisations representing businesses, drawing their attention to the contract notice and asking them to circulate it among their members, etc.;

– mailshot based on transparent and not discriminatory criteria, e.g. list constructed by a webpage subscription mechanism. Mailshots must not be limited to only a few economic operators known to the contracting authority.

4.3.4.3. Correction of a contract notice

If a contract notice already published must be amended prior to the deadline for receipt of tenders or requests to participate, a corrigendum must be published by the same procedure as the original, using a specific model (notice for changes or additional information). If necessary, the time allowed for submitting tenders or requests to participate should be extended. Such an extension is necessary if substantial changes are made. The number of extra days to be allowed should be based on the extra work which will be necessary for the tenderers. For example, a significant change made just before the deadline may require an additional period of several weeks (e.g. because of the different scope of the work, types of cost, staff needed and, probably, different composition of the consortium). In the case of substantial amendment, the time should start running from the beginning.

An extension is also compulsory if:

- access to the other procurement documents is not provided from the date of publication of the contract notice (see Chapter 4.5.4);
- additional information requested no less than 6 working days before the closing date was not provided at the latest six days before the closing date;
- translation of the procurement documents was not provided within 6 working days.

4.4. Launching of the call for tenders

The first phase in the procurement procedure is the preparation of the procurement documents (see Chapter 4.3). Once they are ready, the call for tenders can be launched.

4.4.1. Procedures with a contract notice

In all procedures requiring the publication of a contract notice in the Official Journal the procedure is launched at the moment of dispatch of the contract notice to the Publications Office.

The Publications Office has up to 7 days after dispatch to publish the contract notice in the Official Journal provided the free text in the whole contract notice is **maximum 500 words**.

All contract notices published are available on the TED (Tenders Electronic Daily) database at http://ted.europa.eu . The contracting authority must be able to provide evidence of the date of dispatch.

At the moment of publication of a contract notice, the procurement documents must be made available by electronic means to all economic operators (see Chapter 4.5.4).

[redacted]

4.4.3. Translation

The contract notice is translated by the Publications Office in all EU official languages. For the Commission, translation of the other procurement documents must be organised in advance with DGT.

The contracting authority may choose the official language(s) in which it publishes the procurement documents (except the contract notice, which is prepared in one language and published in all EU languages). However, in case of request for another official language, the translation must be provided within 6 working days. For the Commission, DGT would provide the translation within the requested deadline, provided that the procurement documents have been included in the planning of potential needs. A request for translation is not as such a ground for extending the deadline for receipt of tenders but the receipt date should be postponed by at least the number of days of delay if the translation is not provided within the 6 working days.

4.5. Submission phase

4.5.1. Contacts during the submission phase

Such contacts are allowed, by way of exception, in the following circumstances only (Art. 169 FR):

- at the request of economic operators, the contracting authority may supply additional information solely for the purpose of clarifying the procurement documents;
- on its own initiative, the contracting authority may inform interested parties if it spots any error, inaccuracy, omission or other clerical error in the procurement documents.

As the model invitation to tender includes the same wording, the contracting authority should receive no objections from economic operators seeking other information.

Contacts must always take place **in writing**. All records of contacts with tenderers (correspondence), in any of the situations described above, must be kept in the public procurement file, a model for which is available on BudgWeb.

Any additional information provided at the request of an economic operator and any information provided by the contracting authority on its own initiative must be accessible **simultaneously** to all operators by the same means as for the procurement documents (see Chapter 4.5.4).

If requested no less than six working days before the deadline for receipt of tenders or requests to participate, additional information on the procurement documents and additional documents are provided as soon as possible. In practice, the information is provided as soon as the response is prepared and if several questions must be answered, the answers prepared fast should be provided earlier than those taking more time (good administration).

In any case, the answers must be provided no later than six days before the deadline. If the information is given less than 6 days before the deadline, the contracting authority must extend the time limit for receipt of tenders or requests to participate proportionally.

Contracting authorities are not bound to reply to requests for additional information made less than six working days before the deadline for receipt of tenders or requests to participate but may do so if at all possible. In case the deadline for receipt of requests for additional information does not fall on a working day, requests submitted on the first following working day should be accepted.

In the open or restricted procedure for urgent cases, additional information, if requested in time, is provided no later than four days before the deadline.

If the contracting authority needs to correct the procurement documents with **a significant change,** it should extend the time limit for receipt of tenders or requests to participate so that operators can take these changes into account. This extension will have to be made known in the same way as the original procurement documents, including correction of the contract notice. When this happens very close to the deadline, the corrigendum may be announced with a warning message where the procurement documents are made available. If the change is minor and has no impact on the preparation of tenders or requests to participate, then a new version of the corrected procurement documents and a message concerning the change may be provided by the same means as for the original procurement documents, without corrigendum in the Official Journal.

[redacted]

4.5.4. Dispatch of procurement documents

The means of communication chosen must be generally available and must not have the effect of restricting access by economic operators to the procurement procedure.

Procedure with publication of a contract notice

For all procedures in one or two steps with publication of a contract notice, the set of other procurement documents — i.e. the invitation to tender, the tender specifications and the draft contract — must be made available by electronic means from the date of the publication of the contract notice (Point 25.1 Annex 1 FR).

The eTendering platform should be used. This platform is an extension to TED (Tenders Electronic Daily), the online version of the OJ S.

For the contracting authority eTendering provides:

- synchronization with the calls for tenders elaborated on eNotices and published on TED portal;
- possibility to process and organise answers to economic operators' questions;
- possibility to process changes in the procurement documents.

For economic operators eTendering provides:

- access to all publicly available tender documents, including answers to questions;
- additional services as notification related to changes in procurement documents;

For more information please see the eTendering site page.

Failing that, the procurement documents should be made available for download from the internet site of the contracting authority ("buyer profile"). In all cases, the contract notice must indicate the address from which the documents can be downloaded.

In justified cases, the contracting authority may transmit the procurement documents by other means if direct access by electronic means is not possible for technical reasons (e.g. architecture plans, specific IT formats not commonly available) or if the procurement documents contain confidential information (for more details see Chapter 4.3.4.1). Only parts of the procurement documents which cannot be accessible from the outset (i.e. parts with actual technical restrictions or parts which are really confidential) should be subject to restricted access, so in practice there will always be parts of the procurement documents published with the contract notice (the invitation to tender, the draft contract, the subject, the tasks, the criteria…). The technical specifications should include a caveat explaining

- how the rest of the documents is made accessible, in case of technical restrictions (e.g. access to a specific software, on-site visit, paper format, etc.);
- that the confidential terms will only be provided later to selected candidates and explain how (e-mail sending, paper, on site consultation, etc.).

[redacted]

4.5.5. Receipt of tenders

Before the deadline for receipt of tenders the procedure for registering the exact date and time of receipt should be established.

Arrangements for the submission of tenders are set in the invitation to tender.

The date of receipt is the date as of which the tenderer can no longer alter its tender, i.e.:

- For submission by post, the postmark;
- For submission by courier, the deposit slip of the courier service;
- For submission by hand, the receipt of the Central Mail Service for Commission departments in Brussels and Luxembourg;
- For electronic submission, the time stamp generated by the system.

For information, see the model invitation to tender

If the contracting authority authorises the submission of tenders by electronic means, the tools used and their technical characteristics shall be non-discriminatory, generally available and interoperable with technology in general use, and shall not restrict access of economic operators to the procurement procedure.

In practice, below the Directive threshold, the contracting authority should guarantee confidentiality and integrity of the tenders. Submission with non-secure electronic means (i.e. e-mail to a functional mailbox - several persons should be able to access it to ensure continuous check) may present some risks, so it is up to the authorising officer to decide whether, and up to which value, these means can be used.

As from the Directive threshold, the device for electronic receipt of tenders must fulfil a number of conditions laid down in Article 149(3) FR.

The contracting authority must make arrangements in advance to receive and store the tenders, including all the items for verifying the date of receipt, in particular the receipts issued when tenders are submitted by hand. It is essential that tenders remain sealed until the opening session. In case a tender is accidentally opened by the institution's services before the opening session this error should be documented in a note for the file which should explain all the circumstances including how integrity and confidentiality was ensured.

With a view to the stages of the procedure which will follow the opening of tenders, it is best to make arrangements early in the procedure to:

- organise the opening of tenders
- organise the evaluation of tenders;
- set up an evaluation committee for contracts of a value as from the Directive threshold (see Chapter 4.7.2).

Any specific methods to be used in subsequent stages of the procedure (opening and evaluation) must be laid down before that stage begins. It is also strongly advised to lay down the evaluation method before tenders are opened, in order to avoid any dispute.

The purpose of this working method for opening or evaluation is to lay down an operational practice. Under no circumstances may it alter the rules for determining whether tenders satisfy the requirements at the time of opening or the rules applying to evaluation.

It is possible, for example, to establish a grid for all evaluators for marking the technical aspects of each tender but there can, of course, be no question of altering or adjusting the criteria and weightings set out in the specifications or the contract notice.

When preparing the evaluation, it should be made clear to evaluators what principles are to be applied to avoid confusing exclusion criteria, selection criteria and award criteria.

4.6. Opening phase

4.6.1. Opening of tenders

The contracting authority must make arrangements in advance to hold a session for opening tenders a sufficient time after the closing date for receipt of tenders considering that some tenders sent by post may arrive after the closing date despite being sent before the time limit.

In the case of open procedures, tenderers or their representatives are allowed to attend the opening of the tenders as specified in the contract notice.

If tenders arrive after the opening, a second session must be organised along the same lines as the first. In particular, if the first session was public, the second must be public too, and all tenderers who submitted tenders, including the persons who attended the first session, must be invited to the second.

The department concerned must make all the necessary practical arrangements (book a sufficiently large room for a sufficient length of time, give instructions to guards on the door in buildings, prepare a presence list, etc.).

4.6.2. Opening committee

For all contracts with a value as from the Directive threshold, tenders are opened by an opening committee appointed by the responsible authorising officer. This requirement may be waived on the basis of a risk analysis when reopening competition within a framework contract and for negotiated procedures without prior publication of a contract notice (except where the contract follows a design contest or for building contracts).

The opening committee is appointed by formal decision of the authorising officer using the model for Appointment of opening / evaluation committee.

Composition

The requirements for the opening committee are as follows:

It must be made up of at least “two persons representing at least two organisational entities of the Union institution concerned with no hierarchical link between them". The use of “persons” here rather than “officials" or "other servants” means that seconded national experts or contract agents may be appointed. It can also be concluded that the members of the committee can be chosen from within the same directorate, provided they belong to different units and the responsible authorising officer for the contract is at the Director level.

In representations and delegations or in units isolated in a Member State, if there are no separate entities, the obligation to use organisational entities with no hierarchical link between them does not apply.

Duties and tasks

In order to prevent any conflict of interest, the persons appointed are bound by the obligations set out in Article 61 FR. Accordingly each member of the opening committee should sign a declaration of absence of conflict of interest before opening the tenders. Any member discovering that he has a conflict of interest is under an obligation to inform the authorising officer immediately.

In the case of open procedures, the opening committee must check the credentials of the persons wishing to attend as representatives of tenderers. These persons must sign an attendance list which will be annexed to the record of the opening.

The date of receipt of each tender is checked against the deadline set in the procurement documents. In case of doubt, a tenderer may be asked to provide proof of dispatch. One or more members of the opening committee will initial the proof of the date and time of receipt for each tender.

Tenders **received before the deadline and in a closed envelope** are deemed to be in order and are opened; however, in a procedure in two steps, any tender from an operator who has not been invited to submit a tender is rejected.

In cases where two separate envelopes are required (one for the technical offer and the other for the financial offer) both must be opened.

Where the opening is public, the names of the operators who have submitted a tender closed and on time are read out in the presence of the tenderers or their representatives.

If the contract is awarded based on the lowest price or lowest cost method, the prices or costs shown in the tenders found to be in order are read out loud.

After the opening, one or more members of the committee will initial either each page of each tender (the usual solution) or the cover page and each page of the financial offer, in which case the integrity of the original tender is guaranteed by any appropriate technique applied by a department independent of the authorising department (except in the representations and local units and where there are no separate entities).

After the opening session

It is not compulsory to scan full tenders and register them in ARES. At least the opening record should be registered in ARES and this is sufficient. It is also important to know where tenders are stored after opening. The Secretariat General has provided instructions on recording and scanning of tenders in ARES.

Tenders submitted without respecting the deadline should be stored or sent back to the economic operator if requested. A written track of the return ought to be kept.

Tenders suspected of not being in conformity with the tender specifications should still be registered as submitted, provided they meet the two basic conditions (received before date of receipt and integrity preserved).

4.6.3. Reasons for rejection

Since rejection of a tender for not being in order might have legal implications, it should be borne in mind that only the following conditions count: tenders must be received **by the deadline** and must be in a **closed envelope** (Art. 168(3) FR).

The opening committee will under no circumstances consider the quality or completeness of the tenders.

A tender received after the deadline must be rejected without opening it.

A tender received already open must be rejected without examining its contents.

In a procedure in two steps, any tender from a tenderer who has not been invited to submit a tender must be considered not to be in order.

The following (non-exhaustive) list cannot be considered grounds for rejection:

- the tender was sent in a single envelope rather than the two envelopes required, provided the envelope is sealed (the confidentiality of the tender has been preserved);
- only one copy of the tender was sent, instead of the three (or more) required;
- the tender combines the technical part and the financial part;
- the tender has not used the requested standard presentation; However, the limitation of pages is possible as long as it is applied equally to all tenderers (i.e. there is no breach of the equal-treatment principle). This limitation must be included in the tender specifications, must be applied equally to all tenderers, and must allow the candidates to present a comprehensive offer, i.e. the limitation of pages is not so strict that makes it impossible to present an appropriate offer according to the requirements of the tender specifications.

- certain parts of the tender are clearly missing or the tender is clearly totally unrealistic;

– the tenderer does not have access to the market (see Chapter 4.3.1.6);

If the tenderer has failed to sign the tender, the signature can be requested subsequently.

When a tender has to be rejected, the tenderer must be notified in writing. There is no formal decision on rejection by the responsible authorising officer, the opening report is sufficient. The responsible authorising officer must inform tenderers of the reason for rejection of their tender immediately after the opening session. There is no standstill period.

4.6.4. Opening record

A record of the opening of the tenders is drawn up and signed by the persons in charge of opening.

The record contains:

- the names of the tenderers (specifying the name of each participating entity in the case of a joint tender);
- the tenders which comply or not with submission rules, giving the reasons for rejection by reference to one or the other of the two conditions provided above (see model Record of opening of tenders);
- in case of award on the basis of lowest price or lowest cost, the price or cost of each opened tender.

If a tenderer does not attend the opening session and subsequently requests the name of competitors, it should be provided with this information or with a copy of the opening record (without the names of the persons in charge of the opening phase).

4.7. Evaluation phase

4.7.1. Evaluation of tenders

All opened tenders are evaluated. This means that all tenders for a given contract must be read and evaluated by all evaluators in order to guarantee equal treatment and non-discrimination.

The evaluation is based exclusively on the exclusion, selection and award criteria set out in the procurement documents with nothing added, removed or altered. For a description of the criteria, see Chapter 4.3.1.9 to Chapter 4.3.1.11. For procedures in one step, the three categories of criteria will be evaluated in no particular order or in a pre-defined order, as announced in the tender specifications. Compliance with the minimum requirements in the procurement documents will also be verified.

For procedures in two steps, the exclusion and selection criteria will be evaluated at the stage of evaluation of the requests to participate (see Chapter 4.5.3) and the award criteria at the stage of the evaluation of tenders.

In order to ensure, during the evaluation of the tenders in procedures in one step, that there is no danger of confusion in application of the exclusion, selection and award criteria, it is advised to separate clearly these phases in the evaluation process and also to ensure that the evaluators examine only the relevant documents for each phase. The principles governing the distinction between the criteria (see Chapter 4.3.1.13) also apply to evaluation.

In order to help the evaluators in their work, it may be useful to lay down a method for the evaluation, and it is strongly recommended that this be done before the tenders are opened in order to rule out any dispute. The method must in no way alter or adjust the criteria set in the procurement documents.

It is important to keep timing under control and to reserve evaluation time in advance. If the evaluation lasts for too long (i.e. several months), the validity period of tenders may elapse before signature of the contract. In this case, the contracting authority will have to request all tenderers whether they accept to prolong the validity of their tender (including their price) beyond that originally intended.

Tips for the evaluations

It is good practice for the authorising officer to draft an evaluation method to be communicated to the evaluators before tenders are received. It may include the following aspects:

- Evaluators should receive, read and understand fully the procurement documents (including possible corrigenda, additional information and all questions and answers) before the evaluation starts. They should be given an evaluation schedule (meetings, deadlines). There is always a holiday period (Christmas, Easter or summer) to be taken into account when scheduling an evaluation. Details on organisation should be provided (e.g. use of a reading room, copies provided to evaluators, reading of tenders required prior to the meeting, with or without individual assessment sheets…).
- A meeting may also be organised by the authorising officer to provide details (e.g. difference between selection and award criteria, criteria cannot be modified, tenders must be assessed against the tender specifications but not compared with each other, etc.), answer any questions the evaluators may have and clarify their availability and deadlines for evaluation.
- Evaluators may evaluate the technical offer without having access to the financial offer, in order not to be influenced by the price in the technical award criteria.
- When tenders are evaluated by a committee (see Chapter 4.7.2), there should be no specific role of the members of the evaluation committee (president, secretary, voting/non-voting…) since this is not foreseen in the legislation.

- Individual assessment sheets may be provided to ease and frame the work of the evaluators. These should be considered as working documents only. They are not part of the evaluation report and should not be attached to it.
- Information on the use of marks should be clarified ex ante as this element depends very much on the education system the evaluator grew up with (some evaluators would use the whole range of marks, others not, the same mark does not have the same value for all evaluators, and this is unavoidable in an international institution).
- Evaluation should start with agreeing comments on each criterion of each tender, and marks will follow. It is always easier to accept a modification of initial comments than initial marks.
- The discussion between evaluators should enable to reach a consensus opinion on each criterion of each tender (no voting, no average!).
- The evaluation report should be drafted during the evaluation meetings to ensure consensus on the comments. The text should also be checked to ensure the use of neutral language and the full coherence of the comments and marks for each tender and between the tenders.

4.7.2. Evaluation committee

For all contracts with a value as from the Directive thresholds, tenders are evaluated by an evaluation committee appointed by the responsible authorising officer (Art. 150(2) FR).

The responsible authorising officer may decide that the evaluation committee is to evaluate only the award criteria and that the exclusion and selection criteria are to be evaluated by other appropriate means (e.g. one or two persons) guaranteeing the absence of conflict of interest. It is recommended to use this set up because it alleviates the workload of the evaluation committee and ensures strict separation between selection and award criteria. In this case, the evaluation committee will not evaluate the requests to participate in a procedure in two steps.

The evaluation committee is appointed by formal decision of the authorising officer using the model for Appointment of opening / evaluation committee.

The evaluation committee must be made up of at least “three persons representing at least two organisational entities of the Union institutions with no hierarchical link between them, at least one of which does not come under the authorising officer responsible”. The use of “persons” here rather than “officials or other servants” means that seconded national experts or contract agents can be members of the evaluation committee. In principle, people on contracts from temporary agencies ("intérimaires") can be members too but this is not recommended because they are normally within the Commission for a limited period of time and often for menial tasks, so this may cause problems of continuity in the service (evaluations are sometimes long) and level of expertise. In addition, they are often in fact directly employed by private companies, and as such they, as representatives of an external private party, would have access to internal evaluation procedures.

Members of the committee can be chosen from within the same directorate, provided they belong to different units and responsible authorising officer for the contract is at unit's level. The main thing is that the two entities must be independent of each other and that one of them at least must be independent of the authorising officer. The members can also come from different institutions, not necessarily from the institution carrying out the procurement procedure. This can be a useful way to find experts on the subject and should be used for appointment of evaluation committee members on top of the minimum requirements required by the FR on the committee composition .

In cases where there are no separate entities (e.g. in representations, delegations, unit isolated in a Member States, etc.), the obligation to use organisational entities with no hierarchical link between them does not apply.

In the case of interinstitutional procurement, the evaluation committee will be appointed by the authorising officer from the institution responsible for the procedure and its composition will reflect, as far as possible, the interinstitutional character of the procedure.

The evaluation committee may be made up of the same members as the opening committee (if any). However, it is not recommended because the evaluation requires expertise in the subject of the purchase, whereas opening of tenders is a formal procedure requiring no particular expertise.

In order to prevent any conflict of interest, the evaluation committee members are bound by the obligations set out in Article 61 FR. Accordingly, each member should sign a declaration before evaluating the tenders (see the declaration of absence of conflict of interest and confidentiality).

The authorising officer must ensure appropriate means guaranteeing the absence of any conflict of interest to evaluate the exclusion and selection criteria if that responsibility was not given to the evaluation committee. In practice the evaluators designated should also sign the declaration of absence of conflict of interest and confidentiality.

There may be other persons present at the meetings of the committee such as an observer who checks that the procedure is followed according to the rules. This function of observer is part of management supervision to ensure that the implementation of activities is running efficiently and effectively while complying with applicable provisions (see Internal Control Principle 10). An observer is not appointed as member of the evaluation committee and does not evaluate tenders. Additionally, the observer's activities are not documented in the evaluation report but reported in the context of internal control activities. Other administrative support staff (handling correspondence with tenderers, preparing evaluation documents, helping on formal aspects of the evaluation, etc.) are not evaluators as such and should not be appointed as members either.

The committee gives an advisory opinion, and it is for the authorising officer to take the decision. If the decision diverges from the committee's opinion, the exclusion, selection and award criteria must still be complied with.

For further information on conflict of interest see Chapter 1.6.

4.7.3. External experts in evaluation

External experts are persons not working for the contracting authority that may assist with the evaluation. They are appointed *ad personam* by decision of the authorising officer responsible. They must therefore be natural persons (see Chapter 1.5.3).

It is however possible to contract the services of external experts under a framework contract, provided the framework contract covers this type of tasks. The experts may be staff of the contractor or sub-contractors. It does not matter whether the experts providing services under existing contracts are delivering them *extra muros* or *intra muros*, because they are considered as outside experts in the meaning that they are not employed by the contracting authority.

When external experts' services are contracted under a framework contract, the tasks are performed under the responsibility of the contractor and the payment of the services is made

to the contractor according to the provisions of the contract. The authorising officer responsible must ensure that these external experts satisfy the obligations concerning conflict of interests and confidentiality. For this purpose, each external expert must sign a declaration of non-conflict of interests as well as a code of conduct. These must be attached to the specific contract concluded with the contractor under a framework contract or to the expert's contract if there is no framework contract involved.

The models are available in Annex II and III of the model contract for external experts on Budgweb.

External experts are not members of the evaluation committee. Therefore they should not participate in the meetings of the committee (except on request of the evaluators for clarifying their opinion if necessary) and cannot be involved in the drafting of the evaluation report. The role of external experts is to provide an opinion in writing about all the tenders received, but limiting their opinion to their field of expertise. External experts do not sign the evaluation report including the award recommendation by the committee.

For further information see the Circular on external experts.

4.7.4. Contacts with tenderers

After the tenders have been opened, contacts with tenderers must remain exceptional and can be made only on the initiative of the contracting authority. Such contacts can take place only in the following circumstances:

- if obvious clerical errors in the drafting of the tender need to be corrected or specific or technical elements require confirmation;
- to request additional information or documents on exclusion or selection criteria.

If the tenderers contact the contracting authority, they should be reminded that they are not allowed to do so as indicated in the invitation to tender, and no information on the evaluation results or timeline should be given. If the contact at the initiative of the tenderer was not made in writing, it should be documented in a note to the procurement file.

In the above-mentioned situations the authorising officer or the evaluation committee should take the initiative of contacting the tenderer in writing exclusively, but any such contact must in no way alter the terms of the tender. For any contact which does not take place in writing, a "note for the file" must be produced when the contact takes place.

These contacts are laid down in Article 169 FR.

In line with good administration, it is obligatory to contact the candidates or tenderers to ask for missing information or documents in relation to exclusion or selection criteria or missing signatures. The absence of contact in these cases must be duly justified and documented by note in the procurement file (Article 150 FR).

For obvious clerical errors in the tender itself, the contracting authority cannot correct them on behalf of the tenderer without its prior written consent. The principle of equal treatment demands that if one tenderer is asked to provide missing information or documents or clarifications or to correct obvious clerical errors, the same must apply to all tenderers in the same situation. In order to avoid any problems, questions or requests sent to a tenderer must be very precise: they must be purely factual (e.g. request specific missing documents by referring to the tender specifications, request confirmation about the correction of a clerical error in wording or calculation). Tenderers should not be given an opportunity to provide extra information that may modify the technical offer or the price. Such contacts should leave a reasonable time limit for response, which should be short (e.g. 2 or 3 working days) since all information was supposed to be included in the initial tender and the correction of errors requires only confirmation of an obvious mistake.

The request should remind the tenderer that the tender submitted cannot be altered. Requests for "clarification" must not lead to any amendment of the terms of the tender. This means that tenderers' replies must serve solely to provide the contracting authority with clarification of the elements already mentioned in the tender, without altering the content of

the tender. It should be borne in mind at this point that most doubts could be removed if the tender documents contained clear instructions for tenderers, in particular a detailed summary of the different documents required for evaluation of the tenders against the criteria and, if applicable, a clear price schedule for the presentation of the financial offer.

There can be no negotiation of the tenders, except in procedures where negotiation is allowed (see Chapter 4.8). In all cases, there can be no negotiation of the procurement documents.

4.7.5. Reasons for rejection

In the opening phase, tenders are to be considered irregular and therefore rejected if they do not comply with the requirements for submission (see Chapter 4.6.3).

In the evaluation phase, tenders must be rejected in the following cases:

Unsuitable tender

- The tender is irrelevant to the subject of the contract;
- The tenderer is in an exclusion situation under Article 136(1) FR;
- The tenderer does not meet the selection criteria.

Irregular tender

- The tender does not comply with the minimum requirements specified in the procurement documents (this includes the case of incomplete [redacted]
- The tenderer has misrepresented or failed to supply the information required as a condition to participate in the procurement procedure (Article 141(1)(b) FR);
- The tenderer was previously involved in the preparation of the procurement documents where this entails distortion of competition that cannot be remedied otherwise (Article 141(1)(c) FR). Prior to such exclusion, the economic operator must be given the opportunity to prove that its prior involvement is not capable of distorting competition (see Chapter 1.6 and Chapter 4.3.1.2).
- The price of the tender is abnormally low (see Chapter 4.7.5.1).

Unacceptable tender

The price of the tender exceeds the maximum amount set in the procurement documents or the contracting authority's maximum budget as determined and documented[18] prior to the launching of the procedure;

- The tender fails to meet the minimum quality levels for award criteria; [redacted]

Depending on the order of evaluation of the three categories of criteria, the tenderer will receive feedback on all criteria evaluated before the rejection stage (principle of transparency). For instance, if the selection criteria have been evaluated after the award criteria and the tenderer is to be rejected because it does not meet the selection criteria, it will be informed of the ground for rejection (unsuitable tender: tenderer not meeting the selection criteria) and will receive feedback on the evaluation of the award criteria.

In cases where the ground for rejection of the tender is not linked to the award criteria (e.g. non-compliance with minimum requirements) there is no evaluation of the tender as such. The tenderer will be informed of the ground for rejection without being given feedback on the content of the tender other than on the elements justifying the rejection.

Tenders may be rejected if tenderers do not accept the terms of contract or other conditions contained in the procurement documents and seek to impose their own, but only after the contracting authority has contacted them in writing to warn them that this is a ground for rejection.

[18] Option applicable only when the maximum budget is published.

A tender which does not fall under any of the above defined grounds for rejection is admissible, i.e. it is ranked according to the formula announced in the procurement documents.

To sum up:

Definition	Annex 1 FR	Reason
Unsuitable	Point 11.2	- Irrelevant tender - Exclusion under Article 136(1) FR - Non-selection
Irregular	Point 12.2	- Non-compliant with minimum requirements - Received late - Rejected under Article 141(1)(b) and (c) FR (misrepresentation and distortion of competition) - Abnormally low
Unacceptable	Point 12.3	- Price above maximum - Minimum quality level not reached
Admissible	Point 29.3	- Suitable - Not irregular - Not unacceptable

The above reasons for rejection and their respective legal grounds apply to all procurement procedures.

Tenders cannot be rejected if:

- missing information or documents relating to the exclusion or selection criteria can be requested, or obvious clerical errors can be corrected without going beyond the contacts authorised (see Chapter 4.7.4);
- they contain the information requested, but not on the standard form(s);
- the price exceeds the estimated amount indicated, without being of a significantly different magnitude;
- they are submitted as the basic tender, complying with the tender specifications, together with unauthorised variants (which must be rejected).

4.7.5.1. Abnormally low tenders

If the price or cost of a tender appears to be abnormally low, before rejecting tenders for this reason alone, the contracting authority must request in writing whatever explanations it considers appropriate on the components of the tender and check, taking due account of the reasons given by the tenderer, whether the tender can be considered regular (Point 23 Annex 1 FR).

The explanations requested and observations provided by the tenderer could relate to:

(a) the economics of the manufacturing process, of the provision of services or of the construction process;

(b) the technical solutions chosen or exceptionally favourable conditions available to the tenderer;

(c) the originality of the tender;

(d) compliance of the tenderer with applicable obligations in the fields of environmental, social and labour law;

(e) compliance of subcontractors with applicable obligations in the fields of environmental, social and labour law;

(f) the possibility of the tenderer obtaining State aid in compliance with applicable rules.

The tender may be rejected only where the evidence supplied does not satisfactorily account for the low level of price or cost offered.

The tender must be rejected where the contracting authority has established that it is abnormally low because it does not comply with applicable obligations in the field of environmental, social and labour law.

The tender may be rejected where the contracting authority has established that it is abnormally low because the tenderer has obtained State aid, only if the tenderer is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 TFUE.

4.7.5.2. Non admissible tenders

A tender is not admissible if it is unsuitable, irregular or unacceptable (see Chapter 4.7.5).

Grounds must be given for any decision to reject a tender. As such a, decision may be challenged it is important to define all the conditions clearly in the procurement documents.

If no tender is admissible, the procedure should be closed and, if necessary, restarted. Provided the original procurement documents are not substantially altered, the following procedures without prior publication of a contract notice may be used:

- a negotiated procedure where no suitable tenders were received in the initial procedure (Point 11.1 (a) Annex 1 FR);
- a competitive procedure with negotiation where no regular or acceptable tenders were received in the initial procedure if it includes all and only the tenderers of the initial procedure who satisfy the exclusion and selection criteria, except those who submitted a tender declared to be abnormally low (Points 12.1 (a) and 12.4 Annex 1 FR).

See also Chapter 3.5 and Chapter 3.8.

4.7.5.3. Non-selection of tenderers

The non-selection of tenderers requires some caution. First, it is possible to eliminate tenderers on this basis if the selection criteria themselves are very clear (for transparency and equal treatment reasons). Second, it is compulsory for the contracting authority to contact the tenderer to ask for missing information or documents (e.g. CVs, financial statements…) before rejection (Article 151 FR). This is for reasons of proportionality (eliminating a tender because a document is missing would be disproportionate) and good administration. Indeed after leaving a few extra days to provide the missing information, it will be difficult for the tenderer to contest the rejection. If the contracting authority decides to reject on the grounds of selection without having contacted the tenderer, it must duly justify it in the procurement file.

4.7.5.4. Professional conflicting interest

The contracting authority may reject tenderers under the selection criteria for the technical and professional capacity in case of professional conflicting interest that may affect the performance of the contract, provided this was clearly announced in the tender specifications. Typical examples would be an audit firm that would audit a company for which it has certified the accounts, or a contractor which carries out the evaluation of a project which it has itself carried out. In these cases, the contracting authority may decide to reject the tender, considering that for the contract in question, the tenderer does not have the professional capacity to perform according to the expected quality standards.

This conflicting interest is different from the situation where contractor involved in the preparation of procurement documents can be rejected from the subsequent procedure if its participation entails a distortion of competition that cannot be remedied otherwise (Article 141(1)(c) FR).

For more information on conflict of interests in procurement see Chapter 1.6.

4.7.5.5. Rejection from a given procedure

A contract for a given procedure may not be awarded to economic operators who:

- are in one of the situations leading to exclusion defined in (Article 136 FR) (see Chapter 4.3.1.9 Exclusion criteria).
- have misrepresented the information required by the contracting authority as a condition for participating in the procedure or failed to supply this information;
- were previously involved in the preparation of procurement documents where this entails distortion of competition that cannot be remedied otherwise (see Chapter 1.6 and Chapter 4.3.1.2).

In the case of **misrepresentation in supplying the required information**, the candidate or tenderer is not required to submit any specific evidence. The authorising officer or the evaluation committee must check that the information provided is complete in the light of the requirements of the procedure and, if necessary, identify any false statements. Rejection from the given procedure on this ground may have serious consequences for the operators concerned as it may result in administrative and financial penalties based on grave professional misconduct (Article 136(1)(c)(i) FR).

4.7.6. Consultation of the early detection and exclusion system

The contracting authority is required to consult the early detection and exclusion system (EDES) when checking exclusion criteria, before taking an award decision and before signing a contract.

The check in the EDES must cover intended contractors, the legal entities involved in a joint tender and possibly envisaged subcontractors depending on the risk assessment connected with subcontracting (taking into account, for example, the value of the part to be subcontracted and the principal/ancillary character of the services/supplies/works). It also applies to the decision on authorisation of the subcontracting to be taken during implementation of the contract. The obligation to consult the EDES may also extend to natural persons with powers of representation, decision-making or control over the entities concerned, particularly in case of doubt on one of these persons.

In addition, any natural or legal person, group or entity listed in accordance with a Council Regulation imposing financial restrictions relating to the common foreign and security policy[19] must be excluded from the contract award as well. The list is not automatically included in the EDES, thus, in case the contract is to be awarded to an economic operator from outside of the EU it is necessary to check the *Consolidated list of persons, groups and entities subject to EU financial sanctions* at http://eeas.europa.eu/cfsp/sanctions/consol-list_en.htm; advice can be obtained from the Foreign Policy Instrument Service (FPI):
Functional mailbox: FPI RELEX SANCTIONS (relex-sanctions@ec.europa.eu)
Tel: +32 (0)2-29-58829

For more information see https://myintracomm.ec.testa.eu/budgweb/EN/imp/edes/Pages/edes.aspx.

4.7.7. Evaluation report

A report on the evaluation of exclusion, selection and award criteria and ranking of tenders must be drawn up, dated and signed by all the evaluators if no evaluation committee was

[19] E.g. Council Regulation (EC) No 881/2002 of 27 May 2002, OJ L 139, 29.9.2002, p. 9, plus the amendments and updates thereto.

appointed or all members of the evaluation committee (and persons evaluating the exclusion and selection criteria if those roles are separate). It must be kept for future reference. For procedures in two steps, a separate evaluation report will be drawn at the stage of the evaluation of respectively the requests to participate and the tenders.

The evaluation should contain at least the:

- working method of the evaluation (e.g. date of meetings);
- name and address of the contracting authority;
- the subject of the contract or framework contract;
- names of candidates or tenderers rejected from the procedure based on Article 141 FR (see Chapter 4.7.5.5) or by reference to the selection criteria ;
- tenders rejected and the reasons for their rejection by reference to:
  - (i) non-compliance with the minimum requirements set in the procurement documents;
  - (ii) not meeting the minimum quality levels;
  - (iii) tenders found to be abnormally low;
- names of the candidates and tenderers that passed the exclusion criteria;
- names of the candidates and tenderers selected;
- tenders to be ranked with the scores obtained and their justification;
- name of the contractor proposed and reasons for this choice and, if known, the proportion of the (framework) contract that the contractor intends to subcontract;
- value of the contract or maximum value of the framework contract.

In the case of a joint tender or request to participate, the report must indicate the name of each participating entity.

As the record serves as a reference for the subsequent stages of the procedure and in the event of a dispute, its content should be exhaustive and provide all relevant details. Indeed, the final evaluation report signed by all members of the committee is the only document providing grounds for the outcome of the evaluation and justifying the award decision by the responsible authorising officer. No other justification can be provided a posteriori. In particular, precise and adequately developed arguments must be set out for cases of rejection (see Chapter 4.7.5) and for the marks and comments given for the technical quality of each tender when quality award criteria are applied (including when quality thresholds have been set and were not reached).

For the comments on the award criteria, which will be the only feedback provided to tenderers, it is recommended to:

- not just describe the tender, but actually comment on the quality of the content;
- make factual and precise reference to parts of the tenders where relevant and in particular for cases leading to rejection of the tender (e.g. non-compliance with the minimum requirements or quality below the minimum level set);
- pay attention to the relevance of comments (e.g. no confusion between selection and award criteria, comments relating only to aspects covered by the criteria); for instance avoid using words such as "CVs, profile, qualification, skill, experience, expertise, knowledge of the subject, technical capacity, reference to previous projects…" since these clearly refer to selection criteria; also avoid inappropriate or irrelevant comments such as appreciation of the performance of previous contracts;
- cross-check the consistency of comments and marks not only for each tender but also across different tenders (guarantee of equal treatment);
- if individual evaluation sheets have been used, these should not be kept after the evaluation is concluded and in any case not attached to the evaluation report, because the report is based only on the consensus of the evaluation committee, and individual members may change their mind during the evaluation process.

The evaluation report is a document accessible to the public after the signature of the contract (see Chapter 4.12). For this reason too, special attention should be given to careful preparation of the report.

In some cases the content of the evaluation report and the award decision may be merged into a single document signed by the responsible authorising officer (see Chapter 4.9).

See the model evaluation report.

[redacted]

4.9. Award decision

After the evaluation has been completed and the evaluation report has been produced, the authorising officer responsible draws up the reasoned award decision (Point 30.3 Annex 1 FR).

The award decision must contain at least:

- an approval of the evaluation report (see Chapter 4.7.7);
- the name of the chosen contractor and the reasons for that choice by reference to the pre-announced selection and award criteria, including where appropriate the reasons for not following the recommendation provided in the evaluation report;
- value of the contract or maximum value of the framework contract;
- circumstances justifying the use of a competitive procedure with negotiation, a negotiated procedure without prior publication of a contract notice or a competitive dialogue; in particular, the award decision must duly justify the use of the negotiated procedure for a contract that can be awarded only to a particular economic operator (Point 11.1 (b) Annex 1 FR) (see Chapter 3.8), since the award of the contract may be challenged if the conditions are not fulfilled;[20]
- where appropriate, the reasons why the contracting authority has decided not to award the contract.

The award decision is a formal instrument (see the Model award decision) by which the authorising officer takes responsibility for the choice of contractor, following the recommendation indicated in the evaluation report, whatever the value of the contract. If, for duly justified reasons, the authorising officer does not follow the recommendation of the evaluation committee, he/she must decide how to proceed further (request the evaluation committee to review its recommendation, appoint a new evaluation committee, etc.).

In the case of an inter-institutional procurement procedure, the award decision is taken by the contracting authority responsible for the procedure.

In the case of contracts with lots, the award decision may cover all lots or only some of them, if some of the lots have been evaluated faster. Also, if one lot has been cancelled, this can be done independently from the pursuit of the procedure for other lots.

The responsible authorising officer may merge the content of the evaluation report and award decision into a single document and sign it in the following cases:

- for procedures for contracts of a value below the Directive thresholds where only one tender was received;
- when reopening of competition within a framework contract where no evaluation committee was nominated;
- for the following cases of negotiated procedures without prior publication of a contract notice where no evaluation committee was nominated:
  - extreme urgency (Point 11.1 (c) Annex 1 FR)
  - repetition of similar services or works (Point 11.1 (e) Annex 1 FR).
  - additional supplies (Point 11.1 (f)(i) Annex 1 FR)
  - supplies quoted and purchased on a commodity market (Point 11.1 (f)(iii) Annex 1 FR)
  - legal services (Point 11.1 (h) Annex 1 FR)

[20] See case Fastweb C-19/13: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d5d04849dfa8a34e969171e13b38db2c83.e34KaxiLc3eQc40LaxqMbN4ObN8Te0?text=&docid=157520&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=540588

4.11. Notification of the outcome of the procedure

4.11.1. Information letter

The contracting authority must inform candidates and tenderers, simultaneously and individually, by electronic means of decisions reached concerning the outcome of the procedure as soon as possible at the following stages (Art. 170(2) FR and Point 31 Annex 1 FR):

- after the opening phase for requests to participate received after the deadline for procedures in two steps;
- after the opening phase for tenders received after the deadline or received already open for procedures in one step;
- after the selection phase for candidates who failed to meet the exclusion and selection criteria for procedures in two steps;
- after the award decision for all procurement procedures and for the award of specific contracts with reopening of competition, specifying in each case the grounds for the decision.

It is recommended to include the full reason motivating the decision (marks and comments per criterion, final score and ranking of the tender concerned exactly as written in the evaluation report) in order to avoid that the tenderer requests more details later on.

The information provided to the successful tenderer must specify that the decision notified does not imply any commitment on the part of the contracting authority.

As from the Directive thresholds, the notification letter should require the successful tenderer to submit, within a given time limit, evidence that it is not in exclusion situation and evidence of selection if not requested before, as stated in the ESPD or declaration on honour (see Chapter 4.3.1.18 and Chapter 4.3.1.19). The evidence submitted should be checked.

In order to save time, the draft contract for signature may be attached as a pdf file to the electronic notification, indicating to the future contractor to print it and sign it in two copies without making any changes and send them back to the contracting authority (see Chapter 4.13). At reception, the contracting authority should check that the contract has not been modified before signature by the authorising officer.

4.11.2. Standstill period

The contract cannot be signed for 10 days, counting from the day after simultaneous dispatch of the notification by electronic means to all tenderers (successful and unsuccessful) (Article 175(2) and (3) FR, Point 35.1 (a) Annex 1 FR). Only after the end of this "standstill period" may the authorising officer sign the contract. However if, due to technical reasons, the dispatch is made on paper, the standstill period is 15 days (Article 175(3) FR). If the electronic communication fails, the contracting authority should re-send the notification immediately by post, in which case the 15 day period will apply.

The standstill period concerns all contracts as from the Directive thresholds. In the case of a negotiated procedure without prior publication of a contract notice for works, supplies or services provided only by a particular economic operator (Point 11.1 (b) Annex 1 FR), the standstill period of 10 days is applicable and starts the day after the contract award notice is published in the OJ S. It is therefore important to take this period into account when scheduling the procurement procedure.

It is not necessary to wait for the standstill period before signing the contract in the following cases (Point 35.2 Annex 1 FR):

– any procedure where only one tender has been submitted;

– negotiated procedure without prior publication of a contract notice under Point 11.1 Annex 1 FR (except 11.1 (b) – see above).

4.11.3. Means of redress

The notification sent to the rejected or unsuccessful candidates or tenderers must refer to the possibility of redress, with the type of redress, the body before which it can be brought, and the time limit (Article 133(2) FR). Candidates or tenderers may lodge a complaint to the European Ombudsman for maladministration within two years of notification or bring an action for annulment of the decision under Article 263 TFEU before the General Court of the European Union within two months of notification, as indicated in the model notification letters.

Care must be taken not to generate legitimate expectations on the part of the successful tenderer. The letter of notification to the successful tenderer must always include a reference to the content of Article 171 FR to the effect that the contracting authority may, until such time as the contract has been signed, cancel the procurement procedure without the successful tenderer being entitled to any compensation.

Where appropriate, contracting authorities may suspend signing of the contract for additional examination if justified by the requests or comments made by unsuccessful tenderers during the standstill period or any other relevant information received during that period. In particular, if an unsuccessful tenderer asks for comparative advantages of the winner and the contracting authority responds only at the end of the standstill period, it is recommended to delay contract signature a little to ensure that the information provided does not trigger a legitimate complaint (e.g. error in evaluation).

In the event of suspension of standstill, all the tenderers must be informed within three working days following the suspension decision. The authorising officer should take appropriate action. Depending on the situation, this may consist in the correction of the award decision if there was a mistake or a new element brought to the attention of the authorising officer that would prevent the award of the contract to the winner, or reconvening the evaluation committee in case of factual error in the evaluation, or else appointing a new committee if there were serious irregularities connected with the functioning of the previous evaluation committee.

If the initial award decision needs to be modified following the additional examination, the authorising officer should take a new award decision and it should be notified to all tenderers. This notification starts a new standstill period.

4.12. Request for additional information

Requests from tenderers

If the contract or framework contract is awarded, the unsuccessful tenderers who are not in an exclusion situation (Article 136 FR), who are not rejected from the procurement procedure for misrepresentation of information or distortion of competition (Article 141 FR) and whose tender is compliant with the procurement documents may request in writing information about the **name of the winner** and the **characteristics and relative advantages** of the winning tender. The **total price of the winning tender or alternatively if appropriate the contract value** as well as the breakdown of quality marks and comments as recorded in the evaluation report should be disclosed (Art. 170(3)(a) FR and Point 31.2 Annex 1 FR).

The contracting authority must provide the above information **as soon as possible** and in any case within 15 days of receiving the request.

Given that criteria may be applied in no particular order, it is possible to reply to requests from tenderers whose selection has not been verified.

For the specific case of framework contract in cascade, the second ranked in the cascade may ask for comparative advantages of the tender ranked first, but not about the tender ranked third and so forth if there are more than three contractors in the cascade.

[redacted]

For specific contracts awarded following reopening of competition, the unsuccessful contractors can ask for the name of the winning contractor but not for the characteristics and relative advantages of the winning tender and the price paid. The reason is that the receipt of such information by parties to the same framework contract each time competition is reopened might prejudice fair competition between them.

Requests from members of the public

- On the basis of the Code of Good Administrative Behaviour, any person may request information, only after signature of a contract.
- On the basis of Regulation 1049/2001 and Commission Decision 2001/937 implementing it, anyone may request access to documents connected with a procurement procedure, only after signature of the contract.
- On the basis of Regulation 1367/2006, anyone may request access to environmental information related to the procurement procedure only after signature of the contract.

Requesting parties have no obligation to state the legal basis of the request.

In all cases, a reply must be provided within 15 days.

For further information see the explanatory note on access to information and documents related to tender procedures.

4.13. Signature of the contract

Contracts can only be signed after the standstill period has expired, unless standstill is not applicable (see Chapter 4.11.2)

The standstill period does not prevent the signature of the contract by the successful tenderer provided that the contracting authority does not sign before the end of the standstill period.

Signatures prove the agreement of the parties with the content of the contract including reference to other documents (in annex to it or not). This is why contracts must be signed by an authorised representative of the contractor and by the responsible authorising officer. The signatories must be the persons identified at the beginning of the contract. It is therefore necessary to check whether the person who signs on behalf of the contractor is authorised to do so (Directive 2009/101/EC obliges legal persons to advertise the names of their authorised representatives). The authorising officer must check the identity of the signatory. These authorised representatives may name other persons to sign on their behalf, in which case the relevant power of attorney must also be checked.

Direct contracts correspond to legal commitment and must be preceded by a budgetary commitment. Framework contracts do not necessitate a budgetary commitment before signature; this only comes before signature of specific contracts or order forms.

If the validity of the tender has expired after the award decision is notified but before contract signature, it is still possible to sign provided the awarded tenderer agrees.

In order to ascertain the full content of the contract and its integrity for both parties, it is recommended to send the full contract with annexes for signature. If the annexes are voluminous, at least the special and the general conditions should be sent and they should include a full reference to all the annexes. It is recommended to register the full contract with its annexes (tender specifications) in ARES. The contractor's tender may be scanned and attached in ARES if this is not too cumbersome, otherwise it is also possible to refer to the stored original if needed. The decision not to send back voluminous annexes should be based on a risk assessment of the necessity to prove the actual content of the contract in case of dispute.

The following standard signing procedure is recommended: the contracting authority sends the contractor two original copies of the contract (or more because there are as many original copies as there are signatories to the contract usually), initialled and accompanied by a cover letter (it may be sent together with the award notification letter, to save time). Pages should be numbered. Each page must be initialled for security reasons, preferably in a colour other than black, so that original pages can be easily identified. The initials are only intended to guarantee integrity of the contract, not its signature, so initialling may be carried out by someone other than the authorising officer. It is useful that each page bear the contract number, brief contract title and page number. The letter should state that, at this stage, no changes may be made to the contract and that the two signed original copies should be returned by a set date, beyond which the contracting authority may refuse to sign the contract in question. The fact that the contractor signs first provides the contracting authority with greater legal and financial certainty.

The contractor signs the two original copies and sends them to the contracting authority, which then signs them, files one original copy and returns the other to the contractor.

For practical reasons (e.g. simple and non-voluminous contracts), it can be envisaged to attach the contract as a pdf file to the electronic notification, indicating to the future contractor to print it and sign it in two copies without making changes and send them back to the contracting authority. At reception, the contracting authority checks that the contract has not been modified before signature by the authorising officer.

In the case of purchase orders for low value contracts and order forms under framework contracts, the authorising officer may sign first to speed up delivery. The contractor must sign before contract performance starts, for legal and operational reasons, i.e. to avoid being

systematically in a non-compliance situation, receiving invoices while having no contract duly in place, and to ensure that the presumed contractor is indeed available and willing to implement the order form or purchase order as requested from the set starting date. For purchase orders for low value contracts, and order forms or specific contracts under framework contracts, at least an electronic advanced copy of the signed contract should be received as soon as possible by e-mail. The original should be received back at the latest together with the invoice since it is the legal commitment which shall give rise to payment. In any event, the date of signature of the last contracting party is necessary. The date of signature of the first contracting party is purely informative and not opposable in law. If there are fewer dates than signatures, it is assumed that some parties signed simultaneously and the signature date is that of the last signing party.

Contracts in ABAC

ABAC ("Accrual Based ACcounting") is the information system used by the Commission and many agencies for executing and monitoring all budgetary and accounting operations.

All contracts should be registered into ABAC Contract.

For further details, see ABAC on BudgWeb.

Impossibility of concluding a contract with the winning tenderer

In cases where the contract cannot be awarded to the successful tenderer, the contracting authority may award it to the next best tenderer.

Entry into force

Implementation of the contract must not start before the contract is signed.

Lots

If several lots are awarded to the same tenderer, a single contract covering all the concerned lots may be signed.

4.14. Ex-post publicity

4.14.1. Publication of an award notice in the Official Journal

Transparency obligations are laid down in Articles 38 and 163 FR and Points 2.3, 2.4, 3.2 and 3.3 Annex 1 FR.

Award notice

An award notice must be published in the Official Journal for a contract or framework contract as from the Directive thresholds, even if there was no contract notice.

The award notice must be sent to the Publications Office no later than thirty days after the signature of the contract or framework contract.

[redacted]

The contracting authority must be able to provide evidence of the date of dispatch.

For transparency and symmetry reasons, it is recommended to publish an award notice for contracts where a contract notice was published on a voluntary basis, e.g. when using an open procedure for middle value contracts.

In case of cancellation of the procedure, the contract award notice form must also be used (section V.1 for information on non-award).

The notice must be drafted using the form in the instruction on Drafting notice. This instruction sets out the arrangements for transmitting the notice to the Publications Office, which will have it published in the Official Journal, S series, along with best practices and advice on completing the forms online via eNotices. All award notices published are accessible in the TED (Tenders Electronic Daily) database at http://ted.europa.eu.

Exceptions

- No award notice is to be published for specific contracts based on a framework contract of any type, whatever their value.
- Notices relating to contracts based on a dynamic purchasing system may be grouped on a quarterly basis. In this case, the award notice must be sent no later than thirty days after the end of each quarter.
- For buildings contracts (Point 11.1 (g) Annex 1 FR) and contracts declared secret (Point 11.1 (i) Annex 1 FR), a list of contracts awarded with an indication of the subject and value must be sent to the budgetary authority no later than 30 June of the following year. In the case of the Commission, it is annexed to the summary of the annual activity reports.
- No individual award notice is to be published for the following contracts as these are subject to the publication of an annual list on the contracting authority's internet site (see Chapter 4.14.2):
- legal services under Point 11.1 (h) Annex 1 FR;
- financial services or instruments under Point 11.1 (j) and (k) Annex 1 FR;
- public communication networks and electronic communication services under Point 11.1 (l) Annex 1 FR;
- services provided by an international organisation under Point 11.1 (m) Annex 1 FR.

Notice of modification of contract

In case of modification of a contract or framework contract during its duration (see Chapter 5.7.3) with a value as from the Directive thresholds, a notice of modification of contract must be published in the Official Journal.

[redacted]

4.15. Documentation of the procedure

The authorising department must keep a full file of all items relating to each procurement procedure.

A model for this type of file is proposed in the Model public procurement file on BudgWeb. Each heading can include the relevant items (records, notes for the file, etc.).

Supporting documents must be kept for at least five years following the discharge for the budget year in question. However, under the Commission's internal rules[22] documents relating to tender procedures or to the management of contracts have to be archived for at least ten years following signature of the contract or following the last payment by the Commission, respectively; as an exception, tenders and requests to participate from unsuccessful tenderers or candidates have to be kept only for at least five years following signature of the contract. After this minimum period has elapsed, the documents to be sent to the historical archives of the Commission for further conservation (e.g. for 25 years or permanently) will be selected. The remaining documents are to be destroyed.

[22] Common Commission-level retention list for Commission files – first revision of 17/12/2012 SEC(2012)713

[redacted]

the *service-level agreement* used in the field of IT). This possibility must be assessed case by case and, because of its specific nature, could not be included in the standard contracts.

If, following a legal analysis, the authorising department considers that the contractual penalties provided for in its draft contract might be declared unfair, especially before Belgian courts, it must reduce them.

Model letters with means of redress are available on Budgweb.

5.8.5. Reduction of payment

When the output of the contract (supply, deliverable, etc.) is of low quality or not delivered at all, the contracting authority is entitled to reduce payment in proportion to what it has actually received of acceptable quality. This is difficult to do in practice unless the tender specifications or the draft contact provide for details on how this possibility will be used.

Two main aspects must be taken into account:

- the expected quality level of the output must be very precisely defined in the tender specifications, otherwise the rejection of output for low quality will be challenged by the contractor, leading to long discussions and possibly no reduction of price;

NB: If it is required that the quality level of the output is compliant with "commonly accepted standards of the profession", these accepted standards of the profession must be explicitly defined in the tender specifications. In the absence of an explicit definition, the contracting authority would have to demonstrate that the notion of "commonly accepted standards of the profession" refers to obvious and widely known practices, and cannot be ambiguous, misinterpreted or interpreted in various ways.

- a breakdown of the price per output is helpful to estimate the reduction of price; this can be requested in addition to the global price in a financial tender and should strictly be linked to output (i.e. raw data for one country , first interim report covering X topics, etc.) and not to input (man-days, time to gather data).