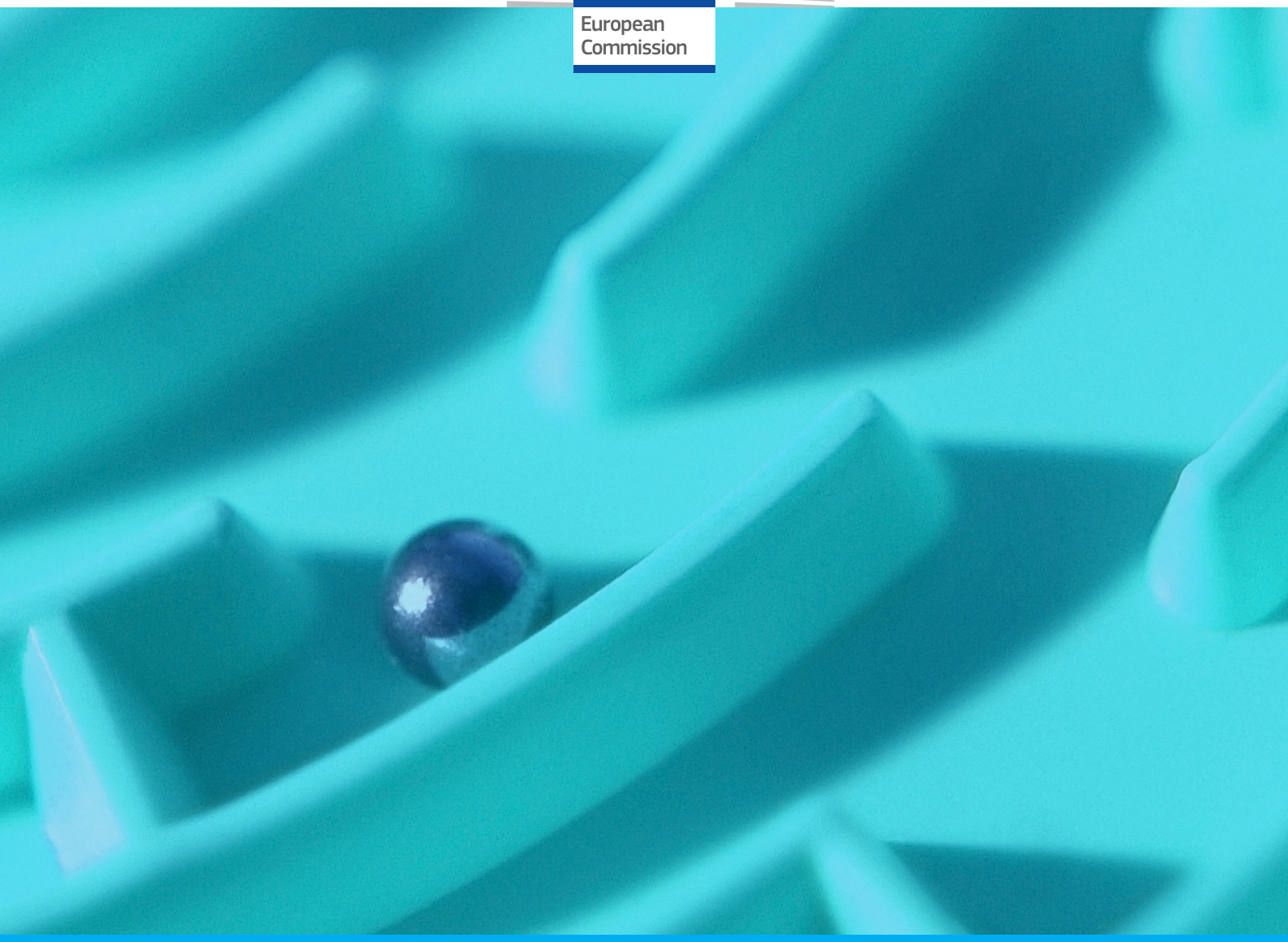
European Commission



PUBLIC PROCUREMENT GUIDANCE FOR PRACTITIONERS

on the avoidance of the most common errors in projects funded by the European Structural and Investment Funds

Europe Direct is a service to help you find answers to your questions about the European Union.

Freephone number (*)**:**

00 800 6 7 8 9 10 11

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

European Commission, Directorate-General for Regional and Urban policy
Competence centre Administrative Capacity Building; Solidarity Fund
Pascal Boijmans
Avenue de Beaulieu 1
1160 Brussels
BELGIUM
E-mail: regio-publication@ec.europa.eu
Internet: http://ec.europa.eu/regional_policy/index_en.cfm

Print ISBN 978-92-79-50323-8 doi:10.2776/578383 KN-02-15-15-570-EN-C
PDF ISBN 978-92-79-51749-5 doi: 10.2776/7059 KN-02-15-758-EN-N

© European Union, 2015
Reproduction is authorised provided the source is acknowledged.
Luxembourg: Publications Office of the European Union, 2015

Printed in Luxembourg



Public Procurement –

Guidance for practitioners on the avoidance of the most common errors in projects funded by the European Structural and Investment Funds

This document has been drawn up by the Commission Services in consultation with the European Investment Bank.

Guidance for practitioners on the avoidance of the most common errors in public procurement of projects funded by the European Structural and Investment Funds

DISCLAIMER

This document contains guidance on how to avoid errors frequently seen in public procurement for projects co-financed by the European Structural and Investment Funds. It is intended to facilitate the implementation of operational programmes and to encourage good practice. It is not legally binding but aims to provide general recommendations and to reflect best practice.

The concepts, ideas and solutions proposed in the guidance are without prejudice to national legislation and should be read and may be adapted taking into account the national legal framework.

This guidance is without prejudice to the interpretation that the Commission may in the future give to any provision of the applicable legislation.

Table of Contents

Table of Contents **4**
Glossary of acronyms **6**
Foreword **7**
How to use this guidance **8**
1. Preparation and planning **11**
1.1 Preliminary scoping 11
1.2 Contract/project management 15
1.3 Developing the business case 17
1.4 Selecting the procedure 17
1.5 Thresholds and advertising 21
1.6 Operational requirements to launch a tender 22
2. Publication **26**
2.1 Publication of EU Notices 26
2.2 Procedures and timetables 27
2.2.1 Minimum time limits 27
2.2.2 Accelerated procedure 29
2.3 Tender documents 30
2.3.1 Setting up selection criteria 30
2.3.2 Setting up Pre-Qualification Questionnaire (PQQ) 31
2.3.3 Setting up award criteria and their weightings 31
2.3.4 Pricing schedule 32
2.3.5 The contract 32
2.4 Specification and standards 33
2.4.1 Specification drafting 33
2.4.2 Standards to be used when drafting specifications 34
2.4.3 Social, ethical and environmental criteria 35
2.4.4 Variants 35
2.5 Obtaining and submitting tenders 36
2.6 Complaints, remedies and liability 36
3. Submission of tenders and selection of tenderers **41**
3.1 Delivery of the tender according to instructions 41
3.2 Follow tendering instructions 41

3.3 Safe custody of tender documents 42
3.4 Opening ceremony 42
4. Evaluation of tenders 44
4.1 Lowest price 44
4.2 Most economically advantageous tender (MEAT) 44
4.3 Dealing with abnormally low tenders 45
4.4 Clarifications 45
4.5 Post tender negotiations 45
4.6 Evaluation Committee decision 46
5. Award 48
5.1 Award notice 48
5.2 Standstill period and informing the tenderers 48
6. Contract implementation 50
6.1 Supplier/contractor relationship 50
6.2 Contract modifications 50
6.3 Closing the contract 50
TOOLKITS 53
TOOLKIT 1 – BUSINESS CASE 54
TOOLKIT 2 – RISK AND CONTINGENCY PLANNING 56
TOOLKIT 3 – GATEWAYS 59
TOOLKIT 4 – SHORTLISTING 61
TOOLKIT 5 – DESIGN OF SELECTION CRITERIA AND SELECTION PHASE 63
TOOLKIT 6 – DESIGN OF AWARD CRITERIA AND AWARD PHASE 67
TOOLKIT 7 – SPECIFICATION WRITING 75
TOOLKIT 8 – MODIFICATION OF CONTRACTS 81
TOOLKIT 9 – COMPLIANCE CHECKLIST 86
TOOLKIT 10 – USEFUL LINKS 89
Acknowledgement 91

Glossary of acronyms

CA: contracting authority

CN: contract notice

ESI Funds: European Structural and Investment Funds

EU: European Union

MEAT: most economically advantageous tender

OJEU: Official Journal of the European Union

PIN: Prior Information Notice

PPP: public-private partnership

PQQ: Pre-Qualification Questionnaire

SIMAP: information system for public procurement (from French: Système d'information sur les Marchés Publics)

SMEs: small and medium-sized enterprises

VFM: value-for-money

Foreword

Public procurement is a key aspect of public investment: it stimulates economic development in Europe and represents an important element for boosting the Single Market. Public procurement matters - it represents around 19% of the EU's GDP and is part of our everyday life. Public administrations purchase goods and services for their citizens: this must be done in the most efficient way. Public procurement also offers opportunities to enterprises, thereby fostering private investment and contributing to growth and jobs on the ground. Finally, public procurement plays an important role in channelling European Structural and Investment Funds.

It is estimated that around 48% of the European Structural and Investment Funds is spent through public procurement. Projects in the Member States, co-financed by the EU funds, must be in line with the applicable public procurement rules which ensure value for money and fair competition in the market. Transparency and integrity in the relevant procedures is also essential for maintaining citizens' trust in government.

For all the reasons above, the correct and coherent implementation of public procurement rules results in benefits in terms of efficiency and effectiveness for everybody – for public administrations at national and regional level, for enterprises and for citizens. It helps us all make the most out of public investment and guarantee the maximum benefits from the EU funds. Yet, data show that a significant part of the overall total of errors in the spending of EU funds is due to an incorrect application of the EU rules on public procurement.

The aim of this document is to provide guidance to public officials, involved in the management of the European Structural and Investment Funds (ESIF), helping them to avoid frequent errors and adopt best practices when it comes to carrying out public procurement procedures. Although it does not provide legal interpretation of the EU directives, it represents a useful tool steering practitioners through the areas where mistakes happen most commonly, giving practical tips on how to avoid them and how to handle each situation. This document also lists a number of good practices, real-life examples, and explanations of specific topics, case studies and templates. Finally, its presentation containing alerts and interactive elements with links to the relevant legislative texts and other useful documents aims to facilitate the use of this handbook.

This guidance is part of the Commission's priority action to help Member States to strengthen their administrative capacity in improving the way the EU funds are invested and managed. It is the result of joint efforts of the Commission services, in consultation with the European Investment Bank. We would like to thank everybody involved in its preparation.

We hope that this guidance will provide useful support.

Corina Crețu,
European Commissioner for Regional Policy

Elżbieta Bieńkowska,
European Commissioner for Internal Market,
Industry, Entrepreneurship and SMEs





How to use this guidance

Who is this guidance for?

This guidance is aimed primarily at procurement officers within contracting authorities who are responsible for planning and delivering a compliant, efficient, value-for-money purchase of public works, supplies or services. Managing authorities may also find the guidance useful, particularly the checklist in Toolkit 9, when conducting checks on public procurements carried out by beneficiaries of EU grants.

Structure of the guidance

This document has two parts:

- **The guidance** structured around the six stages of a public procurement process from planning to contract implementation, highlighting issues to look out for and potential mistakes to avoid, with links to a more detailed toolkit.

- **The toolkit** of resource documents addressing specific topics in greater depth and giving good practice examples on what to do and what not to do during the procurement cycle.

From a practical perspective, the procurement process is broken down into six stages:

1. Preparation and planning
2. Publication
3. Submission of tenders and selection of tenderers
4. Evaluation of tenders
5. Awarding the contract
6. Contract implementation.

The guidance will take a procurement officer step-by-step through the process, including the all-important planning stage, highlighting along the way areas where mistakes are typically made and how to avoid them. At the end of each section, a list indicates the most common errors and gives some examples. Wherever additional resources are available, via the toolkit or other useful documents available on the Internet, a hyperlink is provided.

The guidance covers EU funded contracts for the procurement of works, supplies and services as set out in Directive 2004/18/EC[1]. The Directive, applicable thresholds and interpretative communications on specific topics (such as 'Framework Contracts and Procurement below the thresholds') can be found on the EU website – see Toolkit 10.

[1] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

Explanation of symbols

Throughout the guidance, the following symbols flag critical areas:

 **Warning!** This points out a step where the most common and serious mistakes arise.

 **Alert!** This highlights a risk area to be aware of so as to achieve economy, efficiency and effectiveness in the procurement process.

 **Help!** This is an area where additional resources are provided through the toolkit or via links to other documents.

Works, supplies or services?

There are three types of public contracts to which Directive 2004/18/EC applies: public works contracts, public supply contracts and public service contracts. Public works contracts are public contracts having as their objective either the execution, or both the design and execution, of works related to one of the activities specified in Annex I to Directive 2004/18/EC. A 'work' means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function, such as a road or a sewage plant. Public supply contracts are public contracts having as their object the purchase, lease, rental or hire purchase with or without option to buy, of products, such as vehicles or computers. Public service contracts are public contracts other than public works or supply contracts having as their object the provision of services listed in Annex II to Directive 2004/18/EC, such as consultancy and training.

Contract versus project management

Each contracting authority has its own procedures and ways of organising project and contract management. In the context of funding from the ESI Funds, contracts are procured as part of an EU supported project, which may or may not be delivered through a single contract. Multi-contract projects require careful co-ordination. There have been many, often high profile, 'how did it go wrong?' reviews concluding that poor planning, particularly at the start of a procurement process, is to blame for errors. As a result, contracting authorities increasingly employ dedicated project managers to do complex, risky, high value public procurements, which is considered best practice. Thus, the principles and practices of sound project management and contract management are merging. In this guidance, the term project management is sometimes used synonymously with contract management.

Compliance with internal rules and national legislation

It is, of course, imperative that any public official involved in the procurement process complies with national legislation and with his or her organisation's internal rules, as well as the EU rules. This applies equally to contracts above and below the thresholds for OJEU publication.

The status of this document is that of 'guidance'. It is intended to assist procurement officers in a practical way to avoid some of the most common errors and financial corrections[2]. It is not an instruction manual on how to comply with the requirements set out in Directive 2004/18/EC. It is certainly not a definitive legal interpretation of EU law. This guidance is intended as a support to and not a substitute for internal rules and procedures. In the absence of equivalent national or fund-specific guidance documents, managing authorities may voluntarily adopt the document as guidance towards beneficiaries of EU grants.

The new EU Public Procurement Directives

New Public Procurement Directives[3] were adopted in February 2014 and Member States have until April 2016 to transpose them into their national law (except with regard to e-procurement where the deadline is September 2018).

More information on the new Directives is available here: http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/new/index_en.htm.

[2] The term 'financial corrections' covers the actions taken by the Commission or by a Member State to exclude, from co-financing from the EU budget, expenditure which does not meet the conditions of funding because of irregularity. See the guidelines for determining financial corrections to be made by the Commission to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement, approved by Commission Decision C(2013) 9527 of 19 December 2013 here: http://ec.europa.eu/regional_policy/index.cfm/en/information/publications/cocof-guidance-documents/2013/commission-decision-of-19122013-on-the-setting-out-and-approval-of-the-guidelines-for-determining-financial-corrections-to-be-made-by-the-commission-to-expenditure-financed-by-the-union

[3] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

1. Preparation and planning

The purpose of this stage is to design a robust process for the delivery of the required works, services or supplies.

In general, a competitive tender process carried out in an open, objective and transparent manner should achieve the best value for money in public procurement. This is in line with EU Treaty principles and Directive 2004/18/EC. Essential principles to be observed in conducting procurement for a public contract include: non–discrimination, equal treatment, transparency, mutual recognition, proportionality, freedom to provide service and freedom of establishment for potential tenderers. Directive 2004/18/EC imposes legal obligations on public bodies with regard to advertising for contracts above certain value thresholds.

This first stage of the process is critical and will influence all future activity on the contract. If this part of the tender is done correctly then the rest of the tender should flow without difficulty, but the reverse is also true. It is often the case that the contracting authority (CA) will either underestimate the planning stage of the process or not carry it out at all. Managing authorities and auditors are likely to examine this stage in some detail to ensure that grants have been well spent and that the CA has discharged its responsibilities competently.

Depending upon the size and complexity of the contract, this stage of the process might take months before the contract notice is due to be published. Good planning should minimise the risk of needing contract modifications or variations. The biggest (and potentially most costly) and most common errors on contracts result from inadequate planning. A feasibility study and screening/scoping stage, public awareness and public consultations for larger-scale public plans or programmes, are to be considered. See also Toolkit 10.

✖ **Planning is crucial. If the CA gets this part of the process wrong, mistakes and problems will most likely follow. Many errors can be traced back to inadequate planning. At this stage it is recommended to elaborate standard templates for communication with tenderers, to record key decisions (i.e. to register information known at that stage, available options and justification of the preferred option) and to have rules concerning planning, conducting and control of the procurement procedures.**

1.1 Preliminary scoping

The following steps and questions should be considered from the outset. The elements below are not ranked by priority.

Engagement of key stakeholders: Recognition of (external) stakeholders is a vital aspect of a contract and it is important for the contract's success that they are recognised and managed correctly. Stakeholders may be individuals, groups or sub-groups of the clients (including internal clients), customers/users or other parties (e.g. utility companies affected) that have an interest in the contract. As the contract progresses and its focus changes, the stakeholders and their needs may also change. Customer/user and other stakeholder consultation are just as important as market consultation and both aspects of

consultation should be carried out in conjunction with each other. Consulting with stakeholders will allow them to have a say in how the contract should be specified.

⚠ **Failure to recognise the need for involvement of (external) stakeholders is a common criticism of many contracts and this often has a negative impact on the contract's success, sometimes resulting in additional costs to rectify omissions or errors. However such important involvement and consultations should not jeopardise the independence of the CA decision making process and/or create potential conflict of interest situations and lead to breaching of equal treatment and transparency principles; stakeholder's comments must not influence the substance and target with the tender.**

Identify and assess needs: What is being procured and why? Which features are essential which are optional? What is the key driver for this procurement? What are the critical success factors? What outcomes are being sought? Do we need to procure this work/service/supply? Who says that we need it? What scope is there to purchase ready-made solutions? A critical assessment of the fundamental rationale for the purchase is often best done at an interactive group session involving all key stakeholders.

Options appraisal: Has an options appraisal been carried out to look at different ways of meeting the identified needs? Consider, for example, whether to buy, lease, or rent whatever it is we intend to procure; should we use traditional procurement or a public-private partnership (PPP)? Should we be looking for an innovative solution to our needs?

Budget and funding: Defining a realistic budget for a contract to achieve the desired results and then securing the funds to finance the contract is another critical activity. This should be based on a clear scope of requirements and up to date market price information. Depending upon the nature of the contract, an appropriate level of contingencies should be included. The budget and contingencies should be reviewed at critical stages throughout the life of the contract. Life cycle costs can be taken into consideration at this point, in terms of those being a method to assess the needed budget.

Affordability: Does the CA have the budget for the contract as currently estimated? Affordability also relates to the fact that the contract costs may escalate to a point that they may exceed available budgets, which needs to be addressed through contingency plans.

Value for money: How will the CA demonstrate value for money? How accurately are the costs estimated? What are the resources required to deliver the contract? What are the expected life-cycle costs? Are there any other economic/ resource implications (for example, additional maintenance, operational costs, or bespoke licences)?

Establishing benchmarks: A series of predetermined benchmarks should be established to show what would be considered as an acceptable tender i.e. an optimum theoretical tender prepared beforehand by the CA. This is useful in case abnormally low priced tenders are received, as there is an obligation to ask the tenderer for an explanation of those parts of the tender found to be abnormal. The tender may be rejected if the explanations of the tenderer are not documented in such a way that the CA is convinced that the tenderer can

deliver the contract (see also section 3.2). This needs to be considered at the pre-procurement stage to ensure that the necessary data is collected.

Achievability: A common area for mistakes is where the CA assumes that the market can deliver a contract without consulting the market on its proposals. Not all procurements are achievable. Problems may relate to technological maturity, over saturated demand or unacceptable levels of risk transfer. Can the market deliver? Is the CA seeking something that is beyond the market's (current) capabilities? Are timescales realistic?

Market research: When determining what to buy, estimating costs, and before developing selection and award criteria in a procurement procedure, it is often helpful for purchasers to understand the market. Market research can provide information on the availability of products or services which meet the CA's requirements, allowing the most appropriate procurement approach to be determined. A dialogue with the market before the procurement process begins can help identify innovative solutions or new products or services which the public authority may not have been aware of. It can also assist the market in meeting the criteria which will be applied in the procurement process, by providing information about the public authority's expected requirements. However, the market must be approached in a way that ensures respect for the principles of transparency and equal treatment, avoiding disclosure of privileged information and/or privileged market positions. Where a candidate or tenderer or an undertaking related to a candidate or tenderer has advised the CA, or has been involved in the preparation of the procurement procedure, the CA must take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer in order to avoid its exclusion from the tendering procedure (see joined cases C-21/03 and C-34/03, *Fabricom*).

Pre-commercial procurement[4] (PCP) and the competitive dialogue procedure, introduced under Directive 2004/18/EC, offer greater opportunities for public authorities to engage in market dialogue.

- **Good practice shows that the market research 6-12 months before Contract Notice (CN) publication can be extremely useful.**
- **See Link to Digital Agenda of Europe (DAE) webpage on Innovation Procurement: Toolkit 10**
- **See Link to PPI platform website: TOOLKIT 10 – USEFUL LINKS**

Establishing the subject matter of the contract / single work / advertising as a single contract or in lots:

The first step is to establish clearly the subject matter of the contract.

The second step is to establish if the subject matter of the contract constitutes a single work as defined in Article 1(2)(b) of Directive 2004/18/EC and case law – see cases C-16/98, *Commission v France,* C-574/10 *Commission v Germany,* T-358/08 *Spain V Commission* and T-384/10, *Spain v Commission.*

[4] Commission Communication on "Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe" (COM(2007) 799, 14/12/2007)

The third step is to establish if the contract is above the threshold for advertising in the OJEU. In particular, the CA must not artificially split larger works/ supplies/ services into smaller units to avoid these thresholds. For works, there must be an amalgamation of all separate contracts where there is a functional and timing relationship between them. In general, if the contracts together relate to the same subject-matter, the values must be aggregated together. If the amalgamated values are above the thresholds, the contracts must be advertised in the OJEU. Collaborative multi-partner projects must consider public procurement requirements at the level of the project i.e. not at individual partner level (see section 1.5 on artificial splitting of contracts).

Once the above steps have been taken, the CA can decide whether to have just one contract or to divide it into lots. Having just one contract can lead to economies of scale and scope and it is easier for the CA to manage. The disadvantage is that the high financial or technical criteria set for tenderers may reduce or eliminate market participation by smaller or more specialised contractors. The advantage of dividing the contract into lots is that it opens the competition to more potential tenderers. The disadvantage is that because there are more contracts, it is more difficult for the CA to manage.

Decisions about the subject matter of the contract and how it is advertised need to be justified and may be examined during audits of the project. See more in Toolkit 7 & 9 and section 1.5.

Frameworks: Framework agreements are used widely in certain Member States. Framework agreement is a general term for agreements with providers that set out terms and conditions under which specific purchases (call-offs) can be made throughout the term of the agreement. A framework agreement itself is not a contract, but the procurement to establish a framework agreement is subject to the EU procurement rules.

Framework agreements can be applied to all types of contracts. However, this does not mean that it is the most appropriate method for awarding all contracts. For this reason, CA should assess the suitability of the use of the framework agreement taking into account the advantages and disadvantages of this in relation to the circumstances of the market being addressed. The use of frameworks are more suitable for contracts meeting established, repetitive needs, the amount of which as well as the exact time of occurrence of their need is not known in advance.

They can lead to substantial savings in time, product cost and resources. If the intention is to conclude a framework agreement then the tender documents must, as a minimum, reflect the terms for the contract period, products/service number of suppliers and method of ordering as required under Article 32(3) and (4) and Annex VII of Directive 2004/18/EC.. Historical data on volumes is a crucial factor in all procurements but even more so in the concluding of framework agreements. The more certainty a supplier can be given as to the expected volume of orders the more likely it is that they will be able to provide competitively priced tenders.

See Link to the DG GROW explanatory note on Frameworks Agreements: Toolkit 10

Timetable: A realistic timetable for the entire procurement process including potential remedy procedures, through to contract award and implementation stage needs to be drawn up during the planning stage. Over-optimistic timetables are common and lead to errors in the subsequent implementation phases. For example they could result in failure of

the procurement process or severe implementation problems, due to unrealistic tender preparation periods thereby limiting the number of tenders and affecting their quality.

Public procurement of works, supplies or services involving ESI Fund grants often takes place in the context of a larger EU grant-funded project that may be delivered through the co-ordination of several contracts. Delays in one contract can affect implementation of the other contracts. The timing of grant approvals and payments may impact on budget approvals and the overall contracting process, which needs to be taken into account by the CA. EU grants may also have implications for deadlines regarding eligibility of the contract expenditure and consequently its reimbursement.

1.2 Contract/project management

Project organisation and resources: The design of the contract organisation depends on the size and complexity of the contract and the risks involved. All contracts of any size or complexity will require at minimum a procurement officer who may also be the contract/project manager or may be a specialist brought into the team to manage specific processes (which is recommended on high value, complex, or risky contracts). Roles and responsibilities during the procurement process should be clearly defined within the operational manuals of the CA. Depending on the planned number and complexity of contracts, external specialist advisors on certain aspects of procurement, such as legal matters, may need to be brought into the team.

Controls and Gateways: A number of project management tools and techniques can be used to help control and manage the project, such as document control and issue logs. These tools and techniques form the project assurance function of the project's organisation. The use of Gateways is a powerful project management technique that is increasingly applied to more complex procurements. The Procurement Gateway Review mechanism is a control process that the CA can use to ensure that the activities making up each stage of the contract have been satisfactorily completed before CA approval is given to move on to the next stage. The Procurement Gateway Reviews must be set at key milestones within the overall contract lifecycle. Formal Gateway Reviews are primarily used for high risk/complex/high value contracts.

See Toolkit 3 on use of Gateways

Human Resources: Have adequate human resources been allocated to deliver the procurement? Are people with the right profile available to sit on the Evaluation Committee from the CA, as well as people with project management, procurement, legal, finance, technical, audit and other skills? Who will take ultimate responsibility for key decisions and for allocating budgets? Has he/she been identified, briefed and accepted the role of contract/project owner? If the contract is complex or high cost risk consideration should be given to setting up a Steering Committee to oversee the contract. The Steering Committee would approve all key decisions and would typically comprise people not involved with the actual delivery of the contract.

Evaluation Committee: It is best practice to establish the Evaluation Committee as soon as the decision has been taken to proceed with the procurement to ensure that the procurement process is done in the most professional way by involving all the necessary

staff qualifications from the start. The Committee needs to have a permanent core of members. Procurement, financial and legal persons should be permanent members. Technical staff will be members depending on the type of contract. The committee should ideally comprise members experienced in each of the areas to be examined in the tender. It is often chaired by the contract/project manager and be subject to rules and procedures that will lead to a balanced judgement derived from the individual evaluations of its members. In some Member States only the CA (single – member/ collective body) has decisive competences on the above. It is also possible to have representation from external organisations that are stakeholders in the outcome of the contract, duly appointed by the CA. Decisions should be based purely on the criteria published and be demonstrably free from political and any other undue influence. The work of the Evaluation Committee must be recorded (at least with the attendance list and the summary of the meeting deliberations/minutes).

Integrity and conflicts of interest: The concept of conflicts of interest covers at least any situation where staff members of the CA or of a procurement service provider acting on behalf of the CA who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.
Financial actors and other persons involved in budget implementation and management, including preparatory acts, as well as in audit or control shall not take any action which may bring their own interests into conflict with those of the Union. A conflict of interest exists where the impartial and objective exercise of the functions of a financial actor or other person is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other shared interest with a recipient.
Best practices are:

- that each member of the Evaluation Committee signs a conflict of interest Declaration Form (although no obligation under Directive 2004/18/EC). Anyone with a potential conflict of interest should not play any role in the procurement;
- that systems, controls and training should be in place to make sure that all key actors capable of influencing decisions about the scope or award of a contract are aware of their responsibility to act impartially and with integrity, and should have signed a conflict of interest declaration. At the start of the procurement process, the Evaluation Committee should be asked to declare any actual or potential conflict of interest. Those declarations should be recorded and kept on the contract file. Each CA should have adequate procedures in place in this regard;
- that tenderers are asked to declare any conflict of interest (also any conflict of interest with tenderers' relatives) when submitting their tenders. This declaration is a minimum requirement set in the tender documents.

See more in case C-538/13, *eVigilo*, which ruled that the CA is required to determine the existence of possible conflicts of interest and to take appropriate measures in order to prevent, detect conflicts of interest and remedy them (see in particular points 42 to 44 of this case).
The new Directives define the concept of conflict of interest and list it in principle as a ground for exclusion.
A practical guide "Identifying conflicts of interests in public procurement procedures for structural actions" has been elaborated by OLAF. Access to the guidance is available to Member States' staff.

Discovery of an undeclared conflict of interest may put the impartiality of the procurement process in doubt and lead to financial corrections.

See Link to OECD principles on integrity in public procurement: link

See more on anti-fraud and anti-corruption measures in Article 125 of Regulation (EU) No 1303/2013 in Toolkit 10

Documentation and record keeping: Documenting the entire procurement process and justifying all key decisions is a critical requirement to ensure that the regularity of expenditure can be subsequently verified or audited. The systems for recording information can be manual or electronic or mixed, but the trend is towards fully electronic processing and storage in such a way that ensures transparency of decision-making. The CA should maintain a record of its procurement proceedings and all associated documentation covering all documents from all participants of the procedure.

1.3 Developing the business case

Business case: The business case needs to set out the justification for carrying out the contract and the benefits to be realised. The CA should arrange for the business case to be prepared within the department initiating the procurement request and approved by that department's senior management team. In the case of very high risk procurement contracts the project owner might need to refer the business case to the organisation's corporate management team. For high value procurements, the business case should include a risk register.

See Toolkit 1 for a business case checklist.

Contingency planning, risk management and escalation plans: What are the key risks and how will they be allocated? Can/should they be managed via the contract? What would be the impact of failure? The contract/project manager should carry out a risk assessment of the whole contract and establish appropriate contingency and escalation plans. The contract/project manager should ensure that a contingency plan is prepared during the early stages of the contract lifecycle and that the plan and included in the risk register. The plan should set out: the arrangements that need to be put in place should the project be aborted, not be completed on time or fail during the implementation stage; the responsibility for providing contingency funding; and the actions required to activate the plan.

See Toolkit 2 on developing a Risk Register and Contingency Plan

1.4 Selecting the procedure

The decision concerning which procedure to use is a critical and strategic one affecting the whole procurement process. The decision should be made and justified at the planning stage.

There are several options, three are mentioned below.

- **Open:** This is a process where all providers interested in the contract and who have responded to an advertisement can submit tenders. All such tenders must be considered without any prior selection process. The selection and evaluation is carried out after the submission of the tenders.
- **Restricted:** This is a two-stage process where only those providers who have been invited may submit tenders. The selection and shortlisting are usually carried out on the basis of a Pre-Qualification Questionnaire (PQQ). The Directive sets a minimum of five candidates. The CA may impose a limit on the maximum number for a given procedure.
- **Exceptionally Negotiated/Competitive Dialogue:** This is where the CA may, in certain exceptional circumstances, negotiate the terms of a contract with one or more suppliers of its choice. Ordinarily, negotiation/dialogue should be with not less than three candidates provided that there are a sufficient number of candidates available. The candidates with whom to hold a competitive dialogue may be selected through a restricted procedure.

The open or restricted procedures are the usual methods of procurement for works, services or supplies of a routine nature. Of the two, the open procedure is mostly used when competition is limited to few candidates and the specification might be complicated and technical expertise required. The restricted procedure is generally used where there is a high degree of competition (several potential tenderers) in the marketplace, such as cleaning, IT equipment, service or furniture, and the CA wishes to draw up a shortlist. As a first step, the requirements of the CA are set out in a contract notice published (in the OJEU if above the relevant thresholds) and expressions of interest are invited from potential tenderers. The contract notice may indicate the relevant information to be submitted or the information may be sought via a detailed pre-qualification questionnaire (PQQ) sent to interested parties. The second step involves issuing the tender documents with an invitation to tender (ITT) being sent only to those pre-selected as having the requisite level of professional, technical and financial expertise and capacity.

The advantages and disadvantages of the open and restricted procedures are summarised in the table below.

PROCEDURE	**Advantages:**	**Disadvantages:**
OPEN	• highly competitive due to the unlimited number of tenders, • all documentation from tenderers received at the same time for evaluation, i.e. time saving, • both selection criteria and award criteria indicated in advance in the CN, • the speed of the procedure; • complaints seeking remedies are less likely, since the actions and decisions of the CA are related only to a 'one-process' procedure, • easier to defend the decision as straight forward focus on the award.	• the process can seem to take a long time as all compliant tenders must be examined by the contracting authority. This can delay the awarding procedure. • resource intensive for the CA and the tenderers,

RESTRICTED	• limited number of tenders to evaluate and therefore less resource intensive for the evaluation panel/CA, • possibility to restrict participation only to market operators with high level of specialisation (in the case of complex contracts for which preparing a tender involves significant costs, limiting the number of tenderers through pre-qualification can make the tender more attractive as the chance to win the tender is higher for pre-qualified tenderers than in an open procedure.)	• less competition due to the limited number of tenderers, • more possibilities for complaints seeking remedies since the actions and decisions of the CA are related to a two-process procedure, • more difficult, high requirements to transparency.

The **negotiated procedure** can only be used only in exceptional circumstances as set out in Directive 2004/18/EC. In all cases use of the procedure must be justified. The CA must ensure equal treatment of tenderers. The burden of proof for the circumstances allowing for the use of the negotiated procedure rests with the CA.

There are two types of negotiated procedure in Directive 2004/18/EC:

1) Negotiated procedure <u>with prior publication</u> of a contract notice (Article 30 of Directive 2004/18/EC):
CAs advertise and negotiate the terms of the contract. This process involves the submission of formal tenders by at least three candidates (pre-qualified on the same basis as the restricted procedure described above, provided there are at least this number who meet the minimum qualification criteria) with negotiation on final terms in a competitive process. This procedure may be used:
   - where the nature of the requirement does not permit overall pricing;
   - where it is not possible to specify requirements for a service with sufficient precision to enable tenderers to respond with priced tenders;
   - when works are required which are performed solely for purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs; and
   - where an open, restricted or competitive dialogue procedure has not attracted regular and acceptable tenders (**Irregular tenders** within the meaning of Article 30(1)(a) of Directive 2004/18/EC are tenders which do not comply with the procurement documents, which were received late, where there is evidence of collusion or corruption, or which have been found by the contracting authority to be abnormally low. **Unacceptable tenders** within the meaning of Article 30(1)(a) of Directive 2004/18/EC are tenders unacceptable under national provisions compatible with Articles 4, 24, 25, 27 and Chapter VII (e.g. tenderers submitted by tenderers that do not have the required qualifications).

   CAs don't need to publish a contract notice (CN) where they include in the negotiated procedure all of, and only, the tenderers which satisfy the criteria of Articles 45 to 52 of Directive 2004/18/EC, insofar as the original terms of the contract are not substantially altered.

2) Negotiated procedure <u>without prior publication</u> of a contract notice (Article 31 of Directive 2004/18/EC):

CAs negotiate, without advertising, the terms of the contract directly with one or more parties. This is a departure from the core principles of openness, transparency and competition and is a very exceptional procedure. The burden of proof for the circumstances allowing for the use of the negotiated procedure rests with the CA.

The main instances where this procedure may be used are:

- in cases of extreme urgency justified by unforeseeable circumstances. This procedure concerns cases of extreme urgency in which a CA could not have predicted from the beginning of the tendering procedure and not attributable to actions of the CA (such as natural disasters, floods…).
- for additional works/services/supplies, justified by unforeseen circumstances arriving even if the CA have prepared the project and/or the Terms of Reference in a diligent way (see cases T-540/10 and T-235/11, *Spain v Commission*)
- when, for technical or artistic reasons or due to the existence of special or exclusive rights, there is only one possible supplier or service provider;
- when an open or restricted procedure has not attracted any tenders or any suitable tenders (provided all those who submitted tenders are included in the negotiations and the specifications of the requirement are not altered substantially. **No suitable tenders** within the meaning of Article 31(1)(a) of Directive 2004/18/EC are tenders unusable, irrelevant to the contract, being manifestly incapable of meeting the contracting authority's needs and requirements as specified in the procurement documents, see case C-250/07, *Commission v Greece*).
- when extending existing contracts and repeat contracts subject to certain conditions; and
- for the purchase of supplies on particularly advantageous terms, from either a supplier definitively winding up a business or the receiver or liquidator of a bankruptcy, an arrangement with creditors or similar legal or regulatory procedure.

The use of these procedures is a derogation from the general rules and therefore need to be justified. CAs should ensure that the precise circumstances justifying negotiation, as set out in the Directive, exist before deciding on the use of this procedure. It is vital that any proposal to use the negotiated procedure is justified by detailed reference to the Directive. If in doubt it is advisable to get legal advice (with a written record to that effect). Note that definitions of 'exceptions' and 'urgency' are strictly interpreted. The burden of proof for the circumstances allowing for the use of the negotiated procedure rests with the CA.

The **Competitive Dialogue** procedure aims to provide a certain amount of flexibility during the procurement of 'particularly complex' projects, which can occur where the CA is not objectively able:

- to define the technical means capable of satisfying their needs or objectives; and/or
- to specify the legal and/or financial make-up of a project.

By way of example this procedure can be used for projects which have not been delivered/constructed before, such as complex new developed IT systems, PPP projects, infrastructure or facility management (see Article 1(11)(c) of Directive 2004/18/EC). The burden of proof for the circumstances allowing for the use of this procedure rests with the CA.

Technical complexity exists where the CA is not able to define the means of satisfying its needs and/or able to achieve its objectives. Two cases may arise: either that the CA would not be able to define the technical means to be used in order to achieve the prescribed solution (rare); or that the CA is not able to determine which of several possible solutions would be best suited to satisfying its needs (more frequent). In both cases, the contract in question would have to be considered as being particularly complex. In these situations the CA might consider to accept variants tenders. See more in section 2.4.4 and Toolkit 7.

Financial or legal complexity can arise in projects involving complex and structured financing, the financial and legal make-up of which cannot be defined in advance. Such complexity arises very often in connection with PPP projects.

1.5 Thresholds and advertising

The test of whether a procurement is subject to the EU public procurement rules (and hence requires EU level publicity and tender procedures) is one of monetary value. If the value of the contract is above a certain threshold (which is amended every two years) then Directive 2004/18/EC must be followed. Calculation of the estimated contract value can be done based on sale statistics from current or earlier suppliers. For example, a CA calculates the costs per month per supply/ service of 12 month over a total period of 4 years - the total amount of the contract decide whether the Directive or national procurement regulations apply. See more in Article 9 of Directive 2004/18/EC.

The latest threshold values can be found here: http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/index_en.htm

For **mixed contracts** which combine works, supplies and/or services in a single contract, the principle is that the relevant threshold for works, supplies or services should be determined based on the main purpose of the contract. The main problem concerns mixed contracts for works and services, as it is not the value of every aspect of the contract which defines the main purpose of the contract but the subject matter of the contract (see point 48 of the Case C-145/08, *Hotel Loutraki* and points 23 to 26 of Case C-331/92 *Gestión Hotelera Internacional*). If in any doubt, CAs should seek specialist advice on which rules to apply for mixed contracts (and, as a general rule in public procurement always err on the side of caution).

Above the thresholds, advertising in the OJEU is mandatory. Additional choices of media for advertising will depend on the strategy for the procurement. The OJEU adverts can be placed electronically, in paper form or telefax and in a standard format; the OJEU is only published electronically. Where contracts below the EC thresholds have a potential cross-border interest, the safest course of action to avoid any risk of irregularity and possible financial corrections is to advertise the contract in the OJEU, in a national public procurement web-site or a well-known public procurement web-site.

> ✖ **Failure to advertise is one of the most serious errors. If in any doubt, advertising in the OJEU is recommended as a way of ensuring EU wide competition.**

Artificial splitting of contracts is the splitting of contracts which serve to achieve the same objective into smaller contracts to avoid the thresholds for advertising in the OJEU – see Article 9(3) of Directive 2004/18/EC [see section 1.1 - Establishing the subject matter

of the contract / single work / advertising as a single contract or in lots]. This Directive applies to all public contracts (the contract consists of all parts (lots) which are necessary to fulfil its purpose) having as their object supplies, works and services whose estimated value is equal to or exceeds the thresholds as specified. The characteristics that determine the type of procedure to be used and the various legal obligations are:

- the purpose of the contract (work, supply or service); and
- the value of the contract (net of VAT).

For example if a CA needs to paint a building with 10 rooms, it cannot split the contract into 10 or less (for instance 6) contracts, and award the contracts without tendering. All those services/supplies or works must be "pooled" together which are necessary to create a functional whole and they must be calculated in this example in the total value of the 10 contracts. The overall value decides on the requirement for a tender to follow Directive 2004/18/EC.

✖ **Artificial splitting of contracts so that they fall below the EU thresholds for publication is illegal.**

Phasing: The CA can divide the contract into phases provided the tender documents state it and the tendering process is fair, open and transparent. For works, there must be an amalgamation of all separate contracts where there is a functional and timing relationship between them. In general, if the contracts together serve to achieve the same objective the values must be aggregated together. For example a road project from city x to city y can be divided in several phases (phase 1 from connection point xx to connection point zz, followed by phase 2 from connection point zz to…) and respective contracts if it is implemented over a long timeframe.

1.6 Operational requirements to launch a tender

At the end of the planning stage, the following key operational requirements to launch the tender need to have been achieved.

- The capture of any data/information necessary to quantify the specification (including any information and communication technology database requirements),
- Preparation of the specification (this should include the consultation with customers/users and other stakeholders, drafting of the specification and approval for the final specification),
- Specification of any additional requirements must be dealt with separately from the main requirements (e.g. the main requirements are cars with four doors and additional requirements are cars with five doors). Any additional and enhanced requirements must also be dealt with separately when drafting the pricing schedules (or bills of quantity) but must be calculated with the main requirements to estimate the total contract volume (e.g. the number of the four doors cars procured plus the number of the five doors cars procured),
- Calculation of a realistic pre-tender estimate of the cost of the contract to be procured,
- Confirmation that the levels and standards specified can be afforded within the available budget provision,

- Consultation with the market on the proposed specification, procurement proposals, tendering requirements and timescales,
- Benchmarking the proposed levels and standards against similar provision elsewhere.

Common mistakes leading to financial corrections at the planning stage are:

1. **Direct award of a contract with inadequate justification for non-publication of a contract notice (CN).**

Example: The CN was not published in accordance with the relevant rules (e.g. publication in the OJEU where this is required by Directive 2004/18/EC or national rules) and the contract was directly awarded without any competition.

How to avoid: The calculation of the contract value should be a genuine pre-estimate. Be aware that Article 9 of Directive 2004/18/EC explains the calculation methods. The simplest way to avoid this error is to publish a CN for all contracts above the relevant EU or national thresholds for the type of contract concerned.

In accordance with Article 9 of Directive 2004/18/EC:

In the case of public supply or service contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value shall be based on the following:

(a) either the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year adjusted, if possible, to take account of the changes in quantity or value which would occur in the course of the 12 months following the initial contract;
(b) or the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year if that is longer than 12 months.

For service contracts which do not indicate a total price:
(a) in the case of fixed term contracts, if that term is less than or equal to 48 months: the total value for their full term;

(b) in the case of contracts without a fixed term or with a term greater than 48 months: the monthly value multiplied by 48.

2. **Artificial splitting of works/services/supplies contracts.**

Example: A works project or proposed purchase of a certain total quantity of supplies and/or services is artificially subdivided into several contracts with the intention of ensuring that the value of each contract falls below the thresholds set in Directive 2004/18/EC, i.e., deliberately avoiding publication of the contract in the OJEU for the whole set of works, services or supplies involved.

How to avoid: Make sure that the true scope and value of the project is considered and that the calculation is done correctly in accordance with Article 9 of Directive 2004/18/EC. The value of individual lots should be aggregated to determine if the overall value is above the directive's thresholds.

3. Cases not justifying use of the exceptional negotiated procedure with prior publication of a CN or without prior publication of a CN.

Example: A CA awards a public contract by negotiated procedure, but the CA could not prove that such a procedure was justified.

How to avoid: The negotiated procedure can only be used exceptionally in very specific circumstances which are stated in Articles 30 and 31 of Directive 2004/18/EC. Before using the procedure, carefully check the Directive for the particular circumstances in which the negotiated procedures can be used and obtain advice from national public procurement authorities if in any doubt. Article 30 details the use of the negotiated procedure with prior publication of a CN. Article 31 details the use of the negotiated procedure without prior publication of a CN. The use of the negotiated procedure is a derogation from the general rules. CAs should ensure that the precise circumstances justifying negotiation, as set out in the Directive, exist and CAs are strongly recommended to document reasons for choosing the negotiated procedure.

4. (i) Disproportionate and discriminatory selection criteria and (ii) award criteria not related to the subject matter of the contract.

Example: (i) When it can be demonstrated that the minimum capacity levels set for a specific contract are disproportionate to the subject matter of the contract, or that they are discriminatory thereby creating an unjustified barrier for tenderers. Examples include setting financial criteria at too high a level (dis-proportionate) or requiring registration of experts with a national body and not recognising equivalent qualifications from other member states.

(ii) Using an award criterion such as number of previous contracts completed with the particular contracting authority. This is not related to the subject matter of the contract and could also be considered as discriminatory as it potentially favours local companies who would be more likely to be able to fulfil this criterion.

How to avoid: Prior to publication of the tender notice, the CA should check that the selection and award criteria and the related methodology are proportionate and non-discriminatory. Be aware that Articles 44 to 53 of Directive 2004/18/EC set out the requirements in relation to selection and award criteria. Toolkits 5 and 6 give advice about how to use the criteria correctly.

5. Errors / mistakes in ordering on a framework agreement

Example: A CA of a framework agreement with more suppliers performs direct ordering by decided itself the supplier from the framework agreement. Suppliers were not ranked based on the original tender evaluation.

How to avoid: The CA must rank the suppliers based on the award criteria set out in the tender documents numbered as 1,2,3,4 etc. First, the CA must define a threshold for direct ordering by number one supplier (for instance orders below EUR 30 000). If number one cannot deliver (only accepted by the CA on rare justified conditions) the order goes to number two etc. Second, the CA defines that orders above the threshold set out for direct ordering will be awarded following a mini competition among all suppliers of the framework agreement based on the original tender documents and award criteria. Article 32 of Directive 2004/18/EC sets out the requirements regarding framework agreements.

Actual examples

Artificial splitting or 'Salami-slicing' to avoid the application of Directive 2004/18/EC

Example 1: The review of the project procurement plan for a public building project revealed a pattern of multiple lots with amounts just below the Directive threshold, without clear technical justification. All these lots had been tendered locally, without taking into consideration the total amount of the lots which was well above the threshold.

Example 2: The project works were artificially split into one contract to be tendered, whose amount was 1% below the Directive threshold, and one 'own works' contract executed directly by the CA.

2. Publication

The purpose of this stage is to attract competitively priced tenders to deliver a contract with outcomes meeting the needs of the CA.

2.1 Publication of EU Notices

A fundamental tenet of EU public procurement law is that all contracts above a certain threshold value should be published in a standard format at the EU level in the OJEU, so that economic operators in all Member States have the possibility to tender for contracts for which they consider they can meet the requirements. The PIN alerts the market to future contracts, the CN launches a specific procurement procedure and the award notice informs the market of the outcome of a particular tender.

The standard forms used in European public procurement can be accessed on-line via eNotices. All notices submitted to the OJEU must use a standard vocabulary. The Common Procurement Vocabulary (CPV) is an eight digit (with a ninth for verification) classification system which describes all purchases for works, services and supplies. The CPV codes may be accessed online, via the SIMAP website, see Toolkit 10.

Prior Information Notice (the PIN): The publication of a PIN is not mandatory. However, by publishing a PIN at the beginning of the year it is possible to take advantage of reduced time limits for submission of tenders. The PIN was introduced so that CAs could inform the market of all its upcoming contracts for example in the next six months or next year. However, more recently, CAs have been using the PIN on a contract specific basis. It is important to be aware of any other proposed services, works or supplies procurements around and above the EU thresholds within the CA's organisation scheduled around same time. The PIN for the following year can be announced in November/December for the year ahead but must be published at least 52 days and no longer than 12 months before publication of the specific contract.

Contract Notice (CN): If the procurement is above the EU threshold (and therefore falls within the scope of Directive 2004/18/EC) it is mandatory to publish a CN. Once the notice has been published, material changes to the main content, such as the technical product requirements, volume, time schedules, selection and awarding criteria and contract terms, in principle cannot be amended otherwise a cancellation of the tender procedure is required. It is critical that the content of these notices is accurate (and follows the specification requirements). If any minor changes occur in the tender phase it is mandatory to publish the changes in the OJEU and it is recommended always to extend the deadline for submission of the tender.

According to Directive 2004/18/EC it is possible to send a corrigendum of the published information/forms by the form No. 14 - corrigenda, which has been created by the Publication office EU – TED. Article 51 of new Directive 2014/24/EU allows for publication of a corrigendum as well. Furthermore, Member States have received a draft of the new standard forms for publication information on public procurement, which contains form 14 (corrigenda) for publication of the corrigendum.

✖ **Other than in very specific cases, lack of publication of a CN for a contract with a value above the thresholds will be considered a breach of EU procurement rules and may lead to financial corrections. Compliance with the advertisement requirements of Directive 2004/18/EC is secured when all information required by the standard form is provided in a clear and precise manner.**

Additional notices: Always inform the market if any changes are made in the documents and the notices (for example date for receipt of tenders) by publication of a further notice (and additionally by informing all those that have expressed an interest in the contract). If the CA makes material changes in the technical specification, selection/award criteria and/or contract terms, a cancellation of the process will be necessary. New Directive 2014/24/EU distinguishes between material modification and the alteration of the overall nature of the contract.

2.2 Procedures and timetables

2.2.1 Minimum time limits

The choice of procedure should be made and justified at the planning stage. For procurements above the relevant thresholds the open and restricted procedures are the most commonly used.

Regardless of which procedure is chosen, the process is closely regulated in terms of timescales, communication and documentation. The schedule must comply with the timescales set out in Directive 2004/18/EC (see table below for the deadlines for submission of tenders).

Minimum time limits

(in days from date of despatch for publication in the OJEU)

		Open procedure	Restricted procedure	
		tenders	Applications	tenders
WITHOUT PIN	Ordinary	**52**	**37**	**40**
	Electronic notice	**45**	**30**	**35**
	Electronic access	**47**		
	Electronic notice and access	**40**		
WITH PIN	Ordinary	**36**	**37**	**36**
	Electronic notice	**29**	**30**	**31**
	Electronic access	**31**		
	Electronic notice and access	**24**		

The timetable and steps of the **Open Procedure** are as follows:

- Allow a minimum of 52 days from the date on which the notice was despatched to receipt of tenders. This period can be reduced by 12 days in total if the CN is transmitted electronically and the CA offers full electronically access to the documents (i.e. 40 days). The period can be reduced to 36 days from the date of the CN despatch if a PIN has been published within a minimum of 52 days and a maximum of 12 months before the date upon which the CN was despatched. If the notices are despatched electronically, the PIN must contain as much information as the CN where that information was available at the time (for instance contract volume, selection and award criteria and contract duration). All responses to questions from tenderers must be anonymised and sent out to all interested parties at the latest 6 days before the tender submission deadline (Article 39 of Directive 2004/18/EC). Clarifications provided to tenderers should not have the effect of changing the initial specification (including the initial selection and award criteria). To ensure full transparency prior to the deadline for submission of tenders, all clarifications should be published on the web-site of the contracting authority so that they are available to all potential tenderers.

- When an award has been made a contract award notice must be sent within 48 days of the award to the OJEU for publication.

The timetable and steps of the **Restricted Procedure** are as follows.

- Allow a minimum of 37 days (this can be reduced to 30 days if an electronic notice is given) from the date on which the notice was despatched to the date by which requests to participate must be received.
- If the CA wishes to limit the number of tenderers under this procedure the number must be a minimum of five. The CA is however not obliged to specify a limit if it does not intend to apply one.
- The CA must then select those who will be invited to tender on the basis of a Pre-Qualification Questionnaire (PQQ) (see Toolkit 10 with a link to PQQ).
- Written invitations to tender must then be issued to those selected allowing a minimum of 40 days from despatch of the invitations for receipt of tenders. This period can be reduced to 35 days if there is full electronic access to tender documents.
- If a PIN has been published electronically within a minimum of 52 days, and a maximum of 12 months before the date on which the CN was despatched, the deadline for submission of tender can be reduced to 31 days. The PIN must contain as much information as the CN where that information was available at the time (for instance contract volume, awarding criteria and contract period).
- All responses to questions from tenderers must be anonymised and sent out to all interested parties at the latest six days before tender deadline (Article 39 of Directive 2004/18/EC).
- When an award has been made a Contract Award Notice must be sent within 48 days of the award to the OJEU for publication.

The timetable and steps of the **Negotiated Procedure with publication of CN** are as follows.

- Allow a minimum of 37 days from the date on which the notice was dispatched (not the original unsuccessful notice*)* to the date by which requests to participate must be received.
- All responses to questions from tenderers must be anonymised and sent out to all interested parties at the latest six days before the tender deadline (Article 39 of Directive 2004/18/EC).
- After that date the CA may then negotiate with one or more tenderers.
- When an award has been made, a contract award notice must be sent within 48 days to the OJEU for publication.

If the use of this procedure is justified then the CA is only required to publish a CN in the OJEU (that the CA uses the procedure) if it has received irregular tenders or tenders that have been disqualified following evaluation as a result of the use of either the open or restricted Procedures and the CA decides not to negotiate with all tenderers. If the CA decides to negotiate with all tenderers a CN in the OJEU is not required.

Competitive Dialogue Procedure: This procedure was introduced for 'particularly complex' procurements and can only be used in exceptional circumstances. It is suitable for supplies, services and works contracts where it would not be possible to award a contract using the open or restricted procedure and where the circumstances do not permit the use of the negotiated procedure. The process always involves competitive tendering and can only use the most economically advantageous tender as the basis for the award. Many public-private partnership contracts are tendered using the competitive dialogue procedure.

2.2.2 Accelerated procedure

The accelerated provision enables a CA to speed up both the restricted and negotiated procedures in accordance with Article 38(8) of Directive 2004/18/EC. This procedure may be used where the normal time limits under the restricted or negotiated procedures would be impracticable for reasons of urgency.

In such cases a CN must be placed in the OJEU, and the CA must justify in the notice the objective reasons for the use of the 'accelerated procedure'. The deadline for submission of requests to participate is a minimum of 15 days (instead of 37) from the date of despatch of the CN for publication or not less than 10 days if the notice was sent by electronic means. The time limit for the receipt of tenders is 10 days if the CA is using the accelerated procedure then any additional information requested by tenderers concerning the tender documents must be supplied no later than four days before the closing date for receipt of tenders. Under Directive 2004/18/EC the accelerated procedure cannot be used in the open procedure but in new Directive 2014/24/EU urgency is allowed in the open procedure. Application of the accelerated procedure is a much abused area and the CA must be able to justify its use.

The accelerated procedure should not be confused with the negotiated procedure without publication of a CN based on extreme urgency for unforeseeable circumstances under Article 31(1)(c) of Directive 2004/18/EC which does not require the publication of a CN. The circumstances invoked to justify extreme urgency must not be attributable to the CA.

2.3 Tender documents

As well as containing the usual information (price, delivery, tender submission date etc.) the tender documents should also specify the following information:

- a reference to the published CN;
- further elaboration of the criteria for selection and award of the contract which are set out in the CN;
- the language in which the tender is to be drawn up.

✖ **CAs should not change the selection or award criteria after publication of the CN, except by means of a published corrigendum. The Evaluation Committee should only use the published criteria.**

When starting to design the tender documents the steps and issues explained below need to be considered.

2.3.1 Setting up selection criteria

As with many procurement issues, it is important that the CA makes decisions around the selection process early, at procurement planning stage ideally, but in any event before any notice is issued and the methodology has been tested. The aim is to award the contract to a tenderer who can deliver it. The methodology for selection of tenderers must be transparent. It is recommended that a pre-agreed scoring mechanism is established which will be transparent to any objectors. The CA may want to obtain assurance about financial, technical and managerial capacity, health and safety, green issues or social criteria.

There are a number of common mistakes made at selection stage. The CA must never base the selection of applicants/tenderers on a desire to have local or national suppliers as this is discriminatory and contrary to the fundamental principles of the EU Treaty. The information the CA seeks at this stage must be proportionate and relevant to the subject matter of the contract. For example, insurance and financial requirements should not be set at unreasonably high levels with the effect of automatically eliminating otherwise perfectly competent applicants or (more commonly) should not be set without any real thought as to the effect of the levels. A common example of this is where CAs set the turnover/sales requirements or the number/value of required reference works at a disproportionately high level. Generally best practice is that the annual turnover of tenderers should not be set at more than twice the value of the contract. This requirement is not set under Directive 2004/18/EC but is laid down in Article 58 of new Directive 2014/24/EU. The requirement can be waived if the supply/service or works requires a robust financial and technical tenderer due to a high risk of e.g. delivery, product quality or price.

All selection criteria must be proportionate and relevant to assessing the ability of the tenderer to deliver the contract.

✖ **Any criterion that could be interpreted as being discriminatory or disproportionate is not acceptable according to Directive 2004/18/EC and may lead to financial corrections. Material changes of the selection criteria once set are not acceptable. After publication only minor changes within the main selection criteria are acceptable, such as changes in the wording or the address for submission of application. Changes in requirements such as the financial standing (yearly revenue or equity rate), the number of references or the insurance cover are considered material changes and they require an extension of the application deadline or a cancellation.**

⚠ **Many CAs mix up the selection stage (and selection criteria) with the evaluation stage (award criteria). Remember that there are two parts to the procurement process - selection (of tenderers) and evaluation (of the tenders). They are quite distinct and are not to be confused. At the selection stage the aim is to select those tenderers capable of doing the job. The evaluation stage assesses the best tender received from the selected tenderers. It is strongly recommended to establish appropriate selection and award criteria at the procurement planning stage.**

See Toolkit 5 for more information on selection criteria

2.3.2 Setting up Pre-Qualification Questionnaire (PQQ)

If it is the intention under the restricted or negotiated procedures or the competitive dialogue to have a shortlist of tenderers then this must be done by fair and transparent means (and documented) giving equal treatment to all. Information from tenderers that will be used for selection can be obtained in a standard format via a PQQ. The PQQ can cover questions and requirements of documentation for all selection criteria according to Articles 44 to 52 of Directive 2004/18/EC.

Checks should be made to ensure that the PQQ to be completed does not conflict with any of the rules relating to transparency and equal treatment. The CN in the OJEU and/or the tender documents should always state that one of the selection criteria will be the information supplied by the applicant in a PQQ. This allows for the information provided in the PQQ to be taken into account. If a scoring system or weightings are being used these should be disclosed fully in the CN and in the tender documents. Standard questionnaires (PQQs) should be obtainable from either the CA's corporate procurement function or from the national procurement office.

See Toolkit 4 on PQQs and short-listing

2.3.3 Setting up award criteria and their weightings

Evaluation of the submitted tenders is a critical part of the procurement process and for this reason care must be taken to ensure that the outcome is the right one and that it has been decided in a fair and transparent manner.

The criteria for the awarding of contracts are either:

- the lowest price only; or
- the **m**ost **e**conomically **a**dvantageous **t**ender (**MEAT**).

If the MEAT method is used, either the CN or contract documents must detail all criteria to be used. Best practice would be to disclose in the tender notice or tender documents the scoring matrix or weightings being used in addition to the evaluation methodology.

Tender evaluation should:

- have award criteria that are weighted to reflect importance/priority and are focused on the requirements of the specification (no weighting by lowest price);
- be relevant to the subject matter of the contract;
- preferably be based on a model that takes into account a balance between price and quality where price is the dominant criteria in %. Care must be taken to ensure that the price/quality split reflects the requirements of the contract;
- have approval for the award criteria and the evaluation model (including weightings of each criterion); and
- use an Evaluation Committee made up of appropriate and relevant representation having the necessary experience, technical skills and knowledge.

The relevant professional expertise needs to be available within the Evaluation Committee or alternatively other qualified staff from the CA can be used as non-voting advisors. It is advisable to make contact with those people as early as possible in order to ensure their availability.

The adoption of the award criteria appropriate to a particular contract should be given serious consideration at the procurement planning stage. The award criteria should be listed in order of importance (with the respective weightings where relevant), for example: price 50 %, quality 30 %, service 20 %.

See Toolkit 6 on award criteria

2.3.4 Pricing schedule

The type of procurement will influence the pricing documents prepared. For example, in construction contracts it is common to have either a schedule of rates or, more likely, a bill of quantities. It must correlate with the specification. Best practice would be to prepare, in house and in detail, a 'dummy' tender based on the pricing document and the specification. This enables the CA to immediately identify any pricing by tenderers where they have identified a mistake in the documents (and thus priced it 'low') upon which they can later capitalise (estimate the costs) later should they be the winner. It can also help to indicate whether there are errors in the tender documents. For example, whether one or more tenderers clearly misunderstood the requirement as evidenced by the fact that the prices submitted appear to be abnormal. If an abnormally low tender is received, an accurately priced dummy tender, acting as a benchmark, can be critical in justifying the rejection of such a tender (but the rejection of an abnormally low tender can only be made after the CA has requested a justification from the tenderer on the abnormally low bid and analysed it).

2.3.5 The contract

A draft of the contract should be attached to the tender documents so that all tenderers are tendering on the same basis. In the open and restricted procedure no negotiation should take place on the detail of the contract after the successful tender has been decided (to do so would breach the equal treatment principle). Best practice shows that a well-drafted contract would include provisions for yearly price indexation, regulation, misconduct, liability, and confidentiality obligations. The contract should be fair and balanced in terms of risk sharing. In particular clauses or contract terms shifting risks to the contractor that are totally beyond its control should be avoided, as they may limit the number of tenders, have a significant impact on the price or lead to contract disputes. The

tender documents including annexes and the proposals of the successful tenderer for their fulfilment must be transferred into the final contract according to which the contract is carried out.

See links in Toolkit 10

Dispute resolution: The contract should contain provisions for dispute resolution mechanisms. Mediation solutions should always be considered. Standard *pro forma* contracts will often contain clause options for dispute settlement (and many other issues that the CA initially may not have considered, such as intellectual property rights). The CA should also have competent knowledge about contract law relating to liquidated damages and if this is not the case it should seek appropriate legal advice.

Contract modification clauses:

The general rule is that contract modifications require a new procurement procedure. Only in exceptional circumstances in accordance with Article 31 of Directly 2004/18/EC a negotiated procedure can be used for a contract modification. How the contract deals with the need for changes is a critical area. The planning for the possibility of contract modifications, i.e. the circumstances and boundaries of cost and scope, needs to be thoroughly considered during the planning stage. Then, appropriate provisions should be included in the tender and contract documents.

For the new Directive 2014/24/EU, the level of approvals required for a contract modification, and the scope of permitted changes without requiring a new tender, is indicated. The underlying principle is that any modifications of the original tender that materially change the matter of the contract in terms of value, timetable or scope, to the extent that it might have changed the outcome of the original tender, should be treated as 'substantial' and should therefore be retendered as a new contract for additional works or services. The original contract may provide for optional additional works, services or supplies and request applicable prices at the bid stage. Article 72 of new Directive 2014/24/EU explains reasons. See 6.2 Contract modifications and Toolkit 8.

2.4 Specification and standards

2.4.1 Specification drafting

The specification is the most important document in the tender process. It should describe the service/supply/work to be provided, the levels, standards and inputs together with the outputs or outcomes required. When drafting the specification, the fact that it has a direct influence on cost must not be forgotten.

A well prepared specification should:

- be precise in the way it describes the requirements;
- be easily understood by the tenderers and all stakeholders alike;
- have clearly defined, achievable and measurable inputs, outputs and outcomes;
- not mention any brand names or requirements which limit competition (or if brands are mentioned, include the term 'or equivalent');
- provide sufficiently detailed information that allows tenderers to submit realistic tenders;

- identify any additional or enhanced requirements separately, but calculate in total;
- take into account (in so far as it is possible) the views of the CA, customers/users, other stakeholders and ideas/input of the market;
- be drafted by persons with sufficient expertise whether from the CA or using outside expertise;
- be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users where the procurement is intended for use by natural persons, whether general public or staff of the CA;
- be approved by the Evaluation Committee and/or the CA's senior management depending on the relevant internal rules;
- cover (for works specification) as a minimum: technical works description, technical report, design package (design drawings, design calculations, detailed drawings), assumptions and regulations, bill of quantities (if applicable) and works price list, programme time schedule.

Many of the CAs' best practices now include details of the budget for the contract in the specification to do an as transparent as possible tender document. However, the budget must be realistic for the works, services or supplies requested. Moreover, setting a budget for a contract that will be awarded with a high weighting on quality, such as professional services, in practice means that most tenderers will probably come in at or just below the quoted budget. An open competition without a disclosed budget is always possible, but the tender documents must state that the CA reserves the right not to proceed if no reasonably priced tenders are received (or for any other objective reason). At least, an unpublished maximum acceptable price must be fixed by the CA before launching the tendering procedure. The specification needs to be precisely drafted. The naming of specific brands and products is contrary to the fair and open competition rules. If it is impossible to avoid this provision it is essential that the words 'or equivalent' are added and that any such 'equivalent' tenders received are fairly assessed.

Weak drafting of the specification is often a root cause of subsequent contract modifications due to the fact that it has not reflected the true extent of the proposed contract. If a significant amount of 'additional' work is added to the contract (by way of modifications/variations) once the contract is signed it is inflating both the size and cost of the contract compared to that originally envisaged. In these circumstances, if these works are given to the existing contractor without any new tender procedure taking place, the provisions relating to fair and open competition will be breached, because the contract no longer resembles the one originally advertised. Additional work will be minimised if the procurement planning phase is carried out professionally and the specification expertly written. It is advisable that the CA prioritises each project and provides sufficient time to consider all issues and risks by involving, if necessary, in-house or external expertise to design the specification and the contract.

2.4.2 Standards to be used when drafting specifications

The basic rule is that the procurement must be defined by reference to any European standards which are relevant. Where no European standards exist, the CA must consider products from other Member States having equivalent performance as national products.

The CA is therefore under a duty to use either:

- a national standard implementing a European standard;
- European technical approvals; or
- a common technical specification, i.e. a specification with a view to uniform application in all Member States
- in all cases "or equivalent" must be added.

The specification is the single most critical document influencing the overall quality and competitiveness of the procurement process. Any terms which can be interpreted as discriminatory, particularly against tenderers from another country or requiring goods that only one supplier (or suppliers from one country) can deliver are not acceptable.

In the specifications, use the term 'or equivalent' to avoid restricting competition

See Toolkit 7 for more tips on specification writing

2.4.3 Social, ethical and environmental criteria

Increasingly, CAs use public procurement as a means of achieving objectives other than strict value-for-money. These can include criteria related to the environment[5], the local economy (like hiring young people or people who have been out of the job market for a long period), social or ethical values. Whilst these objectives can legitimately be pursued via public procurement, care needs to be taken to ensure that any special provisions are in line with Directive 2004/18/EC and national rules to ensure fair and equal treatment of tenderers. The new EU Public Procurement Directives are far more explicit about how such considerations can be incorporated into the tender process. See also case C-225/98, *Commission v France* ("Nord-Pas-de-Calais"); case C-19/00, *SIAC Construction*, case C-448/01, *EVN and Wienstrom;* case C-368/10, *Commission v Netherlands*; case C-513/99, *Concordia Bus* and case 31/87, *Beentjes*.

See different topics on the DG GROW website: link
See specific environmental criteria on the DG ENV website: link

2.4.4 Variants

The tenderers must bid on the tender documents as drafted. If a strategic decision is made that in addition to tenders based on the tender documents the CA would be willing to consider an additional variant tender (an alternative solution not mentioned in the original tender documents) the tender documents must state minimum requirements for the variant tender. In that case, the award criteria must take into account the possibility of

5 The Commission has developed Green Public Procurement criteria for more than 20 product groups, most of them available in all EU languages, see: http://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm

variant tenders being received in addition to those set out in the tender documents. This is not an easy task which requires appropriate technical expertise in the Evaluation Committee and needs to be addressed, and agreed, at the procurement planning phase. See more in section 1.4 Technical Complexity

See the section on variants in Toolkit 7

2.5 Obtaining and submitting tenders

The CA must allow tenderers a reasonable amount of time both to obtain the tender documents and submit a tender – at least respecting the minimum time limits laid down in Article 38 of Directive 2004/18/EC. The minimum deadlines may be extended if necessary e.g. because of a complex subject matter of the contract. A fee may be charged to obtain tender documents, but this should not be disproportionate. Best practice is that the tender documents are for free and available via downloads from web-sites. Tenders must be submitted in writing, directly or by post. In the case of electronic tendering, which will become increasingly the norm, certain safeguards should be put into place relating to confidentiality and acknowledgement of receipt. E-signatures must also be accepted. Tenders must be submitted by the method set out in the tender documents. The timetable should take into account the complexity of the contract. In particular, for complex, design/build or public private partnership (PPP) contracts, it is not uncommon to have tender preparation periods in the range of four to six months.

Short timelines can be interpreted as a barrier to competition.

High, disproportionate fees for tender dossiers can be interpreted as a barrier to competition.

2.6 Complaints, remedies and liability

Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC (the so-called Remedies Directive), aims to ensure that suppliers and contractors can pursue complaints on a variety of issues and that action can be taken against alleged failures by a CA. Remedies include suspending any decision taken by a CA, setting aside unlawful decisions, including the contract itself and awarding damages to contractors. In addition, failure to comply with the Remedies Directive could prejudice future EU grants to the organisation, or could lead to reclaiming of grants already made. Furthermore, non-respect of the rules on public procurement can lead to financial consequences e.g. for the CA and its staff who may be personally liable in some jurisdictions. Legal advice could be sought on handling a complaint if necessary.

Common mistakes leading to financial corrections at the invitation to submit a tender stage:

1. **Insufficient definition of the contract subject matter leading to subsequent irregular modifications of the contract**

Example: The description in the contract notice and/or the tender specifications is insufficient for potential tenderers/candidates to determine the subject-matter of the contract. For an example if the tender documents just describe "furniture" or "cars" without explaining what kind of furniture or cars the CA is tendering.

How to avoid: The specification writer(s) should be sufficiently skilled to be able to define the contract accurately and should involve other stakeholders to enable them to do so. However, the specification must be written in a neutral form and clear description of the matter of contract requirements without any kind of discriminatory references to certain brands or standards. Article 23 of Directive 2004/18/EC explains the requirements. There is more help on specification writing in Toolkit 7

2. Lack of publication of a contract notice

Example: The CN was not published in accordance with the relevant rules e.g. publication in the OJEU where this is required by Directive 2004/18/EC or publication according to national rules below the thresholds.

How to avoid: Check the value of the contract identified in the business case against the provisions of Article 9 of Directive 2004/18/EC. If the contract value is over the financial thresholds then it must be advertised in the OJEU via a CN.

3. Non-compliance with minimum time limits for receipt of tenders & requests to participate

Example: The time limits for receipt of tenders (or receipt of requests to participate) were shorter than the time limits set out in Directive 2004/18/EC .

How to avoid: This occurs where the CA fails to give tenderers adequate time to participate. Article 39 of Directive 2004/18/EC covers the time schedules for the tender procedures (see table in section 2.2.1). The CA needs to consider the time limits before publishing the notice and set realistic timetables at the planning stage. If use is to be made of the reduced time limits due to publication of a PIN, ensure that the PIN has all of the information needed for the CN itself, including selection and award criteria insofar as these are available at the time. A failure to publish a time extension in the OJEU and only to inform those tenderers who already obtained the tender documents of the extension can result in unequal treatment of potential tenderers who have not been aware of the extension.

4. Lack of publication of extended time limits for either receipt of tenders or for requests to participate

Example: The time limits for receipt of tenders (or receipt of requests to participate) were extended without publication in accordance with the relevant rules (i.e. publication in the OJEU if the public procurement is covered by Directive 2004/18/EC).

How to avoid: All time extensions need to be published in the OJEU, for contracts where publication of a CN for the contract in the OJEU was required in accordance with Articles 2, 35 and 38 of Directive 2004/18/EC. .

5. Failure to state selection criteria and/or award criteria (and weighting) in the CN or in the tender specification

Example: The CN and/or the tender specifications do not set out the selection and award

criteria (including weightings) at all, or not in sufficient detail in violation of 44(2) and/or 53(2) of Directive 2004/18/EC.

How to avoid: The selection and award criteria (and weighting) must be stated in the CN and either in the specification or other tender documents. Checklists and use of *pro forma* CNs and tender documents/specifications help to avoid this happening.

6. Unlawful and/or discriminatory selection criteria in either CN or tender documents

Example: Cases in which operators have been deterred from tendering because of unlawful selection criteria laid down in the CN or tender documents in violation of Articles 2 and 44(1) of Directive 2004/18/EC. Examples are an obligation to already have an office or representative in the country or region, an obligation of possession of experience in the country or region, an obligation to have a yearly revenue of EUR 10 million even if the contract value is only EUR 1 million, an obligation to have minimum 5 similar public references e.g. for cleaning contracts.

How to avoid: The selection criteria must not be disproportionate or unfair towards economic operators from other Member States. In the above cases, the CA must give a reasonable revenue requirement per year or it may not distinguish between a public and a private reference. If in doubt, legal advice should be sought. Further guidance is in Toolkits 5 to 9.

7. Discriminatory technical specifications

Example: Setting technical specifications for supply of equipment by specifying a particular brand without allowing for an 'equivalent' or using tailor made specifications either intentionally or unintentionally that favour particular suppliers. This is in violation of Articles 23(2) and (8) of Directive 2004/18/EC. This sometimes happens where inexperienced staff responsible for drafting the technical specifications for a piece of equipment simply copy the specifications directly from a brochure of a particular manufacturer without realising that this can limit the number of companies that will be able to supply this equipment.

How to avoid: The words 'or equivalent' should be used in all cases where reference to a particular brand is unavoidable. When drafting specifications, ensure that they are not simply copied from a particular manufacturer's technical specifications and that they are broad enough to ensure genuine competition from a number of suppliers. See Toolkit 7.

8. Disproportionate selection criteria:

Example: Requiring tenderers to provide references for previous works that are significantly higher in value and scope than the contract being tendered. This is disproportionate and could have the effect of unnecessarily limiting the number of tenderers in violation of Article 44(2) of Directive 2004/18/EC. .

How to avoid: Ensure that the references demanded are for works of a similar nature and size to those being tendered.

9. Negotiated procedure without justification (with or without prior publication of a CN)

Example: The CA awards a public contract by negotiated procedure, either with or without publication of a contract notice, but such a procedure is not justified by the relevant

provisions.

How to avoid: Such an occurrence is a fundamental breach of the rules around fair and open competition – always remember to justify the decision of the choice of procedure in the business case. Be aware that Articles 30 and 31 of Directive 2004/18/EC set out the very limited circumstances in which the Negotiated Procedure can be used exceptionally and the related requirements justifying its use, which are very restrictive, in particular those for using the negotiated procedure without prior advertising. The burden of proof for the circumstances allowing for the use of this procedure rests with the CA.

10. Discriminatory selection (e.g. national standards/qualifications specified without recognising 'equivalent' standards/qualifications)

Example: Cases in which operators have been deterred from tendering because of unlawful selection criteria laid down in the CN or tender documents in violation of Articles 2, 44(1) and (2) of Directive 2004/18/EC. . For example the obligation to already have the qualification/professional certificate recognised by a body in the country of the CA at the time of submission of offers would be discriminatory as it would be difficult for foreign tenderers to comply with at the time of submission of offers.

How to avoid: The CA must recognise equivalent standards/qualifications using the term 'or equivalent'. Registration and acknowledgment of qualifications can often be provided after the tender submission deadline. More advice is given in Toolkits 5 and 6.

11. Mixing selection and award criteria

Example: Cases in which the CA use an operator's previous experience with a similar contract as both selection and award criterion. This is in violation of Articles 44 and/or 53 of Directive 2004/18/EC.

How to avoid: Previous experience with a similar contract should not be used as an award criterion as it relates to the capacity of the tenderer to carry out the contract and this should be assessed at the selection stage, not at the award stage. Only criteria related directly to the subject matter of the contract may be used at the award stage.

Actual examples

Use of unlawful and/or discriminatory local content criteria

Example 1: Awarding. A part of a tender required 'equipment to be already present' at the time of submitting the tender. The fulfilment of this requirement had a weight of more than 30% in the tender award criteria.

Example 2: Selection. The tender requirements mentioned that any contractor applying for the tender must have an engineer registered in the country's own National Chamber of Engineers at the time of submission of the tenders, which was a significant restriction to international competition. This requirement should not be set for the submission of tenders date but should only be requested at a later stage of the tender procedure (i.e. before contract signature stage). It could be specified as a condition of the contract.

Non-compliance with minimum time limits for receipt of tenders & requests to participate

Example 3: The financial correction guidelines provide for a financial correction to be made where the time allowed for obtaining the tender documents is less than 80 % of the time set for submission of tenders. Any time restriction on the availability of tender documents should be assessed on this basis, in particular where the deadline for submission of tenders has been reduced due to electronic publication of the CN or the publication of a PIN. If a contracting authority, for one reason or another, does not make the tender documents available during the 10 days prior to the deadline for submission of tender, this may be considered to be an unreasonable restriction on the availability of the tender documents. For example, where the standard number of days for submission of a tender in a open tender of 52 days is reduced to 45 days due to the electronic publication of the tender documents where the period for obtaining the documents is also reduced by 10 days (e.g. 45 days – 10 days= 35 days) 35/45 = 77 %, this may lead to a financial correction as the period during which the documents are available is less than 80% of the time limit for submission of tenders.

3. Submission of tenders and selection of tenderers

The purpose of the submission and selection phase is to ensure that compliant tenders are received and selected according to the rules and criteria established in the tender dossier.

⚠ **Communication with a tenderer before submission of the tender is recommended to be only in writing, with the same information sent to all tenderers. The answers to any questions asked by the tenderer must be anonymised and circulated to all tenderers with clear cut-off dates (for the asking and answering of questions). Communication with the tenderers after the deadline for submission of tenders is limited to clarification of the tender only in open and restricted procedures. Any dialogue relating to the substance of an offer is not acceptable (and would be interpreted as negotiation).**

3.1 Delivery of the tender according to instructions

The time and place for delivery of tenders are fixed in the tender notice. If a tenderer requests a time extension this should be considered and decided by the Evaluation Committee and/or the contracting authority. If the decision is to extend the tender submission date then all tenderers should be immediately informed in writing and a notice sent to the OJEU/ the web-site used so that all potential tenderers are made aware of the new deadline, just in case they may be interested in submitting a tender given the extended timeframe. This includes any tenderers who have already submitted tenders and if they wish they can submit a replacement tender by the new deadline. Any time extension by the CA should be justified and the process open and transparent. Extensions can be justified, for instance, if the CA requires more time to answer a tenderer query.

The tender invitation should clearly state the place (name, address, room or office number) where tenders are to be delivered and that no tenders will be considered that have been delivered other than as instructed. It is the tenderer's responsibility to ensure delivery in accordance with the invitation to tender. Tenderers should be told that tender envelopes should bear markings of the name of the sender, the name, address, room or office number of the CA and the following text: "This envelope must only be opened by procurement officer (name)".

3.2 Follow tendering instructions

The first task of the Evaluation Committee is to check all tenders to ensure that they are 'compliant', in other words that they have followed the instructions to tenderers to the letter. If they have not, they should immediately be rejected as non-compliant and an explanation given to the tenderer as to why it has been rejected. The rejection and the reason(s) must be recorded. This is important as it creates an ethos amongst tenderers that failure to comply will result in rejection and an avoidable waste of their valuable resource input.

3.3 Safe custody of tender documents

The contracting authority should ensure that it has a system in place to keep tender submissions confidential and (also if electronically submitted) in safe custody. It is also advisable for CAs to issue receipts for tenders delivered in person. Best practice is that the CA establishes a list of the incoming tenders (number, time) and writes a receipt to the tenderer for confirmation of the tender.

3.4 Opening ceremony

Many CAs have a formal opening ceremony for tenders which is recommended as good practice. The system varies from country to country. At least two persons of the Evaluation Committee should be present to record the tender details. Members of the public can be invited. All non-compliant tenders must be rejected.

3.5 Selection, minimum requirements and additional documentation

If a tender does not fulfil the selection/minimum requirements the tender must be rejected. At this stage, the CA can only ask bidders to confirm information or to clarify contradictory information, for instance if some information is written unclearly or is clearly wrong. Article 51 of Directive 2004/18/EC states 'Additional documentation and information: The contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted.' The contracting authority may use its discretion and request supplementary information from tenderers to ensure maximum competition, provided the additional information does not have the effect of changing the tender offer. For example, a contracting authority could ask for a particular document (e.g. an existing certificate) which the tenderer had overlooked enclosing with its offer. However, once it does it, it is obliged to treat all tenderers equally (it has to ask for additional documentation from all tenderers whose documents need to be supplemented). Clarifications are not to be understood as negotiations. Accidental calculation, arithmetic errors, spelling mistakes or typos will be accepted as supplements or clarifications. Material alteration or modifications of the tender is not allowed. Following its assessment of any additional information so requested, the Evaluation Committee should then proceed to evaluate all the compliant tenders.

The selection process is described in Toolkit 5

Common mistakes leading to financial corrections at the submission and selection stage:

1. **Elimination of candidates/tenderers using unlawful selection criteria in violation of Articles 2 and 44 of Directive 2004/18/EC.**

How to avoid: Better design and testing of selection criteria and evaluation methodology combined with gateway reviews by the Evaluation Committee/ or the CA should help to eliminate these types of error. For complex contracts, CAs may decide to employ specialist advisors. See Toolkit 5.

2. **Unequal treatment of tenderers**

Example: During the selection process, the Evaluation Committee does not seek clarifications from all tenderers in relation to omissions by them on the same aspects of their offers. For example, requesting one tenderer to submit a tax compliance certificate

that was obviously omitted from the tenderers submission whilst not requesting this from another tenderer would represent unequal treatment and violates Articles 2 and 44 (selection) of Directive 2004/18/EC.

How to avoid: Ensure that all requests for clarification or supplementary documents concerning selection criteria are made for all affected tenderers on an equal basis.

3. Acceptance of tenderers who should have been eliminated at selection stage

Example: Cases have been noted of tenderers that should have been eliminated for failing to meet a particular selection criterion, nonetheless being accepted for evaluation by the Evaluation Committee. In some cases, such tenderers have gone on to win the contract. This is a clear case of unequal treatment and violates Articles 2 and 44 of Directive 2004/18/EC.

How to avoid: Make sure that there is a quality control mechanism within the Evaluation Committee to ensure that there is a review, at least of the winning tenderer, to ensure that the tender has met all selection criteria.

4. Modification of selection criteria after opening of tenders, resulting in incorrect rejection of tenderers

Example: The selection criteria were modified during the evaluation phase, resulting in rejection of tenderers that should have been accepted if the published criteria had been followed.

How to avoid: Modification of selection criteria after submission of tenders is unlawful and violates Articles 2 and 44 of Directive 2004/18/EC.

5. Lack of objective selection criteria used in reducing the number of applicants

Example: In a restricted or a negotiated procedure with publication of a CN, no objective selection criteria were listed and therefore it is unclear how the CA will reduce the number of applicants invited to submit a tender under Article 1(11)(b) of Directive 2004/18/EC. For example, the CA must select minimum five candidates to participating in the final tender procedure. The contracting authority is therefore required to design objective and non–discriminatory selection criteria so the candidates know what criteria they will be evaluated on.

How to avoid: Design transparent and objective selection criteria which could be the highest revenue per year within the matter of the contract over the last three years, or three experiences closest to the tendered contract (evaluated and decided by the CA). If no objective criteria are listed the selection process is unlawful and violates Articles 2 and 44 of Directive 2004/18/EC.

4. Evaluation of tenders

The purpose of this stage is to determine the winning tenderer by strictly applying the published award criteria.

Never amend the award criteria or evaluation methodology midway through the procurement process

4.1 Lowest price

At the procurement planning stage the CA will have taken a decision as to which evaluation method to follow and this should be clear in both the CN and tender documentation. If the lowest price is chosen, then this is the most transparent (and it is hard for tenderers to argue against the decision as a result). However, quality is taken into account only by the quality minimum requirements stated in the specifications. Thus, lowest price is advisable on the condition that the technical specifications can be fixed upfront by the CA and, therefore, must be the same in all proposals.

4.2 Most economically advantageous tender (MEAT)

MEAT is increasingly becoming the most popular evaluation method as contracting authorities become more skilled in its application. CAs need to have the capabilities to carry out an evaluation based on price and quality, technical merits and functional characteristics; and the tenderers equally need to understand how to prepare a tender on that basis. The prior fixing of technical specifications, the checking of proposals against those criteria, and the evaluation of offers based on price and quality necessitate high levels of technical competence. If the CA does not possess those skills then training is required as well as support from experts independent of any tenderers. In an evaluation based on MEAT it is possible (indeed it is to be encouraged where relevant) to include criteria relating to environmental and/or social issues as well as operating costs.

If MEAT is to be used, details of all the criteria (as well as the proposed evaluation methodology) must be included - in order of importance - in either the CN or the tender documents or both.

Setting MEAT criteria for a complex contract requires considerable technical skills and CAs may need to seek external expert advice. Technical advisors can also be used as non-voting members of Evaluation Committees, but it is important that they do not have any conflict of interest *vis-à-vis* potential bidders.

See Toolkit 6 on tender evaluation, including MEAT and scoring

4.3 Dealing with abnormally low tenders

This is an area which causes some difficulties for CAs. Before the CA decides to reject what it considers to be an "abnormally low tender", the CA first needs to define what it considers to be an "abnormally low tender" for all offers! The CA should first clarify with the tenderer why its offer is so low and whether there are any particular circumstances which would reasonably explain the low offer, for example, innovative technical solutions or particular circumstances allowing it to obtain supplies at favourable conditions. Based upon the analysis of the justification provided by the tenderer the CA should decide if the tender should be rejected or accepted. It is mandatory for the CA to ask for justification of the abnormally low offer in any case and not only when the offer is rejected.

Primarily this should be addressed at the procurement planning stage. The question should be asked, 'what will we do if we receive one or more abnormally low tenders'? An abnormally low tender may highlight a fault in the specification or may implicate a possibly incorrect determination of the estimated total value of the contract. It could be the case that the tenderer has misunderstood the specifications or that the specifications have been badly drafted (and therefore are open to exploitation once the contract has been signed).

4.4 Clarifications

In carrying out an open or restricted procedure it is possible for the CA to seek clarifications from tenderers on aspects of their tenders. However, it is not possible to carry out negotiations on those tenders. These requests can only have the character of minor clarification of information already submitted by the tenderer.

In certain circumstances there is an obligation for the CA to ask the tenderer to clarify or complete submitted documents. This obligation applies when the text of the tenderer is vague or unclear and circumstances of which the contracting authority is aware, suggest that this ambiguity can be easily explained or eliminated. In that case, proceeding of the CA that would lead into exclusion of the tenderer without prior request for clarification or submission of additional documents would contradict the good governance principle.
See case C-599/10, *SAG ELV Slovensko,* in which it is was ruled that the CA may ask tenderers in writing to clarify their tenders without requesting or accepting any amendment to the tenders. The CA must treat the various tenderers equally and fairly, in such a way that a request for clarification cannot appear to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed. See also points 45 and 46 of case C-42/13, *Cartiera dell'Adda,*.

✖ **Clarifications should not have the effect of changing the already submitted tender in relation to substantial information such as pricing, quality and service elements. All communication with tenderers must be fully documented.**

4.5 Post tender negotiations

In a restricted or open procedure no negotiations are allowed and the procurement officer must take care not to negotiate the terms of the contract with the tenderers as any changes could invalidate the evaluation process. If the tenders contain a clearly arithmetical error in the tender price the CA may contact the tenderer in order to clarify and correct the tender price.

4.6 Evaluation Committee decision

The chair of the Evaluation Committee must arrange for the tender evaluation results decided by the Evaluation Committee to be presented to the Steering Committee (if such a Committee is established). A full and comprehensive report on the process and outcome of the Evaluation Committee deliberations must be recorded and kept on the contract file. Tender evaluation reports should be clear and sufficiently detailed to demonstrate how the decision to award the contract was taken.

The most common mistakes leading to financial corrections at the evaluation stage:

1. **Modification of award criteria after the opening of tenders resulting in the incorrect acceptance of tenders**

Example: The award criteria were modified, resulting in the evaluation being done on the basis of criteria that were not published. This can sometimes happen where sub-criteria are developed by the Evaluation Committee during the evaluation.

How to avoid: If the award criteria need to be modified after CN publication, the CA must either cancel the tender and retender or issue an erratum and possibly an extension of the deadline for submissions. Modification of award criteria after the tender submission deadline is a violation of Articles 2 and 53 of Directive 2004/18/EC.

2. **Lack of transparency/equal treatment during evaluation**

Example: The scores given to each tender is unclear/unjustified/lacks transparency or have not been recorded fully/or the evaluation report does not exist or does not contain all the elements required to demonstrate how the decision to award the contract to a particular tenderer was arrived at. Article 43 of Directive 2004/18/EC requires CAs to keep information on each contract sufficient to justify, later on, decisions taken on the selection of economic operators and the award of contracts.

How to avoid: This violates Articles 2, 43 and 53 of Directive 2004/18/EC. The chair of the Evaluation Committee should ensure that there is written justification for each score given in the tender evaluation. The scores and comments for each tenderer must be presented in a written letter to the tenderer and included in the evaluation report.

3. **An undisclosed conflict of interest**

Example: Following a whistle-blower report, a member of an Evaluation Committee was discovered to have undeclared links to one of the tenderers. This violates Articles 2 of Directive 2004/18/EC, as interpreted by case C-538/13, *e-Vigilo.*

How to avoid: A conflict of interest declaration should be signed by all Evaluation Committee members. In addition, separate red flag or data mining techniques should be used by the CA to identify and investigate any possible undisclosed links between staff in the CA and tenderers.

4. **Modification of a tender during evaluation**

Example: The CA allowed a tenderer to modify its tender during evaluation of tenders

through the submission of additional material information.

How to avoid: This violates Articles 2 and 44(1) of Directive 2004/18/EC. The procurement officer and chair of the Evaluation Committee must ensure that only information submitted at the time of the tender is evaluated.

5. Negotiation during the award procedure

Example: In the context of an open or restricted procedure, the CA negotiated with the tenderer(s) during the evaluation stage, leading to a material modification of the initial conditions set out in the CN or tender specification (e.g. a significant change in the scope of the project or the contract price).

How to avoid: This is not allowed under Article 2 of Directive 2004/18/EC. Any clarifications or communication with tenderers after the tender submission should be in writing. If the CA has concerns about the clarity of the tender documents then it should consider re-launching the tender with a revised specification.

6. Rejection of abnormally low tenders without justification

Example: Tenders appear to be abnormally low in relation to the goods, works or services requested, but the CA, before rejecting those tenders, does not request in writing details of the constituent elements of the tender which it considers relevant. Some CA have used a benchmark minimum offer price, often calculated by using a mathematical formula, and automatically eliminate bids below this benchmark without first asking them to justify their low offers. This is not allowed under Article 55 of Directive 2004/18/EC.

How to avoid: This is a situation in which many CAs find themselves. It can be avoided by careful pre-procurement planning, including setting benchmark prices. The CA must give tenderers with low tenders the opportunity to justify their low offers and they cannot be automatically excluded. It is mandatory for the CA to claim a written justification from the tenderer clarifying the background for the low price tender.

Actual examples

Conflict of interest during tender evaluation
After the award of the contract, it was found that the wife of the chairman of the tender Evaluation Committee of the CA was a senior employee of the winning tenderer. The CA had no guidelines or protocols to deal with such a clear conflict of interest.

Major reduction in contract scope during the tender process
After a prequalification phase for a project with an estimated cost of EUR 600 million, it was decided to reduce the scope to the contract resulting in a new contract price of EUR 60 million, while keeping the list of already prequalified tenderers. This led to a restriction in competition, as prequalification criteria were not proportionate to the reduced scope, and should have required re-tendering. Additional tenderers may have expressed an interest had they known the true value of the project.

Significant change in the scope of the contract during the tender process
An unclear definition of the subject matter of the contract led to successive changes throughout the tender process, using the lack of precision of the initial CN as a justification for significantly increasing the scope of the contract to include services not initially covered.

5. Award

5.1 Award notice

When the CA has decided to whom the contract should be awarded all tenderers must be informed of the result. After the standstill period (see below) and assuming no complaint has been filed the contract can be signed. Within 48 days after the contract signature the CA must send a contract award notice to the OJEU for publication (even if there were no responses to the OJEU notice).

✖ **Failure to publish the contract award notice is a relatively common error that can be eliminated through the use of checklists and key stage controls. As soon as it is noticed that a contract award notice has not been published, even after the 48 day period, CAs should nonetheless take immediate action to ensure that it is published.**

5.2 Standstill period and informing the tenderers

The Remedies Directive 89/665/EEC, as amended by Directive 2007/66/EC (see also section 2.6 on complaints, remedies and liability), sets out a requirement for standstill period for the review of the contract award decisions made by the CA. Letters (known as 'standstill letters') informing the tenderers of the contract award decision must be sent to all participants stating that the contract will be awarded on expiry of the standstill period (not less than 10 calendar days).

The standstill letter will inform the candidate of the decision reached in accordance with Article 41 of Directive 2004/18/EC and will indicate clearly the exact standstill period applicable pursuant to the provisions of national law transposing the Remedies Directive.

At any time, a CA may decide to cancel a tendering procedure with justification. If the tender is cancelled this should be notified to every tenderer. Best practice is to include information about the time schedule for re-tendering in the notice.

⚠ **As soon as a contract has been awarded the CA must store and file all documents covering the tender evaluation stage, including all tenders received and the report of the Evaluation Committee.**

Common mistakes leading to financial corrections at the contract award stage:

1. Negotiation on the contract

Example: The CA negotiates with the successful tenderer on the scope of the contract, agreeing either to extend or reduce the scope and price of the advertised contract. The essential elements of the award of the contract include, but are not limited to, price, nature of the works, the completion period, the terms of payment and the materials used. It is always necessary to do a case-by-case analysis of what is an essential element.

How to avoid: This type of negotiation violates Article 2 of Directive 2004/18/EC and is prohibited as it changes the nature of the advertised contract and means that the other tenderers have not had the opportunity to make an offer for the 'amended' contract. If the CA discovers before signing the contract that it has to be re-scoped, then the CA must

cancel the tender procedure and retender so that the market has another opportunity to bid for the amended contract. This would apply both in the case of a significant increase or a significant reduction in the scope of the contract.

Actual example

Price negotiation with the lowest tenderer in an open procedure
Although the price of the winning bid under an open procedure was within the CA's budget estimate, the CA invited the tenderer to a negotiation to further reduce its tender price.

How to avoid: This type of negotiation is not legal under an open or restricted procedure. Negotiation with only one tenderer can be used under Article 31 exceptional procedures.

6. Contract implementation

The purpose of this stage of the process is to ensure that the contract is satisfactorily implemented in accordance with the outcome of the tender process.

6.1 Supplier/contractor relationship

The first meeting with the successful bidder should establish how the relationship will work between the parties, including the frequency of meetings, attendance, minutes, progress reporting and escalation plans. Throughout the contract implementation stage, the CA must arrange regular meetings with the contractor to ensure fulfilment of the contract and should include regular monitoring and feedback in the process in order to avoid avoidable conflicts. It is vital that the parties' roles and responsibilities under the contract are mutually agreed and understood before contract signature.

6.2 Contract modifications

With good planning, a comprehensive, robust specification, and a well-designed contract prepared by a diligent CA, the need for any contract modifications or contracts for additional works/services/supplies during the implementation stage should be minimised.

Modifications of contracts and the use of a negotiated procedure for additional works with an existing contractor without any tendering of these additional works or services is one of the most common and serious errors. In most cases, if significant additional works/services are needed then a new contract should be tendered. The only exceptions to this general rule are set out in Article 31 of Directive 2004/18/EC. However, as Article 31 is a derogation from the general rule that additional works/services should be re-tendered, it should only be used in exceptional circumstances and needs to be justified. The burden of proof for the circumstances allowing for the use of this procedure rests with the CA. Audits focus very closely on this issue.

See Toolkit 8 on contract modifications

6.3 Closing the contract

At the completion of the contract, it is important to hold a review meeting to assess how the contract has performed against its original expectations. An important consideration to be taken into account when closing the contract is the communication of success and recognition of those involved in achieving the success and learning from problems overcome in addition to risks realised. Some of the questions to be asked as part of an end of project review are:

- Did we get what we requested?
- Did we get what we actually needed?
- Can we see a difference between the two?
- Can we explain the difference between the two?
- Do we understand how this will influence our procurement and contract management in the future?
- Are there any lessons learned that might affect future contracts/projects?

Common mistakes leading to financial corrections at the implementation stage:

1. Reduction in the scope of the contract

Example: The contract was awarded in compliance with Directive 2004/18/EC, but was followed by a reduction in the scope of the contract. During contract implementation, the CA and the contractor agreed to reduce the scope of the works significantly with a corresponding decrease in the contract price. As this involved a significant change in the contract it is likely that other smaller companies would have been interested in tendering for the reduced size contract. Once the reduced size of the contract was known, the CA should have cancelled the original tender and re-tendered the reduced size contract.

How to avoid: This could constitute a violation of Article 2 of Directive 2004/18/EC and is best avoided at the planning stage by involving all stakeholders to review the scope and risks, including the availability of a sufficient budget. If the reduction in scope is material the contract has to be re-scoped and the CA must cancel the contract and retender so that the market has another opportunity to tender for the revised contract.

2. Award of contracts for additional works or services without competition in the absence of justified urgency brought about by unforeseeable events

Example: The main contract was awarded in accordance with the relevant provisions, but was followed by one or more works/services/supplies contracts for additional works or services (whether or not formalised in writing) awarded without complying with the provisions of Directive 2004/18/EC, i.e. the provisions related to the negotiated procedures without publication for reasons of extreme urgency brought about by unforeseen events.

How to avoid: This is not allowed under Article 31(1)(c) of Directive 2004/18/EC where the justification for 'urgency' does not exist. The procurement planning phase needs to be expertly executed and all risks included in the preparation of the tender documents.

3. Additional Works/Supplies/Services awarded exceeding the limits laid down in the relevant provisions

Example: The main contract was awarded in accordance with Directive 2004/18/EC, but was followed by one or more contracts for additional works or services awarded without competition to the same contractor and which amounted, in total, to more than 50%, of the value of the original contract.

How to avoid: Even if the additional works/services are truly unforeseen, Article 31(4)(a) of Directive 2004/18/EC sets a limit of 50 % of the original contract value.

In the first instance, better planning of the project should help to avoid the need for such additional works/services. Secondly, a contingency can be built into contracts at the outset from which normal variations to a contract can be met. However, the purpose of the contingency needs to be specified precisely in the contract at the outset. There are also provisions in Article 31 relating to the possibility of awarding additional works/services to the existing contractor where such works involve the repetition of similar works.

In addition, during contract implementation, the contracting authority should closely monitor any such additional works or services to ensure that either they meet the conditions in Article 31 or, if they do not, then the contracting authority should plan to tender them at an early stage to avoid unnecessary contract implementation delays.

Actual example

The time period for the delivery of an existing, above the EU threshold, service contract for supervision of a works contract (transport project) was extended directly by the CA with the existing supervising engineer without advertising the additional services to be provided. This resulted in an increase in the original contract price of more than 40%. The CA considered that the extension of the duration of the supervision contract was due to unforeseen circumstances and was therefore permitted by Directive 2004/18/EC. The delay to the works contract for construction of a road was due to delays encountered by the contracting authority in acquiring all of the land it needed for the road from landowners. A substantial amount of land had not been acquired at the time of commencement of the works contract for the construction of the road and further significant delays were encountered due to strong resistance from landowners who refused to sell their land and who brought lengthy legal cases to frustrate the CA efforts to acquire the land.

In this case, the European Commission did not accept that the circumstances justifying the use of a negotiated procedure without advertising for the additional supervision services could be considered as 'unforeseen'. A diligent CA should have anticipated that some landowners would resist attempts to purchase their land and it should therefore have taken steps to ensure that it would be in possession of all land prior to commencing the works. When it became obvious afterwards that long delays in acquiring the land were being experienced, it should have, at this stage, been anticipated that additional supervision services would be needed and decided to tender these services as a separate contract.

TOOLKITS

TOOLKIT 1 – BUSINESS CASE

Toolkit description:
To provide a commercially sound basis for commencing a particular procurement and to provide documentary evidence for decisions made at the outset of the contract.

Common mistakes:
Sometimes this is simply not done. A need is assessed and a process launched without ever documenting the rationale for particular choices and that appropriate approvals were given. Complex procurements consume significant amounts of time and effort. It is essential that any decision to embark on a particular procurement project is based on a thorough and comprehensive assessment of the issues involved and options available. Procurement projects based on poor research and untested assumptions will fail to deliver the required objectives.

Good practice:
The CA should prepare a business case (always proportional to the size and complexity of the project, not every aspect is necessary in case of smaller projects) that provides a clear rationale as to why the procurement should go ahead and that demonstrates that key planning aspects have been considered.

The purpose of the business case is to establish a clear rationale for the proposed course of action by demonstrating that the project/contract will:

- meet the organisation's need;
- choose the most appropriate tender procedure;
- be achievable;
- be affordable;
- be a sound commercial arrangement; and
- be sustainable.

The business case should cover:

- the benefits to be realised/problems that the project will solve;
- the outline of the timescales;
- the justification for the project;
- the estimated costs and budget availability;
- the budget for required material and quantities;
- the workforce and customer/user implications; and
- the major risks.

A business case should be approved at the appropriate hierarchical level within the CA for the required budget as part of the procurement planning stage and certainly before the commencement of the actual procurement process.

A standard contents/checklist for a business case should cover:

1. STRATEGIC FIT
   - alignment of deliverables with internal plans and strategies;
   - external strategies taken into account;
   - project/contract objectives;
   - key benefits to be realised;
   - key risks identified;
   - critical success factors and how they will be measured;
   - main stakeholders.

2. OPTIONS APPRAISAL
   - list of options appraised;
   - high level cost/benefit analysis;
   - non-financial 'soft' benefits;
   - preferred option and rationale for choice;
   - preferred packaging and rationale for choice;
   - is the preferred option available through an already procured contract?

3. COMMERCIAL ASPECTS
   - sourcing options and rationale for selection;
   - procurement strategy and rationale for approach.

4. AFFORDABILITY
   - available funding and sources;
   - outline cost estimate;
   - life-cycle cost.

5. ACHIEVABILITY
   - high level plan of tasks and timetable to deliver the contract.

TOOLKIT 2 – RISK AND CONTINGENCY PLANNING

Toolkit description:
To provide a basis for assessing the risks of a particular project/contract delivering the expected benefits on an ongoing basis and to provide documentary evidence for risks assessed and actions allocated throughout the contract's life. Standard checklists for preparing a risk register assessment and contingency plan, which CAs can adapt to their own templates and procedures are set out below.

Common mistakes:
Complex procurement projects consume significant amounts of time and effort. It is essential that the rationale for a particular course of action is justified and that risks to any project/contract are assessed continually. Many high and very high-risk projects fail to provide proper contingency arrangements for risks labelled as a high in the risk register, including identification of contingency budget lines. The major mistake that managers make is that they do not carry out this function, through a perceived lack of skills or through ignorance of the necessity for such a process step.

Good practice:
The CA should ensure that a risk register and associated contingency plan are prepared during the early stages of the project/contract lifecycle and that they are regularly updated at key stages through the project/contract lifecycle, including a report on the management of high and emerging risks. Good risk management reduces the likelihood of aborted processes, the need for contract modifications during implementation and the risk of financial corrections to EU grants.

The risk assessment should:

- be capable of identifying and quantifying all risks associated with the project;
- include the allocation of ownership of individual risks;
- include a risk register;
- form an integral part of the procurement gateway review mechanism (when applied). See Toolkit 3; and
- include allocation of responsibilities for:
  - the preparation of the risk register; and
  - monitoring and reviewing the register on a regular basis.

There are six elements to risk assessment, namely the following:

- identify potential problems and their causes;
- assess the probability of occurrence (high/medium/low);
- assess the impact on the business and reputation, if the identified risks were to materialise (high/medium/low);
- evaluate the relative costs and benefits of alternative strategies to minimise risks; and come to a view on whether or not to pursue them;
- identify which party is best able to manage the risk;
- devise strategies (with timescales and responsibilities) to manage risks.

Questions to consider for each individual risk include the following.

- Who is best able to control the events that may lead to the risk occurring?

- Who can control the risk if it occurs?
  Is it preferable for the CA to be involved directly in the control of the risk?
- Who should be responsible for a risk if it cannot be controlled?
- If the risk is transferred to the contractor is the total cost to the CA likely to be reduced?
- Will the risk bearer be able to bear the full consequences if the risk occurs?
- Could it lead to different risks being transferred back to the CA (e.g. increased contract price)?
- Would the risk transfer be legally secure?

A contract specific risk register should be developed. When formulating a risk register, the CA should take into account the following factors.

- The fit with the organisation's corporate risk register.
- Business area priorities - by reviewing future plans and meeting with business area representatives.
- Business continuity planning.
- Inter-dependencies with other contracts – what potentially adverse effects would occur if (a) failure in contract X impacted on contract Y, or (b) there was a lack of co-ordination across contracts.
- Commodity-specific aspects - as enshrined in the relevant specification (e.g. for a furniture supply - reputational risk associated with buying timber from non-sustainable sources).
- Asset criticality – asset-focussed risk assessment is particularly important in contracts where management of critical infrastructure is involved, e.g. equipment maintenance.
- Mobilisation period – facilitating a seamless transfer from interim to new contractual arrangements.
- Performance baseline – assess the existing level at which the service is being delivered - either internally or by a third-party contractor.

During the life of the contract, the contract manager must monitor the risks continually, and highlight any emerging problems speedily. Many risks involve the contractor being unable to deliver, or not delivering to the right level of quality. These could include:

- lack of capacity;
- key staff on the contractor-side being redeployed elsewhere, eroding the quality of the service provided;
- the contractor's business focus moving to other areas after contract award, reducing the added value for the CA in the arrangement;
- the contractor's financial standing deteriorating after contract award, eventually endangering their ability to maintain agreed levels of service; and
- problems within the contractor's own supply chain.

Other risks to the contract are beyond the contractor's control, these are likely to include:

- the CA not properly defining the requirement at the outset;
- demand for a service being much greater than expected and the contractor cannot cope;

- demand for a service being too low, meaning economies of scale are lost and operational costs are disproportionately high;
- staff in CA with 'intelligent customer' skills being transferred or move on (same applies to the contractor);
- *force majeure*: factors beyond the contractor's control disrupting delivery, e.g. premises not being accessible because of a natural disaster;
- fundamental changes in the CA's requirements, perhaps as a result of changes in policy, making the arrangement a higher or lower priority or change the level of demand for the service; and
- the CA's inability to meet their obligations under the contract.

The contingency plan should:

- define the contingency arrangements to be put in place;
- identify responsibility for providing the contingency;
- define the implementation arrangements;
- become an integral part of the Project Initiation Document and Transition and Implementation Plan; and
- be set out in the tender documents.

The key components of contingency planning are:

- identifying which services must be maintained in which circumstances – i.e. key business functions;
- a business contingency plan being drawn up that specifies how the business will continue its critical services under a range of disaster scenarios;
- the consequent requirements for continuity for each critical service to the business then being derived;
- service contingency (continuity) plans then possibly being developed; and
- the identification of funding in case existing budgets are exceeded.

TOOLKIT 3 – GATEWAYS

Toolkit description:

Gateways are a mechanism to review procurements at critical points in their development, before key decisions are taken, thereby enabling them to progress through their various stages and if necessary modify or even stop the process. The purpose is to introduce a series of 'health checks' into the project/contract timetable; gateways are designed to ensure that the procurement is soundly based, well planned, that all appropriate stakeholders are involved, so that the objectives are achieved. The mechanism also helps ensure a consistency of approach across different contracts and projects. Each gateway consists of a series of questions designed to test the robustness of decisions. Evidence is submitted to the Evaluation Committee or the CA to demonstrate that the topics covered by the gateway questions have been adequately addressed, before the procurement is allowed to progress to its next stage. The checklist below describes a simplified gateway format.

Common mistakes:

Procurement gateways (a generic term) are a relatively recent introduction into procurement from project management. Their usage came about as a result of various lessons learned exercises (prompted by the question: *how did this happen*?) on mainly Government projects that had gone badly wrong for various reasons, resulting in major cost or time overruns or failure to deliver expected benefits. Failure to put in place breakpoints with 'required go/no-go approvals' misses out an essential part of a well-functioning control system.

Good practice:

The idea of the gateway process is to try and eradicate as far as possible inherent dangers to the process. By insisting that at each stage of the process ('the gateway') the CA must be convinced of reasons to proceed before a further stage can commence, dangers are then dealt with at the appropriate time. Failure to convince the Evaluation Committee or the CA means that the tender does not proceed. There are a number of gateway review systems available.

A **formal** gateway process should only be applied to complex, strategically important or high-risk projects, and an assessment of this should be made before embarking on each procurement project (see Toolkit 2). For projects that fall into this category, the Evaluation Committee or CA must be established in order that it may carry out the gateway reviews. A record of the gateway process should be kept in the project files.

The gateways

Depending on which format is used, there can be different gateways. The example below illustrates gateways:

Gateway 0 – Completion of the planning

This review should be taken at the very early stages to verify the set-up of realistic, coherent and achievable milestones for the procurement process.

- **Gateway 1 – Contract scope and procurement strategy**

This review should take place at the beginning of the project, at the first Evaluation Committee or CA meeting, before any advertisements have been placed or tender documents produced.

- **Gateway 2 – Shortlisting**

  This review takes place following evaluation of PQQs, when the shortlist recommendations have been agreed, and all tender documents produced, but before tenders are invited.

- **Gateway 3 – Tender evaluation**

  This review takes place when the preferred tenderer has been agreed upon, but before contract award; or before proceeding to final tender, in the case of a two stage tender process.

- **Gateway 4 – Contract**

  This review takes place when the second stage tender has been evaluated, but before signature of the contract.

TOOLKIT 4 – SHORTLISTING

Toolkit description:
This toolkit describes how a standard Pre-Qualification Questionnaire (PQQ) can be used for shortlisting applicants under the restricted, negotiated and competitive dialogue procedures or for seeking relevant information on tenderer capacity under the open procedure.

Relevant legal context:
Articles 44 to 52, specifically 45 to 48, of Directive 2004/18/EC.

Common mistakes:
The major mistake that contracting authorities make is that they:

- fail to check that all the questions are relevant (or proportionate) to a particular procurement;
- add questions without any thought as to the potential responses; or
- fail to agree in advance the methodology for scoring as a panel assessment.

Good practice:
Pre-procurement planning is key to avoid above errors. It is suggested that the CA uses one standard template for PQQs as this makes it more user friendly for both CA and applicants. Exclusively the criteria relating to personal situation, financial capacity, technical capacity, relevant experience, expertise and competency of tenderers set out in Articles 45 to 48 of Directive 2004/18/EC are permissible as selection criteria.

A PQQ should cover questions and requirements to:

- the profile of the organisation;
- grounds for exclusion;
- insurance;
- financial information;
- health and safety;
- equality and diversity;
- technical capacity;
- references;
- corporate social responsibility;
- undertaking; and
- bank references.

CAs may opt to shortlist only a limited number of qualified tenderers but this must be indicated in the CN, which should state the number or range of candidates to be shortlisted. Shortlisting of tenderers who meet the minimum qualification criteria must be carried out by non-discriminatory and transparent rules and criteria made known to candidates. Directive 2004/18/EC requires that a sufficient number to ensure adequate competition should be invited to submit tenders and indicates a minimum of five (provided that there is at least this number meeting the pre-qualification criteria).

The Evaluation Committee should adopt the following steps when shortlisting PQQ applicants.

- A 'PQQ evaluation matrix - applicant' should be completed for each applicant. It shows what information has been requested with spaces for scoring and comments for each section.
- The approach to scoring needs to be agreed by the Evaluation Committee before any members start scoring e.g. whether to score individually or as a group and how scores will be allocated. If individual scoring is applied, then the summary PQQ evaluation matrix individual score sheet for each applicant needs to show each individual committee member's scores as well as the total. If preferred, the Evaluation Committee can agree a single score as a group rather than being an average of individual scores. A single PQQ panel score sheet should be used for this option. The scoring mechanism should be disclosed in the CN and tender documents and the mechanism cannot be changed afterwards.
- All evaluators should be named on the score sheet.
- Each applicant must be treated equally and the approach used for scoring must be consistent, non-discriminatory and fair.
- The PQQs should be scored only on the basis of the information contained in them and the Evaluation Committee cannot take into account any other information received by any means, including personal knowledge or experience of the applicant.
- The contents of the Evaluation Committee's scores, individually or in total, should not be disclosed to any person outside of the Committee.
- All questions should be answered on either a pass/fail basis (eligibility) or scored according to the advertised selection criteria.
- If an applicant fails predefined mandatory circumstances, such as minimum turnover, the application should be treated as ineligible, and the rest of the applicant's submission should not be evaluated.
- If appropriate, the shortlist can include all applicants who meet or exceed a certain threshold for any of the scored criteria.

Link to a PQQ example in Toolkit 10

TOOLKIT 5 – DESIGN OF SELECTION CRITERIA AND SELECTION PHASE

Toolkit description:
This toolkit is intended to assist practitioners in designing and carrying out a high standard selection of tenderers' process. The first section advises on designing the selection criteria laid down in the tender documents. The second section gives best practice on how to apply selection criteria to identify the most appropriate applications or eligible tenders.

Relevant legal context:
Articles 44 to 52 of Directive 2004/18/EC.

Common mistakes:
Proposed criteria are not related/proportionate to the subject matter of the contract or are discriminatory. Typical examples of bad practices are as follows.

- Minimum annual revenue required EUR 10 million for a contract with annual value of EUR 1 million.
- Requiring certain standards without mentioning 'or equivalent'.
- Requiring an unnaturally high or low solvency percentage that tends to favour certain operators.
- Lack of clear objective criteria to select the best tenderers. For instance, if the CA just asks for previous experience without requiring further details in the references such as contract type and period, volume and result.
- Requiring the establishment of a local office at time of submission tender (it can be required only at contract date).
- Requiring the registration of a company in the Member States at tender submission time.
- CAs fail to carry out a dry run of both stages of the process to take out any potential malfunctions at the planning stage.
- CAs regularly mix up two distinct stages of the process. Once the selection stage has been completed the CA cannot return to it. There are also certain issues that can be covered only at selection stage (and similarly certain issues that can be covered only at evaluation stage). The opening and evaluation of the participation documents and technical tenders (selection stage) precedes, the opening and evaluation of the economic tenders (award stage) follows.

Selection criteria:
It is important to note that the selection of economic operators and the award of the contract are two different exercises in the award of a public contract. Selection is about determining which economic operators are qualified to perform the contract to be awarded on the basis of the selection criteria pre-established by the CA. All relevant selection criteria for a specific contract must be taken into account to ensure that only those economic operators that are capable of fulfilling the contract are selected to pass through to the evaluation of their tenders stage. The selection criteria must be:

- compliant with the EU Treaty principles, in particular the principles of transparency, equal treatment and non-discrimination;

- proportionate to the size and nature of the contract;
- determined by taking into account the specific need of each tender and they must be relevant to the specific contract to be awarded. They must not be determined in an abstract way;
- designed in such a way that economic operators, including SMEs, that have the potential to be efficient and effective providers would not be deterred from participating;
- formulated in a simple way so that they can be easily understood by economic operators; and
- the selection criteria must always mention 'or equivalent' when specifying standards, brands or origins of any type.

How should the conditions for selection criteria be developed?

The selection criteria used depend upon the specific nature of the procurement. Best practice is to develop them at the same time as developing the specification. Generally, the conditions for selection criteria will address:

- the technical merit of the works, supplies or services offered; and
- the capability of the tenderer to fulfil the specification, including technical and management competence, financial viability, relevant skills, experience and availability or key personnel.

When to develop the conditions for selection criteria and methodology?

- The conditions for participation in the tender and methodology must be completed, and approved at the procurement planning stage as these must be clear by the time the CN is published.

The CA asks for:

- the company history – for example, a definition of the product range, years in business, staff turnover;
- documentation for technical capacity – for example previous experience, equipment and workforce composition;
- Minimum annual revenue of for instance EUR 2 million where the contract value is EUR 1 million per year (The maximum requirement for annual turnover from the economic operators is two times the current amount under Article 58 of new Directive 2014/24/EU. In Directive 2004/18/EC there are no specific requirements apart from the principles of equal treatment, transparency, non – discrimination and proportionality.)
- solvency ratios per year for the last three years (define a minimum level for instance 25% or more);
- references for similar previous contracts/projects within the last three years. Each reference must be detailed – as a general rule, at least two of the references must be appropriate to the contract (minimum requirement);
- valid insurance certificates – documentation that the insurance is in force (can also be requested only at the time of signing the contract).

Criteria (or methodologies) that may be applied in order to choose the economic operators to be invited to tender/negotiate/conduct a dialogue from among the qualified economic operators must be objective and non-discriminatory and may not extend beyond the criteria allowed by the EU Directive itself.

Joint tenders

It is possible for an economic operator to rely on the resources of other entities to prove its economic and financial standing and/or to prove its technical and/or professional ability. An economic operator, may, where appropriate, and with regard to a specific contract, rely on the capacities of other entities, regardless of the legal nature of the links that it may have with them. In this case it must prove that it will have at its disposal the necessary resources, for example by producing an undertaking by those entities to that effect. This possibility enables an economic operator to rely on the economic and financial resources of affiliated entities and also of sub-contractors or any other entity that has actually made its resources available to the economic operator. A group of economic operators may also, under the same conditions, rely on the capacities of participants in the group or of other entities (Article 47(3) of Directive 2004/18/EC). Where the economic operator is a member of a group of economic operators or consortium, it would be sufficient for the economic and financial standing requirements to be satisfied by the group as a whole and not by each individual member. This possibility can also act to encourage the participation of SMEs in the procurement process.

Selection of tenderers

Selection of tenderers is the phase to identify those most appropriate applicants or tenders who will be selected as eligible to submit a tenderers or to pass on to the final evaluation phase in the open procedure.

How should a selection methodology be developed?

The evaluation methodology used depends on the nature and complexity of the procurement. The methodology selected should enable the CA to objectively and transparently determine which tenderer offers the best option in terms of capacity to deliver (selection) by addressing:

- conformity with conditions for participation (mandatory requirements) – a 'yes/no' or 'met/not met' response;
- the degree to which a tender meets qualitative criteria;
- the level of risk associated with selecting a particular quotation; and
- criteria must be listed (in order of priority) in the documents (usually the specification) with weightings (if any) plus the methodology for assessment.

In any case, in open procedures, every tender fulfilling the selection must be evaluated at the award phase, according to Articles 44(1) and 2 (principle of equal treatment) of the Directive 2004/18/EC).

How should a numerical scoring methodology be applied?

In restricted procedures, after screening out those bidders that do not comply with the minimum selection criteria, a numerical rating is allocated if the number of applicants

needs to be reduced in order to make a shortlist. The CA must indicate, in the CN, or in the invitation to confirm interest, the objective and non-discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite and where appropriate, the maximum number. When scoring applicants, the decision on points must always be followed by the evaluation comments so as to be able to brief the applicants on the result.

Good practice

In practice, good selection criteria are considered to be the following:

- the most appropriate experiences with best comparable assignments;
- the best specific economic data, such as solvency;
- the education and qualifications of key staff.

TOOLKIT 6 – DESIGN OF AWARD CRITERIA AND AWARD PHASE

Toolkit description:
This toolkit is intended to assist practitioners in designing a high standard of award criteria in the tender documents and in carrying out the award phase.

Relevant legal context:
Articles 53 to 55 of Directive 2004/18/EC.

Common mistakes:
The most common mistakes are to mix up selection and award criteria or to not define a clear set of requirements. Typical examples of bad practices are:

- Criteria descriptions are too vague (not clearly defined), only minimum requirements are defined and are not linked to the subject matter of the contract – see point 34 of C-340/02, *Commission v France*. Bad practice examples are as follows.
    - Quality is evaluated:
        - on the product's durability (too vague in case no clear definition of product's durability is provided);
        - with a warranty period of 5 years (minimum criteria only, vague, linked to subject matter of the contract);
        - on the colour blue (minimum criteria only); or
        - on robust material (too vague in case no clear definition of robust material is provided).
    - Service is evaluated:
        - on the time of delivery being seven days (minimum criteria only, vague);
        - on robust consultancy advice (too vague in case no clear definition of robust consultancy advice is provided).;
        - on 24/7 ordering (linked to subject matter of the contract); or
        - on the training in use of products (too vague in case no clear definition of the training is provided.
- No connection between the award criteria and the subject matter of the contract.
- Too many criteria without regard to the scope and need of the contract.
- Mixing selection criteria and award criteria (i.e. using selection criteria as award criteria (e.g. previous experience) or using criteria already used at selection stage again at award stage.
- Use of average pricing, whereby tenders close to the average of all tenders receive more points than tenders further away from the average. Although the tender price is an objective criterion to use at award stage the use of this average pricing methodology represents unequal treatment of tenderers, particularly those with

valid low tenders. The practice is therefore not in compliance with Directive 2004/18/EC.

Typical errors that occur during the award phase are as follows:

- failure to adapt the awarding criteria and methodology to the specifics of the contract;
- mixing up the selection and evaluation stages of the process;
- failure to divulge the evaluation methodology in the tender documents in certain conditions – see case C-532/06, *Lianakis;*
- arithmetic errors when adding up scores and ranking tenders;
- elimination of tenders for being too low, even though there were no criteria or methodology established in advance to do this, in violation of Article 55 of Directive 2004/18/EC.

Designing the award criteria

When should the award criteria and methodology be developed?
The award criteria and methodology must be finalised, and approved, before the invitation to tender is published.

How should the award criteria be developed?
Award criteria are used to assess how well a tender meets the CA's requirements and hence ability to rank tenders. The award criteria to be used depend on the specific nature of the procurement. It is recommended to develop them alongside the specification. The **award criteria** must address:

- compliance with contractual terms and conditions;
- the technical merit of the goods or services offered;
- life-cycle costs;
- the risks or constraints associated with the tender; and
- any wider social benefits to the organisation (e.g. environmental considerations).

Good practice:
The award criteria (Article 53 of Directive 2004/18/EC) are the criteria that constitute the basis on which a CA chooses the best tender – i.e. the tender that best meets the requirements set out in the specification – and consequently awards a contract. These criteria must be established in advance, preferably at the planning stage, and must not be prejudicial to fair competition.

Article 53(1) states that the criteria on which a CA is to base the award of public contracts for supplies, works or services must be either:

a) **the most economically advantageous tender (MEAT)** – various criteria linked to the subject matter of the contract can be taken into account to award the contract, for example, quality, price, technical merit, delivery time, after-sales services.

b) **the lowest price** –the contract is awarded on the basis of the lowest price only

Some cases where it may be considered appropriate to use the lowest-price criterion are as follows.

- The procurement of supplies – for the procurement of simple, standardised off-the-shelf products (for example, stationery), the price is normally and typically the only relevant factor on which the contract award decision is based.
- The procurement of works – for works where the designs are provided by the CA or for works with a pre-existing design, it is common to use lowest price.
- The procurement of services – for some services (for example, cleaning services for buildings or publishing services), a CA may prefer to specify in detail the exact specification requirements and then select the compliant tender that offers the lowest price.

MEAT is used where value for money can be assessed as a balance between price and quality. The term 'value for money' means the optimum combination between the various criteria (cost-related and non-cost related criteria) that together meet the CA's requirements. However, the elements that constitute the optimum combination of these various criteria differ from procurement to procurement and depend on the outcomes required by the CA.

Using MEAT, as opposed to the lowest-price criterion, presents a series of advantages. It allows CAs to take into account qualitative considerations. The MEAT criterion is typically used when quality is important for the CA. For those requirements with a long operating life, it enables the CA to take into account the life cycle costs (i.e. costs over the life of the product) of the requirement purchased and not only the direct cost of the purchase (or initial purchase price) within the set specifications.

Some cases where it may be considered appropriate to use the **MEAT** are as follows.

- The procurement of supplies – for public supplies contracts that involve significant and specialised product installation and/or maintenance and/or user training activities, it is usual for the award to be made on the basis of the MEAT criterion. For this type of contract, in fact, the quality is normally of particular importance.
- The procurement of works – for works designed by the tenderer, the MEAT criterion is often used.
- The procurement of services – for the procurement of consultancy services and more generally intellectual services, the quality is normally very important. Experience has shown that when procuring this type of service, best results in terms of best value for money are achieved when MEAT criterion is used.

A CA may take into account various criteria to determine the MEAT. Article 53(1) of Directive 2004/18/EC contains an illustrative list of these criteria, which are as follows:

- price
- quality
- technical merit
- aesthetic and functional characteristics
- environmental characteristics

- running cost
- cost-effectiveness
- after-sales service and technical assistance
- delivery date and delivery period or period of completion.

However, other criteria may be added according to the nature of the contract, for example qualifications and relevant experience of staff proposed to deliver a service contract (but only in the conditions set out in case C-601/13, *Ambisig*).

The award criteria may not be mixed with the selection criteria. Under Directive 2004/18/EC the same documents both at the selection and the award stage can be presented only if it serves to identify the tender offering the best value for money (applicable case by case) and not the tenderer's ability to perform the contract which has already been established in the selection phase. If a criterion is used as a selection criterion in the pre- qualification phase, it cannot be used again as an award criterion in the same way. See also case C-31/87, *Beentjes;* case C-532/06, *Lianakis* and case T-402/06, *Spain v Commission*.

Article 67 of new Directive 2014/24/EU provides information on award criteria.

A CA may also decide to sub-divide the MEAT criteria into sub-criteria. The sub-criteria indicate the specific factors that are taken into account by the CA within a specific criterion. The criterion/sub-criterion must (see case C-513/99, *Concordia Bus,* for an example):

- be connected with the subject matter of the tender;
- not give the originator an 'unrestricted freedom of choice';
- be listed in either the CN or contract documents;
- be measurable and define a range for each criterion (competitive spreads), including a minimum and a maximum acceptable value for the CA;
- be designed and expressed in such a way that all participants will interpret the criteria in the same way; and
- comply with the fundamental principles of EU law, in particular the EU Treaty principles (equal treatment, transparency, non-discrimination, proportionality).

The identification of the criteria (and any sub-criteria) to be applied must be carried out with due care at the planning stage and their use in the evaluation process should be worked through for a range of possible tenders and combinations of criteria to ensure that they achieve the desired value for money. Failure to include relevant criteria or to including inappropriate criteria by mistake may mean that the tender offering best value for money is not selected. The criteria will generally be scored by using a scoring system or a 'scoring rule', which assigns weightings to the criteria used.

Also, the criteria and sub-criteria must be clearly formulated so that tenderers have a clear, common understanding of them. For instance, it is therefore recommendable to formulate the criteria "quality" by one or more sub-criteria and also formulate each sub-criterion by describing the minimum and maximum levels for each of the sub-criterion. A tenderer must, on the basis of the description in the tender documents, see how he will organise his tender in order to achieve a good score and the tender must be supplemented by documentation explaining how the tenderer will deliver the quality and service offered.

Examples of sub-criteria:
service:

- delivery (minimum and maximum level should be formulated)
- payment terms (minimum and maximum level)

quality:

- materials (minimum and maximum level)
- colors (minimum and maximum level)

Bad practice examples – Not to do	**Good practice examples – To do**
1. The supplier must offer minimum opening hours from 08.00 to 16.00 – describe the tenderers opening hours – long opening hours will be evaluated positively (long opening hours is not defined by the CA for instance 24/7).	1. The supplier must offer minimum opening hours from 08.00 to 16.00 – the tenderer to describe the *offered* opening hours – 24/7 offered will be evaluated and weighted positive. (The tenderer now competes between opening hours from 16 to 24/7).
2. The CA should describe days of delivery from ordering – short delivery time will be evaluated positively (short time of delivery is not defined by the Contracting Authority for instance maximum days and days offered will be weighted positively)	2. Tenderer to describe days of delivery from ordering - there is a maximum 12 days delivery from ordering – 4 days offered will be evaluated and weighted positive. (The tenderer now competes between 12 and 4 days – no extra points for a delivery time faster than 4 days). Or the scoring model can be listed and published: <4 days 5 points 5-6 days 4 points 7-8 days 3 points 9-10 days 2 points 11 days 1 point >12 days 0 points
3. The CA should describe if any extra costs will be added for urgent orders (The CA needs to advise an estimated number of 'urgent orders' per year to calculate the costs).	3. Tenderer to describe if any extra costs will be added for urgent orders. The estimated number of 'urgent orders' per year is 500. (Now the CA can calculate a total cost per year for urgent orders – which is transparent and clear)
4. The CA should describe the products durability – minimum durability is 2 years from production date (no preferred durability is defined by the CA).	4. The offered products durability must be at least (minimum criteria) 2 years from production date. The offered durability of 5 years will be evaluated and weighted positive (the tenderer competes between 2 and 5 years in durability – no extra points for an offered durability of more than 5 years).
5. Contract penalties: The use of contract penalties (i.e. the higher the contract penalty the tenderer is willing to pay for late delivery of the contract, the more points it is awarded) is discouraged as an award criterion. Such penalties should simply be provided for in the terms of the contract. 6. Gender equality: CA cannot not use gender as an award criterion for example by awarding points in	

a service type contract on the basis of the gender composition of the team of experts proposed by the tenderer (this is discrimination and a violation of the Treaty principles). 7. Extras: CA should not use 'contract extras' as a factor in the award of contracts, for example by giving additional points to tenderers who offers free items in addition to those requested. 8. Average price: The use of average pricing (i.e. awarding more points to those offers close to the average of all offers received) is not allowed as it is not an objective criterion related to the subject matter of the contract. 9. Level of sub-contracting: CA should not use the level of 'sub-contracting' in order to limit its use, for example by awarding higher points to tenderers who propose not to use sub-contracting compared to those who propose sub-contracting. CA are not entitled to limit the level of sub-contracting proposed by a tenderer. (this criteria is selection matter)	

Evaluation of tenders and awarding the contract phase

This section describes the methodology for carrying out the evaluation of tenders stage of the procurement process.

What are the different evaluation methodologies that can be applied?

The evaluation methodology used depends on the nature and complexity of the procurement. The methodology selected should enable the Evaluation Committee to objectively and transparently determine which tender offers best value for money by addressing:

- the degree to which a tender meets qualitative criteria;
- life-cycle costs;
- the level of risk associated with selecting a particular quotation; and
- the criteria must be listed (in order of priority) in the documents (usually the specification) with weightings (if any) and scoring methodology.

The main evaluation methods are:

A. Lowest price

The lowest price methodology is useful for simple or standardised procurements. It merely involves selecting the lowest price response that meets all of the conditions for participation.

B. MEAT: Price/Quality – numeric scoring

This methodology is useful for evaluating moderately complex purchases where the qualitative criteria are of roughly equal importance. After screening out those tenders that do not comply with the conditions for participation, a numerical rating is allocated against each of the desirable non-cost or qualitative award criteria, depending on the level of

compliance. The ratings are combined for each tender to give an overall quality score. Tenders are then ranked according to the ratio of price/quality score.

C. MEAT: Weighted scoring methodology

This methodology is useful for evaluating complex purchases where the award criteria are of differing importance. After screening out those tenders that do not comply with the conditions for participation, each criterion is allocated a percentage weighting (adding up to 100 percent in total). The weighting allocated to each criterion should be disclosed in the tender documents and must not be varied thereafter. Price is given a numerical weighting in the same way as other criteria and combined to give an overall mark.

D. MEAT: Numerical scoring methodology

This methodology is useful for evaluating complex purchases where the different qualitative factors are scored according to a classification system of 0 to 5. After screening out those tenders that do not comply with the selection criteria, a numerical rating is allocated against each of the qualitative award criteria depending on the assessed level of compliance, for instance using a scale of 0 (unacceptable) to 5 (exceptional). Price is scored and considered part of the value-for-money assessment. The cheapest tender is usually allocated a 100 % mark and other tenderers a lower percentage depending on the value of their tender in a proportional way. The scores are totalled and a value for money assessment is then made comparing the total scores, life-cycle costs and associated risks.

Can tenderers be contacted during the evaluation stage?

When evaluating the tenders, clarifications can be sought from tenderers, but the contracting authority must ensure respect of the principle of equal treatment and non-discrimination. It is best to ask for clarifications in writing by e-mail correspondence and they should refer to a specific section in the tender and must ask a specific question. It should be avoided to ask questions which essentially give the tenderer the opportunity to submit any other additional information or to change the tender as any changes could invalidate the evaluation process. If the tenders contain a clearly arithmetical error in the tender price the CA may contact the tenderer in order to clarify the tender price.

How should the Evaluation Committee reach its decision?

The Evaluation Committee must only score the tender submissions on the information contained in them and any clarifications received. Any other information that Committee members may already have received, including personal experience, should not be taken into account.

Each Evaluation Committee member must initiate, conduct, and complete an individual evaluation of each tender. The evaluations will be summarised and consensus score reached for the Committee as a whole. It may happen that members of the Committee will not always arrive at the same conclusions. In such cases, the Committee should discuss any individual differences as far as possible. The resulting discussions may bring consensus or each member may retain his/her independent thinking in his/her rating which would then be averaged with the other evaluations. Insofar as these methods produce an unacceptable result to any member, he/she may, at his/her option, request this to be noted in the final report. Where such differences are matters of fact (mathematical in nature or facts of evidence), and cannot be resolved by consensus, the Committee Chair shall rule and record such events and rulings.

The score sheet should record comments to support the scoring and it should ensure that these are sufficient for the member to be able to explain the score. The member may also

mark up a copy of the tender as he/she reviews it, but note that such comments may be referred to in any subsequent debrief or challenge. All members should be conscious of and treat all portions of the evaluation with the knowledge that their comments and recommendation may become part of the public record.

The Evaluation Committee should decide in advance if they are going to:

- score individually and then average the scores; or
- reach a moderated score between them as a panel for each tenderer.

When scoring tenders against the award criteria, the scoring rationale must be decided before the members of the Evaluation Committee start evaluating. One suggestion is to have a graduated approach as shown in the following table:

SCORE	CLASSIFICATION
5	Exceptional
4	Above expectations
3	Meets expectations
2	Below expectations
1	Well below expectations
0	Unacceptable

The scores for each tenderer are then added to the overall score sheet to reach the final scores and the ranking. This method avoids any bias from one Evaluation Committee member scoring. All members of the Evaluation Committee should sign and date the score sheets. The chairperson of the Evaluation Committee should sign off the scoring process as being recorded accurately and confirm that the decisions made are clearly documented so that they can be explained to tenderers.

How should tenderers be informed of the outcome?

When the evaluation process is complete the tenderers all need to be notified of the outcome in accordance with Article 41 of Directive 2004/18/EC.

This information must be sent as soon as the decision to award the contract has been made and at least 10 days before the contract is awarded (the so-called 'standstill' period).

If any person asks for a de-briefing meeting within the first two working days the Authority must give the following information in such a time period that the tenderer or interested party has the information for at least three working days before contract award. This is known as an 'accelerated debriefing" and, if necessary, this means the contract award has to be delayed beyond the minimum 10 day period.

A accelerated debriefing to an unsuccessful tenderer needs to explain why they were unsuccessful and, if they submitted an admissible tender, what the characteristics and relative advantages of the successful tender were. The extent and type of information released will depend on the circumstances and the CA should seek advice from the legal team as to what is appropriate.

TOOLKIT 7 – SPECIFICATION WRITING

Toolkit description:
To assist practitioners in designing a comprehensive, high quality specification through a series of questions and answers and a checklist.

Relevant legal context:
Article 23 and 24 of Directive 2004/18/EC.

Common mistakes:
The definition of technical specifications is an area where many mistakes are made, often due to a lack of skills/experience in drafting such documents. The following represents a list of typical areas for mistakes.

- Significant areas of work are missed out of the specification, only to be added at a later stage, leading to confusion or unfair competition.
- An insufficient response from the market or abnormally low prices (or wildly varying tender prices) can often be due to poor specifications (although this can also result from abnormal market conditions). Each party needs to know and understand what is required (a *consensus ad idem).*
- Award of additional works/services/supplies contracts arising from the main contract that should have been foreseen.
- Alleged extreme urgency brought about by 'unforeseeable' events, although in reality due to an unrealistic timetable and/or poor planning.
- Breaches of equal treatment, non-discrimination and transparency requirements (particularly the specifying of named products or restrictive specifications).
- Unlawful, incorrect or inadequate provisions (this is particularly the case with selection and award criteria and the favouring of local contractors).
- Specifications not containing a tender and project timetable or selection and award criteria.

Question & Answer

What is a specification and when, how and by whom is it produced?
The specification is the key procurement document setting out the needs to be satisfied by the procurement. It forms the basis for choosing the successful tenderer and it will become incorporated into the contract setting out what the successful tenderer is to deliver. Its final review and signoff is therefore a key decision point in the procurement process, and it is important that those undertaking it have the necessary knowledge, authority and experience. Sign-off of the specification is normally a key stage in a gateway review process. The purpose of the specification is to present prospective suppliers with a clear, accurate and full description of the CA's needs, and thus to enable them to propose a solution to meet those needs.

Depending upon its complexity, the specification can be drafted by an individual or team within the CA's organisation or by external consultants. Except in the simplest of cases, those drafting the specification will need to draw information together from a number of stakeholders and sources, including examples of previous specifications for similar purchases.

For simple procurements the specification is drafted before the contract (OJEU) notice is placed. For more complex procurements the specification is developed from a statement of the business requirements detailed during the preparation of the business case. In the exceptional cases of the negotiated procedure or competitive dialogue it can be created as the project develops.

Specifications normally go through a process of refinement. The high-level requirements are progressively refined to a level where they provide the necessary detail for suppliers to understand what is required and develop a suitable solution. The requirement may be refined in consultation with suppliers as part of market research or after the supplier selection stage. This can be particularly useful where innovative solutions are being considered. This process must be handled with care and integrity to maintain equal treatment between potential suppliers and to avoid accusations of bias (often resulting in complaints). The specification should not adopt any language that implies a proprietary solution or named products. Always use the term 'or equivalent'.

The specification also contains background material to help the suppliers understand the requirement in context and provides supporting material. The volume of background material can be considerable and the practicalities of copying and issuing it to all prospective suppliers can be complicated. For very complex procurements, background material may be made available on a separate CD or can be physically accessed in a 'data room'.

The specification needs to be finalised before it is issued to suppliers with an invitation to tender. Consider who is most appropriate to review the specification in order to ensure it is complete and accurate, and who should be involved in evaluating responses to it.

See also section 2.4

The requirements are set out in Article 23 and Annex VI of Directive 2004/18/EC

They include the following:

- Technical specifications must be set out in the tender documents.
- Technical specifications must be sufficiently precise to allow tenderers to determine the subject matter of the contract and to allow contracting authorities to award the contract;
- The technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.
- A specification shall be formulated either by reference to national standards European standards, European technical approvals or International standards or other technical reference systems established by the European standardization bodies or to national standards national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words 'or equivalent'.
- The technical specification may also ask for functional requirements for instance of environmental characteristics.

- The CA must accept a tender that proves to the satisfaction of the CA that the tender satisfy in an equivalent manner the specifications, functional or ECO–labels requirements or standards referred to in the tender documents. An appropriate means might be constituted by a technical dossier of the manufacturer or a test report from a recognized body.
- Technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products.
- Such reference shall only be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract is not possible; such reference shall be accompanied by the words 'or equivalent'. The CA must justify the reason to use trademarks, patents etc. in the technical specifications.
- The specifications must be defined so as they take into account accessibility criteria for people with disabilities or design for all users.
- Definitions of specifications and standards are laid down in Annex VI of Directive 2004/18/EC

What are the different types of specification?

There are three types of specification (sometimes known by different names): Input, Output, and Outcome.

- An **Input** based specification (sometimes called a technical specification) is a series of instructions on how to do a job. Largely these have fallen out of fashion (except for basic procurements), because they are inflexible, often do not reflect VFM and do not allow the tenderer to innovate. Any extras added later will usually be charged at a premium. They are usually used with an evaluation on the basis of lowest price only.
- An **Output** based specification focuses on the desired outputs of a service in business terms, rather than a detailed technical specification of how the service is to be provided; this allows providers scope to propose innovative solutions that might not have occurred to the procurement team.
- An **Outcome** based specification can be the easiest of all to draft, but the hardest to evaluate (and monitor). It is a statement of benefits to be achieved rather than the contractor's input or deliverables.

The latter two types are usually supported by a tenderer's method statement(s) to be submitted with the tender, which sets down how the tenderer proposes to meet the requirements of the specification. Each tenderer could propose something different, so the Evaluation Committee needs to be able to evaluate those alternatives.

How will tenders be evaluated to meet the specification?

The evaluation strategy sets out the approach to evaluation, and the evaluation matrix describes how the process will be conducted. The evaluation plan and evaluation model should be developed in parallel with the specification to ensure:

- all information needed for evaluation is requested from suppliers;
- requirements and information requests in the specification are covered by the evaluation; and

- supplier responses will be provided in a form that matches the evaluation model.

Are variant tenders allowed?

Under Article 24 of Directive 2004/18/EC, CAs are allowed (if they choose) to include in their documentation the possibility of variant tenders where the award of the contract is based on MEAT. The possibility of variants is included where the CA has drawn up a specification, but considers that there may be a better, more efficient, value for money or innovative way of delivering the project of which it may not be fully aware. Variants relate to the different manner in which responses to the invitation to tender may be completed. Variant tenders are permitted in controlled circumstances by the Directive, but if a tenderer submits a variant tender, the criteria and the evaluation plan needs to be ready and able to evaluate it.

The tender documents (and notices) must state clearly whether or not variant tender will be allowed. If variant tenders are to be allowed, then the CA should ensure the following:

- **Planning** – The possibility of variant tenders should be addressed at procurement planning stage. Market research should reveal whether there is a possibility that the draft specification can be delivered by a contractor by methods other than those anticipated. If it can, and the CA is willing to embrace the possibility, then the specification should be drafted accordingly.
- **Specification** – Only in the case of output or outcome based specifications can the CA invite variant tenders.
- **Award criteria and methodology** – The award criteria must be designed in such a way that both 'compliant' and 'variant' tenders can be evaluated using the same criteria. It is critical that the award criteria are thoroughly tested at procurement planning stage. What can and does happen is that the award criteria are not sufficiently robust to enable a fair, open and transparent evaluation; however the award criteria cannot be redrawn once it has been settled at planning stage and been published. In extreme cases, this can lead to the tender having to be cancelled and restarted.

Requirements as set out in Article 24 of Directive 2004/18/EC

- Use of variant tenders require the most economically advantageous tender as award criterion.
- The CA indicate in the tender documents whether or not they authorize variants or not.
- If variants are allowed to be submitted the CA sets out a list of minimum requirements to the variant to be met.
- Only variants meeting the minimum requirements shall be taken into consideration.

Specification checklist

The specification must be consistent with the following:

- the business case
- OJEU published notices
- the procurement and contract strategies
- the evaluation methodology.

Generally, does the specification:

- support standardisation and rationalisation of supplies/services?
- restrict competition?
- enable contractor to make quick decision as to whether to tender?
- act as a barrier to alternative products/new/advanced technology?
- encourage innovation?
- fit with standard specifications in use in the organisation?
- include items that should be covered better elsewhere through another contract?
- reflect organisational priorities, for example the local SME strategy?
- allow consortia tenders?
- identify the procurement route?
- include pain/gain provisions to incentivise performance?
- cover confidentiality and data protection?
- present a realistic timetable for the procurement and implementation?
- state start and finish date/contract period and any possible extensions?
- indicate certainty around volumes (or are they banded?)?
- allow sub-contracting?
- have a version control mechanism?

Is the specification:

- uniform for the same or similar requirements?
- clear complete, reliable and proofread?
- readily incorporated into a contract?
- challenge proof?
- not asking for irrelevant information?

Has the CA:

- consulted key partners, sector stakeholders, statutory stakeholders, local communities, third sector, trade unions?
- identified user needs including local needs?
- considered how innovation would be incorporated into delivery?
- researched the market – can it deliver the likely cost and the timescales?
- considered alternative delivery mechanisms?
- carried out a risk assessment and allocated risks appropriately?
- considered the impact of supplier failure?
- identified what is to be procured and that it will fulfil customer needs?
- reflected the market and stakeholder consultations and corporate priorities in the packaging of the contract?
- determined the scope and the range of goods/services/works required?

- determined the selection and award criteria including weightings, scoring mechanism and methodology (and documented them)?
- ensured award criteria are clear to all?
- tried 'dummy' runs to test the selection and award criteria?
- considered collaborating with other procurers?
- ensured that declarations of interest/ conflict of interest have or will be made (especially consultants and Evaluation Committee members)?
- considered and identified mandatory/desirable elements of the specification?
- covered social responsibility issues?
- considered division into lots?
- ensured that funding is available?
- got a communication plan in place?
- made arrangements to 'freeze' the specification (and budget) at an appropriate time?

Reviewing current specification:

- Did the specification accurately define the required outputs/outcomes?
- Did the specification accurately identify the customer requirements?
- Are there provisions in place to inform future specifications?

TOOLKIT 8 – MODIFICATION OF CONTRACTS

Toolkit description:
This toolkit sets out the issues arising when a contract can be modified or additional works/services/supplies can be directly awarded to an existing contractor in Q&A format, and gives good practice examples of how to avoid this situation, essentially through better planning and controls or through tendering competitively a new contract for additional requirements.

Relevant legal context:
Articles 30 and 31 (Article 61 on additional works in concessions) of Directive 2004/18/EC

Common mistakes:
CAs wrongly assume that changes required during the implementation stage can simply be accommodated by either modifying the existing contract or concluding a contract for additional works or services with the incumbent contractor performing the contract, provided such changes do not increase the value of the contract by more than 50 %.

Good practice:
The general principle is that during the implementation stage of a contract, the CA may not amend its essential conditions. Any such modification must be considered equivalent to the conclusion of a new contract, requiring, in principle, a new tender. A contract modification or a contract for additional works or services may concern: changes in the subject matter or nature of the contract; the price; the duration; or the volume of work. Contracts (or contract modifications) for additional works or services can only be awarded 'directly' (i.e. without prior advertising) if the cumulative conditions set out in Article 31(4)(a) of Directive 2004/18/EC are met. The underlying principle is that any modifications that change the contract in terms of value, timetable or scope (volume, subject matter or nature) to the extent that it might have changed the outcome of the original tender should be treated as 'material' and should be retendered as a new contract for additional works/services/supplies.

Additional works or services can only be allowed if unforeseen circumstances occur. Unforeseen circumstances must be interpreted very restrictively and must be justified.

A number of **actions** during the procurement cycle can help avoid the risk of modifications or contracts for additional works or services. All of these actions may not be relevant to every case. The CA should consider each action and decide which ones are relevant:

- a gateway review assessing whether all necessary studies and investigations needed before the launch of the contract are complete;
- freezing the specification and budget at the procurement planning stage;
- ensuring that the original contract provides for optional additional works, services or supplies and includes applicable prices at the tender stage;
- the use of standard *pro forma* contracts which will include clauses controlling modifications and annual price regulations;
- formal procedures that require modifications to be documented and approved by the senior management level of the CA and/or the Evaluation Committee.

A diligent CA in a works contract should, for instance, carry out the necessary geotechnical studies to determine ground conditions in advance, or the risk should be assigned to the contractor but with adequate time for tenderers to make their own investigations in order to quantify the risk and price accordingly. All relevant permits, building approvals and licences should be obtained by a diligent CA prior to starting the works and should not/cannot be used as 'unforeseen circumstances' to justify the direct award of additional works.

The best way to avoid material modifications during the implementation stage is through more diligent planning, including completing all necessary studies before contracting, choosing an appropriate tender procedure and using a form of contract with appropriate pricing, incentives and risk transfer. Contingency plans should prepare for the possibility of extra works/services/supplies being necessary and be prepared to launch a new competitive tender for such 'extras' if necessary.

Question & Answer

Q.1. When can a CA award a contract for additional works or services directly during the implementation stage?

A.1. Article 31 of Directive 2004/18/EC defines the circumstances in which a CA can use the negotiated procedure without publication of a CN to directly award additional works/services/supplies. The following conditions must be met (Article 31(4)).

a) For additional works or services that were not initially included in the project or in the original contract and that have, through unforeseen circumstances, become necessary for the performance of the works or services described therein, on the condition that the award is made to the economic operator performing such works or services:
    - When such additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the CAs, or
    - When such works or services, although separable from the performance of the original contract, are strictly necessary for its completion.

    However, the aggregate value of contracts awarded for additional works/services/supplies may not exceed 50 % of the amount of the original contract.

    All of these cumulative conditions (i.e. (i) 'unforeseen', (ii) 'not separable' or if separable 'strictly necessary', and (iii) not more than 50 % of the original contract value) must be fulfilled in order to justify direct award of additional works or services. The exceptions provided by Directive 2004/18/EC must be interpreted strictly.

b) For new works or services consisting of the repetition of similar works or services entrusted to the economic operator to whom the same CAs awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded following an open or restricted procedure. As soon as the first project is put up for tender, the possible use of this procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the CAs when calculating the

estimated value of the contract. This procedure may only be used during the three years following the conclusion of the original contract.

Any CA seeking to use Article 31 should ensure that the particular circumstances match those set out in the Directive.

Q.2. Is it possible to provide for future modifications in the tender documents?
A.2. The contracting authority can expressly provide in the tendering documents for the possibility of introducing future modifications to the terms of the original contract. The clause providing for such possibility must be drawn up in a clear, precise and unequivocal manner, stating the scope and nature of the possible modifications and the conditions under which the clause may be used. Clauses that are vague, imprecise or allow contracting authorities to introduce modifications at will would not be valid.

Q.3. When can a contract be amended without material change and how to do it in practice?
A.3. In principle, a public contract cannot be amended unless allowed by Directive 2004/18/EC or by the relevant case-law.

Leaving aside the situations seen above (i.e. additional works or services and adequate revision clause), Directive 2004/18/EC and the existing case law prohibit material changes to contracts without a new procurement procedure. The facility to make changes after the contract is signed is limited in the same way as in the period from CN to award. Changes made after signing the contract could well be seen as attempts to circumvent Directive 2004/18/EC. The following guidelines should be borne in mind:

- The principles of equal treatment and transparency are valid throughout the contract period (from start to end);
- The CA is bound by the provisions contained in the tender documents;
- Material changes related to the contract would require a new competition;
- The CA can make changes after signing the contract but only after having taken advice on the legal effects.

The key question becomes, 'what represents a 'material' change'?

Q.4. What are the three tests that constitute material changes?
A.4. A change to the contract is material if it passes one or more of the following tests:

- The change would have had an impact on who the CA would have awarded the original contract to. If, during the contract period, changes are made that would have encouraged other tenderers to participate, or it would have been possible for the CA to accept another tender, then the changes are to be considered substantial and are not allowed;
- the change significantly expands the contract quantitatively and qualitatively to include elements that were not initially provided for at the time of tender;
- Changes make a difference to the economic balance in favour of the private party in a way that was not specified in the original terms.

In any of the above circumstances, the changes are substantial and prohibited. There is now a significant body of jurisprudence on this matter, which the CA should be aware of and if in doubt could take advice on.

The above-mentioned case-law is based on the principles of equal treatment, non-discrimination and transparency. Directive 2014/24/EU codifies the rules on modifications, including the concept of substantial modifications.

Q.5. What are 'unforeseen circumstances'?

A.5. Unforeseen circumstances are circumstances which a diligent CA could not have reasonably foreseen from the beginning and these circumstances are not attributable to actions of the CA, such as poor planning (see cases T-540/10 and T-235/11, *Spain/Commission*). This test should be strictly applied. Unforeseen circumstances should be assessed on a case by case basis, but may include (not exhaustively) the following:

- new law/regulations (depending on the case)
- strike

Q.6. When does the '50 %' criteria apply?

A.6. Article 31 of Directive 2004/18/EC covers a specific situation in the use of the negotiated procedure without publication of a CN, in other words direct negotiation. The ceiling of 50 % of the original contract sum is included in the Directive as a caveat. The CA can only claim the 50 % option if unforeseen circumstances have occurred are well documented and a justification is given as to why a new tender is not possible. It is the duty of the CA to prove the unforeseen circumstances and that these cannot be attributable to the actions of the CA.

Q.7. Are options for additions within the contract the best way to deal with this?

A.7. One way to avoid additional elements in a contract is to have planned for them upfront as optional additional works/services/supplies. The Directive allows options to be part of the contract, however these must be clearly specified, calculated, priced and evaluated as part of the originally proposed contract. An option is a right of the CA to purchase additional goods, works or services. An option can be both a right to buy other or more works/services/supplies and a right to extend the current contract. The option must be clearly described in the tender documents. The option must be priced by the tenderers and calculated in the total volume in the awarding process. If a change is not covered by an option, modifications can only be made if they are not material. The CA should also in this case refer back to Article 31 of Directive 2004/18/EC and check its applicability. The Directive therefore only allows changes if they are covered by an option that allows the change and the option is priced accordingly. A new contract procedure would need to be launched when the variation to the original contract is classed as material. Best practice is to use options to ensure additional contracts. The options must be included in the total contract value.

Q.8. How should modifications be approved and documented?

A.8. Both internal procedures of the CA and the contracts themselves should set out the methodology for approving and documenting modifications. Contracts should include a provision for modifications (variations) and these clauses should explain how the modification system will operate. Ordinarily, they can be proposed/approved by the person

nominated to manage the contract. In a construction contract this would be the architect or engineer, who will order a variation on a standard form to be valued by the quantity surveyor. The contract should include a provision for the contractor to have the ability to challenge the value of the variation. Similar control mechanisms should be in place for service contracts. It is good practice for all modifications with an additional cost implication above certain thresholds to require approval at the senior management level within the CA.

TOOLKIT 9 – COMPLIANCE CHECKLIST

Toolkit description:

The following is a final checklist of key elements that are often checked *ex-post* to verify whether a public procurement has complied with minimum obligations.

Checklist

Planning stage

1) Should the contract have been advertised in the OJEU, but wasn't?
2) Has the contract been artificially split in order to avoid the requirement to publish the CN in the OJEU?
3) Has the contract value been under-estimated compared to the actual contract price, either intentionally or unintentionally, particularly where the budget price is just below the threshold in the Directive but the actual contract price is above the threshold?
4) If a contract has been awarded directly by the CA without advertising, for instance a 2B service contract in Directive 2004/18/EC (list of services not mandatory to tender), check for cross-border interest, i.e. could economic operators from other MS find interest in tendering?
5) For below threshold procurements, are there elements to substantiate an infringement of national public procurement legislation?
6) If the contract has been awarded by the negotiated procedure without prior advertising, then can one of the permitted cases (Article 31 of Directive 2004/18/EC) be justified?
7) If the contract was awarded by negotiated procedure with prior publication of a CN or the competitive dialogue procedure was used, were the relevant conditions (Article 30 of Directive 2004/18/EC) for the use of these procedures fulfilled?
8) Was any use made of 'exceptions' or 'urgency' provisions to avoid advertising, restrict competition and/or accelerate procedures, that is not attributable to unforeseeable factors that were outside the control of the CA?
9) If the competitive dialogue procedure was followed, is there a valid justification (Article 29 of Directive 2004/18/EC) for complexity due to the technical or legal and/or financial make-up of the project?
10) Was an Evaluation Committee formed at an appropriate point in the process and did it or did the senior management of the CA authorise key steps in the procurement?
11) Was the make-up of the Evaluation Committee appropriate for the subject matter of the contract and did all members sign a conflict of interest declaration?
12) Does the contract packaging reflect the market and stakeholder consultations and the organisation's corporate priorities as well as ensuring a valid competition?

Advertising and tendering stage

13) Were the minimum time limits specified in Directive 2004/18/EC (depending on whether a PIN was published) complied with?

14) Were all the compulsory elements (Annex VII A to Directive 2004/18/EC) included in the CN?

15) Was the use of EU grant funding indicated in the CN (note that this is not compulsory, but is good practice for EU grant supported projects)?

16) Does the CN or related descriptive documents clearly state the criteria to be employed for selecting capable tenderers and evaluating the best tender?

17) Where the contract is to be awarded to the most economically advantageous tender (MEAT), were weights for the award criteria listed in the CN or related descriptive document, or, where this has not been possible, were the criteria listed in descending order of importance?

18) Where relevant and possible, do the technical specifications take account of accessibility criteria for disabled users (Article 23(1) of Directive 2004/18/EC)?

19) Do the technical specifications afford equal access to compete to all tenderers and without creating unjustified obstacles to competition (Article 23 of Directive 2004/18/EC), e.g. avoid setting national standards without recognising the possibility for 'equivalent' standards?

20) Are variants allowed and was this referred to in the CN?

21) Are MEAT criteria used and was this referred to in the CN?

22) For restricted procedures, were at least five companies (three for competitive dialogue and negotiated with advertising) selected and invited, in writing and simultaneously (Article 44(3) of Directive 2004/18/EC), to submit tenders, negotiate or take part in the dialogue?

23) Were requests for information from tenderers responded to with equal treatment to all tenderers and within the time limits set in Directive 2004/18/EC (within six days of the request and at least six days before the latest date for receipt of tenders)?

24) At the tender opening, were all tenders opened together, in the presence of at least two officials of the Evaluation Committee, correctly recorded, and were any received after the closing date/time rejected?

Selection stage

25) In the case of restricted, negotiated with prior publication or competitive dialogue procedures, if the number of participants to be invited after pre-selection was to be limited, were the short-listing criteria stated in the CN or related descriptive documents and were the minimum and maximum number of participants to be shortlisted stated?

26) Were the selection criteria used to select the candidates capable of performing the contract limited to those allowed by the Directive, e.g. personal situation, financial capacity, technical capacity, relevant experience, expertise and competency?

27) Were the criteria applied those and only those set out in the instructions to tenderers and in the CN?

28) Were the selection criteria applied fairly and equally between candidates?

29) If some candidates were rejected at the selection stage, were the reasons for rejection valid?

Award stage

30) Did the Evaluation Committee carry out a non-discriminatory evaluation procedure following the methodology described in the CN or related descriptive documents in order to award the contract?

31) Were the award criteria used to evaluate the tenders and the related weightings those and only those set out in the instructions to tenderers and in the CN?

32) Where a restricted, negotiated or competitive dialogue procedure was used, were any of the criteria used at the pre-selection phase re-used at the evaluation stage?

33) If the contract was awarded on the basis of MEAT, were the award criteria linked to the subject matter of the contract (e.g. quality, price, technical merit, aesthetic, functional or environmental characteristics, running costs, cost-effectiveness, after-sales service, delivery schedule) and not to the capability of bidders?

34) If any tenders were rejected due to being 'abnormally low', were the conditions met, namely, that the CA requested in writing details of the constituent elements of the tender (Article 55 of Directive 2004/18/EC) that it considered relevant in justifying the abnormally low tender price?

35) Are all key decisions concerning the contract clearly documented and in particular is there a complete evaluation report signed by all members of the Evaluation Committee?

36) Was the contract actually awarded to the tenderer chosen by the Evaluation Committee?

37) Was the result of the contract award published in the OJEU within 48 days of the contract signature date?

38) Were all unsuccessful tenderers notified with the correct information, within the relevant timescale and a 'standstill period' applied before contract signature?

39) Did any tenderer submit a complaint or appeal to the CA or other relevant body and was there any substance to such a complaint?

Implementation stage

40) If any additional works/services/supplies were awarded without competition, did all of the relevant conditions (Article 31(4) of Directive 2004/18/EC) apply: (i) 'unforeseen' by the CA; (ii) 'not separable' or if separable 'strictly necessary'; and (iii) additional value not more than 50 % of the original contract value?

41) If any additional works/services/supplies have been awarded by negotiation without advertising, would the value of the contracts for additional works or services bring the cumulative value of the original and the contracts for additional works or services above the relevant threshold in the Directive?

42) Did any reduction in the scope of the project occur or were contracted timescales altered in such a way that put into question the original decision to award the contract to the contractor?

TOOLKIT 10 – USEFUL LINKS

The DG GROW website on public procurement is the primary source of information on public procurement matters in the EU:
http://ec.europa.eu/growth/single-market/public-procurement/index_en.htm

Current rules, thresholds and guidelines
http://ec.europa.eu/growth/single-market/public-procurement/rules/current/index_en.htm

Explanatory note - Framework agreements:
http://ec.europa.eu/internal_market/publicprocurement/docs/explan-notes/classic-dir-framework_en.pdf

Standard forms used in European public procurement can be accessed on-line via eNotices:
http://simap.europa.eu/enotices/viewFormTypes.do

The SIMAP website contains many useful procurement resources, including templates for publications and key documents:
http://simap.ted.europa.eu

The Common Procurement Vocabulary (CPV) explanations and codes can be found here:
http://ec.europa.eu/growth/single-market/public-procurement/index_en.htm

Legal texts:
http://eur-lex.europa.eu/
Directive 2004/18/EC:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0114:0240:en:PDF
Directive 2014/24/EU:
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0065.01.ENG
http://uk.practicallaw.com/6-422-3174
http://gettingthedealthrough.com/books/33/public-procurement/

Regional Policy and public procurement links:
http://ec.europa.eu/regional_policy/information
Regulation (EU) No 1303/2013:
http://ec.europa.eu/regional_policy/index.cfm/en/information/legislation/regulations/
http://europeanfundingnetwork.eu/policy/procurement
http://admin.interact-eu.net/downloads/1909/Public_procurement_in_IPA_cross_border_cooperation_programmes_with_EU_Member_States_in_shared_management.pdf

Sustainable procurement and environment:
http://ec.europa.eu/environment/gpp/index_en.htm
http://ec.europa.eu/environment/gpp/buying_handbook_en.htm
http://ec.europa.eu/environment/eia/home.htm
http://ec.europa.eu/environment/newprg/
http://www.iclei-europe.org/topics/sustainable-procurement
http://www.scotland.gov.uk/Resource/Doc/116601/0053331.pdf

Innovation in procurement:

https://www.innovation-procurement.org/

http://ec.europa.eu/digital-agenda/en/innovation-procurement

Procurement forum / PPI Platform:
https://procurement-forum.eu/

Other public procurement guidance – practical issues around procurement:
OECD and principles for integrity in public procurement:
http://www.oecd.org/gov/ethics/public-procurement.htm
http://www.oecd.org/gov/ethics/48994520.pdf
http://www.eib.org/epec/resources/epec-procurement-and-cd-public.pdf
http://www.procurementportal.com/
http://www.etenders.gov.ie/generalprocguide.aspx
http://www.scotland.gov.uk/Topics/Government/Procurement
PQQ example
http://www.wandsworth.gov.uk/downloads/file/4441/template_pqq

Acknowledgement

This document has been produced under the supervision of a working group representing: the European Commission Directorates-General responsible for managing the European Structural and Investment (ESI) Funds (namely, the Directorate-Generals for Regional and Urban Policy, for Employment, Social Affairs and Inclusion, for Agriculture and Rural Development, and for Maritime Affairs and Fisheries); the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs; and the European Investment Bank.

HOW TO OBTAIN EU PUBLICATIONS

Free publications:

- one copy:
  via EU Bookshop (http://bookshop.europa.eu);
- more than one copy or posters/maps:
  from the European Union's representations (http://ec.europa.eu/represent_en.htm);
  from the delegations in non-EU countries (http://eeas.europa.eu/delegations/index_en.htm);
  by contacting the Europe Direct service (http://europa.eu/europedirect/index_en.htm) or
  calling 00 800 6 7 8 9 10 11 (freephone number from anywhere in the EU) (*).

  (*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

Priced publications:

- via EU Bookshop (http://bookshop.europa.eu).

KN-02-15-758-EN-N



ISBN 978-92-79-50323-8
doi:10.2776/578383