



EUROPEAN COMMISSION  
Budget  
Central Financial Service

# **VADE-MECUM**

## **ON PUBLIC PROCUREMENT IN THE COMMISSION**

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### **Disclaimer**

This Vade-mecum on public procurement procedures in the Commission has been produced for internal use. The aim is to provide contracting authorities in the European institutions and agencies with practical assistance in preparing and implementing these procedures.

This Vade-mecum does not apply to external actions which are covered by a separate guide (the PRAG from DG DEVCO).

It does not claim to cover every single matter that might arise in connection with public procurement. Because of the number and variety of contracts involved, specific questions are bound to arise that cannot be covered in what, by nature, is only a general guide. It does, however, give advice on how to find answers to them.

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

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# Abbreviations

used in the Vade-mecum

English	Meaning	French
ABAC	Accrual-Based ACcounting and financial IT system of the European Commission; one of its modules is the register of contracts called “ABAC contracts”	
AO	Authorising Officer	ordonnateur
CEI	Call for expressions of interest (“appel à manifestations d’intérêt”)	AMI
CPC	<a href="#">Central Product Classification</a>	
CPV	<a href="#">Common Procurement Vocabulary</a>	
EDES	Early Detection and Exclusion System	
FR	Financial Regulation	RF
FWC	Framework Contract	CC
MEAT	Most economically advantageous tender	
MFC	Multiple Framework Contract	CCM
MS	Member States	EM
NACE	French acronym for <a href="#">Statistical Classification of Economic Activities in the European Union</a> (“Nomenclature générale des activités économiques dans l'Union européenne”)	NACE
OJ S	Supplement to the Official Journal of the European Union, where procurement notices are published	JO S
PO	Publications Office	OP
RAP	Rules of Application (of the Financial Regulation)	RAP
TED	<a href="#">Tenders Electronic Daily</a>	
TFEU	Treaty on the Functioning of the European Union	TFUE
TEU	Treaty on the European Union	TUE

# Glossary

English	Meaning	French
request to participate	the first step in two-step procurement procedures	candidature
award notice	advertisement published in the OJ S to inform interested parties that a contract has been awarded or is to be awarded	avis d'attribution
buyer profile	part of the web page of the contracting authority where information concerning its procurement is published	profil d'acheteur
call for tenders	a public procurement procedure (regardless of the type of procedure)	appel d'offres, appel à la concurrence
candidate	any economic operator who submits a request to participate in a two-step procedure	candidat
concession contract	type of contract used when purchasing a service or works concession (as opposed to public contract)	contrat de concession
contract	generic term that may refer to any type of contract and includes both public contract and concession contract	contrat
contract notice	advertisement launching the procurement procedure published in the OJ S	avis de marché
contracting authority	public body launching a procurement procedure	pouvoir adjudicateur
day	unless specified otherwise, "day" means a calendar day (not a working day)	jour
direct contract	contract containing all the details necessary to implement it (as opposed to FWC)	contrat direct
(the) Directive	the Public Procurement Directive – Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014	la directive
thresholds set in the Directive	thresholds as from which the Directive applies, which are updated on 1 January of even years	seuils de la directive
economic operator	any natural or legal person, including a public entity or group thereof that offers supplies, services or works on the market	opérateur économique
framework contract (FWC)	contract establishing the general outline of the services or supplies to be delivered and requiring an additional step to make the actual purchase	contrat cadre
invitation to tender	letter giving the necessary details for tender submission; it is part of procurement documents	invitation à soumissionner
order form	simplified form of specific contract, used under a framework contract	bon de commande
prior information notice	optional advertisement in the OJ S announcing the intention of launching the procurement procedure in the near future	avis de pré-information
purchase order	simplified form of direct contract used for simple purchases of low value	bon d'achat
specific contract	contract specifying details of a particular purchase based on a framework contract	contrat spécifique



technical specifications	document describing the subject of the procurement (part of the tender specifications)	spécifications techniques
tender	Offer, bid; sometimes incorrectly used as public procurement procedure	offre
procurement documents	set of documents presented by the contracting authority to economic operators to enable them to submit tenders (includes notice, tender specifications, draft contract and invitation to tender)	documents d'appel à la concurrence
public contract	Type of contract used when purchasing services, supplies or works (as opposed to concession contract)	contrat public
tender specifications	document or set of documents giving full details of the subject matter, conditions and organisation of the procurement procedure (includes technical specifications and criteria)	cahier des charges
tenderer	an economic operator who has submitted a tender	soumissionnaire

# Part 1. Introduction and definitions

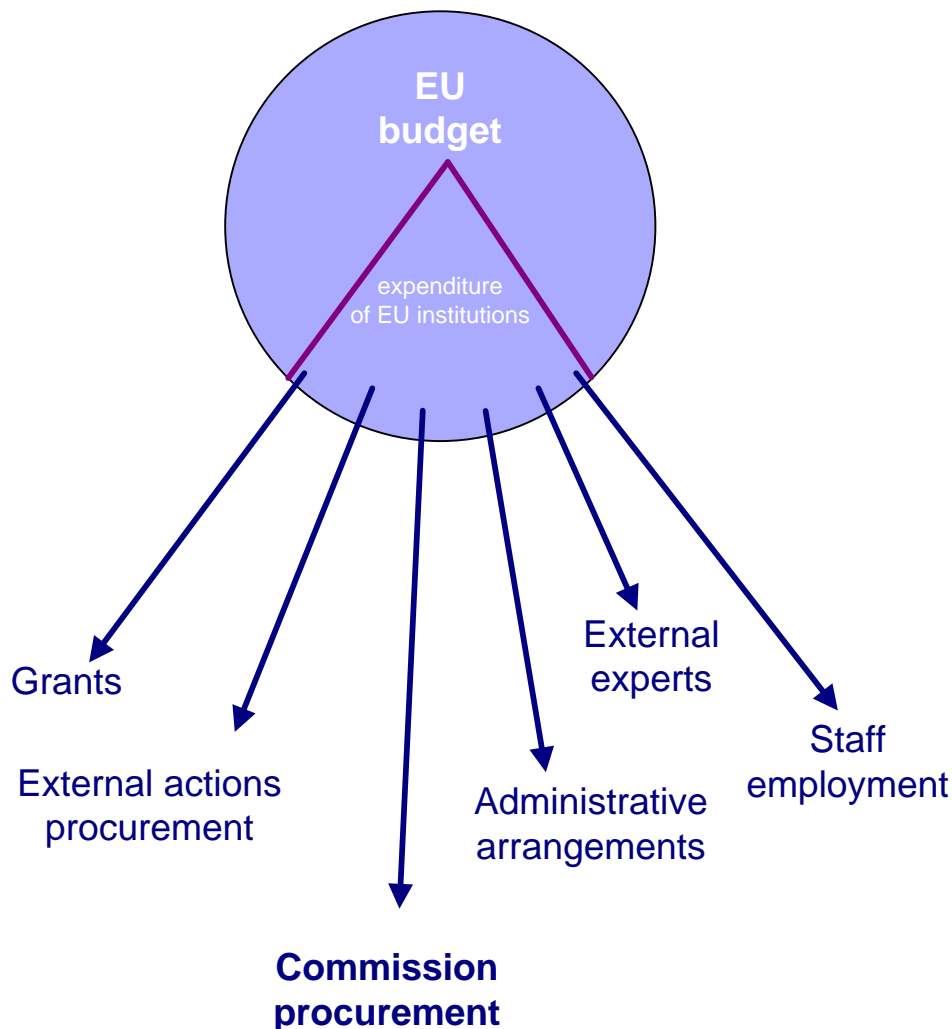
## 1.1. Scope of this Vade-mecum

This Vade-mecum applies **only to public contracts** for services, supplies, works and buildings or **concession contracts** for services or works concluded by the European institutions on their own account, as defined in Part I, Title V of the Financial Regulation.

It does not cover operations such as staff recruitment, to which different rules apply.

Nor does it cover contracts concluded by the Commission on behalf of and on the account of one or more beneficiaries in connection with external actions (see [Practical Guide to contract procedures for EC external actions](#)), as defined in Part Two, Title IV of the Financial Regulation. The award of such contracts is subject to the special provisions laid down in the Rules of Application (Title II, Chapter III).

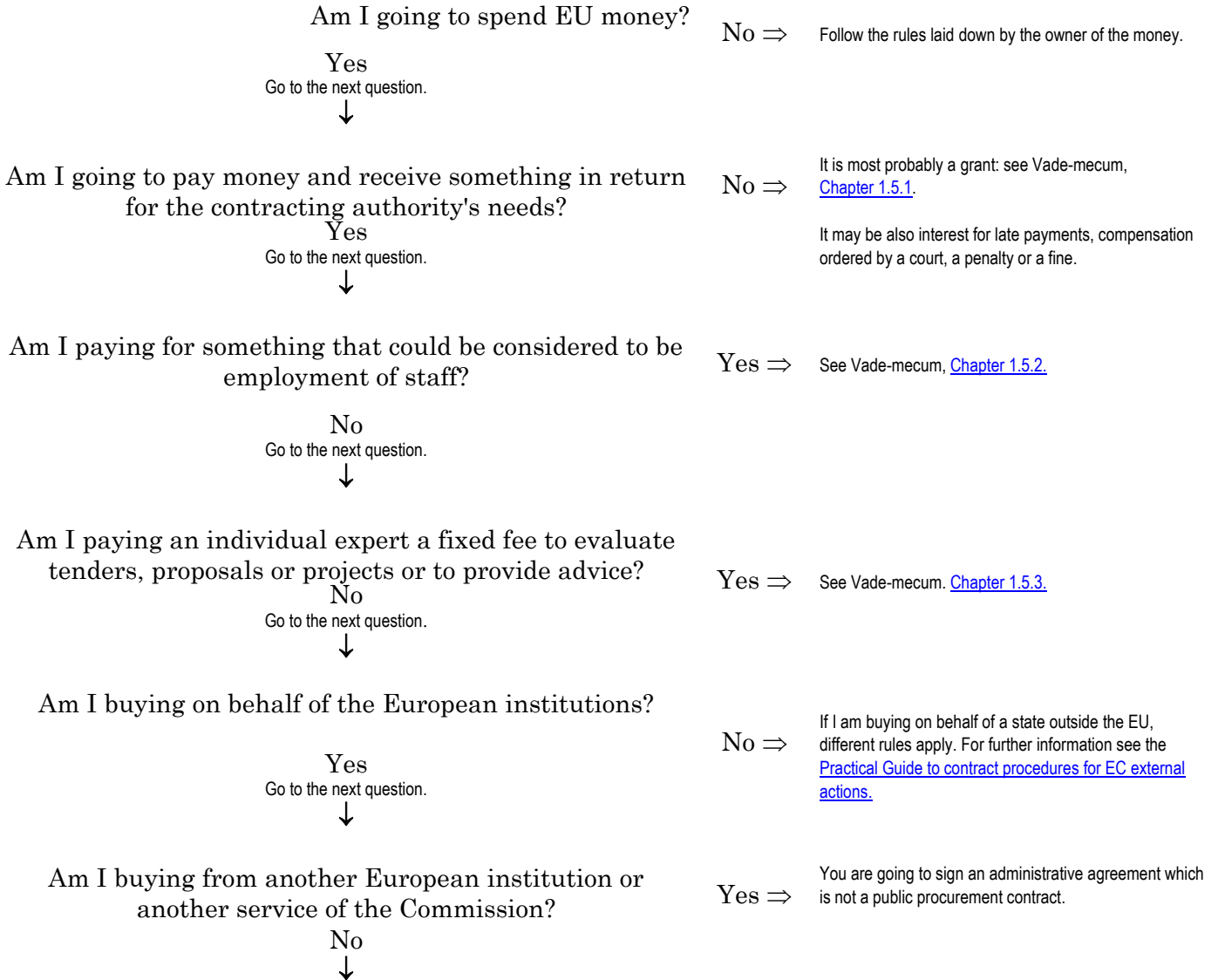
Throughout this Vade-mecum, “EU procurement”, “EU public contracts” or “awarded by the contracting authority” mean public contracts **awarded by the Commission, other institutions, executive agencies, decentralised agencies or the European External Action Service on their own account**, as defined above.



## 1.2. Procurement at a glance

### 1.2.1. Does this Vade-mecum apply?

I want to buy something. Do I need to follow the rules in this Vade-mecum?



Your answers to the questions above indicate that you do need to follow the procurement rules in this manual.

## 1.2.2. Before launching the procurement procedure

Before you start your procurement procedure, answer the following further questions:

Maybe I already have what I need?

It is advisable to make sure that no-one else – in your or another DG – has already signed a contract covering your needs.

Yes ⇒ You may consult ABAC Contracts to look for existing contracts or framework contracts or the [Official Journal on TED](#) to look for existing Calls for Expression of Interest (see [Chapter 3.6](#)) or contact colleagues who may be dealing with similar issues.

No  
Go to the next question.  
↓

Do I have the money available?

You have to be sure that you are indeed allowed to make the budgetary commitment (not in case of framework contract).

No ⇒ You have to identify the budget line, make sure that the legal basis and budget comments permit procurement and verify how much time you have. E.g. administrative expenditure (*chapter 01* of each title of the budget) is qualified as *non-differentiated* and thus should be contracted in the current year (N) and spent until the end of the following year (N+1).

Yes  
Go to the next question.  
↓

Is there a framework contract that I can use?

It is advisable to consult the *ABAC contract* system to identify whether there is a valid framework contract covering your field of interest. If there is, contact the department managing it to verify whether the level of use made of it allows an additional specific contract.

Yes ⇒ See [Chapter 2.7](#).

No  
Go to the next question.  
↓

Do I have a financing decision covering my needs (for operational expenditure only)?

No ⇒ You cannot launch the procedure without a financing decision. See [Chapter 2.1](#).

Yes  
Go to the next question.  
↓

Do I know who is responsible for my procurement?

You have to know the main parties involved in your procedure.

No ⇒ You have to know which contracting authority will sign the contract and who the authorising officer is.

Yes  
Go to the next question.  
↓

Do I know what type of contract I need?

You have to know whether you are going to buy services, supplies or works or to sign a building contract or whether you need a concession contract.

No ⇒ See [Chapter 2.6](#).

Yes  
Go to the next question.  
↓

Do I know what principles I need to follow?

No ⇒ See [Chapter 1.4.1](#).

Yes  
Go to the next question.  
↓

Do I know the value of my purchase?

No ⇒ See [Chapter 2.2.4](#).

Yes  
↓

Now you should start preparing your procurement procedure. Please continue with choosing the type of the procedure.

### 1.2.3. What procedure to use?

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

#### [3.3 Open procedure](#)

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

#### [3.4 Restricted procedure](#)

You are in a situation where you can negotiate with tenderers, e.g.:

you need a concession contract;

you need training or hotel or restaurant services;

Then you might be interested in a:

#### [3.5 Competitive procedure with negotiation](#)

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

#### [3.6.3. List of pre-selected candidates](#)

#### [3.6.4 List of vendors](#)

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

#### [3.7. Negotiated procedure for middle or low- value contracts](#)

You are in exceptional circumstances, e.g.:

You have received no tender in response to your open or restricted procedure and this is definitely not due to bad timing or imprecise tender specifications.

There is a monopoly situation on the market.

Then you might be interested in a:

#### [3.8. Negotiated procedure without publication](#)

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

#### [3.9. Competitive dialogue](#)

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

#### [3.10. Innovation partnership](#)

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

#### [3.11. Design contest](#)

## 1.2.4. What kind of contract to choose?

Before launching the procurement procedure you also have to decide what kind of contract you will use. Depending on its subject, repetitiveness and value you may choose one of the following:

Type of contract Subject	Direct	Framework	Concession
Services	<p><a href="#">Direct service contract</a></p> <p>If you are procuring services and the precise volume and timing of delivery <b>can be defined</b> at the outset:  <a href="#">model direct contract</a> or, for a low or middle value, <a href="#">model purchase order</a>            (It is a simplified direct contract)</p>	<p><a href="#">Framework service contract</a></p> <p>If you are procuring series of services but the precise volume and timing of delivery <b>cannot be defined</b> at the outset, the volume and other specific conditions will be laid down in "specific contracts" or "order forms":  <a href="#">model framework contract</a></p>	<a href="#">Concession contract</a>
Supplies	<p><a href="#">Direct supply contract</a></p> <p>If you are procuring supplies and the precise volume and timing of delivery <b>can be defined</b> at the outset:  <a href="#">model direct contract</a> or, for a low or middle value, <a href="#">model purchase order</a>            (It is a simplified direct contract)</p>	<p><a href="#">Framework supply contract</a></p> <p>If you are procuring series of supplies but the precise volume and timing of delivery <b>cannot be defined</b> at the outset, the volume and other specific conditions will be laid down in "order forms":  <a href="#">model framework contract</a></p>	Not applicable
Works	<p>Work contract</p> <p>If you are executing works to construct all or part of a building (provided by OIB):  <a href="#">model contract</a></p>	<p><b>Framework work contract</b></p> <p>If you are procuring a series of works to construct all or part of buildings.            Used mainly by OIB and OIL, there is no model contract provided.</p>	<a href="#">Concession contract</a>
Buildings	<p><a href="#">Building contract</a></p> <p>If you are buying or renting all or part of a building</p>		

## 1.2.5. Sales of assets

The sale of assets follows a procedure similar to procurement procedures, on the basis of article 157.2 of the FR and article 252 of the RAP. The obligation of transparency is based on the value of the purchase of the asset.

Two specific thresholds apply:

- If the unit purchase value is €8.100 or more and below €391.100, the sale must be advertised locally (website, magazines, newspapers) and the minimum period between the publication and the conclusion of the sale is 14 days.
- If the unit purchase value is €391.100 or more, a notice for sale must be published in the OJ and the minimum period between the publication and the conclusion of the sale is 1 month. Any other appropriate local advertisement or in the Member States' press may also be envisaged.
- If the unit purchase value is below €8.100, no particular procedure is mandatory.

The contracting authority must obtain the highest price for these sales.

The principles applicable to procurement can be used for sales.

As an exception, these rules don't apply to sales between Union Institutions and their bodies referred to in Article 208 of the FR.

### 1.3. How to use this Vade-mecum?

This Vade-mecum is structured in a way that will allow you to consider the key factors which determine the choice of procedure right at the start of the procurement operation and then to go straight to the relevant parts:

- **Part 1 ‘Introduction and definitions’** sets out the scope of this Vademecum, the basic concepts which apply to all contracts, sales and other types of expenditure which are not procurement.
- **Part 2 ‘Conceiving the purchase and the contract’** presents the obligations as regards financing decisions, the factors which services must take into account when defining the characteristics of a purchase, joint and interinstitutional procurement and the different types of contracts.
- **Part 3 ‘Procurement procedures and systems’** presents, one by one, the different procedures which apply, depending on the nature and value of the contracts, as well as specific electronic systems that may be used in procedures.
- **Part 4 ‘Stages in the procurement procedure’** gives a detailed description of the steps in the procedure.
- **Part 5 ‘Contract management’** gives information about basic concepts and dealing with potential problems with contract implementation.

This structure makes it possible to refer directly to the chapter(s) concerning any particular part of the procurement exercise. It also avoids repetition of chapters common to several types of procedure.

The Vade-mecum also offers a facility to go straight to the description of any particular aspect of the procedure, using the links in the overview table at the end of the description of each procedure.

## 1.4. What is public procurement?

### 1.4.1. Basic information about EU public procurement

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

#### The goal of procurement rules

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

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

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

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

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

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

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

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

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

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

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

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

#### Advertising the contract

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

#### Choosing the right award procedure

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

#### Conclusion

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

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

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

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

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



## 1.4.2. Legal basis and general principles

The legal basis for EU procurement consists of the relevant articles of the Financial Regulation (FR) and its Rules of Application (RAP). Please note that all legal references to the FR and RAP should point to the initial acts only, which include by definition all subsequent amendments (dynamic legal reference)<sup>1</sup>. You can find all amendments in the 'linked documents' tab in Eur-Lex. In the reference below, the parts in italics are for information only:

- Financial Regulation – Regulation (EU, Euratom) No 966/2012 of the European Parliament and the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union<sup>2</sup>, Part One, Title V (Procurement) (Articles 101 to 120), *as amended by Regulation (EU, Euratom) No 2015/1929 of the European Parliament and the Council of 28 October 2015*.
- Rules of Application – Commission Delegated Regulation (EU, Euratom) No 1268/2012 of 29 October 2012<sup>3</sup>, Part One, Title V (Procurement) (Articles 121 to 172), *as amended by Commission Delegated Regulation (EU) 2015/2462 of 30 October 2015*.
- Judgments, mainly of the General Court in procurement cases.

The FR and the RAP incorporate the rules from Directive [2014/24/EU](#)<sup>4</sup> (“the Directive”) and Directive 2014/23/EU on concessions<sup>5</sup>.

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

- ⇒ All EU procurement must comply with the principles of **transparency, proportionality, equal treatment** and **non-discrimination** and **sound financial management**.
- ⇒ The basic rule underlying public procurement is to ensure **competition** between economic operators. Cases where a contracting authority can approach an operator of its choice without launching a competitive procedure are the exception and are reserved for specific, clearly defined situations.
- ⇒ **Competitive procedures** are based first on a precise definition of the subject and terms and conditions of the contract and, second, on a variety of criteria, of which operators must be notified so that they can draw up their tender accordingly.
- ⇒ The EU institutions are not legally bound vis-à-vis an economic operator until the contract is signed. This should be made clear in all contacts with candidates/tenderers. Up to the time of signature, the contracting authority may cancel the procedure without the candidates/tenderers being entitled to any compensation. Reasons must, of course, be given for the decision and the candidates/tenderers must be notified.

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

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

<sup>2</sup> OJ L 298, 26.10.2012, p. 1, see consolidated version: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02012R0966-20160101>

<sup>3</sup> OJ L 362, 31.12.2012, p. 1, see <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012R1268>

<sup>4</sup> OJ L 94, 28.03.2014, p. 65, see <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN>

<sup>5</sup> OJ L 94, 28.03.2014, p. 1, see <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0023&from=EN>

## 1.5. What is not public procurement – other types of expenditure

### 1.5.1. Grants

This Vade-mecum does not apply to grants paid from the Union's budget. Still it is helpful to look at the definition of grants in order to draw a clear distinction between them and contracts.

“Grants are **direct financial contributions**, by way of donation, from the budget in order to finance:

- a) either an action intended to help achieve an objective forming part of a European Union policy;
- b) or the functioning of a body which pursues an aim of general European interest or has an objective forming part of a European Union policy.”

As a general rule, the difference between a public contract and a grant is fairly clear. Briefly, in the case of a contract the Commission obtains a product or service it needs in return for payment, while in the case of a grant it makes a contribution either to a project carried out by an external organisation or directly to that organisation because its activities contribute to Union policy aims.

Generally, the legal basis, financing decisions and budget lines include comments that determine whether the expenditure should be classified as procurement or grant.

The table below explains into which category the proposed operation falls into by virtue of its main characteristics.

Please note that if an economic operator is a beneficiary of a grant, it does not prevent it from being awarded a contract.

#### Comparison of procurement and grants

	Public contract	Grant
<b>Purpose</b>	To acquire a supply, service, work or building which the contracting authority needs for its own activities.	To encourage action recognised by the Commission as useful for Union policies, but which falls primarily within the scope of the beneficiary's activities.
<b>Initiative and control</b>	Lie entirely with the contracting authority (CA): the CA produces the detailed specifications. The successful tenderer must comply with the specifications.	The application for financing originates with the beneficiary, who submits a proposal for support for activities it is carrying out or plans to carry out in response to a Commission call for proposals. The proposal sets out the specifications for the action to be performed within the framework laid down in advance by the Commission.
<b>Ownership</b>	Ownership as a rule remains with the contracting authority.	Ownership as a rule remains with the beneficiary of the grant.
<b>Union contribution</b>	The contracting authority pays 100% of the contract price.	The grant may not finance the total cost of the action, save in exceptional cases.
<b>Mutual obligations and monitoring</b>	The contract is bilateral: it imposes reciprocal obligations on the CA and on the contractor The CA monitors the delivery of the purchase.	Conditions are attached to the grant awarded, but there is no direct specific link between individual obligations on either side (Commission and beneficiary). The Commission has the right to monitor technical implementation of the action and the use made of the funds granted.
<b>Profit</b>	It is natural that the contractor's remuneration should include an element of profit.	The grant must not have the purpose or effect of producing a profit for the beneficiary.
<b>Procedures</b>	Tenders are received in response to a call for tenders.	Grant applications are normally received in response to a call for proposals.
<b>Legal instrument</b>	The outcome of a <i>procurement procedure</i> is a <i>contract</i> .	The outcome of a <i>grant award procedure</i> takes usually the form of a <i>grant agreement</i> .

For further information on awarding grants see the [Grants Vademecum](#).

## 1.5.2. Employment contracts

The confusion between *employment contract* and *provision of services* can lead to difficult legal situations, since the link between the contracting authority and the contractor can sometimes be misconstrued as an employment contract.

In fact, despite the diversity of national law, the national courts will almost always take into account a range of factors, including:

- working on Commission premises, using Commission infrastructure and, especially, having an e-mail address ending in “@ec.europa.eu” instead of “... @ext.ec.europa.eu”, a job description in Sysper, the right to use a parking space in Commission buildings, etc.;
- the existence of a hierarchical link, whether formal (clauses in a contract or references in specifications) or *de facto* (authorisation of leave or organisation of working time, attendance requirements (hours or days), services provided expressed in terms of hours per month, taking instructions from and reporting to a “hierarchical superior”, etc.);
- payment for services comparable with a salary (fixed monthly amount rather than payments for individual specifically defined tasks);
- the nature of the tasks actually performed (as compared with the description of the service purchased under the procurement procedure);
- the duration and continuous nature of the services. DG HR insists that natural persons should not provide services for the Commission for more than six years over a period of twelve years<sup>6</sup>. However, this precaution is not, in itself, enough to prevent confusion. Application of this restriction must be checked (in principle by DG HR).

Using loose terminology can also create a false impression of the nature of the contractual link: a service provider operating under a service contract is not “recruited”, does not have a “job” or “duties” at the Commission, is not paid a “fee” or a “salary”, does not “take leave” and does not “resign”. All these terms imply employment, and hence obligations for the institution as an employer, rather than performance of a public contract.

Consequently, special attention must be paid to these aspects when drawing up the procurement documents and during performance of the contract.

The DG HR website contains further information on the regulations and administrative provisions governing external staff covered not by the Staff Regulations but by service contracts: [https://myintracomm.ec.europa.eu/hr\\_admin/en/external\\_staff/Pages/index.aspx](https://myintracomm.ec.europa.eu/hr_admin/en/external_staff/Pages/index.aspx)

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<sup>6</sup> [http://intracomm.ec.testa.eu/guide/publications/infoadm/2004/ia04075\\_en.html](http://intracomm.ec.testa.eu/guide/publications/infoadm/2004/ia04075_en.html).

### 1.5.3. External experts

Below the threshold set in the Directive, a **special procedure** based on Articles 204 FR and 287 RAP may be used to select experts needed to assist in evaluation of grant proposals or procurement tenders, in project follow-up and in *ex-post* evaluation and for providing opinion and advice in specific cases. This procedure is an exception to public procurement rules and should not be used to circumvent the requirements of a public procurement procedure.

Experts are remunerated at a fixed rate defined by the service who needs expertise, which may vary in line with the type or level of expertise required and is capped at 450 EUR per working day (see [Commission Decision C\(2014\)2220](#)). Experts are selected to carry out the tasks on the basis of their capacity and in accordance with the principles of non-discrimination and equal treatment. The first step in the procedure is to select experts by means of a call for expressions of interest (the [model](#) available on BudgWeb is recommended) published in the OJ S and/or on the website of the institution.

This procedure is applicable below the threshold of the Directive. This ceiling applies to the total of all payments (including any refundable expenses) to be made to each expert throughout the duration of the multiannual programme (as set out in the basic act to which the list of experts relates) or the duration set for the list of experts if it is drawn up outside the scope of a multiannual programme (maximum 5 years). Thus, if the ceiling is reached (or is about to be reached) the expert can no longer be assigned tasks covered by the initial call for expression of interest (CEI) within the scope of the relevant programme.

In order to guarantee ex-post transparency, the list of experts and the subject of the tasks shall be published annually. The remuneration shall also be published where it exceeds EUR 15 000 for the tasks performed.

This procedure does not apply to:

- experts who belong to the expert groups governed by the horizontal rules established by the Communication [C\(2010\)7649](#) on the framework for expert groups and who are not remunerated;
- experts who are not remunerated and only receive reimbursement of their expenses as set out in Commission Decision [C\(2007\)5858](#);
- experts who belong to the advisory committees coming under the comitology procedure;
- scientific experts covered by Article 181(4) FR and used by the research family;
- experts who carry out tasks that are beyond the scope of Article 204 FR and which therefore fall under procurement procedures.

Information on expert groups and comitology is available on the following page from the Secretariat General: <http://ec.europa.eu/transparency/regexpert/>

For further details, see the [Circular on external experts](#).

## 1.6. Conflict of interests in procurement

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

- (1) conflict of interest for the contracting authority,
- (2) grave professional misconduct,
- (3) involvement in drafting tender specifications and distortion of competition,
- (4) professional conflicting interests.

(1) The notion of **conflict of interests** refers normally to situations where **an agent of the contracting authority** is in one of the cases listed in Art. 57(2) FR, i.e. where the impartial and objective exercise of the function of the person is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other interest with a candidate, tenderer or contractor.

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

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

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

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

- where the operator attempts to unduly influence the decision-making of the contracting authority during a procurement procedure;
- where the operator enters into agreement with other operators in order to distort competition;
- where the operator tries to obtain confidential information that may give it undue advantages in the procedure.

These cases are listed in Article 106(1) (c) FR and are a basis for exclusion of the operator.

(3) There are cases where the contracting authority used a technical assistance contract to help **drafting the tender specifications** of a subsequent procurement procedure. In this case, it is the responsibility of the contracting authority to ensure equality of treatment between the operator involved in the technical assistance and other economic operators. The contractor involved in the preparation of procurement documents can be rejected from the subsequent procedure only if its participation entails a **distortion of competition** and that this cannot be remedied otherwise (Art. 107(1) (c) FR).

It is up to the contracting authority to prove the distortion of competition and to prove that it has taken all possible measures to avoid the rejection. Such rejection is subject to a contradictory procedure, so the tenderer must be given the opportunity to prove that its prior involvement cannot distort competition (Art. 142 RAP).

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

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

Besides, the time limit for receipt of tenders of the second procedure should be long enough (well above the legal minimum) to ensure that all operators can absorb the relevant information. A short time limit would indeed give an undue advantage to the technical assistance contractor.

(4) Finally, there are specific cases where the operator has a **professional conflicting interest** which negatively affects its capacity to perform a contract (Art. 148(6) RAP). This is treated at the selection

stage. This provision is meant to avoid cases where an operator is awarded a contract to evaluate a project in which it has participated or to audit accounts which it has previously certified.

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

## Part 2. Conceiving the purchase and the contract

### 2.1. Financing decision

Contracts must be covered by a “financing decision”, as provided for by Article 84(2) FR, in case of operational appropriations. This is not necessary in the case of administrative appropriations including technical support lines (of the form XX 01, also called ex-BA lines).

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

It must indicate:

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

Further information is available in the [circular on financing decisions](#):

### 2.2. Characteristics of the purchase

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

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

Departments of the institutions which form a single legal entity (the Union) are deemed to be contracting authorities except where they conclude **administrative arrangements** between themselves<sup>7</sup>. In other words, two Commission DGs or the Commission and the Parliament can conclude administrative arrangements. This does not apply to executive and decentralised agencies which are separate legal entities.

#### 2.2.1. Subject matter and type of purchase

The service must give a clear, full and accurate description of the subject matter of the procurement. The technical content must be clearly set out, indicating the duration, estimated value and type of contract.

It is essential to identify the subject matter in order to select the procurement procedure to be followed and the type of contract. A more detailed description of the various subjects can be found in the reference nomenclature provided by the common procurement vocabulary (CPV) established by Regulation (EC) No 2195/2002<sup>8</sup>.

Procurement can be used for four different types of purchases:

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

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<sup>7</sup> Please consult the Commission circular of 9 July 2004 on [JRC participation in procurement and grant procedures](#), available on BudgWeb.

<sup>8</sup> OJ L 340, 16.12.2002, p. 1, as amended by Regulation (EC) No 2151/2003 (OJ L 329, 17.12.2003, p. 1).

outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic or technical function;

- **'building'** covers the purchase, long lease, usufruct, leasing, rental or hire purchase, with or without option to buy, of land, existing buildings or other real estate.

### **2.2.2. Lots**

Contracts covering a set of supplies or services serving a similar purpose, whose combined value is such that few operators would be able to provide them all in their entirety, should be split into lots, so that any operator who is interested can tender for one or more lots (Art. 168 RAP).

Dividing a contract into lots increases competition and make it easier for small and medium-sized companies to participate. Indeed, in the case of very high-value contracts competition can only be achieved by splitting the contract, since only a small number of operators would be able to offer all the products or services requested, thus placing the contracting authority in a position of dependence.

Splitting into lots is also appropriate when a contract for a single global purchase is made up of a variety of products or services offered by companies operating in different sectors of the economy (for example, information and communication activities often include managing a website, producing videos, publishing written material, etc.). In such cases, a company which is highly efficient within its own sector but is not able to provide all the products or services would be unfairly prevented from competing.

### **2.2.3. Duration of the contract**

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

The duration of framework contracts (see [Chapter 2.6.2](#)) shall be stipulated and may not exceed four years, save in exceptional cases justified, in particular, by the subject matter of the contract. For instance, a FWC for maintenance of a machine expected to last for 10 years should be 10 years as this is justified by the nature of the required service. A specific contract (see [Chapter 2.6.3](#)) under a framework contract shall stipulate the duration for its performance, like a direct contract. The framework contract shall continue to apply to the specific contract after its expiry. The framework contract must set a maximum duration for performance of specific contracts after its expiry (usually 6 months).

Contracts awarded for multi-annual operations on administrative appropriations normally include a clause allowing them to be renewed subject to certain conditions (e.g. availability of budget), usually at the end of the first year. This renewal is not subject to procurement procedure as it is part of the contract from the outset.

Following the principle of broadest possible competition and by analogy with framework contracts, the performance of direct contracts should not exceed a four year duration.



## 2.2.4. Estimating the value of a contract

The contracting authority must estimate the value of a purchase (Art. 169 RAP) on the basis of previous experience, previous similar contracts and/or on the basis of a preliminary market research. It is possible to consult specialised services (e.g. DG COMM for communication services, DG DIGIT for IT purchases) to obtain information on the value of the purchase.

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

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

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

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

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

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

### **If the contract includes revenues**

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

### **Regarding framework contracts:**

- The basis for calculating the total value of FWCs is the maximum value of all the specific contracts envisaged during the total duration of the framework contract (FWC) including all renewals, reimbursable expenses and margins for indexation and security.
- For joint contracts with contracting authorities from Member States, EFTA states or candidate countries or interinstitutional contracts or contracts involving several departments, the total value must be taken into account.

Regarding long-term purchases:

In the case of service contracts which do not specify a total price or supply contracts for leasing, rental or hire purchase of products, the basis for calculating the estimated value is:

- in the case of fixed-term contracts:
- if their duration is 48 months or less in the case of services or 12 months or less in the case of supplies, the total contract value for their duration;
- if their term is more than 12 months in the case of supplies, the total value, including the estimated residual value;
- in the case of contracts for an indefinite period, or in the case of services for a period exceeding 48 months, the monthly value multiplied by 48.

Regarding repetitive purchases:

In the case of service or supply contracts which are awarded regularly or are to be renewed within a given period, the contract value is established on the basis of any of the following:

- the total actual value of successive contracts of the same type awarded during the preceding 12 months, adjusted, where possible, to take account of changes in quantity or value which would occur in the 12 months following the initial contract;
- the total estimated value of successive contracts of the same type to be awarded during the financial year.

**Regarding concessions:**

The value of a concession is an estimate of the total turnover of the concessionaire generated over the duration of the concession. This value must be estimated using an objective method which must be announced in the procurement documents. The method must take into account:

- (a) the revenue from the payment of fees and fines by the users of the works or services other than those collected on behalf of the contracting authority;
- (b) the value of grants or any other financial advantages from third parties for the performance of the concession;
- (c) the revenue from sales of any assets which are part of the concession;
- (d) the value of all the supplies and services that are made available to the concessionaire by the contracting authority provided that they are necessary for executing the works or services;
- (e) the payments to candidates or tenderers.

## 2.3. Risk Management

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

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

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

- critical analysis of the project (tender) documentation, possibly by a person not involved in the earlier stages of preparation of the project; and
- feedback from implementation of previous projects (“lessons learned”).

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

## 2.4. Interinstitutional procurement

First, a procedure carried out by several DGs of the Commission is not an interinstitutional procedure since only one institution is involved.

The main reason for securing interinstitutional cooperation in public procurement procedures is that economies of scale can be achieved by pooling the purchasing power and resources of the European institutions, bodies, offices and other agencies involved (Art. 104a FR).

Consequently, the contracting authorities must seek to carry out procurement procedures on an interinstitutional basis whenever there is a possibility of achieving efficiency gains. This is especially possible in the case of framework contracts for horizontal services (IT systems, audit, communication, etc.). Nevertheless direct contracts (not only framework contracts) can also be subject to an interinstitutional procurement procedure.

There is no permanent interinstitutional structure that manages public contracts. All potentially interested institutions and agencies should be informed about procurement plans well in advance of the publication of the call. The [list of contact points in decentralised agencies and Public-Private Partnerships](#) should be used to organise the consultation as it provides the most efficient access points.

The list of institutions participating has to be published in the contract notice. No institution can be added later.

The lead institution (in most cases the Commission) will be the sole representative of the contracting authorities during the procurement procedure up to signature of the contract, and the sole manager of the framework contract.

Although in the case of interinstitutional procedures the *award decision* is taken by the authorising officer of the lead institution, each authorising officer bears ultimate responsibility for the specific contracts used by his or her institution. Only one framework contract is signed for all participating institutions.

After signature of the contract, the lead institution remains responsible for overall management of the framework contract (e.g. extension, price revision, amendments, etc.). The institutions participating are responsible for execution of their own specific contracts, ordering, receipt of deliverables and payments.

For further information see the [Guidelines on interinstitutional tenders](#) and the [Guidance on the participation of EU decentralised agencies in the Commission procurement procedures](#) as well as the [Secretariat General page on agencies](#).

## 2.5. Joint procurement

If a public contract or a framework contract is necessary to implement a joint action between an EU contracting authority and a contracting authority from one or more Member States, EFTA or candidate country, the procurement procedure may be carried out jointly. In the case of third states, the joint procurement is possible only when it has been foreseen in a bilateral or multilateral Treaty (Art. 104a FR).

In the case of joint procurement with one or more State(s), procurement should in principle be carried out by the EU institution using its procedure. Procurement may be carried out by the contracting authority from a Member State if its share of the contract exceeds 50% or in other justified cases, provided the Member State's procedures are equivalent to those of the EU institution. Nevertheless, practical arrangements should be agreed in advance (evaluation of the requests to participate or the tenders, award of the contract, the law applicable to the contract and the competent court for hearing disputes) in a so-called Joint Procurement Agreement signed by the parties before launching the procedure.

## **2.6. Types of contracts**

A written contract must be drawn up for each public or concession contract awarded by the contracting authority, except for payments against invoices equal to or less than €1000 (Article 137(3) RAP).

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

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

The [various model contracts](#) are available on [Budgweb](#).

### **2.6.1. Direct contracts or purchase orders**

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

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

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

### **2.6.2. Framework contracts**

Unlike direct contracts, framework contracts stipulate the subject matter of the purchase, the price list, the parties, the legal setup, the duration and the method of making particular purchases. The other necessary elements of the contractual relationship are defined at a later stage in a specific contract indicating e.g. the quantities and date of delivery. Framework contracts therefore give rise to no direct obligation for the contracting authority. Consequently, only the specific contracts concluded under a framework contract must be preceded by a budgetary commitment.

Framework contracts can be used for services and supplies. They are rarely used for works and they do not apply to buildings.

### **2.6.3. Specific contracts or order forms**

A framework contract is implemented via specific contracts, which are preceded by a budgetary commitment and create the legal obligation for the purchase. They usually specify the date and quantity of delivery, as well as any other term not defined at FWC level.

An order form is a simplified form of specific contract, used, whatever the value, when only the quantity ordered and place of delivery need to be indicated.

### **2.6.4. Concession contracts**

Concession contracts are a specific form of direct contract where the subject matter is to entrust the execution of works or the provision and management of services to a contractor ('the concessionaire') over a long period of time, in particular when there is a need for return on investment. The payment term usually consist in the right of the concessionaire to exploit the works or services, although there may also be an actual payment from the contracting authority.

The main characteristic of the concession is that the operating risk is transferred to the concessionaire. In other words, there will be no extra payment if the revenue from the exploitation of the concession is smaller than anticipated/calculated by the concessionaire.

For instance, a service concession would cover the cafeterias and canteens, vending machines or press shop within an institution building. A work concession would cover the right to exploit a building or other work after constructing it to get a return on investment.

### **2.6.5. Mixed contracts**

In the case of contracts combining works and/or supplies and/or services or in the case of contracts combining procurement and concessions, the estimated value of the particular parts of the contract should be taken into the account and the following rules apply (Art. 121(5) RAP):

- if the contract combines concession and procurement, it should be awarded according to its main subject; if the concession is the main subject, it allows for the possibility to use a competitive procedure with negotiation;
- contracts which combine supplies and services are classified on the basis of which of the two accounts for the greater estimated value;
- if the contract combines works and services, it should be awarded according to its main subject: if services are minor, the works threshold will apply; if the works are minor, the service threshold will apply.

### **2.6.6. Building contracts**

Building contracts cover the purchase, long lease, usufruct, leasing, rental or hire purchase, with or without option to buy, of land, existing buildings or other real estate. These contracts are not standard and vary according to the type of contractual relation and to the location of the building.

For information about the negotiated procedure for building contracts see [Chapter 3.12](#).

## 2.7. Use of framework contracts

### 2.7.1. Functions and limitations of framework contracts

A framework contract (FWC) is concluded between one or more contracting authorities and one or more economic operators to lay down the basic terms for a series of specific contracts to be concluded over a given period, particularly the duration, subject, price, implementing conditions and quantities envisaged (Art. 122 RAP). Formally, signing a FWC does not commit the authorising officer to purchasing.

The contracting authority may conclude multiple framework contracts, which are separate but identical contracts concluded with a number of contractors. The maximum number of operators with which the contracting authority intends to conclude contracts must be indicated in the tender specifications. In multiple FWC, the minimum number of economic operators must be at least two (for cascade) or three (for reopening of competition), provided enough tenderers satisfy the selection criteria and/or enough tenders satisfy the award criteria.

Framework contracts are treated like any other procurement contracts as regards the award procedure, including the publicity arrangements. The duration of framework contracts should not exceed four years, save where duly justified by the nature of the purchase. For instance, a FWC for maintenance of a machine expected to last for 10 years should be 10 years as this is justified by the nature of the required service. The value of the FWC over its total duration must be estimated. A maximum total amount in EUR (the ceiling) must be indicated in the award decision, in the award notice and in the FWC itself. The FWC can then be "consumed" up to that ceiling.

**For calculation of the ceiling, see the [circular on framework contracts](#).**

Specific contracts or order forms based on FWC are awarded in accordance with the terms of the FWC and only between the contracting authorities and the contractors originally party to the FWC.

In practice, FWC are for a precisely defined subject, but where the exact quantities and delivery times cannot be indicated in advance. The rules state that *contracting authorities may not misuse framework contracts in order to hinder, limit or distort competition*. This situation would arise:

- if the subject of the contract, the quantities involved and the work schedule cannot be precisely indicated when the specifications are drawn up. Use of a FWC would not satisfy the obligation to provide a comprehensive, clear and accurate definition of the subject of the contract. Some economic operators may fail to respond to the call for tenders because of, say, uncertainty concerning the work schedule in the light of their work planning. Note that as a matter of principle, to ensure transparency and sound financial management, a framework contract should not be envisaged if the same subject matter is already covered by another existing framework contract (inter institutional or not) to which the contracting authority has access.;
- if the practical conditions for a multiple FWC were not met, use of these arrangements could be challenged by an operator who considers it was able to meet any work requirements during performance of the contract.

It is strongly advised to use FWC only in the specific situations in which this approach is justified and does not infringe public procurement rules.

A list of specific contracts over €15 000 based on a FWC during a financial year must be published on the Internet site of the contracting authority not later than 30 June of the following year.

For the Commission, this publication can be done automatically via the [Financial Transparency System](#) (FTS) for all specific contracts exceeding €15 000. Below that amount, there is no ex-post publication.

**For more information see [Chapter 4.14.2](#).**

## **2.7.2. Single FWC**

If a FWC is concluded with a single economic operator, the award of the order forms (simplified specific contracts) is based on the direct application of the terms of the FWC. The order forms specify the quantity requested, unit prices (as stated in the FWC) and total amount.

## **2.7.3. Multiple FWC in cascade**

The award of the order forms (simplified specific contracts) is based on the direct application of the terms of the FWC. FWC in cascade are best suited where security of supply is endangered, either because of the large volume of purchase in the light of what the market can provide or because the delivery is urgent and contractors have an extremely short time in which to respond. The minimum number of contractors is two.

The contracting authority ranks the tenderers in descending order with a view to establishing the list of contractors (in line with the maximum number announced beforehand) and the sequence in which they will be offered orders. The department always contacts the contractor at the top of the list. If that contractor is unavailable or incapable to respond for reasons which do not entail terminating the contract, the second contractor may be contacted, and then, if necessary and under the same conditions, the third.

## **2.7.4. Multiple FWC with reopening of competition**

In the case where not all the terms can be precisely laid down in the FWC, or if the prices can fluctuate unpredictably (IT hardware or services, paper, raw materials, etc.), or in order to reduce possible dependence on contractors, competition between contractors makes it possible to obtain the best tender for each specific contract. The pressure of competition between contractors under the same FWC helps to maintain the quality and speed of response of the contractors and to avoid the possibility of a contractor abusing its position as sole contractor or first contractor in the cascade.

FWC with reopening of competition are awarded on the basis of indicative tenders and without any priority amongst contractors. The minimum number of contractors is three (provided enough tenderers satisfy the selection criteria and/or enough tenders satisfy the award criteria) but it is recommended to have more to avoid collusion between contractors and to ensure that the minimum number is always present in case the framework contract would be terminated with one contractor. The FWC contains two different sets of award criteria, one for awarding the FWC, and one for awarding specific contracts.

When sending the request for service to all contractors, the contracting authority may refine the terms of the FWC and formulate them more precisely, although without substantial change. Contractors are put into competition to provide a specific tender within a reasonable time limit. It must be long enough to allow them to prepare their specific tenders but there is no legal minimum period. Confidentiality of tenders must be respected. Although specific tenders must be evaluated, it is not necessary to nominate an evaluation committee for that purpose.

## **2.7.5. Multiple FWC with both cascade and reopening of competition**

The contracting authority may envisage a FWC in which some of the specific contracts will be awarded according to the cascade system and others will be awarded by reopening competition between contractors. The tender specifications must explain exactly which services will be subject to one or the other award mechanism (transparency principle). The choice cannot take place during FWC implementation at the discretion of the contracting authority. Such mixed FWC can be used when the FWC covers standard purchases (direct order of the necessary quantity by the cascade system) and purchases which require a specific tender from contractors (based on their estimation of necessary resources to perform the specific contract – by reopening competition).

For more information on framework contracts, see the [Circular on framework contracts](#).

### **2.7.6. Benchmarking and mid-term review**

In sectors subject to rapid price movements and technological change, FWC without reopening of competition must contain a clause either on a mid-term review or on a benchmarking system. After the mid-term review, if the conditions initially laid down are no longer geared to the new prices or technology, the contracting authority may no longer use the FWC concerned and must take the appropriate measures to terminate it.

This clause is available in the [model framework contract for supplies](#).



## 2.8. Special contracts

Some contracts are subject to special procedures governed by specific rules.

### 2.8.1. IT contracts

The IT Directorate-General (DG DIGIT) has several framework contracts which cover a substantial part of EU institutions' needs and can be activated by signing specific contracts (thus saving the time and work which launching a procedure in each service would entail). It has drawn up a special standard framework contract and also provides technical assistance. It is advised to consult it for contracts concerning IT supplies or services (hardware, software and related services, including telecommunications).

For further information, see [http://ec.europa.eu/dgs/informatics/procurement/useful\\_documents/index\\_en.htm](http://ec.europa.eu/dgs/informatics/procurement/useful_documents/index_en.htm) or contact the IRM (Information Resource Manager) network local correspondents.

### 2.8.2. External relations

DG DEVCO has drawn up a series of standard contracts and procedures for contracts awarded on behalf of third-country recipients and taking account of the specific nature of the external relations field. The principles governing these contracts and the award procedures are outlined in Part Two of the FR and the RAP. This Vade-mecum concerns contracts awarded by the EU institutions on their own account, including those awarded by Commission Delegations in non-EU countries in connection with routine administrative work (rental contracts, purchases, works, cleaning, security services, etc.). The above-mentioned special provisions are outside its scope.

For more information, see DEVCO's Practical Guide at: <http://ec.europa.eu/europeaid/prag>

### 2.8.3. Legal assistance services

The Legal Service has drawn up, for its own purposes, a simplified model contract for legal assistance services ("legal assistance agreement") with legal experts, lawyers and other specialists. This contract may be obtained from the Commission Legal Service directly.

### 2.8.4. Subscription contracts

In the case of economic operators which offer standard services to the public (e.g. utilities, newspapers, data bases, news agencies, etc.) and which use a publicly available standard contract (subscription contracts), such contracts often have to be accepted by the EU contracting authority.

These contracts may be signed with some adaptation.

Selected clauses of the model contract should be included: there must be provision for terms of payment, the VAT exemption clause should be added, an applicable law and court must be defined, preferably within the EU, and there must be provision for checks and audits. Those clauses should be quoted in the tender specifications and it should be explained that the operator's standard contract must be amended accordingly.

Moreover, the general conditions of the model service contract may be attached to the operator's contract with a clause stating that the attached general conditions apply in situations not regulated by the main contract.

At the same time, assessment of the quality of the tenderer's model contract (legal security, termination clauses, etc.) may be used as one of the award criteria if there is more than one economic operator on the market.

## 2.9. Purchase of studies

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

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

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

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

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

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

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

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

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

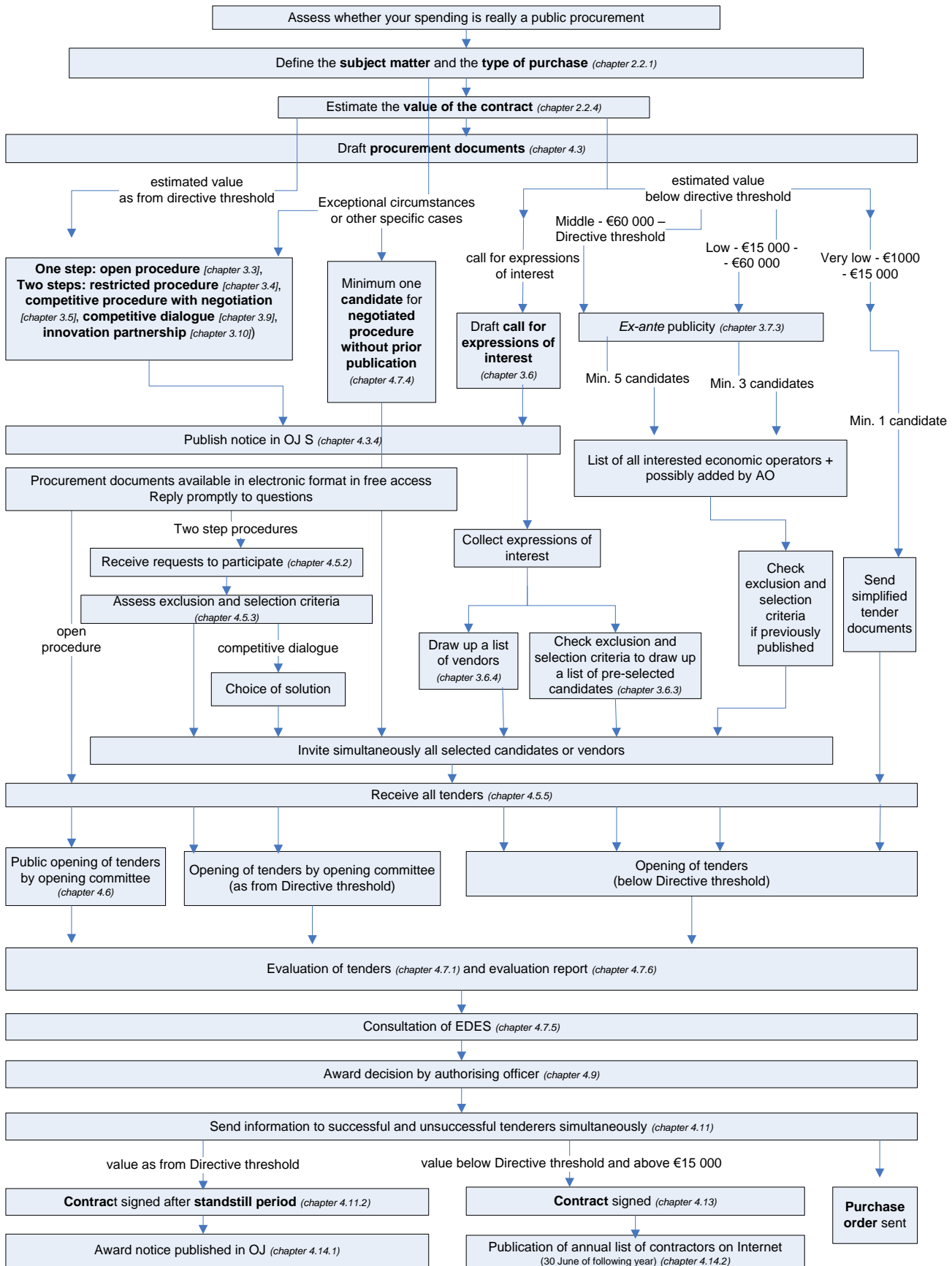
Please note that the "study report" is the main contract "deliverable" and, as a rule, is different from the technical implementation "progress reports" that the service provider may be required to present (in accordance with the model service contract).

All Commission publication including studies shall apply the [EC Visual Identity](#).

For more information see the [circular on contracts for studies](#) and the [Secretariat General page on managing studies](#)

# Part 3. Procurement procedures and systems

## Overview of the procurement process



### 3.1. Choice of procedure

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

Estimated value of contract		Type of standard procedure minimum applicable procedure	Special procedures
Services or supplies	Works		
€0.01 - €1 000		Simple <b>payment</b> against invoice <i>Article 137(3) RAP</i>	Dynamic purchasing system for commonly used purchases <i>Article 131 RAP</i>
€1 000.01 - €15 000		<b>Negotiated procedure with a single tender</b> <i>Article 137(2) RAP</i>	
€15 000.01 - €60 000		<b>Negotiated procedure with at least three candidates</b> , without a contract notice <i>Article 137(1) RAP</i>	
€60 000.01 to <€135 000	€60 000.01 < €5 225 000	<b>Negotiated procedure with at least five candidates</b> , without a contract notice <i>Article 136a RAP</i>	Competitive dialogue for particularly complex contracts <i>Article 132 and 135 RAP</i>  Negotiated procedure without prior publication of a contract notice for exceptional cases <i>Article 134 RAP</i>
		<b>Procedures following a call for expressions of interest</b> (list of pre-selected candidate or list of vendors) (Procedure useful if a number of contracts are planned over a period of several years.) <i>Article 136 RAP</i>	
≥ €135 000*	≥ €5 225 000 *	<b>Open or restricted procedure</b> with publication of a contract notice in the Official Journal <i>Article 104(2) FR</i>	Design contest <i>Article 130 RAP</i> <b>Innovation partnership</b> for research <i>Article 129 RAP</i>
Services under Annex XIV to Directive 2014/24/EU, concessions, certain research services and certain audio-visual or media services, without limit	N/A	Competitive procedure with negotiation <i>Article 135 RAP</i>	

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

130 000 SDR 5 000 000 SDR	These amounts in euro may be revised every two years; they are applicable from 1 <sup>st</sup> of January of even years.
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### **Notes to the table on choice of procedure**

- ⇒ Use of the open or restricted procedure with publication of a contract notice in the Official Journal is always an option. The other procedures are the minimum to be followed in each case.
- ⇒ In specific circumstances, the competitive procedure with negotiation may be used.
- ⇒ In exceptional cases the negotiated procedure without prior publication of a contract notice in the Official Journal may be used.
- ⇒ The possibility of using a dynamic purchasing system (theoretical at the moment) depends not on the value of the contract but on its subject: commonly used purchases.
- ⇒ The competitive dialogue is an option available to the contracting authority when a contract is particularly complex.
- ⇒ The estimated value or type of contract must not be established in such a way as to evade the procedure that would apply if that value or type were defined correctly.
- ⇒ If there are doubts concerning the estimated value of the contract or if the value is close to a threshold, it is advised to use a procedure for a higher level, as what counts for the validity of the procedure is not the initial estimate but the actual final price.
- ⇒ In the case of buildings contracts, the negotiated procedure without prior publication of a contract notice after prospecting the local market may be used (Article 134(1) (g) RAP).

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

Legal minimum time limits in days (Art. 152 RAP)

**BEWARE: until 01/01/2018, the Publications Office still uses the 12 days limit for publication (transitional period) so all legal minima following publication are increased by 5 days.**

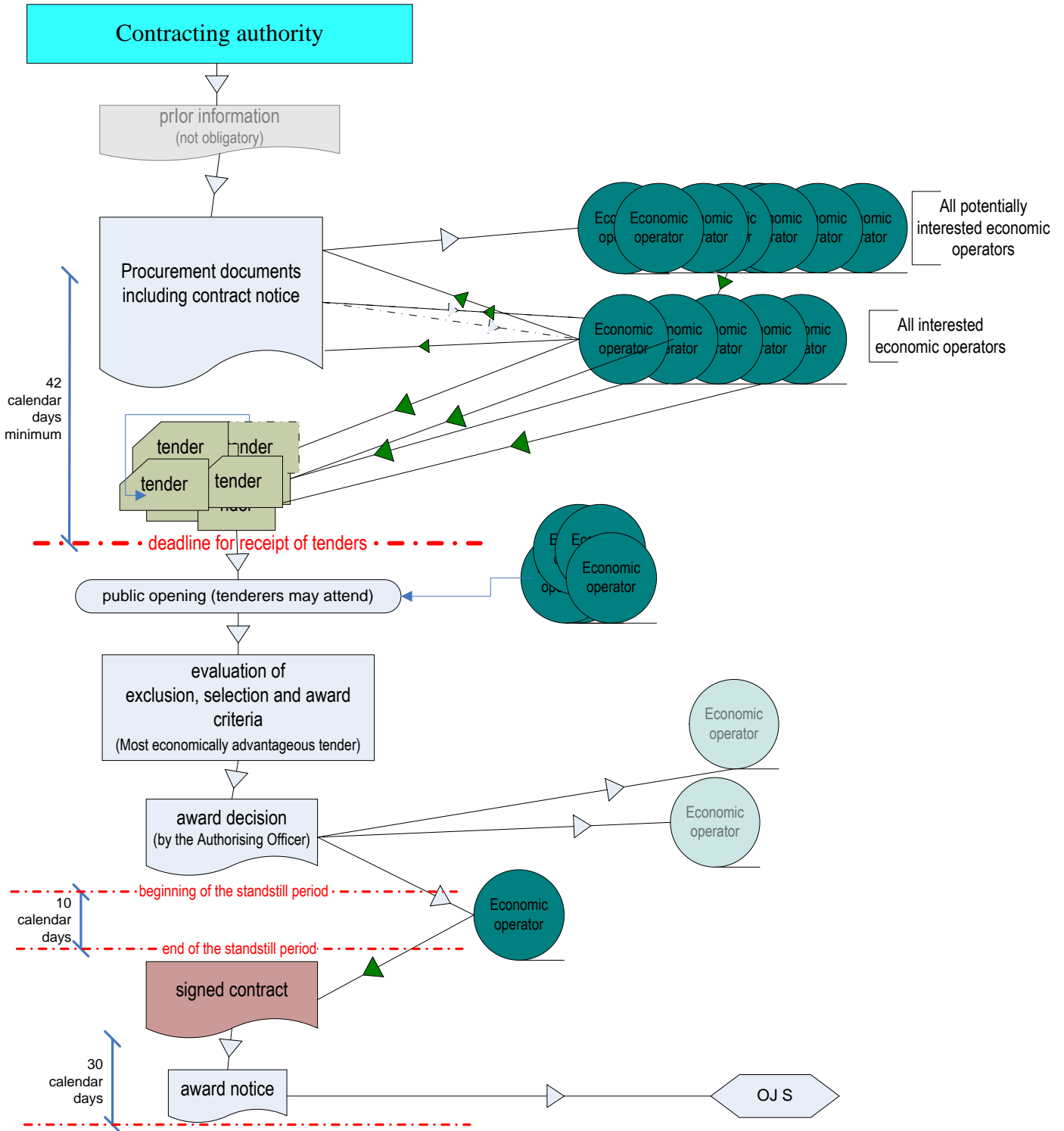
Procedure	Request to participate	Tender
<i>If procurement documents not electronic: + 5 days</i>		
<i>If free text in contract notice is longer than 500 words: + 5 days</i>		
<i>If e-submission of tenders is allowed: - 5 days</i>		
Open	-	37 ( <b>currently 42</b> ) (urgent: 15)
Restricted	32 ( <b>currently 37</b> ) (urgent: 15)	30 (urgent: 10)
Competitive procedure with negotiation	32 ( <b>currently 37</b> )	30
Competitive dialogue, Innovation partnership	32 ( <b>currently 37</b> )	Reasonable time
Dynamic purchasing system	Open for maximum 48 months	Reasonable time
Call for expressions of interest (one or two steps)	10 (if applicable)	10

#### Notes on time limits

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

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

### 3.3. Open procedure



### 3.3.1. Scope and characteristics

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

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

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

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

### 3.3.2. Applicable time-limits

**BEWARE: until 01/01/2018, the Publications Office still uses the 12 days limit for publication (transitional period) so all legal minima following publication are increased by 5 days.**

The time-limit for receipt of tenders is minimum 37 days (**currently 42 days**) counting from the day after dispatch of the contract notice to the Publications Office.

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

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

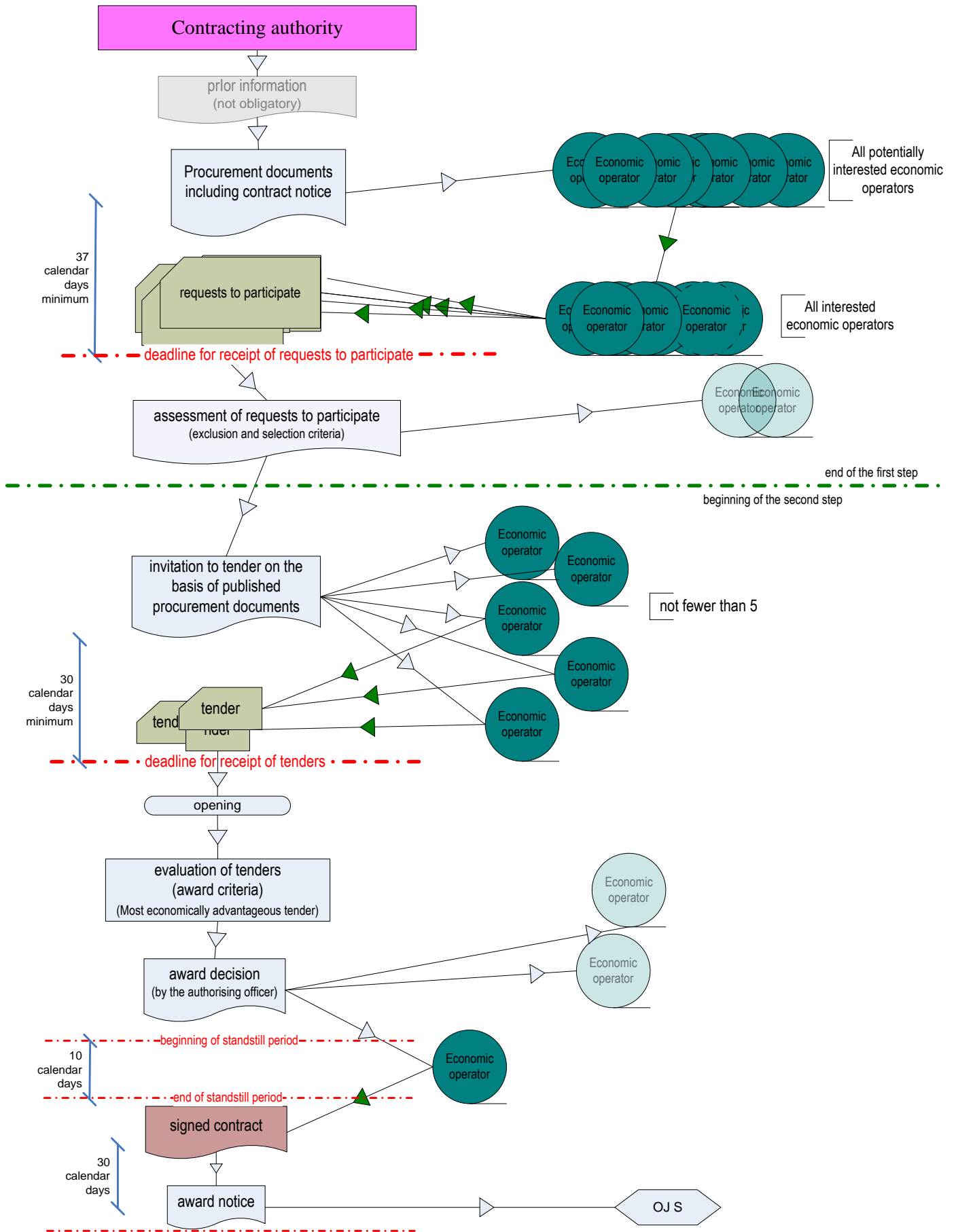
In cases of urgency, the minimum time limit for receipt of tenders is 15 days from the dispatch of the contract notice to the Publications Office.



## Overview of the open procedure

Step of the procedure	Short description, requirements, limitations or remarks	Time requirement	References: Vade-mecum, circulars	Model documents	Legal basis	
					Articles of FR	Articles of RAP
Financing decision			<a href="#">Chapter 2.1</a>		84	94
[optional] Prior information notice	To be published in the OJ S or buyer profile	maximum 12 months before dispatch of contract notice	<a href="#">Chapter 4.2</a>	To be submitted via eNotices	103	123(2)
Contract notice	Published in the OJ S. Full, direct electronic access to the procurement documents	Publications Office has 12 days for publication	<a href="#">Chapter 4.3.4</a> <a href="#">Drafting notice</a>	To be submitted via eNotices	103	123(3), 125
Procurement documents available in eTendering	Procurement documents consist of: - invitation to tender, - tender specifications, - draft contract, - contract notice	From the time the contract notice is published at least until the deadline	<a href="#">Chapter 4.5.4</a>	<a href="#">Model invitation to tender</a>  <a href="#">Model contracts</a>	105	138, 139
[optional] Clarifications, answers to questions, corrigenda	Must be published at the place where the procurement documents are published	Must be published ASAP and no later than six days before the deadline. Requests less than six working days before the deadline do not have to be answered	<a href="#">Chapter 4.5.1</a>		112	153, 160
Receipt of tenders	The mechanism for registering the exact date and time of receipt should be established.	Not earlier than 42 days after dispatch of the contract notice	<a href="#">Chapter 4.5.5</a>		111(1)	152, 155
Opening	Public opening Written record signed by opening committee members	Reasonable time after deadline for receipt of tenders, allowing tenders sent by mail to reach the contracting authority	<a href="#">Chapter 4.6</a>	<a href="#">Model record of opening of tenders</a>	111(4)	157
Checking of exclusion criteria and selection criteria	By an evaluation committee or by other means ensuring there is no conflict of interest		<a href="#">Chapter 4.7</a>		106, 107, 110	158
Evaluation of award criteria	Evaluation report signed by the evaluation committee and if applicable, persons involved in assessing exclusion and selection		<a href="#">Chapter 4.7</a>	<a href="#">Model evaluation report</a>	110	158, 159
[optional] Submission of additional materials or clarifications by tenderer	Request of additional material for exclusion or selection. Correction of clerical errors. In no circumstances may the tenders be altered		<a href="#">Chapter 4.7.4</a>		112	160
Award decision	Taken by the AO on the basis of recommendations of the evaluation report		<a href="#">Chapter 4.9</a>	<a href="#">Model award decision</a>	113(1)	159
Notification of tenderers	By electronic means	ASAP after award decision is taken	<a href="#">Chapter 4.11</a>	<a href="#">Model information letters</a>	113(2), 113(3)	161
Signature of the contract	Only after adoption of the budgetary commitment (except framework contract)	Not earlier than 10 calendar days after electronic dispatch of notification to tenderers	<a href="#">Chapter 4.13</a>	<a href="#">Model contracts</a>	118	171
[optional] Release of the tender guarantees	If tenderers were requested to provide guarantees		<a href="#">Chapter 5.6</a>		111(3)	156
Beginning of implementation of the contract	Cannot start before the contract is signed				118	
Award notice	To be sent to Publications Office for publication in the OJ S	Not later than 30 days after signature of the contract	<a href="#">Chapter 4.14.1</a>	To be submitted via eNotices	103	123(5)
Archiving	Proper filing of the documentation of the procedure	To be kept for 10 years following signature of the contract or cancellation of the procedure	<a href="#">Chapter 4.15</a>	<a href="#">Reference file for public procurement</a>	66(6)	48

### 3.4. Restricted procedure



### 3.4.1. Scope and characteristics

This is a standard procedure in two steps that may be used for any contract. It has the same legal value as the open procedure

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

Contrary to the open procedure, the restricted procedure is organised in two steps: in the first step only the exclusion and selection criteria are assessed and in the second step the award criteria are evaluated. Any interested economic operator may ask to take part in the first step of this procedure, but only those invited can submit a tender that will be evaluated in the second step.

A restricted procedure may be useful:

- if a large number of tenders is expected in order to receive tenders only from selected economic operators and to avoid that economic operators not fulfilling the selection criteria do an unnecessary effort for preparing a tender;
- for practical reasons, to know in advance the maximum number of tenders and plan evaluation accordingly;
- if the contracting authority needs to limit circulation of the procurement documents (e.g. for security or confidentiality reasons) (see Chapters [4.3.4.1](#) and [4.5.4](#));
- if a site visit is necessary for economic operators to submit a tender (see Chapter [4.3.1.4](#)).

### 3.4.2. Applicable time-limits

**BEWARE: until 01/01/2018, the Publications Office still uses the 12 days limit for publication (transitional period) so all legal minima following publication are increased by 5 days.**

The time-limit for receipt of requests to participate is minimum 32 days (**currently 37 days**) counting from the day after dispatch of the contract notice to the Publications Office.

The time-limit for receipt of tenders is minimum 30 days counting from the day after dispatch of the invitation to tender to selected candidates.

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

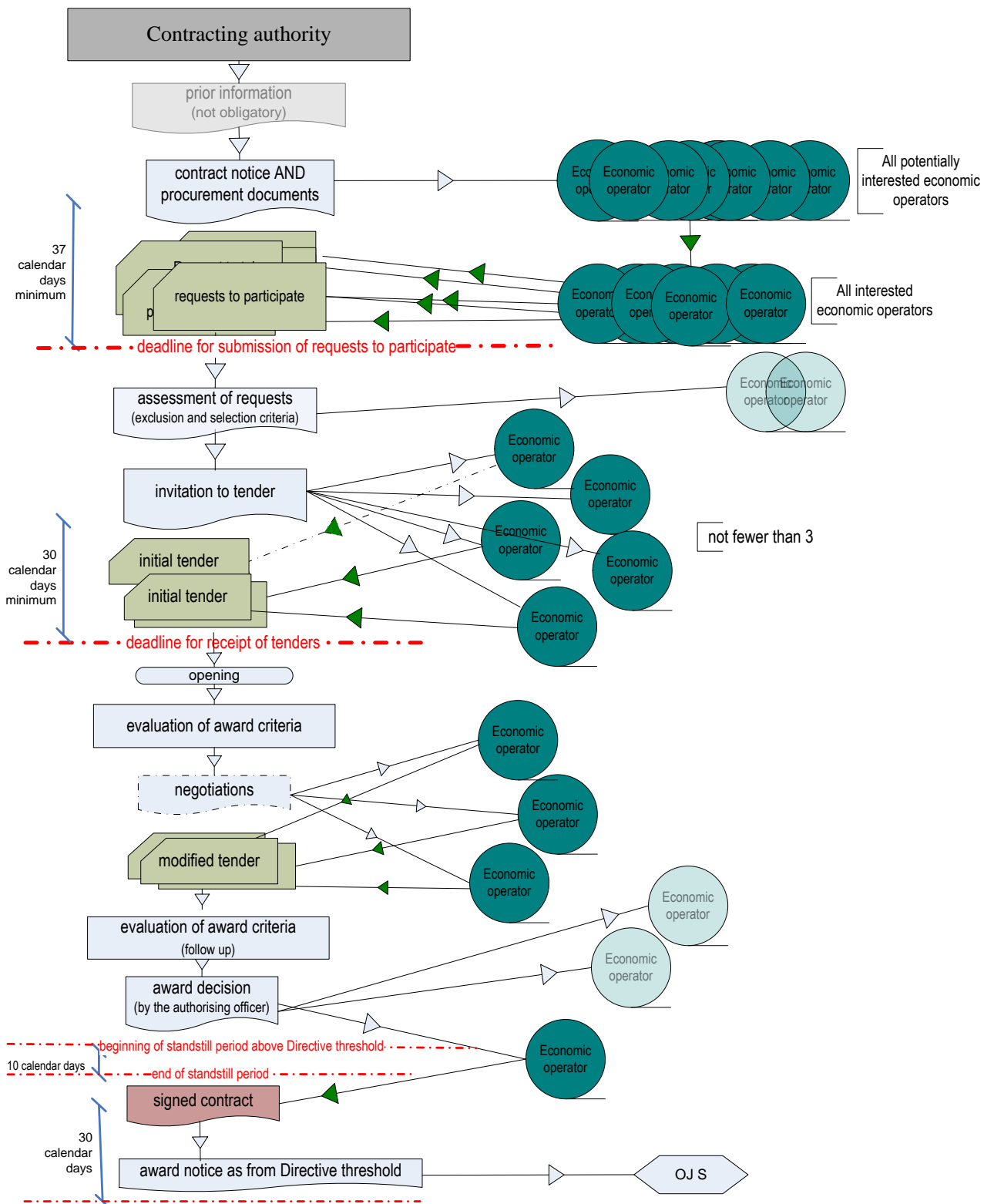
Where the urgency of the situation renders the normal time limits impracticable, the contracting authority may use an accelerated procedure. It must duly justify the existence of objective circumstances giving rise to urgency and making it genuinely impossible to comply with the normal time limits. This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

In cases of urgency, the minimum time limit for receipt of requests to participate is 15 days from the dispatch of the contract notice to the Publications Office and 10 days from the dispatch of the invitation to tender to selected candidates.

## Overview of the restricted procedure

Step of the procedure	Short description, requirements, limitations or remarks	Time requirement	References: Vade-mecum, circulars	Model documents	Legal basis	
					Articles of FR	Articles of RAP
Financing decision			<a href="#">Chapter 2.1</a>		84	94
[optional] Prior information notice	To be published in the OJ S or buyer profile	maximum 12 months before dispatch of contract notice	<a href="#">Chapter 4.2</a>	To be submitted via eNotices	103	123(2)
Contract notice	Published in the OJ S. Full, direct electronic access to the procurement documents	Publications Office has 12 days for publication	<a href="#">Chapter 4.3.4</a> <a href="#">Drafting notice</a>	To be submitted via eNotices	103	123(3), 125
Procurement documents available in eTendering	Procurement documents consist of: - invitation to tender, - tender specifications, - draft contract, - contract notice	From the time the contract notice is published at least until the deadline	<a href="#">Chapter 4.5.4</a>	<a href="#">Model invitation to tender</a>  <a href="#">Model contracts</a>	105	138, 139
Receipt of requests to participate	The mechanism for registering the exact date and time of receipt should be established.	Not earlier than 37 days after dispatch of the contract notice	<a href="#">Chapter 4.5.2</a>		111(1)	152, 155
Selection of candidates	Only the exclusion and selection criteria are checked by an evaluation committee or other means ensuring there is no conflict of interest Not fewer than five economic operators to be selected Report on the selection of candidates should be prepared Possible request of additional material for exclusion or selection.		<a href="#">Chapter 4.5.3</a>	<a href="#">Model evaluation report</a>	106, 107, 110, 111(4), 112	157, 158, 159
Notification to rejected candidates	By electronic means	ASAP after selection of candidates	<a href="#">Chapter 4.5.3</a>	<a href="#">Model information letters</a>	113(2)	161
Dispatch of procurement documents to selected candidates	Only in cases where, for technical or confidentiality reasons, procurement documents are not made available from publication of the contract notice	ASAP after selection of candidates	<a href="#">Chapter 4.5.4</a>	<a href="#">Model invitation to tender</a>  <a href="#">Model contracts</a>	105	138, 139
[optional] Clarifications, answers to questions, corrigenda	Must be published at the place where the procurement documents are published or (if technical issues or confidentiality), sent simultaneously to invited candidates	Must be published ASAP and no later than six days before the deadline. Requests less than six working days before the deadline do not have to be answered	<a href="#">Chapter 4.5.1</a>		112	153, 160
[optional] Site visit	Minutes must be prepared and sent to all candidates	Separate dates for each candidate to avoid collusion	<a href="#">Chapter 4.3.1.4</a>		111(1)	152(1)
Receipt of tenders	The mechanism for registering the exact date and time of receipt should be established.	Not earlier than 30 days after dispatch of the invitation to tender	<a href="#">Chapter 4.5.5</a>		111(1)	152, 155
Opening	Written record signed by opening committee members	Reasonable time after deadline for receipt of tenders, allowing tenders sent by mail to reach the contracting authority	<a href="#">Chapter 4.6</a>	<a href="#">Model record of opening of tenders</a>	111(4)	157
Evaluation of award criteria	Evaluation report signed by the evaluation committee and if applicable, persons involved in assessing exclusion and selection		<a href="#">Chapter 4.7</a>	<a href="#">Model evaluation report</a>	110	158, 159
[optional] Submission of additional materials or clarifications by tenderer	Correction of clerical errors. In no circumstances may the tenders be altered		<a href="#">Chapter 4.7.4</a>		112	160
Award decision	Taken by the AO on the basis of recommendations of the evaluation report		<a href="#">Chapter 4.9</a>	<a href="#">Model award decision</a>	113(1)	159
Notification of tenderers	By electronic means	ASAP after award decision is taken	<a href="#">Chapter 4.11</a>	<a href="#">Model information letters</a>	113(2), 113(3)	161
Signature of the contract	Only after adoption of the budgetary commitment (except framework contract)	Not earlier than 10 calendar days after electronic dispatch of notification to tenderers	<a href="#">Chapter 4.13</a>	<a href="#">Model contracts</a>	118	171
[optional] Release of the tender guarantees	If tenderers were requested to provide guarantees		<a href="#">Chapter 5.6</a>		111(3)	156
Beginning of implementation of the contract	Cannot start before the contract is signed				118	162
Award notice	To be sent to Publications Office for publication in the OJ S	Not later than 30 days after signature of the contract	<a href="#">Chapter 4.14.1</a>	To be submitted via eNotices	103	123(5)
Archiving	Proper filing of the documentation of the procedure	To be kept for 10 years following signature of the contract or cancellation of the procedure	<a href="#">Chapter 4.15</a>	<a href="#">Reference file for public procurement</a>	66(6)	48

### 3.5. Competitive procedure with negotiation



### 3.5.1. Scope and characteristics

The competitive procedure with negotiation is similar to a restricted procedure (see [Chapter 3.4.](#)).

This is a standard procedure in two steps that may be used only under specific cases regardless of the value of the purchase. In practice, it is mostly used as from Directive thresholds since there are lighter procedures (negotiated procedure for middle or low value contracts) available below the thresholds.

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

In the first step only the exclusion and selection criteria are assessed and in the second step the award criteria are evaluated. Any interested economic operator may ask to take part in the first step of this procedure, but only those invited can submit a tender that will be evaluated in the second step.

Unlike the open or restricted procedure, the submitted tenders can be negotiated, more specifically the technical and the financial offers. If the contracting authority decides not to negotiate, this possibility must be announced in advance.

For more information on the negotiation phase, see [Chapter 4.8.](#)

### 3.5.2. Applicable time-limits

**BEWARE: until 01/01/2018, the Publications Office still uses the 12 days limit for publication (transitional period) so all legal minima following publication are increased by 5 days.**

The time-limit for receipt of requests to participate is minimum 32 days (**currently 37 days**) counting from the day after dispatch of the contract notice to the Publications Office.

The time-limit for receipt of tenders is minimum 30 days counting from the day after dispatch of the invitation to tender to selected candidates.

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

### 3.5.3. Conditions for use

This competitive procedure with negotiation can be used:

(a) *Where tenders which are irregular or unacceptable are submitted in response to an open or restricted procedure which has been completed, provided that the original procurement documents are not substantially altered.*

A tender is deemed irregular if:

- it does not comply with the minimum requirements specified in the procurement documents; or
- it has been rejected during the opening phase; or
- the tenderer has been rejected due to misrepresentation of information; or
- the tenderer has been rejected due to previous involvement in the preparation of procurement documents which entailed distortion of competition; or
- it has been declared abnormally low.

A tender is deemed unacceptable if:

- the price exceeds the planned budget (in this case, the planned budget must be documented internally before the launch of the procedure),
- it has failed to meet the minimum quality levels for award criteria.

The initial (open or restricted) procedure is deemed completed when the cancellation notice has been published in the OJ.

In addition, the contracting authority may waive the obligation to publish a contract notice if it includes in the competitive procedure with negotiation all tenderers and only tenderers satisfying the exclusion and selection criteria except those who submitted an abnormally low tender.

It is necessary to ensure that all received tenders really were irregular or unacceptable. If tenders were found to be irregular or unacceptable because of errors made in the procurement documents (including the definition of minimum requirements), or if substantial alterations need to be made to the tender specifications, a new open or restricted procedure must be organised.

- (b) *With regard to works, supplies or services fulfilling one or more of the following criteria:*
- i) the needs of the contracting authority cannot be met without adaptation of a readily available solution;*
  - ii) they include design or innovative solutions;*
  - (iii) the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up or the risks attached to the subject matter of the contract;*
  - (iv) the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, as foreseen in Article 139(3);*

In practice, this legal basis justifies the use of a competitive dialogue, i.e. a very complex purchase where the tender specifications are impossible to establish. Given the type of services purchased by the institutions, this is rarely used. The inability to establish tender specifications with sufficient precision must not be due to any lack of expertise on the part of the contracting authority or to any failure to carry out a sufficiently detailed analysis of needs.

In this regard, it should be borne in mind that it is possible to call in outside expertise to analyse needs and help drafting the technical specifications. However the contracting authority may not exclude the operator who provided the expertise from the subsequent procurement procedure and must ensure equal information and equal treatment of all tenderers (See [Chapter 4.3.1.2](#)).

- (c) *For concession contracts*

In case of concession contracts, this procedure can be used instead of the open or restricted procedure.

- (d) *For the service contracts referred to in Annex XIV of the Directive*

This article covers for instance hotel and restaurants, education services including training, legal services (except litigation and pre-litigation cases), cultural services, libraries, etc.

- (e) *For certain types of research and development services provided that the results do not belong exclusively to the contracting authority for use in its own affairs or where the service provided is not remunerated in full by the contracting authority.*
- (f) *For service contracts concerning the purchase, development, production or co-production of programmes for audio-visual or radio media services as defined in Directive 2010/13/EU or concerning broadcasting time.*

## Overview of the competitive procedure with negotiation

Step of the procedure	Short description, requirements, limitations or remarks	Time requirement	References: Vade-mecum, circulars	Model documents	Legal basis	
					Articles of FR	Articles of RAP
Financing decision			<a href="#">Chapter 2.1</a>		84	94
[optional] Prior information notice	To be published in the OJ S or buyer profile	maximum 12 months before dispatch of contract notice	<a href="#">Chapter 4.2</a>	To be submitted via eNotices	103	123(2)
Contract notice	Published in the OJ S. Full, direct electronic access to the procurement documents	Publications Office has 12 days for publication	<a href="#">Chapter 4.3.4</a> <a href="#">Drafting notice</a>	To be submitted via eNotices	103	123(3), 125
Procurement documents available in eTendering	Procurement documents consist of: - invitation to tender, - tender specifications, - draft contract, - contract notice	From the time the contract notice is published at least until the deadline	<a href="#">Chapter 4.5.4</a>	<a href="#">Model invitation to tender</a>  <a href="#">Model contracts</a>	105	138, 139
Receipt of requests to participate	The mechanism for registering the exact date and time of receipt should be established.	Not earlier than 37 days after dispatch of the contract notice	<a href="#">Chapter 4.5.2</a>		111(1)	152, 155
Selection of candidates	Only the exclusion and selection criteria are checked by an evaluation committee or other means ensuring there is no conflict of interest Not fewer than three economic operators to be selected Report on the selection of candidates should be prepared Request of additional material for exclusion or selection.		<a href="#">Chapter 4.5.3</a>	<a href="#">Model evaluation report</a>	106, 107, 110, 111(4), 112	157, 158, 159
Notification to rejected candidates	By electronic means	ASAP after selection of candidates	<a href="#">Chapter 4.5.3</a>	<a href="#">Model information letters</a>	113(2)	161
Dispatch of procurement documents to selected candidates	Only in cases where, for technical or confidentiality reasons, procurement documents are not made available from publication of the contract notice	ASAP after selection of candidates	<a href="#">Chapter 4.5.4</a>	<a href="#">Model invitation to tender</a>  <a href="#">Model contracts</a>	105	138, 139
[optional] Clarifications, answers to questions, corrigenda	Must be published at the place where the procurement documents are published or (if technical issues or confidentiality), sent simultaneously to invited candidates	Must be sent or published ASAP and no later than six days before the deadline. Requests less than six working days before the deadline do not have to be answered	<a href="#">Chapter 4.5.1</a>		112	153, 160
[optional] Site visit	Minutes must be prepared and sent to all candidates	Separate visits for each candidate to avoid collusion	<a href="#">Chapter 4.3.1.4</a>		111(1)	152(1)
Receipt of tenders	The mechanism for registering the exact date and time of receipt should be established.	Not earlier than 30 days after dispatch of the invitation to tender	<a href="#">Chapter 4.5.5</a>		111(1)	152, 155
Opening	Written record signed by opening committee members above Directive threshold	Reasonable time after deadline for receipt of tenders, allowing tenders sent by mail to reach the contracting authority	<a href="#">Chapter 4.6</a>	<a href="#">Model record of opening of tenders</a>	111(4)	157
Evaluation of award criteria	Evaluation of initial tenders and feedback to tenderers		<a href="#">Chapter 4.7</a>	<a href="#">Model evaluation report</a>	110	158, 159
Negotiation phase	Contacts in writing or with written record with all tenderers, complying with confidentiality requirements and the principle of equal treatment		<a href="#">Chapter 4.8</a>		104(1c)	128
Evaluation of award criteria	Evaluation report signed by the evaluation committee (above Directive threshold) and if applicable, persons involved in assessing exclusion and selection		<a href="#">Chapter 4.7</a>	<a href="#">Model evaluation report</a>	110	158, 159
Award decision	Taken by the AO on the basis of recommendations of the evaluation report		<a href="#">Chapter 4.9</a>	<a href="#">Model award decision</a>	113(1)	159
Notification of tenderers	By electronic means	ASAP after award decision is taken	<a href="#">Chapter 4.11</a>	<a href="#">Model information letters</a>	113(2), 113(3)	161
Signature of the contract	Only after adoption of the budgetary commitment (except framework contract)	Not earlier than 10 calendar days after electronic dispatch of notification to tenderers above Directive threshold	<a href="#">Chapter 4.13</a>	<a href="#">Model contracts</a>	118	171
[optional] Release of the tender guarantees	If tenderers were requested to provide guarantees		<a href="#">Chapter 5.6</a>		111(3)	156
Beginning of implementation of the contract	Cannot start before the contract is signed				118	162
Award notice	To be sent to Publications Office for publication in the OJ S	Not later than 30 days after signature of the contract	<a href="#">Chapter 4.14.1</a>	To be submitted via eNotices	103	123(5)
Archiving	Proper filing of the documentation of the procedure	To be kept for 10 years following signature of the contract or cancellation of the procedure	<a href="#">Chapter 4.15</a>	<a href="#">Reference file for public procurement</a>	66(6)	48



## 3.6. Procedures following a call for expressions of interest

### 3.6.1. Scope and characteristics

A call for expressions of interest (CEI) serves to invite economic operators to put themselves forward to be included either on a list of pre-selected candidates or on a list of vendors (Art. 136 RAP). It can be seen as a way of generating shortlists which may be used many times for many different procurement procedures. It must be prepared and put into action in line with the principles of public procurement (transparency, proportionality, equal treatment and non-discrimination). The different procurement procedures following a call for expression of interest (list of pre-selected candidates and list of vendors) are explained in turn below. Please note that calls for expressions of interest, using the same model referred below, can also be used to select experts based on Art. 204 FR (see [Chapter 1.5.3](#)).

In practical terms, it is only worth using a call for expressions of interest when a series of similar contracts are planned. If there are only few contracts planned, it will generally be more efficient for the contracting authority to use an open or restricted procedure or negotiated procedure for middle value contracts.

It is highly recommended to establish sub-lists, linked to possible future procurement subject matters. The scope of the sub-lists must be clearly defined in the call for expressions of interest. Using sub-lists avoids the problem of consulting economic operators whose interest or capacity is limited to a general or parallel field that has no direct link with the subject matter of a particular contract. One economic operator can be included in one or more sub-list(s).

There is no standard eNotice form for calls for expressions of interest for dispatch to the Publications Office. It is advised to use the [model call for expression of interest](#) and to send it to the dedicated Secretariat General functional mailbox for publication in the Official Journal S series ("SG PUBLICATIONS AU JO").

TED ([ted.europa.eu](http://ted.europa.eu)) can be consulted to check whether there is a CEI of another Commission service which might correspond to the same purchase. The general principle that a contract cannot be split in order to avoid use of the proper procurement procedure applies. Thus, it is not possible to award multiple contracts for the same purpose and for a total value exceeding the Directive threshold on the basis of a CEI.

A list of pre-selected candidates or a list of vendors resulting from a call for expressions of interest may be used for contracts of a value above €60 000 and below the Directive thresholds.

The list of pre-selected candidates or the list of vendors may also be used for contracts up to € 60 000 if it is so provided in the CEI. In these cases a procedure following CEI may be used but not the negotiated procedure for low value contracts (no mixing of procedures).

The value of the contract must be calculated in accordance with the principles set out in [Chapter 2.2.4](#). In particular, contracts may not be split into parts in order to avoid applying the open or restricted procedure.

For the pre-selection of candidates, the threshold applies per year and per sub-list, because in practice the call for expression of interest is the first step of a restricted procedure so all candidates on a sub-list respond to the same selection criteria (i.e. they are selected for similar purchases as set out in Article 169(5)(a) RAP).

For the list of vendors, it is possible to apply the threshold per contract, provided there is no artificial split of purchase (i.e. the procedure is chosen by estimating the total value of all similar purchases over one year). Indeed there is no check of the economic operators for exclusion and selection criteria before they register on the (sub)lists. Therefore contracts awarded to vendors on the same sub-list may be for different subject matters.

In any procedure, the list used must be relevant to the subject of the contract and used during its period of validity. The list of pre-selected candidates or the list of vendors established by one

Commission department may be used by another department, provided the scope of the list fits the procurement need.

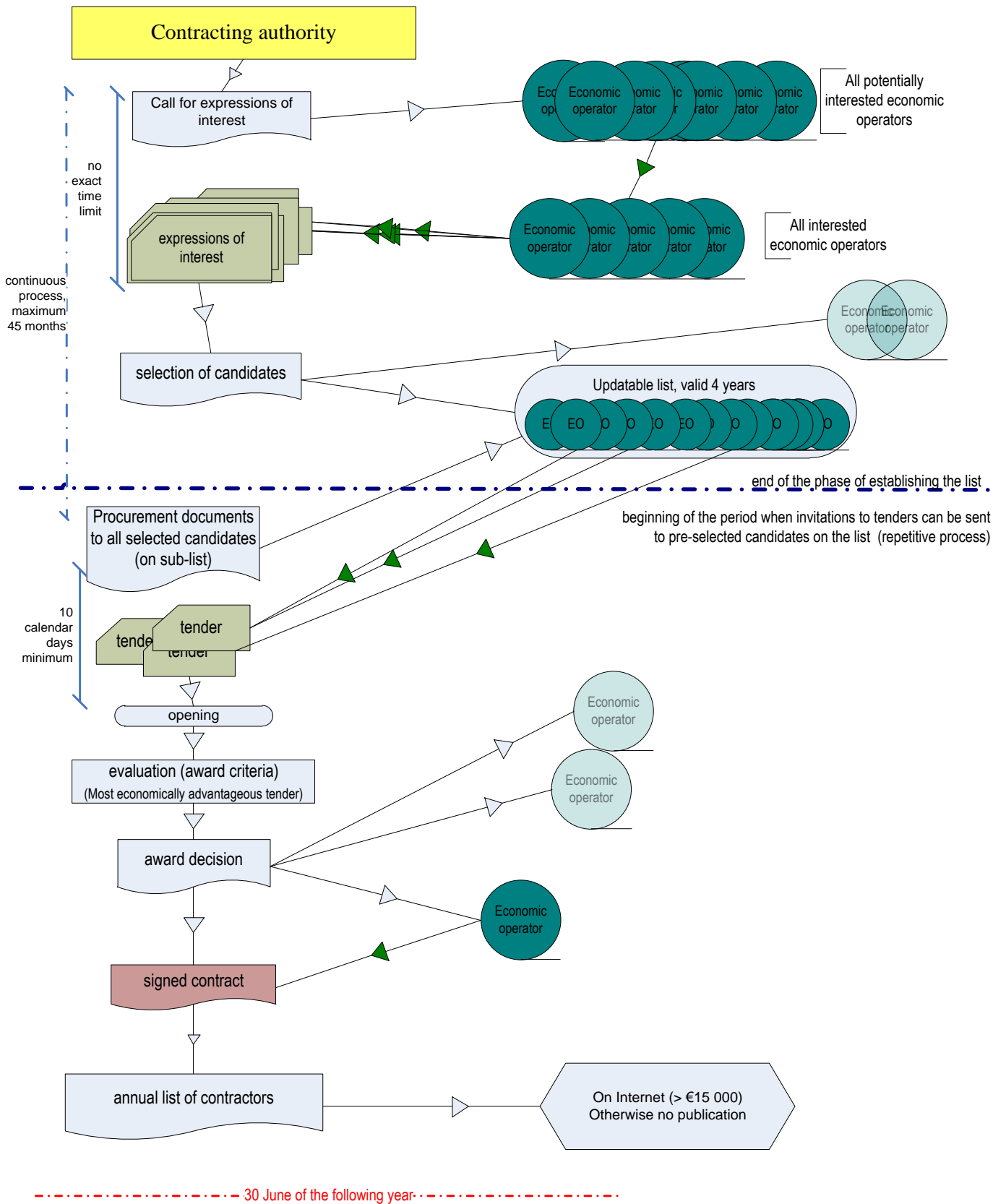
### **3.6.2. Applicable time limits**

The minimum time limit for receipt of tenders is 10 days from the day after simultaneous dispatch of the procurement documents to all the pre-candidates on the (sub-)list drawn up following the call for expressions of interest and to all the vendors on the (sub-)list in a one-step procedure.

For the two-step procedure with a list of vendors, the minimum time-limit for receipt of requests to participate (Step 1) is 10 days, and the minimum time limit for receipt of tenders (Step 2) is 10 days.

The time limits indicated above are the minimum. The actual limit must be long enough to allow invited candidates a reasonable and appropriate time to prepare their tenders and for the contracting authority to receive them, taking particular account of the complexity of the contract and the need to visit the site or consult documents on the spot.

### 3.6.3. List of pre-selected candidates



The French term for call for expressions of interest is “appel à manifestations d’intérêt” (AMI) and the list of pre-selected candidates is often called the “AMI list”.

The list of pre-selected candidates is established following evaluation of exclusion and selection criteria. All candidates who are not in exclusion situation and who fulfil the selection criteria are included on the list or sub-list(s). Whenever a contract is to be awarded, the contracting authority invites all the candidates on the relevant sub-list to tender.

There must be minimum five candidates on a given list or sub-list to be able to use it, provided that a sufficient number of candidates satisfy the selection criteria. It is recommended to wait for a reasonable time before using the list, in order to ensure genuine competition between the economic operators.

**Do not mix up a list of pre-selected candidates with a framework contract**

The restricted procedure following a call for expressions of interest is clearly distinct from the framework contract in that:

- it results in a contract that is enforceable immediately after it is signed, unlike a framework contract, which is implemented by “specific contracts” or order forms in the case of standard orders;
- it is confined to contracts below the Directive thresholds, unlike a framework contract, for which the procurement procedure used is adapted to its value whereas there is no limit of value for specific contracts under a framework contract;
- the list shall remain open to new candidates throughout its duration while the framework contract identifies the contractor(s) once and for all.

The call for expressions of interest is open and the list of pre-selected candidates is valid for up to four years from the date on which the call is published in the Official Journal. Anyone who is interested may apply at any time during this period, except the last three months.

The contracting authority should evaluate the applications it has received at regular intervals (for example, every quarter). Evaluation is to be carried out by person(s) nominated by the authorising officer. An evaluation committee is not necessary at this stage. Due to the length of the process it may not be possible that requests are assessed by the same people for the whole duration of the call for expression of interest. Nevertheless, as far as possible the evaluators should be the same.

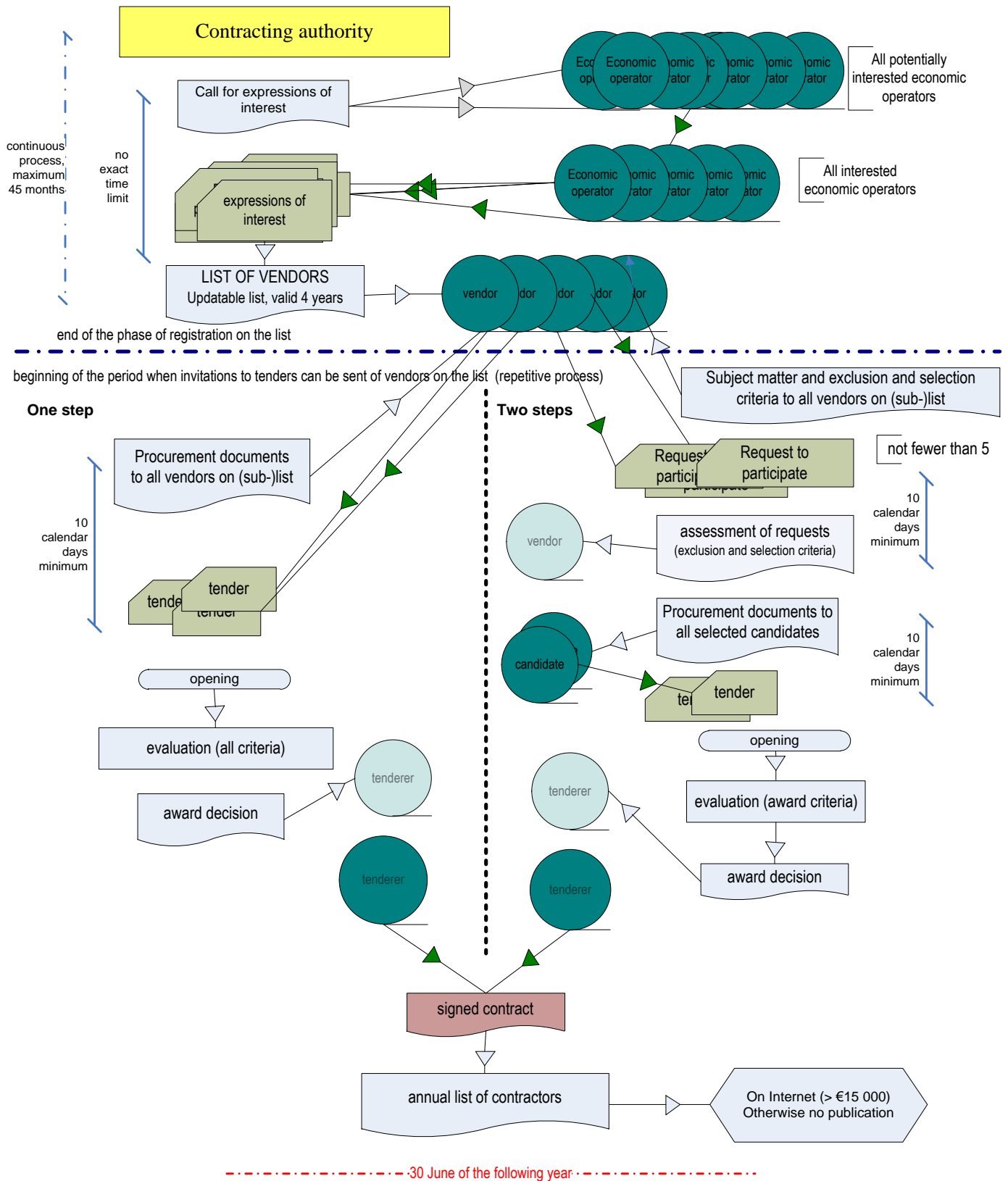
Pre-selected candidates (who have successfully passed the exclusion and selection phase) are put on one or more sub-lists as appropriate. The contracting authority will notify candidates that they have been included on the list, generally within 15 days of the evaluation, as dictated by good administrative practice.

Unsuccessful candidates should be informed by the contracting authority within the same time limit as pre-selected candidates.

When a contract is to be awarded, the contracting authority invites all pre-selected candidates of the relevant sub-list to submit a tender and will send them the procurement documents.

Given that a company’s economic and financial situation can change very quickly, it is good practice to ensure that the candidates selected send in updated documents every year, in order to check their economic and financial situation against the selection criteria set out in the call for expressions of interest, using the latest accounts.

### 3.6.4. List of vendors



The call for expressions of interest only includes the subject matters of future procurement as sub-lists, but no exclusion, selection or award criteria. So any economic operator can register on the sub-list(s) of their choice without having to put together an application. The registration system including acknowledgement of inclusion on the list can be automated.

Whenever a contract is to be awarded in a topic covered by the list of vendors, the contracting authority invites all the vendors on the relevant sub-list to tender, and there must be minimum five economic operators on that sub-list to be able to use it.

The contracting authority can choose to do a one-step or a two-step procedure:

(i) one-step works like an open procedure: all procurement documents (including exclusion, selection and award criteria) are sent to all vendors of the relevant sub-list, and full tenders are received and evaluated.

(ii) two-step works like a restricted procedure: only the subject matter of the purchase, exclusion and selection criteria are sent to all vendors of the relevant sub-list, and they submit requests to participate. Only those who pass exclusion and selection criteria are then invited to tender in a second step.

The call for expressions of interest and the list of vendors are valid for up to four years from the date on which the call is published in the Official Journal. Anyone who is interested may register to the list at any time during this period, except the last three months.

### **3.6.5. Comparison between list of pre-selected candidates and list of vendors**

- Establishing the lists:

- for pre-selected candidates it can take several months (drafting and sending out the call for expressions of interest, reviewing and processing the applications regularly, pre-selecting a sufficient number of candidates per sub-list). Only once this process has been completed will the list be ready to be used for the first time;
- for vendors, the process (drafting and sending out the call for expressions of interest) is faster since there is no evaluation at this stage. In addition, an IT system can be set up to facilitate management of the requests. Registration is automatic so the list is ready to use relatively quickly.

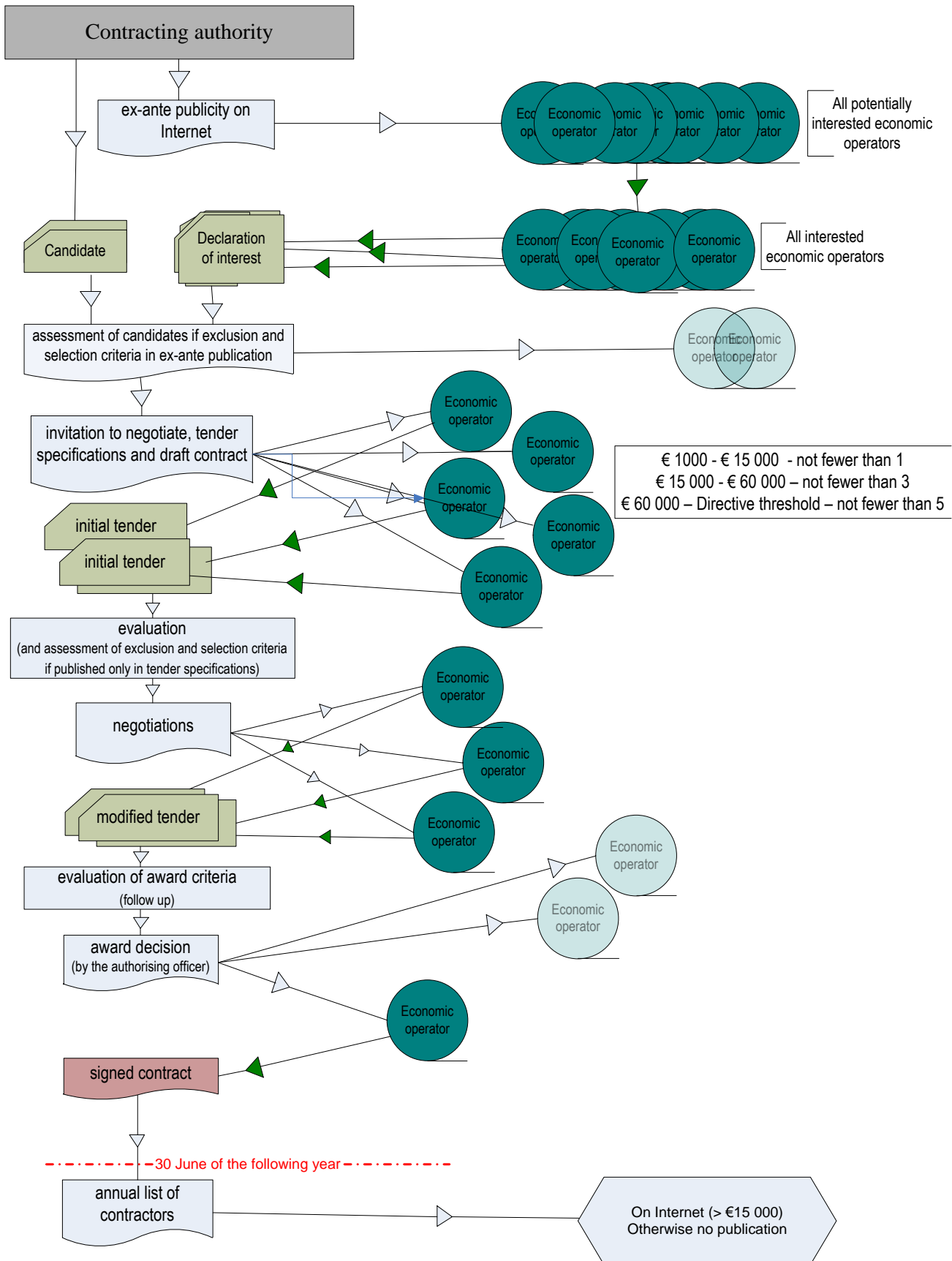
- Using the lists:

- for the list of pre-selected candidates the threshold applies per sub-list per year (similar purchases over 12 months), so it is easily reached.
- for the list of vendors, the threshold may be applied per contract provided there is no artificial split of purchase.

## Overview of the procedures following a call for expressions of interest

Step of the procedure	Short description, requirements, limitations or remarks	Time requirement	References: Vade-mecum, circulars	Model documents	Legal basis	
					Articles of FR	Articles of RAP
Financing decision			<a href="#">Chapter 2.1</a>		84	94
[optional] Prior information notice	To be published in the OJ S or buyer profile	maximum 12 months before dispatch of notice	<a href="#">Chapter 4.2</a>	To be submitted via eNotices	103	123(2)
Call for expressions of interest	Published in the OJ S.  For pre-selected candidates: must indicate the deadline for submitting requests and the exclusion and selection criteria  For vendors: must indicate the deadline for registering on the list, no criteria.	Publications Office has 12 days for publication	<a href="#">Chapter 4.4</a>	<a href="#">Model call for expression of interest</a>	103, 104	123, 125, 136
Receipt of expressions of interest / registration	The mechanism for registering the exact date and time of receipt should be established. For vendors: send acknowledgement of receipt of registration	Any time, except the last three months of validity of call for expressions of interest			104	136
Checking of exclusion criteria and selection criteria	Only for pre-selected candidates: the exclusion and selection criteria are checked (evaluation committee not compulsory)		<a href="#">Chapter 4.7</a>		106, 107, 110	158
Establishing a list	List can be divided into sub-lists  Not fewer than five candidates to be included on the list or sub-list before it can be used  Request of additional material for exclusion or selection.	List is valid for maximum four years following publication of the notice	<a href="#">Chapter 3.6.2</a>		104	136
Notification to rejected candidates	Only for list of pre-selected candidates, by electronic means Registration in the list of vendors has no restriction	ASAP after selection of candidates	<a href="#">Chapter 4.5.3</a>	<a href="#">Model information letters</a>	113(2)	161
Dispatch of procurement documents to selected candidates	Not fewer than five economic operators to be invited Vendors can be invited to tender (one step) or invited to submit requests to participate and then only selected candidates are invited to tender (two steps)		<a href="#">Chapter 4.5.4</a>	<a href="#">Model invitation to tender</a>  <a href="#">Model contracts</a>	105	128, 138, 139
[optional] Clarifications, answers to questions, corrigenda	Must be sent simultaneously to all invited candidates or tenderers	Must be sent ASAP and no later than six days before the deadline. Requests less than six working days before the deadline do not have to be answered	<a href="#">Chapter 4.5.1</a>		112	153, 160
Receipt of tenders	The mechanism for registering the exact date and time of receipt should be established.	Not earlier than 10 days after dispatch of the tender documents For list of vendors in two steps, 10 days for requests to participate and 10 days for tenders	<a href="#">Chapter 3.6.2</a>		111(1)	152, 155
Opening	Written record signed by persons responsible for opening (committee not compulsory)	Reasonable time after deadline for receipt of tenders, allowing tenders sent by mail to reach the contracting authority	<a href="#">Chapter 4.6</a>	<a href="#">Model record of opening of tenders</a>	111(4)	157
Evaluation of award criteria	Evaluation report signed by the persons involved (committee not compulsory)		<a href="#">Chapter 4.7</a>	<a href="#">Model evaluation report</a>	110	158, 159
[optional] Submission of additional material or clarification by tenderer	Clarification or correction of clerical errors. In no circumstances may the tenders be altered		<a href="#">Chapter 4.7.4</a>		112	160
Award decision	Taken by the AO on the basis of recommendations by the evaluation report		<a href="#">Chapter 4.9</a>	<a href="#">Model award decision</a>	113(1)	159
Notification of tenderers	By electronic means	ASAP after award decision is taken	<a href="#">Chapter 4.11</a>	<a href="#">Model information letters</a>	113(2), 113(3)	161
Signature of the contract	Only after adoption of the budgetary commitment (except framework contract)	No standstill below Directive threshold	<a href="#">Chapter 4.13</a>	<a href="#">Model contracts</a>	118	171
Beginning of implementation of the contract	Cannot start before the contract is signed				118	162
Publication of the list of contractors	To be published on Internet (Financial Transparency System)	Before 30 June of the following year	<a href="#">Chapter 4.14.2</a>		103	124(3)
Archiving	Proper filing of the documentation of the procedure	To be kept for 10 years following signature of the contract or cancellation of the procedure	<a href="#">Chapter 4.15</a>	<a href="#">Reference file for public procurement</a>	66(6)	48

### 3.7. Negotiated procedure for middle and low value contracts





### 3.7.1. Scope and characteristics

In the case of repetitive purchases of middle or low value over a financial year, the procedure must be chosen in view of the total annual value of similar contracts (Art. 136a and 137 RAP). The thresholds do not apply per contractor or per contract, only per subject matter of the purchases (similar contracts for the same type of services / supplies). In case of recurrent needs over several years, the services should not launch a procedure every year (sound financial management).

When the duration of the contract (direct or framework) exceeds one year, the value to be taken into account is the estimated total amount corresponding to the whole duration of the contract (including the possible renewals).

The contracting authority must invite to tender the economic operators who have shown their interest during ex-ante publicity. In case this ex-ante publicity is unsuccessful or in addition to it, the contracting authority may invite candidates of its choice. These may come from an ongoing list of vendors or list of pre-selected candidates with the same subject matter as the purchase at hand, provided that the possibility of using this list for low-value procedure has been announced in the initial CEI.

It is good practice to document the reason of the choice of candidates (note to the file) in particular to justify that the chosen candidates fulfil the intended selection criteria.

The contracting authority must invite to tender a minimum number of candidates depending on the value of the contract.

Value	Amount	Minimum number of candidates to be invited	Ex ante publicity
N/A	€0.01 - €1000	None - no procedure – payment against invoice	Not obligatory
Very low value	€1000.01 - €15 000	At least <b>one</b>	Not obligatory
Low value	€15 000.01 - €60 000	At least <b>three</b>	On Internet
Middle value	€60 000.01 – Directive threshold	At least <b>five</b>	On Internet

The procedure is still valid if not all invited candidates submit a tender, as long as at least one tender passes all criteria and can lead to contract signature.

After evaluating the initial tenders received, the contracting authority may negotiate the technical or financial offers submitted.

After negotiation, it is possible that a tender originally below minimum levels of quality becomes good enough to be considered.

Finally, there is no limit for the number of rounds of negotiation, but it is not recommended to use a lot of time and resources for a middle or low-value purchase.

For more information on the negotiation phase, see [Chapter 4.8](#).

### 3.7.2. Minimum time limits

The rules lay down no minimum time limit for receiving tenders in procedures for middle and low value contracts, but tenderers should be given reasonable time to prepare good tenders. Depending on the value and complexity of the contract, it is recommended to leave at least 10 days between the day after dispatch of procurement documents and the deadline for receipt of tenders.

### 3.7.3. Adequate publicity for middle and low value contracts

#### Ex-ante publicity

Ex-ante publicity on the institutions' websites is compulsory for contracts with a value between €15 000 and the Directive threshold.

Departments can fulfil these conditions as follows:

1. They should publicise, as soon as available:
  - either the annual work programme (see [Chapter 4.2.3](#)) on their website (ensuring that it is accessible directly from the buyer profile);
  - or a list of their needs for middle or low value contracts on their buyer profile (with the indicative number of such contracts, their subject matter and the indicative time schedule for launching the procedure).
2. A contact point (functional mailbox – several persons should be able to access it to ensure continuous check) should be provided where economic operators may express their interest or ask for information. In order to limit the number of requests, it is recommended to indicate that specific information will be provided later on the same webpage for each procurement procedure listed in the buyer profile / work programme, and that economic operators are invited to consult the page regularly.
3. When getting close to the actual launch of a specific procedure listed in the buyer profile / work programme, more detailed information can be provided. It may include more details on the subject matter of the purchase, or the selection criteria, or even the full tender specification so that economic operators can determine whether they are interested or not. The more information is provided the more targeted the publicity. In addition, a deadline for economic operators to express their interest should be provided. Since the objective of ex-ante publicity is to increase transparency and competition, it should be publicised for a reasonable time. It is recommended to leave **at least two weeks** between publicity and the start of the procedure.
4. The actual procedure is launched by sending the invitation to tender to all economic operators who expressed interest, if any, as well as to any other economic operator that the contracting authority wishes to invite. The deadline for receipt of tenders is indicated in the invitation letter, as for any other procedure.

It is good practice to maintain closed publications on the website, for transparency purposes and to provide information on purchasing habits to economic operators (which is the main objective of a buyer profile). Therefore an ex-ante publicity may be marked as "closed", or it may be moved to an archive page when the contracting authority launches the negotiated procedure.

Alternatively, instead of a middle or low-value negotiated procedure, it is possible to carry out a procedure following a CEI by using a relevant and valid list of pre-selected candidates or a list of vendors if such a possibility (i.e. covering contracts below €60 000) was announced in the CEI (see [Chapter 3.6](#)).

#### Ex-post publicity

The contracts between €15 000 and Directive threshold awarded in one financial year must be published on the internet site of the institution before 30 June of the following year.

For the Commission, if contracts are correctly entered in ABAC workflow (with a meaningful title), the publication is automatic via the [Financial Transparency System](#). (See [Chapter 4.14.2](#))

### 3.7.4. Easing the formalities below Directive thresholds

For **exclusion criteria**, the European Single Procurement Document (ESPD - see [Chapter 4.3.1.18](#)) or, failing that, a declaration on honour is sufficient between €15 000 and the Directive threshold. Up to €15 000, the ESPD or declaration is not necessary.

Evidence may be asked to the successful tenderer in case of doubt.

For **selection criteria**, the ESPD or, failing that, a declaration on honour should be requested. For contracts with a value up to €15 000, the contracting authority may decide not to require the ESPD or declaration. Indeed, when choosing the tenderer, the authorising officer should already ensure that it has the necessary capacity. Evidence should be requested only from the successful tenderer and this is not even obligatory for contracts below Directive threshold, depending on the risk analysis of the authorising officer. For middle or low-value contracts, the tender documents can be shortened or simplified (e.g. use of the purchase order for low-value contracts, instead of the standard contract), provided all the relevant elements necessary to submit tenders are included). Award criteria must always be indicated.

As for use of electronic means, procurement documents can be sent by e-mail for middle and low-value procedures.

Tenders can be accepted by e-mail for contracts below the Directive threshold, provided the authorising officer, after a risk assessment, has established procedures and technical tools for keeping tenders integer and confidential. In addition, it is recommended to use a functional mailbox and have it checked regularly at all times.

Neither an opening committee nor an evaluation committee need to be nominated, but the authorising officer can nominate them if the subject is sensitive or complex. Otherwise opening and evaluation can be carried out by one person. A written record of opening should be kept for audit trail and the evaluation report is always compulsory as it is the basis for feedback to the tenderer. If an evaluation committee is nominated, its members should sign the evaluation report so the report and the award decision cannot be merged into one document.

Below Directive threshold, if only one tender was received, the evaluation report and the award decision can be merged into one single document signed by the authorising officer.

The standstill period is not applicable to middle and low-value procedures (See [Chapter 4.11.2](#)).

## Middle and low value contracts

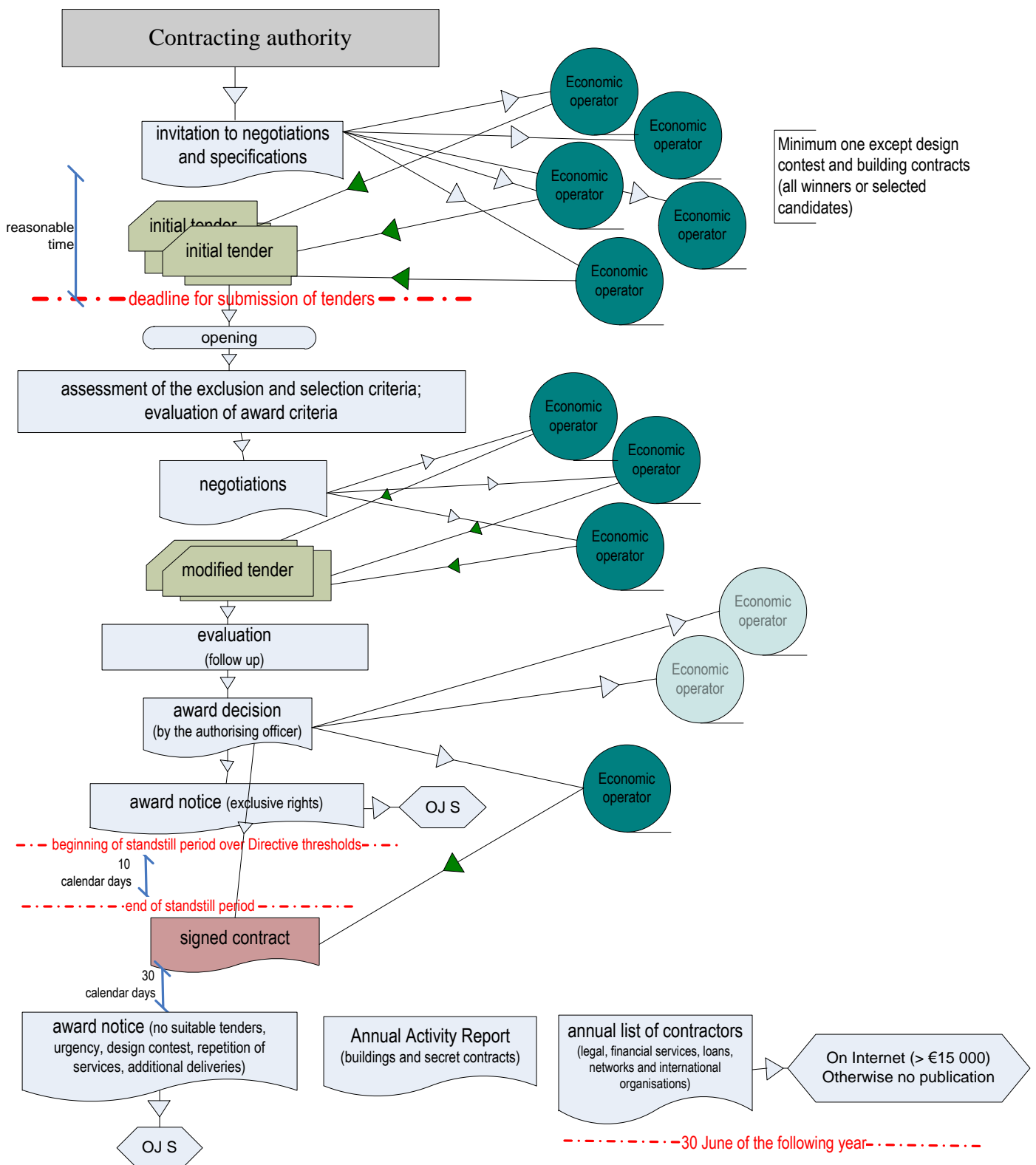
### Overview of the procedure

Contract value	Ex-ante publicity and selection of candidates	Number of candidates	Contents of procurement documents	Dispatch of procurement documents by e-mail	Submission of tenders by e-mail	Opening committee	Evaluation committee	Compliance with exclusion criteria	Compliance with selection criteria	Possibility to negotiate tenders	Award decision (formal document)	Information to all tenderers	Model contract	Post-award publicity
≤ Directive threshold	Publication on the DG's buyer profile (AO may invite other candidates of his choice) or use of list of pre-selected candidates or list of vendors following CEI (call for expressions of interest)	Minimum five	Full or simplified tender dossier depending on complexity	Possible	Possible, if confidentiality and integrity can be maintained	Not obligatory.	Not obligatory. May be used if required by complexity	ESPD or declaration sufficient (evidence requested in case of doubt)	ESPD or declaration from all tenderers; Evidence not obligatory	Yes	Yes Can be merged with evaluation report if no evaluation committee	Yes	Purchase order or standard model contract <sup>10</sup> depending on complexity	Annual list of contractors, via FTS for the Commission
≤ €60 000		Minimum three												No (in general, but ESPD or declaration or evidence requested in case of doubt)
≤ €15 000	Chosen by authorising officer with justification (audit trail)	Minimum one	Simplified											No
≤ €1000	Chosen by authorising officer	One	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A <sup>11</sup>	N/A

<sup>10</sup> Purchase order should not be used for complex projects e.g. if they include purchase of intellectual property rights.

<sup>11</sup> In some cases such as local purchases in Belgium, not using a purchase order would prevent VAT exemption (a contract is required).

### 3.8. Negotiated procedure without prior publication of a contract notice



### 3.8.1. Scope and characteristics

The negotiated procedure without prior publication is an exception which can only be used under the cases exhaustively listed in Article 134 RAP, regardless of the value of the purchase.

The contracting authority must be able to demonstrate that it is in one of those exceptional situations by virtue either of the subject of the contract or of the circumstances. The reasons must be set out in the authorising officer's decision awarding the contract. It is good practice to draft a note for the file before launching this negotiated procedure to justify its use (audit trail).

In addition, as a way of preventing its overuse, the procedures used on the basis of Article 134(1), points (a) to (f) RAP must be included in the Annual Activity Report of the authorising officer (see [Chapter 4.14.3](#)).

The submitted tenders can be negotiated, more specifically the technical and the financial offers. If the contracting authority decides not to negotiate, this possibility must be announced in advance.

### 3.8.2. Minimum time-limits

The rules lay down no minimum time limit for receiving tenders in negotiated procedures without prior publication of a contract notice, but tenderers should be given reasonable time to prepare good tenders, taking particular account of the complexity of the contract or the need for on-site visit.

The time-limit for sending the contract award notice for publication is maximum 30 days after signature of the contract for points (a) and (c) to (f) below.

### 3.8.3. Conditions for use

This negotiated procedure without prior publication of a contract notice can be used:

- (a) *Where no tenders, no suitable tenders or no request to participate or no suitable request to participate have been submitted in response to an open procedure or restricted procedure after the initial procedure has been completed, provided that the original procurement documents are not substantially altered.*

A tender is considered unsuitable if it is irrelevant to the subject matter of the contract in question. It is therefore totally inadequate for the contracting authority's purposes as defined in the specifications. This is consequently considered equivalent to an absence of tenders. A request to participate is considered unsuitable if the candidate is in an exclusion situation or if it does not meet the selection criteria.

The initial procedure is deemed completed when the cancellation notice has been published in the OJ. The negotiation takes place with minimum one candidate. The standstill period does not apply. Publication of a contract award notice is compulsory.

- (b) *Where the works, supplies or services provided only by a particular economic operator for any of the following reasons: for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract can be awarded only to a particular economic operator.*

*(i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;*

*(ii) competition is absent for technical reasons;*

*(iii) the protection of exclusive rights including intellectual property rights must be ensured;*

*The exceptions set out in points (ii) and (iii) shall only apply when no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters when defining the procurement.*

This provision must be interpreted strictly. According to established case law<sup>12</sup>, it is not sufficient for the products in question to be protected by exclusive rights; it is also necessary that they are manufactured or delivered by only one particular operator. This condition is met only in the case of products for which there is no competition on the market at all (monopoly) independently from the contracting authority's purchasing habits.

The negotiation takes place with one candidate. The standstill period applies as from publication of the award notice in the OJ, after the award decision is taken and, of course, before signature of the contract.

- (c) *In so far as is strictly necessary, where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, it is impossible to comply with the time limits set for the other procedures; the circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority.*

Three conditions must be met: there must be an unforeseeable event, it must not be attributable to the contracting authority and it must be impossible to follow an ordinary procedure. The negotiation takes place with minimum one candidate. The standstill period does not apply. Publication of a contract award notice is compulsory.

“Unforeseeable event” means an occurrence absolutely atypical for normal economic and social life, such as an earthquake, flooding or terrorist attack. In situations like these the contracting authority has to act promptly and efficiently from the moment the unforeseeable event happens.

In such situations a negotiated procedure may be used only “as strictly necessary”. This implies that any contract emerging from the negotiated procedure can cover only the period necessary to carry out a new standard procedure covering the same procurement.

- (d) *Where a service contract follows a design contest and is to be awarded to the winner or one of the winners; in the latter case, all winners must be invited to participate in the negotiations.*

All winners of the contest must be invited to negotiate. The standstill period does not apply. Publication of a contract award notice is compulsory.

- (e) *For new services or works consisting in the repetition of similar services or works entrusted to the economic operator to which the same contracting authority awarded an original contract, provided that these services or works are in conformity with a basic project for which the original contract was awarded after publication of a contract notice.*

*In this case the basic project shall indicate the extent of possible new services or works and the conditions under which they will be awarded. As soon as the basic project is put up for tender, the possible use of the negotiated procedure shall be disclosed, and the total estimated amount for the subsequent services or works must be taken into consideration in applying the thresholds. This procedure may be used only during the execution of the original contract and at the latest during the three years following its signature.*

The negotiation takes place with one candidate, the incumbent contractor (all contractors in case of multiple framework contract). This procedure can be used to increase the maximum ceiling of a framework contract. It cannot be used to extend the duration of a FWC. The standstill period does not apply. Publication of a contract award notice is compulsory.

- (f) *For supply contracts:*

- i) for additional deliveries which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations, where a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the duration of such contracts may not exceed three years;*

The negotiation takes place with one candidate, the incumbent contractor. The standstill period does not apply. Publication of a contract award notice is compulsory.

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<sup>12</sup> See cases C-57/94 Commission v. Italy §23, Joined Cases C-20/01 and C-28/01 Commission v. Germany §59 and Case C-394/02 Commission v. Greece §34.

*ii) where the products are manufactured purely for the purpose of research, experimentation, study or development, however such contracts shall not include quantity production to establish commercial viability or to recover research and development costs;*

The negotiation takes place with minimum one candidate. The standstill period does not apply. Publication of a contract award notice is compulsory.

*iii) for supplies quoted and purchased on a commodity market;*

The negotiation takes place with minimum one candidate. The standstill period does not apply. Publication of a contract award notice is compulsory.

*iv) for purchases of supplies or services on particularly advantageous terms, from either an economic operator which is definitively winding up its business activities, or the liquidators in an insolvency procedure, an arrangement with creditors, or a similar procedure under national law.*

The negotiation takes place with one candidate. The standstill period does not apply. Publication of a contract award notice is compulsory.

*(g) For building contracts, after prospection of the local market.*

All candidates selected after the prospection of the local market must be invited to negotiate. The standstill period does not apply. Ex-post publication takes place in the Annual Activity Report (see [Chapter 4.14.3](#)).

*(h) For contracts for:*

*i) legal representation by a lawyer within the meaning of Article 1 of Council Directive 77/249/EEC in arbitration or conciliation or judicial proceedings;*

*ii) legal advice given in the preparation of the proceedings referred to above or where there is tangible indication and high probability that the matter to which the advice relates will become the subject of such proceedings, provided that the advice is given by a lawyer within the meaning of Article 1 of Directive 77/249/EEC;*

*iii) for arbitration and conciliation services*

*iv) document certification and authentication services which must be provided by notaries;*

This procedure should be interpreted strictly and does not cover legal analysis or legal studies. The negotiation takes place with minimum one candidate. The standstill period does not apply. Ex-post publication takes place on internet by 30 June of the following year (see [Chapter 4.14.2](#)).

*(i) For contracts declared to be secret or for contracts whose performance must be accompanied by special security measures, in accordance with the administrative provisions in force or when the protection of the essential interests of the Union so requires, provided the essential interests concerned cannot be guaranteed by other measures; these measures may consist in requirements to protect the confidential nature of information which the contracting authority makes available in the procurement procedure.*

The negotiation takes place with minimum one candidate. The standstill period does not apply. Ex-post publication takes place in the Annual Activity Report (see [Chapter 4.14.3](#)).

*(j) for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, central bank services and operations conducted with the European Financial Stability Facility and the European Stability Mechanism;*

The negotiation takes place with minimum one candidate. The standstill period does not apply. Ex-post publication takes place on internet by 30 June of the following year (see [Chapter 4.14.2](#)).

*(k) loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;*

The negotiation takes place with minimum one candidate. The standstill period does not apply. Ex-post publication takes place on internet by 30 June of the following year (see [Chapter 4.14.2](#)).

*(l) for the purchase of public communication networks and electronic communications services with the meaning of Directive 2002/21/EC*



The negotiation takes place with minimum one candidate. The standstill period does not apply. Ex-post publication takes place on internet by 30 June of the following year (see [Chapter 4.14.2](#)).

(m) *services provided by an international organisation where it cannot participate in competitive procedures according to its statute or act of establishment.*

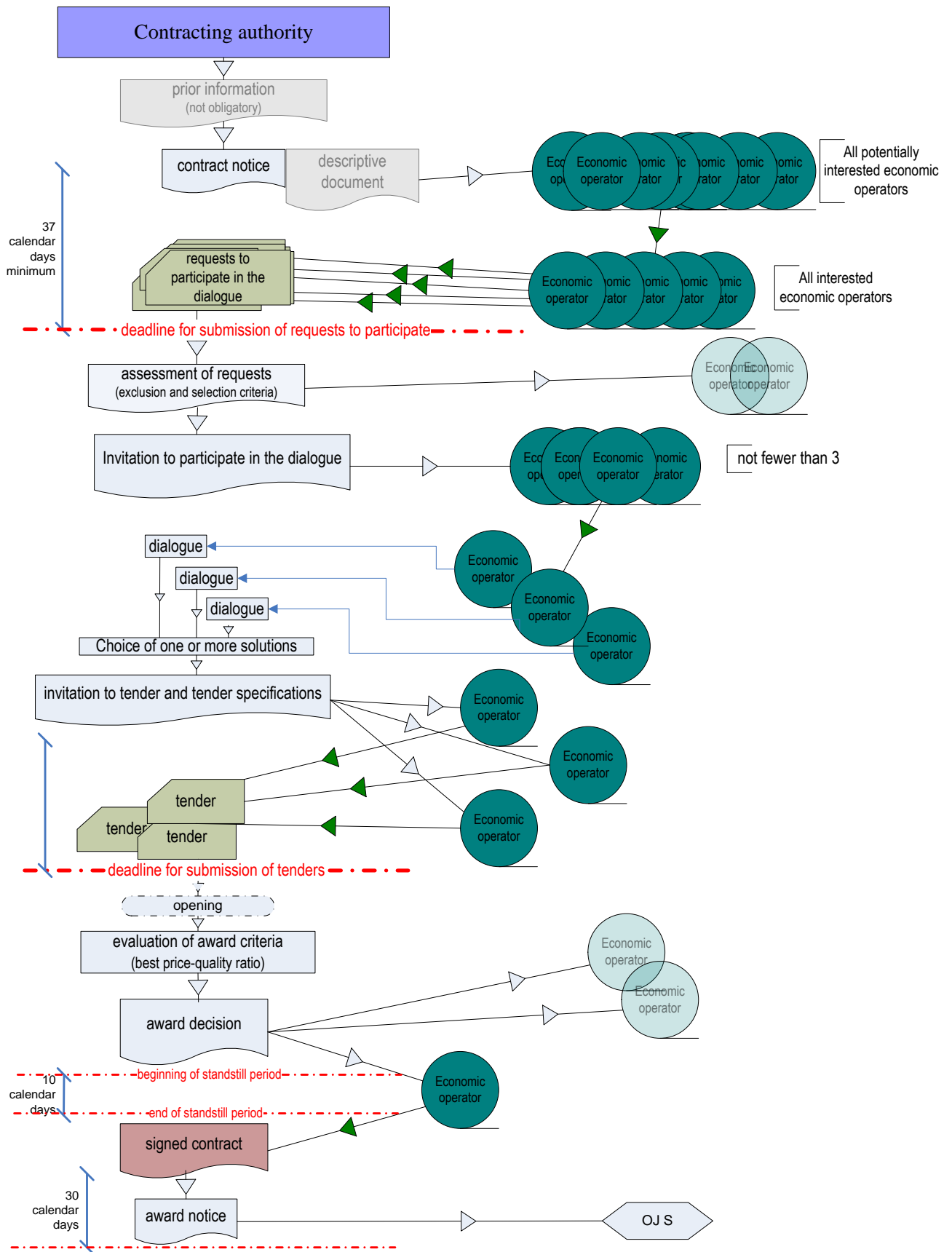
This procedure may be used in particular with the World Bank, which cannot reply to competitive tendering. On the other hand, United Nations agencies can usually participate in calls for tenders so they should not be subject to this procedure.

The negotiation takes place with minimum one candidate. The standstill period does not apply. Ex-post publication takes place on internet by 30 June of the following year (see [Chapter 4.14.2](#)).

## Overview of the negotiated procedure without prior publication of a contract notice

Step of the procedure	Short description, requirements, limitations or remarks	Time requirement	References: Vade-mecum, circulars	Model documents	Legal basis	
					Articles of FR	Articles of RAP
Financing decision			<a href="#">Chapter 2.1</a>		84	94
Dispatch of procurement documents to qualified economic operators	<p>One economic operator to be invited in accordance with the conditions for using the negotiated procedure without a contract notice</p> <p>For buildings and design contests, minimum three economic operators.</p> <p>Procurement documents consist of:</p> <ul style="list-style-type: none"> <li>- invitation to tender,</li> <li>- tender specifications,</li> <li>- draft contract.</li> </ul>		<a href="#">Chapter 4.5.4</a>	<a href="#">Model invitation to tender</a>  <a href="#">Model contracts</a>	105	128, 138, 139
[optional] Clarifications, answers to questions, corrigenda	Must be sent simultaneously to all economic operators invited	Must be sent ASAP and no later than six days before the deadline. Requests less than six working days before the deadline do not have to be answered	<a href="#">Chapter 4.5.1</a>		112	153, 160
[optional] Site visit	Minutes must be prepared and sent to all candidates	Separate visits for each candidate to avoid collusion	<a href="#">Chapter 4.3.1.4</a>		111(1)	152(1)
Receipt of tenders	The mechanism for registering the exact date and time of receipt should be established	Reasonable time	<a href="#">Chapter 4.5.5</a>		111(1)	152
Opening	Written record signed by opening committee members	Reasonable time after deadline for receipt of tenders, allowing tenders sent by mail to reach the contracting authority	<a href="#">Chapter 4.6</a>	<a href="#">Model record of opening of tenders</a>	111(4)	157
Evaluation of award criteria	Evaluation of initial tenders and feedback to tenderers		<a href="#">Chapter 4.7</a>	<a href="#">Model evaluation report</a>	110	158, 159
Negotiation phase	Contacts in writing or with written record with all tenderers, complying with confidentiality requirements and the principle of equal treatment		<a href="#">Chapter 4.8</a>		104(1c)	128
Evaluation of award criteria	Evaluation report signed by the evaluation committee and if applicable, persons involved in assessing exclusion and selection		<a href="#">Chapter 4.7</a>	<a href="#">Model evaluation report</a>	110	158, 159
Award decision	Taken by AO on the basis of recommendations of the evaluation report		<a href="#">Chapter 4.9</a>	<a href="#">Model award decision</a>	113(1)	159
Notification of tenderers	By electronic means	ASAP after award decision is taken	<a href="#">Chapter 4.11</a>	<a href="#">Model information letters</a>	113(2), 113(3)	161
Award notice	Case 134(1)(b) only: to be published in the OJ S if the value of the contract exceeds Directive thresholds	Before contract signature for standstill period	<a href="#">Chapter 4.11.2</a>	To be submitted via eNotices	103, 118	123(5), 171
Signing of the contract	Only after adoption of the budgetary commitment (except framework contract)	Not earlier than 10 calendar days after award notice is published in the OJ for case 134(1)(b)	<a href="#">Chapter 4.11.2</a>	<a href="#">Model contracts</a>	118	171
Award notice or Internet publication	For certain cases: to be published in the OJ S if the value of the contract exceeds Directive thresholds Other cases: Internet publication	Not later than 30 days after signature of the contract  Before 30 June of the following year	<a href="#">Chapter 4.14.1</a>  <a href="#">Chapter 4.14.2</a>	To be submitted via eNotices	103, 118	123(5), 124(3), 171
[optional] Release of the tender guarantees	If tenderers were requested to provide guarantees		<a href="#">Chapter 5.6</a>		111(3)	156
Beginning of implementation of the contract	Cannot start before the contract is signed				118	162
Archiving	Proper filing of the documentation of the procedure	To be kept for 10 years following signature of the contract or cancellation of the procedure	<a href="#">Chapter 4.15</a>	<a href="#">Reference file for public procurement</a>	66(6)	48

### 3.9. Competitive dialogue



### 3.9.1. Scope and characteristics

Contracting authorities who undertake complex projects might be objectively unable to define the means of meeting their needs or of assessing what the market can offer in terms of technical or financial or legal solutions. This can arise with major integrated transport infrastructure, large computer networks or projects involving complex and structured financing, for which the financial and legal make-up cannot be determined in advance.

Given that open or restricted procedures could not be used to award such contracts, a flexible procedure is required which guarantees competition between economic operators and meets the need for the contracting authorities to discuss every aspect of the project with each candidate (Art. 132 RAP). However, this procedure must not be used in such a way as to restrict or distort competition, in particular by changing basic elements of the specifications.

Besides, this procedure requires intense use of internal resources as it deals with a complex subject matter and it is time-consuming. A high level technical expertise on the subject matter is necessary in-house for the contracting authority to carry out the procedure with the best chances of success and to be able to hold the dialogue with the selected candidates.

Use of a competitive dialogue does not depend on the thresholds set in the Directive but on the particular circumstances of the purchase, especially the complexity of the contract which makes it impossible to award it by the open or restricted procedure.

These circumstances are expressly set out in Article 135 RAP. This legal basis allows for the use of a competitive procedure with negotiation or a competitive dialogue as they are treated as equivalent procedures. Nevertheless, Article 135(1) (b) RAP provides the basis which is most frequently used for competitive dialogues.

A competitive dialogue can be used for works, supplies or services in one of the following cases:

- (i) the needs of the contracting authority cannot be met without adaptation of a readily available solution;
- (ii) the purchase includes design or innovative solutions;
- (iii) the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up or the risks attached to the subject matter of the contract;
- (iv) the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, as foreseen in Article 139(3) RAP;

In practice, given the resources needed for a competitive dialogue, the principle of proportionality should apply: this procedure should only be used where the purchase is really complex, i.e. if the contracting authority is not objectively able to define the technical means capable of satisfying the needs or objectives or not able to specify the legal or financial make-up of the project.

As it is a procedure subject to its own rules, the nature of the contract must be examined case by case, making due allowance for the capabilities of the contracting authority to see whether use of the competitive dialogue would be justified. In other words, the contracting authority must show due diligence: if, by reasonable means, it is able to define the technical means required or to specify the legal or financial make-up, the competitive dialogue cannot be used.

The fact that a contract involves aspects of technical innovation does not automatically mean that it requires a competitive dialogue. For instance, a contracting authority would be perfectly capable of setting technical specifications limiting the power consumption of lamp bulbs to be purchased to x W/h even if this limit were well below the power consumption of the most efficient lamp bulb on the market.

When, for the purposes of carrying out a project, it is necessary or desirable to involve private capital, the contracting authorities might be unable to say in advance whether the economic operators will be prepared to accept the risk, with the result that the contract will be a concession contract, or whether, in the end, it will be a public contract.

### 3.9.2. Minimum time-limits

**BEWARE: until 01/01/2018, the Publications Office still uses the 12 days limit for publication (transitional period) so all legal minima following publication are increased by 5 days.**

The time-limit for receipt of requests to participate is minimum 32 days (**currently 37 days**) counting from the day after dispatch of the contract notice to the Publications Office.

There is no minimum legal time-limit for receipt of tenders.

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

### 3.9.3. Procedure for competitive dialogue

#### First step: selection

In the contract notice or in the so-called “descriptive document”, the contracting authority must provide:

- its “needs and requirements”,
- the exclusion and selection criteria
- the award criteria,
- the indicative timeframe of the dialogue,

It is strongly recommended to keep the contract notice to a minimum and to provide the full information in the descriptive document. These substantial elements cannot be changed during the whole procedure.

The award method must be best price-quality ratio in a competitive dialogue.

The competitive dialogue is a two-step procedure, so the contracting authority initially receives requests to participate. There must be at least three selected candidates to be invited to the dialogue, unless there are not enough candidates meeting exclusion and selection criteria.

If the contracting authority intends to limit the number of candidates, it must indicate the objective and non-discriminatory selection criteria to be applied, the minimum and the maximum number of candidates to be invited. The contracting authority may not include in the procedure economic operators who have not sent a request to participate.

If the contracting authority intends to make use of the possibility of reducing the number of solutions during the dialogue by applying the award criteria, it must announce it in the contract notice or the descriptive document.

#### Second step: dialogue

After expiry of the time limit for receipt of requests to participate and after selection, the contracting authority opens the dialogue with the selected candidates, with a written invitation to tender.

The objective of the dialogue is to identify and define the means that will best satisfy its needs. The candidates submit an initial tender with the proposed (draft) solution. During this dialogue it can discuss every aspect of the future contract with the tenderers, but it cannot alter its initial needs and requirements and the award criteria as provided above.

The starting point is that the dialogue must be conducted with each of the tenderers individually on the basis of the ideas and solutions put forward by the candidate concerned. Confidentiality of the solutions proposed or of other information must be guaranteed unless the parties agree to disclosure. The contracting authority must ensure equal treatment of all tenderers during the dialogue.

The contracting authority continues the dialogue until it can identify one or several solutions that respond to its needs and requirements.

It is possible to provide for payments to the candidates in view of the large investment that they may have to make.

### **Final tender and award**

The contracting authority declares the dialogue concluded and informs the tenderers. It invites them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. These tenders must contain all the elements required and necessary for performance of the project.

After the final tenders have been received, the contracting authority may ask that they be clarified, specified and optimised, provided this does not involve substantial changes to the tender or the procurement documents.

The final tenders are then evaluated against the award criteria and the tender offering best price-quality ratio is identified.

**The explanatory note provides further information on competitive dialogue:**

[http://ec.europa.eu/internal\\_market/publicprocurement/docs/explan-notes/classic-dir-dialogue\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/explan-notes/classic-dir-dialogue_en.pdf).

## Overview of the competitive dialogue

Step of the procedure	Short description, requirements, limitations or remarks	Time requirement	References: Vade-mecum, circulars	Model documents	Legal basis	
					Articles of FR	Articles of RAP
Financing decision			<a href="#">Chapter 2.1</a>		84	94
[optional] Prior information notice	To be published in the OJ S or buyer profile	maximum 12 months before dispatch of contract notice	<a href="#">Chapter 4.2</a>	To be submitted via eNotices	103	123(2)
Contract notice	Published in the OJ S  Must indicate the deadline for submitting requests and the exclusion and selection criteria	Publications Office has 12 days for publication	<a href="#">Chapter 4.3.4</a>  <a href="#">Drafting notice</a>	To be submitted via eNotices	103	123(3), 125
Procurement documents available in eTendering	Procurement documents consist of: - invitation to tender, - descriptive document, - draft contract, - contract notice	From the time the contract notice is published at least until the deadline	<a href="#">Chapter 4.5.4</a>	<a href="#">Model invitation to tender</a>  <a href="#">Model contracts</a>	105	138, 139
Receipt of requests to participate	The mechanism for registering the exact date and time of receipt should be established.	Not earlier than 37 days after dispatch of the contract notice	<a href="#">Chapter 4.5.2</a>		111(1)	152, 155
Selection of candidates	Only the exclusion and selection criteria are checked by an evaluation committee or other means ensuring there is no conflict of interest Not fewer than five economic operators to be selected Report on the selection of candidates should be prepared Request of additional material for exclusion or selection.		<a href="#">Chapter 4.5.3</a>	<a href="#">Model evaluation report</a>	106, 107, 110, 111(4), 112	157, 158, 159
Notification to rejected candidates	By electronic means	ASAP after selection of candidates	<a href="#">Chapter 4.5.3</a>	<a href="#">Model information letters</a>	113(2)	161
Inviting selected candidates to dialogue	Descriptive document may be attached		<a href="#">Chapter 3.9</a>		104	132
Dialogue procedure	Dialogue may be organised in successive stages Documentation of dialogue in writing		<a href="#">Chapter 3.9</a>		104	132
Choice of suitable solution(s)	Preparation of the final procurement documents on the basis of suitable solution(s)		<a href="#">Chapter 4.3</a>		105	128, 132(4), 139
Dispatch of procurement documents to selected candidates	Procurement documents consist of: - invitation to tender, - tender specifications, - draft contract.		<a href="#">Chapter 4.5.4</a>	<a href="#">Model invitation to tender</a>  <a href="#">Model contracts</a>	105	138, 139
[optional] Clarifications, answers to questions, corrigenda	Must be sent simultaneously to invited candidates	Must be sent ASAP and no later than six days before the deadline. Requests less than six working days before the deadline do not have to be answered	<a href="#">Chapter 4.5.1</a>		112	153, 160
[optional] Site visit	Minutes must be prepared and sent to all candidates	Separate visits for each candidate to avoid collusion	<a href="#">Chapter 4.3.1.4</a>		111(1)	152(1)
Receipt of tenders	The mechanism for registering the exact date and time of receipt should be established.	Reasonable time	<a href="#">Chapter 4.5.5</a>		111(1)	152
Opening	Written record signed by opening committee members	Reasonable time after deadline for receipt of tenders, allowing tenders sent by mail to reach the contracting authority	<a href="#">Chapter 4.6</a>	<a href="#">Model record of opening of tenders</a>	111(4)	157
Evaluation of award criteria	Evaluation report signed by the evaluation committee and if applicable, persons involved in assessing exclusion and selection		<a href="#">Chapter 4.7</a>	<a href="#">Model evaluation report</a>	110	158, 159
Award decision	Taken by AO on the basis of recommendations of the evaluation report		<a href="#">Chapter 4.9</a>	<a href="#">Model award decision</a>	113(1)	159
Notification of tenders	By electronic means	ASAP after award decision is taken	<a href="#">Chapter 4.11</a>	<a href="#">Model information letters</a>	113(2), 113(3)	161
Signature of the contract	Only after adoption of the budgetary commitment (except framework contract).	Not earlier than 10 calendar days after electronic dispatch of information to tenderers	<a href="#">Chapter 4.13</a>	<a href="#">Model contracts</a>	118	171
[optional] Release of the tender guarantees	If tenderers were requested to provide guarantees		<a href="#">Chapter 5.6</a>		111(3)	156
Beginning of implementation of the contract	Cannot start before the contract is signed				118	162
Award notice	To be sent to Publications Office for publication in the OJ S	Not later than 30 days after signature of the contract	<a href="#">Chapter 4.14.1</a>	To be submitted via eNotices	103	123(5)
Archiving	Proper filing of the documentation of the procedure	To be kept for 10 years following signature of the contract or cancellation of the procedure	<a href="#">Chapter 4.15</a>	<a href="#">Reference file for public procurement</a>	66(6)	48

## 3.10. Innovation partnership

### 3.10.1. Scope and characteristics

The objective of the innovation partnership is to develop an innovative product (supply, service or works) and to guarantee its subsequent purchase by the contracting authority, on the condition that:

- the product corresponds to the performance levels and maximum costs agreed between the contracting authorities and the partners; and
- no equivalent product becomes available on the market during the partnership.

Before launching an innovation partnership (Art. 129 RAP), the contracting authority must carry out a preliminary market analysis (see [Chapter 4.1](#)) to ensure that the desired product is not already available on the market or has not been already developed and is close to commercial phase.

### 3.10.2. Minimum time-limits

**BEWARE: until 01/01/2018, the Publications Office still uses the 12 days limit for publication (transitional period) so all legal minima following publication are increased by 5 days.**

The time-limit for receipt of requests to participate is minimum 32 days (**currently 37 days**) counting from the day after dispatch of the contract notice to the Publications Office.

There is no minimum legal time-limit for receipt of tenders.

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

### 3.10.3. Procedure for innovation partnership

#### First step: selection

In the procurement documents, the contracting authority identifies its need for innovative works, supplies or services and includes which elements of this description define the minimum requirements. It also defines the arrangements applicable to intellectual property rights.

The contracting authority may decide to set up the innovation partnership with one partner or with several partners conducting separate research and development activities.

The award method must be best price-quality ratio.

The innovation partnership is a two-step procedure, so the contracting authority initially receives requests to participate. There must be at least three selected candidates to be invited to the dialogue, unless there are not enough candidates meeting exclusion and selection criteria.

If the contracting authority intends to limit the number of candidates, it must indicate the objective and non-discriminatory selection criteria to be applied, the minimum and the maximum number of candidates to be invited. The contracting authority may not include in the procedure economic operators who have not sent a request to participate.

If the contracting authority intends to make use of the possibility to terminate the partnership or to reduce the number of partners in each phase of the partnership on the basis of intermediary targets, it must announce it in the procurement document together with the conditions for applying this possibility.

#### Second step: contract award and partnership

The contract is awarded to one or more selected candidates on the basis of their initial tenders. The procedure largely follows the competitive procedure with negotiation.

For more information on negotiation phase, see [Chapter 4.8](#).



The partnership is structured in different phases which follow the various steps of the research and innovation process. These steps may include the completion of the works, the manufacturing of the products or the provision of the services and it must include intermediate targets to be attained by the partners.

The structure of the partnership and, in particular, the duration and value of the different phases must reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required. The remuneration must be proportionate and paid in appropriate instalments.

The partnership contract covers both the research and the delivery stages. It must include all these elements, as well as the possibility to terminate the contract with partners on the basis of intermediary targets or if the initial targets (performance and maximum cost) are exceeded.

## 3.11. Design contest

### 3.11.1. Definition

Design contests are procedures which enable the contracting authority to acquire, mainly in the fields of architecture and civil engineering or data processing, a plan or design proposed by a jury after competitive procedure with or without the award of prizes (Art. 130 RAP). The winner or winners are then invited to negotiate before signature of the subsequent contract. The negotiated procedure without prior publication of a contract notice can be used for that purpose (see [Chapter 3.8](#)).

For more information on negotiation phase, see [Chapter 4.8](#).

### 3.11.2. Calculation of the estimated value of the design contest

For the purpose of calculating the amount of the contest, account should be taken of any prizes that may be awarded. The total amount of the contest will include any prizes and payments received by the participants.

### 3.11.3. Organisation and procedure

Generally speaking, design contests, like any other public procurement procedure, must comply with the principles of transparency, proportionality, equal treatment and non-discrimination. This means, for instance, that there can be no requirement that participants must be either natural or legal persons; similarly, clear and non-discriminatory criteria must be laid down.

A design contest notice must be published for contract values as from the Directive threshold. The standard form must be used for the design contest notice (see [instruction to use the standard forms](#)).

The rules governing organisation of a design contest are made available to anybody interested in participating.

The minimum number of candidates invited to participate is not laid down in the regulations. It must, however, be sufficient to ensure genuine competition so it is recommended to be at least five.

The jury is appointed by the authorising officer responsible. It is made up exclusively of natural persons having no connection with participants in the design contest. If a specific professional qualification is required for participation in the contest, at least one third of the members of the jury must have the same or an equivalent qualification.

The jury is fully autonomous in its opinions. These opinions are adopted on the basis of projects submitted to it anonymously by the candidates and solely in the light of the criteria set out in the design contest notice.

The proposals of the jury, based on the merits of each project, and its observations, shall be recorded in a report signed by its members. Candidates shall remain anonymous until the jury has given its opinion.

Candidates may be asked by the jury to answer the questions recorded in the report in order to clarify a project. A full report of the ensuing dialogue must be drawn up.

The contracting authority then takes an award decision giving the name and address of the candidate selected and the reasons for the choice by reference to the criteria announced in the design contest notice, especially if it diverges from the proposals made in the jury's opinion.

An award notice (the results of the contest, whatever the outcome) must be published, using the standard form (see [instruction to use the standard forms](#)), for contract values above the Directive threshold. The award notice must be sent to the Publications Office no later than 30 days after the contract has been signed. The contracting authority must be able to provide evidence of the date of dispatch.

For reasons of transparency, it may also be advisable to publish an award notice for design contests where a contest notice was published on a voluntary basis below Directive threshold.

Public contracts awarded after a design contest for which it is not necessary to publish a design award notice are included in the annual list of contractors (see [Chapter 4.14.2](#)).

### 3.12. Negotiated procedure for building contracts

Building contracts cover the purchase, long lease, usufruct, leasing, rental or hire purchase, with or without option to buy, of land, existing buildings or other real estate. Given the uniqueness of each building and/or location, the contract specifications cannot be established with sufficient precision to allow the award of the contract by choosing the best tender according to the rules governing open or restricted procedures. That's why building contracts can be concluded by negotiated procedure without prior publication of a contract notice, after the local market has been prospected (Art. 134.1(g) RAP).

The negotiated procedure taking place after the prospection of the market is subject to the rules on procurement.

**For more information on the negotiation phase, see [Chapter 4.8](#).**

Building contracts are subject to Articles 203(3) FR and 286 RAP. Each institution must submit a communication to the budgetary authority<sup>13</sup> presenting all relevant information on the planned building project with significant financial implications (more than €750 000), the cost for the current financial year and for future years, its justification as regards the principle of sound financial management and its impact on the financial perspectives. Information on the schedule for the operation must also be provided. This allows the budgetary authority to give its opinion on the planned building projects.

In order to satisfy transparency requirements, the list of contractors is sent to the budgetary authority. In the case of the Commission, it is annexed to the summary of the annual activity reports in the same way as the report on negotiated procedures (see [Chapter 4.14.3](#)).

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<sup>13</sup> The standard consultation form is available on BudgWeb (only accessible to the Commission):  
<https://myintracomm.ec.europa.eu/budgweb/EN/imp/administrative-restricted/Pages/frame.aspx#b>

### 3.13. Dynamic purchasing system

The dynamic purchasing system (DPS) is a completely electronic process for commonly used purchases, which is open throughout its duration to any economic operator who satisfies the selection criteria. It is a variant of the restricted procedure making exclusive use of electronic means (Art. 131 RAP).

The DPS is very similar to a list of pre-selected candidates following a call for expressions of interest except that the value of the purchases under a DPS is not limited.

The DPS can facilitate the management of the procurement procedure and represent a saving in terms of the resources needed to manage commonly used purchases. The choice of this system depends on the subject of the contract. Examples of standard purchases are office supplies and laboratory chemicals (JRC).

The main advantages for the contracting authorities are:

- wholly electronic process;
- transparency and competitiveness within the selection procedure;
- flexibility in meeting the specific requirements of individual authorities.

The procedure may be divided into (sub-) categories of works, supplies or services depending on the characteristics of the procurement to be undertaken under the category concerned.

In this case, selection criteria must be defined for each category.

In order to procure through a DPS, the contracting authority must follow the rules of the restricted procedure. The DPS is published as a restricted procedure on TED. The number of candidates shall not be limited. The period of validity of the DPS must be indicated in the contract notice. It may not last for more than four years, except in duly justified exceptional cases.

The procurement documents must indicate:

- the nature and the estimated quantity of the purchases envisaged;
- the exclusion and selection criteria;
- the award criteria for the future calls for tenders;
- all the necessary information concerning the purchasing system;
- the electronic equipment used;
- the technical connection arrangements and specifications.

The contracting authority shall give any economic operator, throughout the period of validity of the DPS, the possibility of requesting to participate in the system. As in a restricted procedure, the request to participate includes exclusion and selection criteria.

The contracting authority shall complete its evaluation of such requests within 10 working days following their receipt. This deadline may be prolonged to 15 working days where justified. However, the contracting authority may extend the evaluation period provided that no invitation to tender is issued in the meantime. The contracting authority shall inform the candidate as soon as possible of whether or not it has been admitted to the DPS.

When the contracting authority wishes to use the DPS, it shall invite all candidates admitted to the system under the relevant category to submit a tender within a reasonable time.

An electronic auction (see [Chapter 3.14](#)) may be used for contracts to be awarded under the dynamic purchasing system.

The contracting authority shall award the contract to the tenderer who has submitted the most economically advantageous tender on the basis of the award criteria set out in the contract notice. Those criteria may, if appropriate, be formulated more precisely in the invitation to tender.

At present there are no IT solutions allowing use of this procedure by the Commission.

### 3.14. Electronic auction

An electronic auction is a process using electronic means for presenting an electronic tender (Art. 150 RAP). It is not a procurement procedure.

Electronic auctions should be used only for works, supply and service contracts where the specifications can be established with precision. The use of electronic auctions enables the contracting authority to ask tenderers to revise prices downwards, to rank them automatically and, when the contract is awarded following the best price-quality ratio, to improve features of the tender other than price.

In order to ensure compliance with the principle of transparency, only features that can be evaluated automatically by electronic means, with no intervention and/or assessment by the contracting authority, can be open to electronic auction, i.e. only features that are quantifiable and can be expressed in figures or percentages. Consequently some works and service contracts involving intellectual services, such as design, should not be open to electronic auctions.

An electronic auction may be used in an open or restricted procedure, a competitive procedure with negotiation, in the reopening of competition among the parties to a framework contract and in the contracts to be awarded under the dynamic purchasing system (see [Chapter 3.13](#)) when the procurement documents can be established with precision.

The electronic auction is based on one of the three award methods: lowest price, lowest cost or best price-quality ratio (see [Chapter 4.3.1.12](#)) and must be announced in the contract notice.

The procurement documents must include the following details:

- a) the value of the features which will be the subject of electronic auction, provided that those features are quantifiable and can be expressed in figures or percentages;
- b) any limits on the values which may be submitted, as they result from the specifications relating to the subject matter of the contract;
- c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;
- d) the relevant information concerning the electronic auction process including whether it includes phases and how it will be closed;
- e) the conditions under which the tenderers will be able to tender and, in particular, the minimum differences which will, where appropriate, be required when submitting the tender;
- f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

Before proceeding with an electronic auction, the contracting authority must make a full initial evaluation of the tenders in accordance with the award criteria set out in the procurement documents.

All tenderers who have submitted admissible tenders shall be invited simultaneously by electronic means to participate in the electronic auction using, as of the specified date and time, the connections in accordance with the instructions set out in the invitation. The invitation to participate in the electronic auction shall be accompanied by the outcome of the evaluation of the relevant tender.

The invitation shall also state the mathematical formula (including weighting) to be used in the electronic auction to determine automatic re-rankings on the basis of the new prices and/or new values submitted. Where variants are authorised, a separate formula shall be provided for each variant.

The electronic auction may take place in a number of successive phases. It may not start sooner than two working days after the date on which invitations are sent out.

Throughout each phase of an electronic auction the contracting authority shall instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment. It may also, where this has been previously indicated,

communicate other information concerning other prices or values submitted as well as announce the number of participants in any specific phase of the auction. In no case, however, may it disclose the identities of the tenderers during any phase of an electronic auction.

The contracting authority shall close an electronic auction in one or more of the following ways:

- a) at the previously indicated date and time;
- b) when it receives no more new prices or new values which meet the requirements concerning minimum differences, provided that it has previously stated the time which it will allow to elapse after receiving the last submission before it closes the electronic auction;
- c) when the previously indicated number of phases in the auction has been completed.

After closing an electronic auction, the contracting authority shall award the contract on the basis of the results of the electronic auction.

At present there are no IT solutions allowing use of this award system by the Commission.

### **3.15. Electronic catalogue**

The electronic catalogue is a form of technical and financial offer in electronic format submitted by a tenderer. It is not a procurement procedure or linked to a particular procurement procedure or type of contract or a specific award method. An electronic catalogue may be used for supplies and standardised products or services (e.g. office supplies, training).

If the presentation of tenders in the form of electronic catalogues is required, this must be specified in the contract notice. The procurement documents must indicate all the necessary information concerning the required format, the electronic equipment used and the technical connection arrangements. Tenderers cannot send their general catalogue of products. They must prepare their e-catalogue exactly like a tender, by responding precisely to the requirements of the contracting authority, i.e. listing only relevant products and prices. If a product does not correspond to a requirement, the e-catalogue may be rejected for non-compliance.

In the case of a framework contract with reopening of competition concluded following submission of tenders in the form of electronic catalogues, the reopening of competition for specific contracts may take place on the basis of updated catalogues by using one of the following methods:

- invite contractors to resubmit their electronic catalogues, adapted to the requirements of the specific contract in question;
- notify contractors that the information needed will be collected from the electronic catalogues already submitted to constitute tenders adapted to the requirements of the specific contract in question, provided that the use of that method has been announced in the procurement documents for the framework contract.

When using the second method, the contracting authority must notify contractors of the date and time at which they intend to collect the information needed to constitute tenders adapted to the requirements of the specific contract in question and give contractors the possibility to refuse such collection of information, allowing for an adequate period between the notification and the actual collection of information.

Before awarding the specific contract, the contracting authority must present the collected information to the contractor concerned so as to give it the opportunity to contest or confirm that the tender constituted does not contain any material errors.



## Part 4. Stages in the procurement procedure

### 4.1. Preliminary market analysis

The contracting authority may conduct a preliminary market analysis with a view to preparing the procurement procedure (Art. 105(1) FR and 137a RAP). Gaining prior knowledge and understanding of the relevant market, thereby saving time and efforts by bringing a precise focus to the planned procurement, derives from the principle of sound financial management.

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

It is advisable to conduct a preliminary market analysis when envisaging a negotiated procedure without prior publication for a contract that can be awarded only to a particular economic operator (Article 134(1)(b) RAP) (see [Chapter 3.8](#)).

#### Purpose

The main purpose is to allow the contracting authority:

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

#### Method

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

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

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

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

#### General principles

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

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

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

## 4.2. Ex-ante publicity

### 4.2.1. Prior information notice

The prior information notice serves to make it known to economic operators that a contracting authority is planning to award one or more contracts (Art. 123(2) RAP). It is published ahead of the procedure, before a contract notice is published (see [Chapter 4.3.4](#)) and obviously before the procurement documents are made available to potential tenderers. Publication of a prior information notice creates no obligation towards the contracting authority and consequently no financing decision or budgetary commitment is needed at this stage.

Publication of a prior information notice is not compulsory. It enables operators to make preparations (for example, to gather the necessary documentation and plan how to free up sufficient resources) so that they are ready to produce a tender as soon as the contract notice is published. It is therefore a way of increasing the chance of obtaining (good) tenders. It is especially advisable to use a prior information notice in the case of big projects that, by nature, would probably entail joint tendering: international projects to be implemented in several countries, complex multidisciplinary projects, large-scale contracts, big works contracts, etc.

#### 4.2.1.1. Arrangements for publication

There are two methods of publishing a prior information notice:

- (a) publication in the Official Journal "S" series (OJ S),
- (b) publication on the buyer profile<sup>14</sup> plus information in the OJ S indicating where the prior information can be found.

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

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

**BEWARE: until 01/01/2018, the Publications Office still uses the 12 days limit for publication (transitional period)**

The prior information notice will be published by the Publications Office within 7 days (**currently 12 days**) of dispatch.

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

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

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

#### 4.2.1.2. Other forms of publicity

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

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

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

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

- publication on the contracting authority's website;
- publication in the general or specialist press;
- letter to the professional associations or organisations representing businesses, drawing their attention to the prior information notice and asking them to circulate it among their members, etc.,
- mailshot based on transparent and not discriminatory criteria, e.g. list constructed by a webpage subscription mechanism. Mailshots must not be limited to only a few economic operators known to the contracting authority.

## 4.2.2. Call for expressions of interest

### 4.2.2.1. Publication of calls for expressions of interest

The text of calls for expressions of interest should be sent by electronic means only to the Secretariat-General at “SG PUBLICATIONS AU JO”, in one language only. It should be accompanied by a formal request for publication, signed by the Head of Unit and addressed to the Head of Unit SG.A.3.

The Secretariat-General is responsible for sending it to the Publications Office, which provides for translation into all languages of the European Union and publication in the Official Journal (within 12 days).

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

After publication in the Official Journal, the call for expressions of interest may be published on the Internet site of the contracting authority.

See the model of [notice of call for expressions of interest](#).

### 4.2.2.2. Other forms of publicity

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

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

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

- publication on other websites;
- publication in the general or specialist press;
- letters to the professional associations or organisations representing businesses, drawing their attention to the call for expression of interests and asking them to circulate it among their members;
- mailshot based on transparent and not discriminatory criteria, e.g. list constructed by a webpage subscription mechanism. Mailshots must not be limited to only a few economic operators known to the contracting authority.

## 4.2.3. Publicity on the website

Ex-ante publicity on the institutions' websites is compulsory for middle and low-value contracts above €15 000 for which no call for expressions of interest was published. Such publicity can take the form of publication of the annual work programme directly accessible from the buyer profile. It may also take the form of specific publicity on the buyer profile per procedure, or in advance as a list of intended procedures (see [Chapter 3.7.3](#)).

### 4.3. Preparation of the procurement documents

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

The procurement documents consist of (i) the contract notice published in the Official Journal or other publication if applicable (ii) the invitation to tender, (iii) the tender specifications or the descriptive document for a competitive dialogue, and (iv) the draft contract. They are designed to achieve a number of distinct and complementary objectives:

- (i) to advertise the procurement procedure
- (ii) to lay down the conditions governing submission of requests to participate or tenders;
- (iii) to provide an exact definition of the characteristics of the supply or service required by the contracting authority and to announce the criteria and method on the basis of which the contracting authority will award the contract;
- (iv) to describe the contractual terms on which the contracting authority is prepared to acquire the supply or service.

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

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

In the case of negotiated procedures involving just one tenderer and for low-value contracts (see [Chapter 3.7](#)), the content of the procurement documents may be simplified.

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

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

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

In practice, the procurement documents will be prepared in the following order:

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

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

## 4.3.1. Tender specifications

### 4.3.1.1. Title, purpose and context of the procurement

This must include the reference number of the procurement procedure.

A description of each lot must be given, where appropriate.

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

### 4.3.1.2. Subject of the contract and technical specifications

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

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

#### **General requirements concerning technical specifications:**

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

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

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

The tasks entrusted to contractors may not involve exercising public authority power or budgetary implementation tasks (Art. 63 FR). For instance, the task may include administrative tasks such as managing the reimbursement of participants in a conference, but the contractor may not decide the list of guests or the rules for reimbursement.

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

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

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

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

### **Technical specifications for services may include:**

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

### **Technical specifications for supplies may include:**

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

### **Minimum requirements to be met by the tender**

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

Minimum requirements may relate to e.g.:

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

The minimum requirements must always include compliance with applicable environmental, social and labour law obligations established by Union law, national legislation, collective agreements or the international environmental, social and labour conventions listed in Annex X to the Directive.

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

Regarding the evaluation, compliance with law obligations is not subject to systematic ex-ante verification. It is only in case of doubts that it should be verified (e.g. in the case of abnormally low tender – Art. 151 RAP).



### 4.3.1.3. Environmental and social aspects

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

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

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

Environmental and social specifications may be formulated in any of the following ways (Art. 139(3) RAP):

- (a) in order of preference, by reference to European standards, European technical assessments, common technical specifications, international standards, other technical reference systems established by European standardisation bodies or, failing this, their national equivalents; every reference shall be accompanied by the words "or equivalent";
- (b) in terms of performance or of functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject matter of the contract and to allow the contracting authority to award the contract;
- (c) by a combination of those two formulation methods.

They can also be formulated by requiring a specific label or the specific requirements from a label under the following conditions (Art. 139(6) RAP):

- (a) the label requirements only concern criteria which are linked to the subject matter of the contract;
- (b) the label requirements are based on objectively verifiable and non-discriminatory criteria;
- (c) the labels are established in an open and transparent procedure in which all relevant stakeholders may participate;
- (d) the labels are accessible to all interested parties;
- (e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

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

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

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

#### **4.3.1.4. Site visit**

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

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

#### **4.3.1.5. Variants**

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

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

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

For detailed information see the [note on variants](#).

#### **4.3.1.6. Access to the market**

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

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

For further information please consult the note on the [access of candidates and tenderers from third countries](#)

### 4.3.1.7. Joint tenders and subcontracting

The principle is that economic operators on the market are free to organise themselves as they so wish. As a rule groups of economic operators are authorised to submit a tender or request to participate ("joint tender") and subcontracting is allowed<sup>15</sup>. A joint tender may also involve subcontracting. The number of entities in a joint tender or the number of subcontractors or the share of subcontracting may be not limited.

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

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

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

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

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

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

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

For detailed information see the [circular on subcontracting and joint tenders](#).

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<sup>15</sup> See in particular the Judgements of the ECJ C-314/01 of 18/03/2004, (Siemens AG Österreich und ARGE Telekom & Partner vs. Hauptverband der Österreichischen Sozialversicherungsträger) and C-176/98 of 02/12/1999 (Holst Italia SpA vs. Comune di Cagliari).

#### **4.3.1.8. Criteria**

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

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

#### **4.3.1.9. Exclusion criteria**

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

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

The only criteria which should be applied are set out in Articles 106 and 107 FR, with nothing added, deleted or altered.

**For information on supporting documents concerning exclusion criteria, see [Chapter 4.3.1.18](#).**

#### **4.3.1.10. Selection criteria**

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

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

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

#### **Minimum capacity level**

A selection criterion must consist in three elements: (i) the criterion, (ii) the minimum level or minimum requirement and (iii) the relevant supporting documents (Art. 146(1)RAP). It is not sufficient to require "sufficient financial capacity" without any precise criteria, or to require experience with no minimum number of years of experience or without specifying its precise field. Selection criteria are not scored and do not necessitate marking; they are just "pass or fail".

The minimum capacity level set for each of the criteria defines the capacity below which the candidate or tenderer will not be selected because it is considered as not capable of implementing the future

contract. Therefore, below these levels, the candidate will not be invited to submit a tender (procedures in two steps) or the tender will be rejected (procedure in one step).

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

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

### **Individual vs. consolidated assessment**

Selection criteria can be applied:

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

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

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

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

### **Legal and regulatory capacity**

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

### **Technical and professional capacity**

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

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

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

The contracting authority may announce in the tender specifications that it may require that certain critical tasks be performed directly by the tenderer itself or, where a tender is submitted by a consortium of economic operators, a participant in the consortium. This provision is to be used with

caution, as it could be interpreted as a restriction to the market. It assumes that all tasks are very well defined and that one or two of them are critical for the contracting authority. In this case, there will be a direct contractual link between the contracting authority and the entity performing these tasks. This provision is not to be understood as the possibility to cap subcontracting.

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

### **Economic and financial capacity**

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

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

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

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

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

**For information on supporting documents concerning selection criteria, see [Chapter 4.3.1.19](#).**

### 4.3.1.11. Award criteria

The award criteria are not related to the tenderer but to the tender. The purpose of the award criteria is to evaluate the technical and financial offer with a view to choosing the most economically advantageous tender (Art. 149 RAP).

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

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

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

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

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

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

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

- efficiency (e.g. speed of printer);
- functional characteristics;
- duration of warranty;
- after-sale service and technical assistance;

- delivery time;
- environmental performance (e.g. possibility of recycling the machine or materials);
- comfort of work (e.g. noise);
- aesthetics.

Award criteria that should not be used:

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

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



#### 4.3.1.12. Award methods

The award of contracts is based on the most economically advantageous tender, which consists in one of three award methods: lowest price, lowest cost or best price-quality ratio (Art. 110(4) FR). The method chosen must be announced in the procurement documents. It is not possible to mix the methods.

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

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

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

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

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

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

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

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

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

##### **Best price-quality ratio method**

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

This method entails defining detailed award criteria to determine quality.

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

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

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

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

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

In exceptional cases in which weighting is not technically possible, mainly because of the subject of the contract, it is sufficient to indicate the various criteria in descending order of importance. This

wording – technical impossibility of establishing a weighting – conveys that this situation is extremely rare and not normally justified for public contracts concluded by the institutions.

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

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

### Weighting

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

### Formula

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

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

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

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

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

Score for tender X	=	$\frac{\text{cheapest price}}{\text{price of tender X}}$	*	total quality score (out of 100) for all criteria of tender X
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- b) the method applying a weighting for quality and price expressed in percentage (e.g. 60%/40%):

score for tender X	=	$\frac{\text{cheapest price}}{\text{price of tender X}}$	*	100	*	price weighting (in %)	+	total quality score (out of 100) for all award criteria of tender X	*	quality criteria weighting (in %)
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The weighting factor determines how much extra money the contracting authority is ready to spend in order to award the contract to an economic operator whose tender is of a higher technical value.

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

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

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

### **Evaluating prices for framework contracts**

If the price is quoted in the form of a list of unit prices (as is usually the case for framework contracts - FWCs), the contracting authority must indicate in advance which method will be used to ensure comparability.

Usually this is done by indicating a realistic purchase scenario for using the FWC. Quantities of resources corresponding to the unit prices will be specified in the scenario, without this implying any commitment on the part of the contracting authority as regards the actual volume of work. For instance, if the specifications require a tender expressed in terms of fees per day worked for each category of staff involved, the tender specifications will give a scenario specifying how many working days, by category, will be used for purposes of comparison. For example, if unit prices are required for each of (a) delivery of training, (b) preparation of training and (c) supply of training materials, the evaluation scenario could indicate that the comparison will be based on, say, 100 days of (a), 10 days of (b) and 200 units of (c).

In some cases, the tender requested may include specifications for one or more case studies. In such cases, tenderers will be required to submit a technical and financial offer for the case study or studies. When case studies are used, they should cover all the price items in the price list for the framework contract and tenderers must apply the maximum unit prices of the price list to the case studies.

If the tender specifications do not provide precise information about the method for comparing the price, tenderers will be unable to submit a competitive tender in full knowledge of all the parameters used to determine the most economically advantageous tender. Experience suggests that, when this information is not available, tenders are not comparable and it is not possible to award the contract.

#### 4.3.1.13. Distinction between selection and award criteria

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

Confusing selection and award criteria constitutes a procedural defect which is likely to result in the procedure being annulled in the event of a dispute. As a matter of fact, the confusion could favour certain economic operators at the detriment of others regardless of the quality of their technical offer. This has been confirmed by the case-law of the Court<sup>16</sup>.

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

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

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

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

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

#### **4.3.1.14. Value of the contract**

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

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

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

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

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

#### **4.3.1.15. Price and reimbursement of expenses**

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

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

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

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

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

As a rule, travel expenses should be included in the global price offered by the tenderer. For that, the contracting authority must indicate precisely the required travel in the tender specifications (e.g. number and location of all meetings). Travel and accommodation should be reimbursed separately from the global price only when necessary, i.e. where it is not possible to identify the amount or place of travel required within the project. In this case, the contracting authority should provide the reimbursement rates for travel and subsistence, based on the standard Commission rules, and a maximum amount (in euro) for travel and subsistence expenses payable under the whole contract. It

should be estimated by using the maximum rates and the estimated necessary travel for performance of the contract.

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

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

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

See the [Circular on price revision](#)

#### **4.3.1.16. Contents of the tender**

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

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

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

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

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

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

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

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

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

In the case of framework contracts, the financial offer takes the form of a list of unit prices which will be applied to the specific contracts implementing the framework contract. The prices of the list are maximum prices in the case of multiple framework contracts with reopening of competition. Care should be taken that all price items to be used when the framework contract is implemented are incorporated into the price list. It is recommended to attach a template on which to submit the prices to the tender specifications.

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

#### **4.3.1.17. Identification, legal status and access to the market**

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

##### **Identification and legal status:**

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

[http://ec.europa.eu/budget/contracts\\_grants/info\\_contracts/legal\\_entities/legal\\_entities\\_en.cfm](http://ec.europa.eu/budget/contracts_grants/info_contracts/legal_entities/legal_entities_en.cfm)

##### **Access to the market:**

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

##### **SMEs**

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

#### **4.3.1.18. Declaration and evidence on exclusion criteria**

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

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

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

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

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

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

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

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

The documents to be requested are listed in Article 141(3) RAP and consist mainly in an extract of judicial record, a certificate on payment of social security and a certificate on payment of taxes.

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

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

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

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



#### **4.3.1.19. Declaration and evidence on selection criteria**

The contracting authority must request the candidates or tenderers to provide the European Single Procurement Document (ESPD) or, as long as the ESPD is not available for EU institutions, a [declaration on honour](#), signed and dated, stating that they fulfil the selection criteria (see [Chapter 4.3.1.10](#)). The contracting authority must provide a link to the ESPD or the model declaration as an annex. The purpose is to alleviate the workload of tenderers having to submit and of the contracting authority having to check supporting documents for all tenderers. For procedures as from Directive thresholds, the candidates or the successful tenderer must provide evidence confirming the ESPD or declaration. The contracting authority may request all or part of the documentation at any time to ensure the proper conduct of the procedure.

In practice, for two-step procedures, the contracting authority may ask for evidence with the request to participate to ensure that selected candidates have proven capacity. For one-step procedures, the contracting authority may request all or part of the evidence with the tender or during the evaluation or at award stage. For instance, it may be appropriate to ask for CVs at tender stage; or to request evidence to the second best tenderer to ensure fast contract signature in case of problem with the successful tenderer while not raising legitimate expectations.

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

For contracts with a value up to Directive thresholds, the contracting authority may, depending on its assessment of the risks, choose not to ask candidates or tenderers to provide documentary evidence of their legal and regulatory, financial and economic and technical and professional capacity. In such case the selection criteria are assessed on the basis of the tenderers declarations only. For lists of pre-selected candidates, the contracting authority may ask only for the ESPD/declaration when putting candidates on the list and may request evidence when using the list depending on its assessment of the risks.

For contracts with a value up to €15 000, the contracting authority may decide not to require the above-mentioned ESPD or declaration. Indeed, when choosing the tenderer, the authorising officer should already ensure that it has the necessary capacity.

If the contracting authority decides not to require evidence of the legal, regulatory, financial, economic, technical and professional capacity of candidates or tenderers, no pre-financing can be foreseen.

##### **Verification of the legal and regulatory capacity:**

The authorisation for the tenderer to perform the contract proven by inclusion in a trade or professional register (e.g. the bar for lawyers), membership of an organisation, VAT registration or an express authorisation (e.g. inclusion on a national decree or law for certain professions) as indicated in Article 146(2) RAP.

##### **Verification of economic and financial capacity:**

Article 147(1) RAP provides a non-exhaustive list of possible documents, but it is not obligatory to request them all. Only the documents necessary to check the criteria (and minimum levels) indicated in the tender specifications should be requested, e.g. financial statements of the past two years (max. three) if there is a criterion on minimum turnover for that period.

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

The possibility for economic operators to rely on the capacity of other entities, as provided for in Article 146(5) RAP, must be mentioned in the tender specifications. If the tenderer uses this possibility, the contracting authority may request the legal entity providing financial backing to be jointly liable for the execution of the contract, e.g. by requesting it to sign the contract or, failing that, to provide a joint and several first-call financial guarantee.

**Verification of technical and professional capacity:**

Article 148(2) RAP provides an exhaustive list of possible documents, several of which relate to supplies or works contracts, but it is not obligatory to request them all. Only the documents necessary to check the criteria (and minimum levels) indicated in the tender specifications should be requested. Generally, it is recommended to have the following:

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

### 4.3.2. Draft contract

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

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

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

The model contracts are on Budgweb:

[https://myintracomm.ec.europa.eu/budgweb/en/imp/procurement/pages/imp-080-030-010\\_contracts.aspx](https://myintracomm.ec.europa.eu/budgweb/en/imp/procurement/pages/imp-080-030-010_contracts.aspx).

#### 4.3.2.1. Use of the DG BUDG model contracts

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

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

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

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

#### 4.3.2.2. Terms of payment

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

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

Interim payments are made in exchange of receiving something of equivalent value (e.g. raw data from a survey, the first draft of a report, the per country situation of 5 out of 28 countries...). In order to facilitate access to SMEs to EU contracts, it is recommended to pay an interim payment fairly early in the payment schedule, but it should still be in exchange of a deliverable of equivalent value. Apart

from reducing the risk to the budget, it is also useful in case of termination of the contract, as it ensures that the contracting authority does not pay more than what the deliverable is worth.

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

#### **4.3.2.3. Reimbursement of expenses**

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

#### **4.3.2.4. Guarantees**

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

##### **Tender guarantee**

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

##### **Guarantee for pre-financing**

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

##### **Performance guarantee**

On a case-by-case basis and subject to a risk-analysis, a performance guarantee may be required from the contractor in order to ensure compliance with substantial contractual obligations in the case of works, supplies or complex services. The performance guarantee amounts to a maximum of 10 % of the total value of the contract and is to be released after final acceptance of the works, supplies or complex services. It may be released partially or fully upon provisional acceptance.

##### **Retention money guarantee**

The use of a retention money guarantee is restricted to a particular situation: it may be requested, on a case-by-case basis and subject to a risk analysis, in order to ensure that the works, supplies or services have been fully delivered and when final acceptance according to the terms of the contract cannot be given upon final payment by the authorising officer. In other words, if all tasks can be finalised and approved before payment of the balance, there is no retention money guarantee. Otherwise, the guarantee will cover the period between provisional acceptance (at payment of the balance) and final acceptance (which can be several months later) and this is referred to as contract liability period. This is used e.g. for software development (the software is delivered but bugs may be detected for a period after final delivery) or for works contracts. It may take the form of a retention on payment of maximum 10 % (which is recommended as it is easy to manage). If 10% is not considered adequate, the authorising officer may set a lower percentage according to the usual commercial terms. It shall be proportionate with regard to the nature of the purchase, its organisation and risk.

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

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

For financial guarantees, the [model guarantee](#) must be provided.

For information on management and release of guarantees see [Chapter 5.6](#).

For further information see the [Circular on guarantees](#).

#### **4.3.2.5. Intellectual property rights**

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

More information is available in the [Explanatory note on intellectual property rights](#).

#### **4.3.2.6. Contract phases, renewal or options**

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

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

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

### 4.3.3. Invitation to tender

An invitation to tender is the procurement document giving the administrative details for submitting tenders, outlining the procedural requirements for contacts with the contracting authority (Art. 160(2) RAP) and providing extra-legal clauses. These clauses do not need to be repeated in the tender specifications, and they include:

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

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

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

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

See [model invitation to tender](#)

### 4.3.4. Contract notice

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

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

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

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

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

#### 4.3.4.1. Content

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

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

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

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

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

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

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

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

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

#### **4.3.4.2. Additional publicity**

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

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

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

- publication on the Directorate-General's website;
- publication in the general or specialist press;
- letter to the professional associations or organisations representing businesses, drawing their attention to the contract notice and asking them to circulate it among their members, etc.;
- mailshot based on transparent and not discriminatory criteria, e.g. list constructed by a webpage subscription mechanism. Mailshots must not be limited to only a few economic operators known to the contracting authority.

#### **4.3.4.3. Correction of a contract notice**

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

An extension is also compulsory if:

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



## 4.4. Launching of the call for tenders

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

### 4.4.1. Procedures with a contract notice

**BEWARE: until 01/01/2018, the Publications Office still uses the 12 days limit for publication (transitional period) so all legal minima following publication are increased by 5 days.**

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

The Publications Office has up to 7 days (**currently 12 days**) after dispatch to publish the contract notice in the Official Journal provided the free text in the whole contract notice is **maximum 500 words**.

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

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

### 4.4.2. Procedures without prior publication of a contract notice

For negotiated procedures without prior publication of a contract notice (see [Chapter 3.8](#)), dispatch of the invitation to tender to the candidate(s) marks the launch of the procedure.

Procedures involving a call for expressions of interest (see [Chapter 3.6](#)) do not require a specific publication in addition to the notice of call for expressions of interest published ex-ante in the OJ S (see [Chapter 4.2.2](#)). For these procedures, dispatch of the invitation to tender to the pre-selected candidates or to the vendors on the list marks the launch of the procedure.

For negotiated procedures for middle and low-value contracts, specific information may be published on the website (see [Chapter 3.7.3](#)). For very low value contracts (up to € 15 000) there is no publication requirement. These procedures are launched by the dispatch of the invitation to tender to potential tenderers.

### 4.4.3. Translation

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

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

## 4.5. Submission phase

### 4.5.1. Contacts during the submission phase

Such contacts are allowed, by way of exception, in the following circumstances only (Art. 160 RAP):

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

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

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

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

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

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

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

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

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

## 4.5.2. Receipt of requests to participate

In procedures in two steps, the first stage after publication of the notice is the receipt of requests to participate, followed by the selection of the candidates who will be invited to submit a tender. In the procedure for pre-selection of candidates following publication of a call for expressions of interest, requests to participate can be received and candidates preselected at any time (see [Chapter 3.6.3](#)).

The arrangements for submission of requests to participate are determined by the contracting authority, which may choose a single exclusive method of submission. Requests to participate are sent by post, courier service or electronic means.

The date of receipt consists in the date at which the candidate can no longer alter its request to participate, i.e.:

- For submission by post, the postmark;
- For submission by courier, the deposit slip of the courier service;
- For submission by hand, the receipt of the Central Mail Service;
- For electronic submission, the time stamp generated by the system.

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

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

As from the Directive threshold, the device for electronic receipt of requests to participate must fulfil a number of conditions laid down in Article 155(3) RAP.

### 4.5.3. Selection of candidates

#### Opening

It is compulsory to open requests to participate (Art. 111(4) FR and 157 RAP). There is no opening committee for requests to participate. It is up to the responsible authorising officer to decide about the appropriate organisation. The persons in charge of opening check whether the requests to participate have been received on time. Requests to participate which satisfy this condition are considered to be in order. Although the rules lay down no obligation, it is advised to produce an opening record of this step to be signed by the relevant person(s). The [model record of opening of tenders](#) can be taken as a basis.

#### Evaluation

It is compulsory to assess requests to participate (Art. 158 RAP). There is no evaluation committee. The responsible authorising officer may decide that requests to participate are to be evaluated by appropriate means (e.g. appoint one or two persons to do it).

The evaluator(s) evaluate the requests to participate by reference solely to the exclusion and selection criteria specified in the procurement documents.

Requests to participate which do not contain all the requested information and documents or do not satisfy the specific requirements cannot be eliminated outright, on the basis of good administration (Article 96 FR). The evaluators shall ask the candidate to provide additional supporting documents or clarifications relating to the exclusion and selection criteria, setting a final date for replying (see [Chapter 4.7.4](#)).

If requests to participate are sent before the deadline but arrive late to the contracting authority (delay caused by distance or strikes, for instance), the evaluator(s) should reconvene in the same composition to ensure that all requests to participate are given equal treatment.

After this stage, only the candidates selected will be invited to tender. In the restricted procedure and in procedures in two steps involving a call for expressions of interest the number may not be fewer than five, provided a sufficient number of candidates satisfy the exclusion and selection criteria.

In a restricted procedure with publication of a contract notice or following a call for expressions of interest there may be a maximum number of candidates invited, announced in the procurement documents, but this is not recommended as it is very difficult to do in practice.

In the competitive procedure with negotiation, the competitive dialogue, the innovation partnership and the prospection of the local market for building contracts, the number required is at least three. In any event, the number of candidates allowed to tender must be sufficient for there to be real competition.

#### Selection

There is no formal decision on selection by the authorising officer. The report on selection signed by the relevant persons involved is sufficient. The authorising officer responsible must inform non-selected candidates of the reasons for rejection of their request to participate as soon as possible after the report on selection is finalised based on the exclusion and selection criteria. There is no standstill period.

**Model notification letters are available on:** [https://myintracomm.ec.testa.eu/budgweb/en/imp/procurement/pages/imp-080-030-010\\_contracts.aspx#INFO](https://myintracomm.ec.testa.eu/budgweb/en/imp/procurement/pages/imp-080-030-010_contracts.aspx#INFO)

At the same time, the invitations to tender are sent to the selected candidates.

If any candidate requests information about the selection of other candidates, it should not be given this information until the time limit for receipt of tenders has elapsed. Indeed, there is a risk of collusion between selected candidates and a risk of transmission of this information from non-selected candidates to selected candidates.

For procedures with publication of a contract notice, the invitation letter will refer to the other procurement documents already published. For procedures without publication of a contract notice, the other procurement documents will be attached to the invitation letter.

#### 4.5.4. Dispatch of procurement documents

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

##### **Procedure with publication of a contract notice**

For all procedures in one or two steps with publication of a contract notice, the set of other procurement documents — i.e. the invitation to tender, the tender specifications and the draft contract — must be made available by electronic means from the date of the publication of the contract notice (Art. 153(1) RAP).

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

For the contracting authority eTendering provides:

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

For economic operators eTendering provides:

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

For more information please see the [eTendering site page](#).

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

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

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

##### **Procedures without publication of a contract notice**

For all procedures in one or two steps without publication of a contract notice (procedures following a call for expressions of interest, negotiated procedures under Article 134 RAP, negotiated procedures below the Directive thresholds), access to the procurement documents must be provided simultaneously by electronic means.

It is recommended to use separate e-mails so that candidates do not learn who their potential competitors are.

In procedures in two steps, the procurement documents must under no circumstances be provided to operators other than the selected candidates (candidates who have presented a request to participate and who satisfy the exclusion and selection criteria).

### 4.5.5. Receipt of tenders

Receipt of the tenders is the next milestone in the procedure. Before the deadline for receipt of tenders the mechanism for registering the exact date and time of receipt should be established.

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

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

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

For information, see the [model invitation to tender](#)

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

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

As from the Directive threshold, the device for electronic receipt of tenders must fulfil a number of conditions laid down in Article 155(2) RAP.

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

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

- organise the opening of tenders
- organise the evaluation of tenders;
- set up an evaluation committee for contracts of a value equal or greater than the Directive threshold (see [Chapter 4.7.2](#)).

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

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

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

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

## 4.6. Opening phase

### 4.6.1. Opening of tenders

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

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

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

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

### 4.6.2. Opening committee

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

The opening committee is appointed by formal decision of the authorising officer using the [model for Appointment of opening / evaluation committee](#).

#### Composition

The requirements for the opening committee are as follows:

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

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

#### Duties and tasks

In order to prevent any conflict of interest, the persons appointed are bound by the obligations set out in Article 57 FR and in Article 31 RAP. Accordingly each member of the opening committee should sign a [declaration of absence of conflict of interest](#) before opening the tenders. Any member discovering that he has a conflict of interest is under an obligation to inform the authorising officer immediately.

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

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

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

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

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

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

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

#### **After the opening session**

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

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

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

### **4.6.3. Reasons for rejection**

Since rejection of a tender for not being in order has important implications, it should be borne in mind that only the following conditions count: tenders must be received **by the deadline** and must be in a **closed envelope** (Art. 111(4) FR).

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

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

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

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

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

- the tender was sent in a single envelope rather than the two envelopes required, provided the envelope is sealed (the confidentiality of the tender has been preserved);
- only one copy of the tender was sent, instead of the three (or more) required;
- the tender combines the technical part and the financial part or has not used the requested standard presentation;
- certain parts of the tender are clearly missing or the tender is clearly totally unrealistic;
- the tenderer does not have access to the market (see [Chapter 4.3.1.6](#));

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

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



#### **4.6.4. Opening record**

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

The record contains:

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

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

## 4.7. Evaluation phase

### 4.7.1. Evaluation of tenders

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

The evaluation is based exclusively on the exclusion, selection and award criteria set out in the procurement documents with nothing added, removed or altered. For a description of the criteria, see [Chapter 4.3.1.9](#) to [Chapter 4.3.1.11](#). For procedures in one step, the three categories of criteria will be evaluated in no particular order or in a pre-defined order, as announced in the tender specifications. For procedures in two steps, the exclusion and selection criteria will be evaluated at the stage of evaluation of the requests to participate (see [Chapter 4.5.3](#)) and the award criteria at the stage of the evaluation of tenders.

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

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

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

#### **Tips for the evaluations**

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

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

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

#### **4.7.2. Evaluation committee**

For all contracts with a value as from the Directive thresholds, tenders are evaluated by an evaluation committee appointed by the responsible authorising officer (Art. 158(2) RAP). This requirement may be waived on the basis of a risk analysis when reopening competition within a framework contract. It may also be waived in the following cases of negotiated procedures without prior publication of a contract notice:

- extreme urgency (Article 134(1)(c) RAP);
- repetition of similar services or works (Article. 134(1)(e) RAP);
- additional supplies (Article 134(1)(f)(i) RAP);
- supplies quoted and purchased on a commodity market (Article 134(1)(f)(iii) RAP);
- legal services (Article 134(1)(h) RAP).

For the other cases under Article 134(1) RAP no waiver is provided as the evaluation committee is considered as a safeguard to secure the evaluation.

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

The evaluation committee is appointed by formal decision of the authorising officer using the model for [Appointment of opening / evaluation committee](#).

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

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

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

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

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

In order to prevent any conflict of interest, the evaluation committee members are bound by the obligations set out in Articles 57 FR and 32 RAP. Accordingly, each member should sign a declaration before evaluating the tenders (see the [declaration of absence of conflict of interest and confidentiality](#)).

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

There may be other persons present at the meetings of the committee, for instance an observer who checks that the procedure is done according to the rules. This function of observer is part of management supervision (see [Internal Control Standard 9](#)) and is not related to the appointment of the evaluation committee since the observer does not evaluate. Other administrative support staff (handling correspondence with tenderers, preparing evaluation documents, helping on formal aspects of the evaluation, etc.) are not evaluators as such and should not be appointed as members either.

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

For further information on conflict of interest see [Chapter 1.6](#).

### 4.7.3. External experts in evaluation

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

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

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

The models are available in Annex II and III of the [model contract for external experts](#) on Budgweb.

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

For further information see the [Circular on external experts](#).

#### 4.7.4. Contacts with tenderers

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

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

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

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

These contacts are laid down in Articles 112 FR and 160 RAP.

In line with good administration (Article 96 FR), it is obligatory to contact the candidates or tenderers to ask for missing information or documents in relation to exclusion or selection criteria or missing signatures. The absence of contact in these cases must be duly justified and documented by note in the procurement file.

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

The request should remind the tenderer that the tender submitted cannot be altered. Requests for “clarification” must not lead to any amendment of the terms of the tender. This means that tenderers’ replies must serve solely to provide the contracting authority with clarification of the elements already mentioned in the tender, without altering the content of the tender. It should be borne in mind at this point that most doubts could be removed if the tender documents contained clear instructions for tenderers, in particular a detailed summary of the different documents required for evaluation of the tenders against the criteria and, if applicable, a clear price schedule for the presentation of the financial offer.

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

#### 4.7.5. Reasons for rejection

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

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

##### Unsuitable tender

- The tender is irrelevant to the subject of the contract;
- The tenderer is in an exclusion situation under Article 106(1) FR;
- The tenderer does not meet the selection criteria.

### Irregular tender

- The tender does not comply with the minimum requirements specified in the procurement documents; in case of negotiated procedure, the tender may still be negotiated to bring it in line with minimum requirements;
- The tenderer has misrepresented or failed to supply the information required as a condition to participate in the procurement procedure (Article 107(1) (b) FR);
- The tenderer was previously involved in the preparation of the procurement documents where this entails distortion of competition that cannot be remedied otherwise (Article 107(1) (c) FR). Prior to such exclusion, the economic operator must be given the opportunity to prove that its prior involvement is not capable of distorting competition (see [Chapter 1.6](#) and [Chapter 4.3.1.2](#)).
- The price of the tender is abnormally low (see [Chapter 4.7.4.1](#)).

### Unacceptable tender

- The price of the tender exceeds the maximum amount set in the procurement documents or the contracting authority's maximum budget as determined and documented internally prior to the launching of the procedure;
- The tender fails to meet the minimum quality levels for award criteria; in case of negotiated procedure, the tender may still be negotiated to bring it in line with minimum levels of quality.

In cases where the ground for rejection is not linked to the award criteria there is no evaluation of the tender as such. The tenderer will be informed of the ground for rejection without being given feedback on the content of the tender other than on the elements justifying the rejection.

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

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

To sum up:

<b>Definition</b>	<b>Article RAP</b>	<b>Reason</b>
Unsuitable	134(2)	<ul style="list-style-type: none"><li>- Irrelevant tender</li><li>- Exclusion under Article 106(1) FR</li><li>- Non-selection</li></ul>
Irregular	135(2)	<ul style="list-style-type: none"><li>- Non-compliant with minimum requirements</li><li>- Received late</li><li>- Rejected under Article 107(1)(b) and (c) FR (misrepresentation and distortion of competition)</li><li>- Abnormally low</li></ul>
Unacceptable	135(3)	<ul style="list-style-type: none"><li>- Price above maximum</li><li>- Minimum quality level not reached</li></ul>
Admissible	158(4)	<ul style="list-style-type: none"><li>- Suitable</li><li>- Not irregular</li><li>- Not unacceptable</li></ul>

Tenders cannot be rejected if:

- missing information or documents relating to the exclusion or selection criteria can be requested, or obvious clerical errors can be corrected without going beyond the contacts authorised (see [Chapter 4.7.4](#));

- they contain the information requested, but not on the standard form(s);
- the price exceeds the estimated amount indicated, without being of a significantly different magnitude;
- they are submitted as the basic tender, complying with the tender specifications, together with unauthorised variants (which must be rejected).

#### **4.7.5.1. Abnormally low tenders**

If the price or cost of a tender appears to be abnormally low, before rejecting tenders for this reason alone, the contracting authority must request in writing whatever explanations it considers appropriate on the components of the tender and check, taking due account of the reasons given by the tenderer, whether the tender can be considered regular (Article 151 RAP).

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

- (a) the economics of the manufacturing process, of the provision of services or of the construction process;
- (b) the technical solutions chosen or exceptionally favourable conditions available to the tenderer;
- (c) the originality of the tender;
- (d) compliance of the tenderer with applicable obligations in the fields of environmental, social and labour law;
- (e) compliance of subcontractors with applicable obligations in the fields of environmental, social and labour law;
- (f) the possibility of the tendering obtaining State aid in compliance with applicable rules.

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

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

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

#### 4.7.5.2. Non admissible tenders

A tender is not admissible if it is unsuitable, irregular or unacceptable (see [Chapter 4.7.4](#)).

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

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

- a negotiated procedure where no suitable tenders were received in the initial procedure (Article 134(1)(a) RAP);
- a competitive procedure with negotiation where no regular or acceptable tenders were received in the initial procedure if it includes all and only the tenderers of the initial procedure who satisfy the exclusion and selection criteria, except those who submitted a tender declared to be abnormally low (Article 135(1)(a) RAP).

See also [Chapter 3.5](#) and [Chapter 3.8](#).

#### 4.7.5.3. Non-selection of tenderers

The non-selection of tenderers requires some caution. First, it is possible to eliminate tenderers on this basis if the selection criteria themselves are very clear (for transparency and equal treatment reasons). Second, it is compulsory for the contracting authority to contact the tenderer to ask for missing information or documents (e.g. CVs, financial statements...) before rejection. This is for reasons of proportionality (eliminating a tender because a document is missing would be disproportionate) and good administration (Article 96 FR). Indeed after leaving a few extra days to provide the missing information, it will be difficult for the tenderer to contest the rejection. If the contracting authority decides to reject on the grounds of selection without having contacted the tenderer, it must duly justify it in the procurement file.

#### 4.7.5.4. Professional conflicting interest

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

This conflicting interest is different from the situation where contractor involved in the preparation of procurement documents can be rejected from the subsequent procedure if its participation entails a distortion of competition that cannot be remedied otherwise (Article 107(1) (c) FR).

For more information on conflict of interests in procurement see [Chapter 1.6](#).

#### 4.7.5.5. Rejection from a given procedure

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

- are in one of the situations leading to exclusion defined in (Article 106 FR) (see [Chapter 4.3.1.9](#) Exclusion criteria).
- have misrepresented the information required by the contracting authority as a condition for participating in the procedure or failed to supply this information;
- were previously involved in the preparation of procurement documents where this entails distortion of competition that cannot be remedied otherwise (see [Chapter 1.6](#) and [Chapter 4.3.1.2](#)).

In the case of **misrepresentation in supplying the required information**, the candidate or tenderer is not required to submit any specific evidence. The authorising officer or the evaluation committee must



check that the information provided is complete in the light of the requirements of the procedure and, if necessary, identify any false statements. Rejection from the given procedure on this ground may have serious consequences for the operators concerned as it may result in administrative and financial penalties based on grave professional misconduct (Article 106(c)(i) FR).

#### 4.7.6. Consultation of the early detection and exclusion system

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

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

In addition, any natural or legal person, group or entity listed in accordance with a Council Regulation imposing financial restrictions relating to the common foreign and security policy<sup>17</sup> must be excluded from the contract award as well. The list is not automatically included in the EDES, thus, in case the contract is to be awarded to an economic operator from outside of the EU it is necessary to check the *Consolidated list of persons, groups and entities subject to EU financial sanctions* at [http://eeas.europa.eu/cfsp/sanctions/consol-list\\_en.htm](http://eeas.europa.eu/cfsp/sanctions/consol-list_en.htm); advice can be obtained from the Foreign Policy Instrument Service (FPI):

Functional mailbox: FPI RELEX SANCTIONS ([relex-sanctions@ec.europa.eu](mailto:relex-sanctions@ec.europa.eu))

Tel: +32 (0)2-29-58829

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

#### 4.7.7. Evaluation report

A report on the evaluation of exclusion, selection and award criteria and ranking of tenders must be drawn up, dated and signed by all the evaluators if no evaluation committee was appointed or all members of the evaluation committee (and persons evaluating the exclusion and selection criteria if those roles are separate). It must be kept for future reference. For procedures in two steps, a separate evaluation report will be drawn at the stage of the evaluation of respectively the requests to participate and the tenders.

The evaluation should contain at least the:

- working method of the evaluation (e.g. date of meetings);
- name and address of the contracting authority;
- the subject of the contract or framework contract;
- names of candidates or tenderers rejected from the procedure based on Article 107 FR (see [Chapter 4.7.4.5](#)) or by reference to the selection criteria ;
- tenders rejected and the reasons for their rejection by reference to:
  - (i) non-compliance with the minimum requirements set in the procurement documents;
  - (ii) not meeting the minimum quality levels;
  - (iii) tenders found to be abnormally low;
- names of the candidates and tenderers selected;
- tenders to be ranked with the scores obtained and their justification;
- name of the contractor proposed and reasons for this choice and, if known, the proportion of the (framework) contract that the contractor intends to subcontract;
- value of the contract or maximum value of the framework contract.

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<sup>17</sup> E.g. Council Regulation (EC) No 881/2002 of 27 May 2002, OJ L 139, 29.9.2002, p. 9, plus the amendments and updates thereto.

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

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

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

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

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

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

See the [model evaluation report](#).

## 4.8. Negotiation phase

In the case of procedures involving negotiation (competitive procedure with negotiation, negotiated procedures for middle and low value contracts, negotiated procedure without prior publication of a contract notice and innovation partnership), the contracting authority negotiates the proposed price(s) and/or the received technical tenders in order to improve their content to adapt them to the requirements set out in the procurement documents.

The negotiation may not modify the minimum requirements and the criteria specified in the procurement documents. A contrario, what is not defined as minimum requirements in the tender specifications may be negotiated. It is necessary to clearly announce these minimum requirements ex ante, in particular concerning contractual provisions (some may be open to negotiation, e.g. intellectual property rights), technical aspects, etc.

In practice, the negotiation consists in providing feedback to each tenderer on the evaluation of its initial tender, indicating elements not compliant with the minimum requirements and other aspects which should or could be improved. The tenderer may of course improve aspects not raised in the feedback when submitting a revised tender. The feedback should never contain elements of comparison with the other tenders.

There is no limit as to the number of rounds of negotiation. The effort and resources should be proportionate to the subject and value of the contract (sound financial management).

During the negotiation the contracting authority must ensure, that tenderers are treated equally. The contracting authority must not discriminate by supplying information that could be of more benefit to some tenderers than to others.

After receipt of the tenders, the contracting authority may arrange for the negotiated procedure to take place in stages in order to reduce the number of tenders to be negotiated, by applying the award criteria set out in the procurement documents. This consists in evaluating the received tenders (in a second round) and rejecting those below the pre-announced quality thresholds; tenders above thresholds are invited to negotiate further. The contract notice or the tender specifications must stipulate the use of this option.

The contracting authority must inform tenderers who are not in an exclusion situation, whose tender is compliant with the procurement documents and who make a request in writing, of the progress of negotiation. Such information should not prejudice the legitimate commercial interest of tenderers or distort fair competition between them.

The contract may be awarded on the basis of the initial tender without negotiation if this possibility was indicated in the procurement documents.

## 4.9. Award decision

After the evaluation has been completed and the evaluation report has been produced, the authorising officer responsible draws up the reasoned award decision (Art. 159(3) RAP).

The award decision must contain at least:

- an approval of the evaluation report (see [Chapter 4.7.7](#));
- the name of the chosen contractor and the reasons for that choice by reference to the pre-announced selection and award criteria, including where appropriate the reasons for not following the recommendation provided in the evaluation report;
- value of the contract or maximum value of the framework contract;
- circumstances justifying the use of a competitive procedure with negotiation, a negotiated procedure without prior publication of a contract notice or a competitive dialogue; in particular, the award decision must duly justify the use of the negotiated procedure for a contract that can be awarded only to a particular economic operator (Article 134(1)(b) RAP) (see [Chapter 3.8](#)), since the award of the contract may be challenged if the conditions are not fulfilled;<sup>18</sup>
- where appropriate, the reasons why the contracting authority has decided not to award the contract.

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

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

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

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

- for procedures for contracts of a value below the Directive thresholds where only one tender was received;
- when reopening of competition within a framework contract where no evaluation committee was nominated;
- for the following cases of negotiated procedures without prior publication of a contract notice where no evaluation committee was nominated:
  - extreme urgency (Article 134(1)(c) RAP)
  - repetition of similar services or works (Article. 134(1)(e) RAP).
  - additional supplies (Article 134(1)(f)(i) RAP)
  - supplies quoted and purchased on a commodity market (Article 134(1)(f)(iii) RAP).
  - legal services (Article. 134(1)(h) RAP).

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<sup>18</sup> See case Fastweb C-19/13:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d5d04849dfa8a34e969171e13b38db2c83.e34KaxiLc3eQc40LaxqMbN4ObN8Te0?text=&docid=157520&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=540588>

## 4.10. Cancellation of procedure

It may happen that the contract or framework contract is not awarded because no tenders or no admissible tenders (see [Chapter 4.7.4.2](#)) were received, or that the needs giving rise to the procurement become obsolete due to a change of political priority.

In this case the procedure must be cancelled. Cancellation of the procedure can take place up until signature of the contract (Art. 114 FR).

Candidates or tenderers must always be informed as soon as possible if it is decided, in the course of the procedure, to cancel it. Reasons must be given, and means of redress must be provided too. This is indicated in the [model notification letters](#).

If the procedure is cancelled after tenders or requests to participate have been received but before opening, it is good practice to send them back to the candidates or tenderers.

## 4.11. Notification of the outcome of the procedure

### 4.11.1. Information letter

The contracting authority must inform candidates and tenderers, simultaneously and individually, by electronic means of decisions reached concerning the outcome of the procedure as soon as possible at the following stages (Art. 113(2) FR and 161 RAP):

- after the opening phase for requests to participate received after the deadline for procedures in two steps;
- after the opening phase for tenders received after the deadline or received already open for procedures in one step;
- after the selection phase for candidates who failed to meet the exclusion and selection criteria for procedures in two steps;
- after the award decision for all procurement procedures and for the award of specific contracts with reopening of competition, specifying in each case the grounds for the decision. It is recommended to include the full reason motivating the decision (marks and comments per criterion, final score and ranking of the tender concerned exactly as written in the evaluation report) in order to avoid that the tenderer requests more details later on.

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

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

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

### 4.11.2. Standstill period

**The contract cannot be signed for 10 days**, counting from the day after simultaneous dispatch of the notification by electronic means to all tenderers (successful and unsuccessful). Only after the end of this "standstill period" may the authorising officer sign the contract. However if, due to technical reasons, the dispatch is made on paper, the standstill period is 15 days (Article 118(3) FR and 171 RAP). If the electronic communication fails, the contracting authority should re-send the notification immediately by post, in which case the 15 day period will apply.

The standstill period concerns all contracts as from the Directive thresholds. In the case of a negotiated procedure without prior publication of a contract notice for works, supplies or services provided only by a particular economic operator (Article 134(1)(b) RAP), the standstill period of 10 days is applicable and starts the day after the contract award notice is published in the OJ S. It is therefore important to take this period into account when scheduling the procurement procedure.

It is not necessary to wait for the standstill period before signing the contract in the case of:

- any procedure where only one tender has been submitted;
- specific contracts based on framework contracts (whatever the type of FWC);
- negotiated procedure without prior publication of a contract notice under Article 134(1) RAP (except 134(1)(b) – see above)

### 4.11.3. Means of redress

The notification sent to the rejected or unsuccessful candidates or tenderers must refer to the possibility of redress, with the type of redress, the body before which it can be brought, and the time limit (Art. 97 FR). Candidates or tenderers may lodge a complaint to the European Ombudsman for maladministration within two years of notification or bring an action for annulment of the decision under Article 263 TFEU before the European Court within two months of notification, as indicated in the [model notification letters](#).

Care must be taken not to generate legitimate expectations on the part of the successful tenderer. The letter of notification to the successful tenderer must always include a reference to the content of Article 114 FR to the effect that the contracting authority may, until such time as the contract has been signed, cancel the procurement procedure without the successful tenderer being entitled to any compensation.

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

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

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

## 4.12. Request for additional information

### Requests from tenderers

If the contract or framework contract is awarded, the unsuccessful tenderers who are not in an exclusion situation and whose tender is compliant with the procurement documents may request in writing information about the name of the winner and the **characteristics and relative advantages** of the winning tender (Art. 113(3) FR and 161(2) RAP). The contracting authority must provide this information **as soon as possible** and in any case within 15 days of receiving the request. The total price of the winning tender, breakdown of quality marks and comments as recorded in the evaluation report should be disclosed.

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

For framework contracts with reopening of competition, all tenderers can ask for the comparative advantages of the winning tenders, including the winners themselves. Indeed, a winner may want to dispute the award of the FWC to another winner, because if his claim is granted, there may be fewer contractors against which to compete for specific contracts.

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

### Requests from members of the public

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

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

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

For further information see the explanatory note on [access to information and documents related to tender procedures](#).



## 4.13. Signature of the contract

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

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

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

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

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

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

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

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

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

In the case of purchase orders for low value contracts and order forms under framework contracts, the authorising officer may sign first to speed up delivery. The contractor must sign before contract performance starts, for legal and operational reasons, i.e. to avoid being systematically in a non-compliance situation, receiving invoices while having no contract duly in place, and to ensure that the presumed contractor is indeed available and willing to implement the order form or purchase order as requested from the set starting date. For purchase orders for low value contracts, and order forms or specific contracts under framework contracts, at least an electronic advanced copy of the signed

contract should be received as soon as possible by e-mail. The original should be received back at the latest together with the invoice since it is the legal commitment which shall give rise to payment. In any event, the date of signature of the last contracting party is necessary. The date of signature of the first contracting party is purely informative and not opposable in law. If there are fewer dates than signatures, it is assumed that some parties signed simultaneously and the signature date is that of the last signing party.

### **Contracts in ABAC**

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

All contracts should be registered into ABAC Contract.

For further details, see [ABAC](#) on BudgWeb.

### **Impossibility of concluding a contract with the winning tenderer**

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

### **Entry into force**

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

### **Lots**

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

## 4.14. Ex-post publicity

### 4.14.1. Publication of an award notice in the Official Journal

Transparency obligations are laid down in Article 35 and 103 FR and 21 and 123 RAP.

#### Award notice

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

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

Only in the case of a negotiated procedure without contract notice for works, supplies or services provided only by a particular economic operator (Article 134(1)(b) RAP), the award notice must be published before the signature of the contract or framework contract because the publication is the start of the standstill period (see [Chapter 4.11.2](#)).

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

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

The award notice is to be used when the contract is awarded. In case of cancellation of the procedure, the corrigendum notice should be used instead.

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

#### Exceptions

- No award notice is to be published for specific contracts based on a framework contract of any type, whatever their value.
- Notices relating to contracts based on a dynamic purchasing system may be grouped on a quarterly basis. In this case, the award notice must be sent no later than thirty days after the end of each quarter.
- For buildings contracts (Article 134(1)(g) RAP) and contracts declared secret (Article 134(1)(i) RAP), a list of contracts awarded with an indication of the subject and value must be sent to the budgetary authority no later than 30 June of the following year. In the case of the Commission, it is annexed to the summary of the annual activity reports.
- No individual award notice is to be published for the following contracts as these are subject to the publication of an annual list on the contracting authority's internet site (see [Chapter 4.14.2](#)):
  - legal services under Article 134(1)(h) RAP;
  - financial services or instruments under Article 134(1)(j) and (k) RAP,
  - public communication networks and electronic communication services under Article 134(1)(l) RAP;
  - services provided by an international organisation under Article 134(1)(m) RAP.

#### Notice of modification of contract

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

#### 4.14.2. Publication on internet

The contracting authority must publish an annual list of contracts on its internet site for:

- Contracts below the Directive thresholds, except very-low value contracts;
- Modification of contracts (see [Chapter 5.7.3](#)) below the Directive thresholds;
- Specific contracts under a framework contract, whatever their value;
- Contracts resulting from an negotiated procedure without prior publication of a contract notice, whatever their value, for:
  - legal services under Article 134(1)(h) RAP;
  - financial services or instruments under Article 134(1)(j) and (k) RAP,
  - public communication networks and electronic communication services under Article 134(1)(l) RAP;
  - services provided by an international organisation under Article 134(1)(m) RAP.

The list must specify the name of the contractor, the subject and amount of the contract awarded. The information may be aggregated per contractor for specific contracts under the same framework contract.

The list must be published on the institution's Internet site by 30 June of the following year; for the Commission and executive agencies, if the subjects of the contracts are correctly encoded in ABAC workflow, this publication is done via the [Financial Transparency System](#).

For contracts up to €15 000, it is forbidden to publish ex-post in order to protect personal data as there are many natural persons as contractors below this amount<sup>19</sup>.

Above €15 000, if the published contractor is a natural person, the publication must be removed from the website two years after the year during which the contract was awarded, in order to protect personal data. This is automated in FTS.

For other cases, there are no rules regarding the period during which the data must be kept on the website. There would be no reason to delete the information published - at least as long as the computer storage capacity is sufficient and maintaining the publication does not involve practical or technical problems. However, if the information is deleted then there should be a way to provide it to anyone upon request.

##### **Exception:**

Publication of certain information on contract award may be withheld where its release would impede law enforcement, or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators or might prejudice fair competition between them. The total price of a direct contract or the maximum value of a framework contract does not fall under this exception.

#### 4.14.3. Annual Activity Report on negotiated procedure without prior publication of a contract notice

Each authorising officer by delegation must draw up a list of negotiated procedures under Articles 134(1)(a) to (f) (see [Chapter 3.8](#)) carried out during the previous financial year as laid down in Article 53 RAP.

If the proportion of negotiated procedures in relation to the number of contracts awarded by the same authorising officer by delegation increases appreciably over earlier years, or if this proportion is distinctly higher than the average throughout the Commission, the authorising officer concerned must report to the Commission whatever measures have been taken to reverse this trend.

The report on negotiated procedures is annexed to the summary of the annual activity reports referred to in Article 66(9) FR.

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<sup>19</sup> See case C-92/09 Volker und Markus Schecke GbR vs. Land Hessen.

The other Union institutions apply the same principles.

#### **4.15. Documentation of the procedure**

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

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

Supporting documents must be kept for at least five years following the discharge for the budget year in question. However, under the Commission's internal rules<sup>20</sup> documents relating to tender procedures or to the management of contracts have to be archived for at least ten years following signature of the contract or following the last payment by the Commission, respectively; as an exception, tenders and requests to participate from unsuccessful tenderers or candidates have to be kept only for at least five years following signature of the contract. After this minimum period has elapsed, the documents to be sent to the historical archives of the Commission for further conservation (e.g. for 25 years or permanently) will be selected. The remaining documents are to be destroyed.

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<sup>20</sup> Common Commission-level retention list for Commission files – first revision of 17/12/2012 [SEC\(2012\)713](#)

## Part 5. Contract management

### 5.1. Payment time limits and default interest

Making payments within the deadlines is an essential part of sound financial management. The central accounting system (ABAC) offers tools to keep track of payment deadlines.

The time limit allowed for payment, as defined in Articles 92 FR and 111 RAP, includes the time to analyse any report sent with the invoice, and the processing of the payment itself.

#### **NB: Deliverable vs. (progress) report**

The FR / RAP refer to "reports" submitted with invoices. This is to be understood either as "progress reports", i.e. a short report explaining what has been executed so far to justify payment, including problems encountered, delays, etc. or as deliverables, which are what is purchased in a service contract. Deliverables may take the form of reports (e.g. country report, a study, an evaluation, an audit report, etc.) but they are not per se progress reports.

When drafting the contract it must be clear what is to be submitted with an invoice, and interim payments should be linked to delivery of similar value to the invoice. The invoice must be submitted together with the final deliverables of the corresponding period, unless these have been delivered and approved beforehand.

The time limit for payment starts to run on the date when an invoice is received. The invoice should be registered in any IT system (ARES, ABAC, local system, depending on the departments) as soon as possible, and it is deemed received when it is registered.

The invoice is rejected where one of the following elements is missing: the contractor's identification, the amount, the currency or the date. In this case, the contractor must be informed as soon as possible of the rejection and the reason. If these four elements are present, and usually they are, the invoice must be registered. The time allowed for making payment is:

- 90 days for contracts which are particularly complex to evaluate and for which payment depends on the approval of a report;
- 60 days for contracts for which payment depends on the approval of a report;
- 30 days for payment without report.

The time limit for payment may be suspended if the amount is not due (e.g. clerical error), or necessary reports or other documents have not been submitted, or a report is rejected. The authorising officer must inform the contractor in writing of any suspension of the time limit for payment, stating the reasons for suspension. It is strongly recommended to set a deadline for submitting the supplementary information or documents requested in the contract terms. The time-limit for payment starts to run again once the corrected or missing documents are submitted.

If the time-limit for payment is exceeded the contractor is automatically entitled to interest for late payment. Only as an exception when the total does not exceed €200, interest is paid upon request by the contractor, submitted within two months of receiving late payment.

The default interest begins to accrue from the first day following the end of the contractual payment period. The end date of the period for calculating such interest is the date of payment by the contracting authority (the date on which the bank account of the contracting authority is debited).

The interest rate to be used equals the rate applied by the European Central Bank (ECB) to its main refinancing operations, as published in the Official Journal of the European Union (C series), plus a margin expressed in percentage points. This margin is:

- a) eight percentage points when the source of the debt is a public supply or service contract;
- b) three and a half percentage points in all other cases.

For more detailed information see the [interpretative note on payment time limits](#) and the [model letter of suspension](#).

## 5.2. Price revision

Contracts for transactions extending over several years can include price review clauses (*indexation clauses*) – an upward or downward adjustment of the contract price to bring it into line with the current value of the supplies, works or services covered by the contract.

Inclusion of the price revision clause is a decision taken by the authorising officer based on an assessment of the overall economic conditions for the contract. Without such a clause, the price is deemed to be fixed during the whole duration of the contract. Information about price revision has to be given in the draft contract as part of the tender documents.

If needed, a partial price review may also be introduced (e.g. different inflation in various sectors, contract implemented in several countries with various economic conditions).

The price can be reviewed from the beginning of the second year onwards for contracts with a duration of more than 12 months. The price is reviewed every year or every time the contract is renewed if so requested by one of the contracting parties no later than three full months before either the anniversary or the end of the contract.

Indexation is a mathematical operation based on indexes – the inflation measures published by statistical institutions. The following indexes are recommended:

- Monetary Union Index of Consumer Prices (MUICP) – euro area;
- European Consumer Price Index (ECPI) – all EU Member States.

Depending on the subject of the purchase, other indexes can be used which are more adapted to the real price evolution, e.g. salary indexes in Belgium for labour-intensive contracts like interim services.

The [model contracts](#) include optional price revision clauses.

For more detailed information see the [circular on price revision](#) .

### **5.3. Mid-term review and benchmarking**

The only situation where it is obligatory to introduce a price-checking method is for framework contracts without reopening of competition in a sector which is assessed by the contracting authority as subject to rapid price movements and technological change. In this case the clause on the mid-term price review or benchmarking system has to be included in the contract.

There is no legal definition of a sector subject to rapid price movements and technological change. This therefore has to be assessed by the contracting authority on the basis of previous experience and knowledge of the current situation in the sector.

It is the contracting authority's responsibility to draft clauses about the benchmarking system or mid-term review to be included in the contract, although some clauses for both are proposed in the [framework supply model contract](#).

First, the benchmarking clause places an obligation on the contractor to revise the financial offer regularly to keep the prices and technological quality of the goods delivered constantly in line with the market conditions. In this case the contracting authority has to monitor whether the contractor has revised the financial offer properly. The second clause proposes benchmarking conducted by an outside expert.

In the case of the mid-term review formula, the contracting authority includes in the contract the clause about the mid-term review and sets the time frame for reviews. If the review finds that the relation between the contract prices and the market prices is significantly worse or that the equipment offered is technologically obsolete, the contracting authority may no longer use the contract and shall terminate it.

### **5.4. Assignment of contracts**

In some cases, the contractor may request to assign the contract to another entity. This is subject to prior written approval of the contracting authority. The approval can be given after checking that the new entity has access to the market (see [Chapter 4.3.1.6](#)), is not in an exclusion situation, fulfils the selection criteria, and accepts the assignment of all rights and obligations without any change to contractual terms.

If the request is due to an acquisition or a merger, there is no assignment as such because it is a universal succession (which cannot be opposed by the contracting authority) and the contract is transferred to the new entity automatically. However, the documents proving such change must also be provided and verified, and the situation of the new contractor (exclusion, selection and access to the market) should also be verified. Once all this has been checked, the changes (name, bank account, contact details, etc.) are formalised by an amendment to the contract. If there is a problem (exclusion situation for instance), termination of the contract may be initiated instead of an amendment.

### **5.5. Factoring**

Factoring is a financial transaction in which the contractor sells its claims to a third party called a factor, so that it receives payment much earlier than the due date for payment (usually within 2 days). The factor collects payment from the contracting authority. There is no impact on the contract terms and the contracting authority cannot refuse this. The contractor will issue the invoice containing a mention that the invoice must be paid to the factor ("subrogation"). In practice, the Bank Account File of the factor needs to be registered in ABAC and it should be linked to the Legal Entity File of the contractor.



## 5.6. Management of guarantees

A guarantee is a form of financial security making a third party irrevocably liable to pay a sum of up to the limit of the guarantee at the first request by the contracting authority ("first-call guarantee). The guarantor's obligations are independent of the contractor's underlying contractual obligations. Consequently, any challenge against the validity or scope of the underlying obligation does not delay payment by the guarantor. Guarantees have to be lodged in euro (for details on the different types of guarantees see [Chapter 4.3.2.4](#)).

The guarantor can be either a bank or an approved financial organisation, i.e. one permitted by the competent national authorities. It may be replaced by a joint and several guarantee from another reliable third party. The authorising officer may refuse any guarantee considered unsatisfactory. Reasons must be given for any such decision.

In case of a group of economic operators, any member of the group may present a single guarantee for the whole requested value. Alternatively, several members of the group may present a number of guarantees summing up to the requested value.

Releasing or calling the guarantees:

(1) Tender guarantee:

- for tenderers who did not pass the exclusion or selection criteria or where tenders were rejected as abnormally low or for non-compliance or for quality below the minimum level: released together with the notification on the outcome of the procedure;
- for tenderers who submitted a ranked tender: released after signature of the contract.

The guarantee is called if the tender is withdrawn after the deadline for receipt.

- (2) Pre-financing guarantee: released when pre-financing is finally deducted from the interim or final payments. The guarantee may be called (fully or partially) if the contract is terminated and its performance so far does not correspond to the amount of pre-financing.
- (3) Performance guarantee: released after acceptance of the final deliverables, within a time limit to be specified in the contract (30, 60 or 90 days). The guarantee may be called (fully or partially) in case of non-compliance with substantial contractual obligations during contract performance.
- (4) Retention money guarantee: released after final approval of deliverables, i.e. within a time limit to be specified in the contract (30, 60 or 90 days) after the end of the contractual liability period. The guarantee may be called (fully or partially) in case of non-performance during the contractual liability period.

It is therefore important to set the expiry date of the guarantee properly, so that it covers the whole duration of the activity for which it is intended plus the time necessary if the guarantee is to be called.

The guarantees must be safely stored so that they can be easily located if needed and are protected against being lost, destroyed or stolen.

For further information see the [Circular on guarantees](#).

See also the models for [performance and retention money guarantee and the pre-financing guarantee](#).

## 5.7. Amendment or modification of the contract

During the term of a contract, there may be situations where the parties agree to modify one or several clauses of the contract. In general, an amendment does **not modify substantially the conditions of the initial procurement procedure**. Amendments bringing substantial modification to the contract require a new award decision based on a new procurement procedure. Therefore a **highly rigorous approach is required** when evaluating the necessity and legitimacy of amending the contract.

Amendments can be classified in three categories, depending on whether or not a procurement procedure or publication of an award notice is necessary.

### 5.7.1. Technical amendment

This concerns a minor change or a change which does not affect substantial aspects of the contract or the initial procurement procedure, or a change which is part of the economic life of the contractor. Technical amendments can take place for direct, framework or specific contracts.

These amendments have a legal basis in Article 114a(3) (d) FR:

*(d) where the minimum requirements of the initial procurement procedure are not altered; any ensuing modification of value shall comply with the conditions set under point (c), unless it results from the strict application of the procurement documents or contractual provisions.*

Point (c) refers to the double *de minimis* rule, i.e. the value of the amendment must be below Directive threshold and below 10% of the initial value of the contract (15% for works). In practice, most technical amendments do not entail a change in value of the contract.

Such technical amendments include:

- Change of the contractor's name;
- Modification of administrative details, i.e. change of the address or bank account number, provided that the holder of the account remains unchanged;
- Price revision in accordance with contractual provisions (documentation of the change of price, not modifying the text of the contract);
- Correction of clerical errors;
- Modification of the deadlines or in the frequency for submission of documents, such as reports or interim deliverables but without changing the deadline for performance of the contract which reflects the budgetary commitment conditions;
- Modification of place of delivery due to unforeseen circumstances and as long as this has no financial consequences for none of the contracting parties;
- Total or partial transfer of the contract. Transfer of the contract to a new entity is automatic (universal succession). If the following conditions are fulfilled, the transfer shall be formalised by an amendment to the contract. The amendment serves to confirm the transfer and to introduce administrative changes (name, bank account, etc.). It also confirms that the new entity takes over all the rights and obligations under the contract. If the conditions are not met, the contract should be terminated. The specific conditions are:
  - Evidence of the takeover by the new entity must be provided (takeover agreement, extract of register of companies), including all necessary documentation for the identification of the new entity.
  - The new entity must have access to the market (Articles 119 & 120 FR).
  - The new entity must be checked in relation to exclusion criteria.

- The new entity must be checked in relation to the selection criteria. The responsible authorising officer may use a balanced approach for selection criteria in relation to the progress of implementation (e.g. selection criteria only necessary for the start phase do not have to be fulfilled anymore at a later stage of the contract).
- The new entity must take over all the rights and obligations under the contract.
- The new entity must provide a new financial guarantee if there is one under the contract.
- Total or partial assignment of the contract. Assignment of the contract is similar to transfer but is subject to prior authorisation from the contracting authority, because it is not based on universal succession but on the will of the contractor. The conditions are partly the same as with transfers (access to the market, exclusion and selection criteria and guarantee). Additional questions to be asked are e.g.:
  - What is the reason for the assignment?
  - Is the assignee a subcontractor that was already executing a substantial part of the contract or a complete outsider?
  - Are the principles of fair competition, transparency and equal treatment being respected?
  - Should we launch a new procedure instead of agreeing with the assignment?

### **5.7.2. Amendment with procedure**

This concerns a substantial change to the contract which requires a negotiated procedure without prior publication of a contract notice before it can be enacted. Such amendment can be done on the following basis:

- Services or works consisting in the repetition of similar services or works provided these are in conformity with a basic project as per Article 134(1)(e) RAP. This can be used only within three years of the contract and only if the possibility to use this negotiated procedure was announced from the outset of the initial procedure; this legal basis is used to increase the ceiling of a framework contract;
- In case of supplies, for additional deliveries or as the extension of existing supplies or installations, where a change of supplier would oblige the contracting authority to acquire equipment having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance (Article 134(1)(f)(i) RAP).

The authorising officer takes an award decision and the outcome of this procedure is the amendment to the contract instead of a new contract. There is then publication of a contract award notice.

### **5.7.3. Modification of contract**

This is a change to the contract which does not require a procurement procedure but is subject to publication of an award notice or publication in internet. Such modification can be done during the term of the contract, for direct or specific contracts, on the following basis.

(a) for additional works, supplies or services by the original contractor that have become necessary and that were not included in the initial procurement where all the following conditions are met:

- (i) a change of contractor cannot be made for technical reasons linked to interchangeability or interoperability requirements with existing equipment, services or installations;
- (ii) a change of contractor would cause substantial duplication of costs for the contracting authority;
- (iii) any increase in price, including the net cumulative value of successive modifications, does not exceed 50 % of the initial contract value;

(b) where all of the following conditions are fulfilled:

(i) the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;

(ii) any increase in price does not exceed 50 % of the initial contract value;

(c) where the value of the modification is below both of the following values (also known as the 'double *de minimis* rule'):

(i) the Directive thresholds applicable at the time of the modification; and

(ii) 10 % of the initial contract value for service and supply contracts and works or services concession contracts and 15 % of the initial contract value for works contracts;

The net cumulative value of several successive modifications under point (c) cannot exceed the limits indicated in point (c).

Points (a) and (c) also apply to framework contracts.

In case of lots, there is one contract per lot, so the modification of the contract takes place per lot and is calculated by taking into account the amount (ceiling) of the relevant lot. If there is once contract covering several lots, the contract should include separate ceilings per lot and the same reasoning per lot applies. If the contract provides only one global ceiling and does not distinguish the lots, the modification applies to the contract as a whole.

The "initial contract value" does not take price revisions into account.

There is no need for a formal award decision as such modification of contract does not involve a procurement procedure. The modification should still be documented internally through a note to the file (no particular template is required). Whatever the form of document used, it must provide the legal basis and the justification for the modification in line with the conditions set in the relevant paragraph of Article 114a (3) FR.

The modifications in points (a) and (b) are subject to **publication of a notice for modification of contract on the Official Journal** as soon as the amendment is signed if the modification is above Directive threshold.

The modification in point (c), as well as modifications under points (a) and (b) with a value below Directive threshold are subject to **publication on Internet** by 30 June of the year following signature of the amendment.

#### **Examples:**

- A customised software contract which included initial user training has been in place for three years. The contracting authority decides to deploy this software to a new site linked to the current site. It can use point (a) to deploy the same software instead of buying a new one, because there are issues of interoperability with a new software, so both sites should be have new software and this would entail duplication of training costs.

**NB:** the obligation to have a procurement procedure does not count towards the "substantial duplication of costs". The limit in value (50% of successive modification) is meant to avoid a complete lock-in of the contract with no reopening of competition at all.

- A contracting authority constructs a tunnel. The ground is more unstable than initially envisaged. The contracting authority can use point (b) to do the extra works.

**NB:** this case is capped at 50% of the initial value each time it used as unforeseen circumstances can happen repeatedly during a contract, e.g. if the tunnel is then flooded, the same procedure would be used.

- A contract for a study of 1 MEUR including publication covers all Member States. For political reasons, data on Norway should also be included in the study. This modification is estimated at 50 000 EUR, which below Directive threshold and below 10% of the initial value (100 000 EUR). The contracting authority can use point (c) as a legal basis.

Later on, the contracting authority requests a larger publication, with one short annex per Member State (not originally included in the publication). This modification is estimated at 70 000 EUR. The cumulated value is still below Directive threshold but it is above 10% of the initial value (120 000 EUR instead of 100 000 EUR). So this modification cannot take place without a new procurement procedure.

- Due to an increase of needs, the ceiling of a framework contract must be increased. Depending on the size of the increase, the contracting authority may use either the 'double de minimis' rule (below Directive threshold and below 10% of the initial value of the framework contract - Art. 114a(3)(c) FR) or the negotiated procedure for 'repetition of similar services' under Art. 134(1)(e) RAP. The contracting authority may not use the modification of contract linked to additional services (Art. 114a(3)(a) FR) because the services to be repeated are not additional services (different than those initially included in the FWC) but similar services (same as those initially included in the FWC). The contracting authority may not use Art.114a(3)(b) FR on unforeseen circumstances which cannot be used for framework contracts.

#### 5.7.4. Procedure for amendment

An amendment can be requested by any party. It is concluded in writing only and must be signed by an authorising officer for the contracting authority and an authorised legal representative for the contractor. It enters into force after signature of the last party.

The changes brought by an amendment must be compatible with other contractual terms and the amendment must be compatible with the principles of transparency, equal treatment and fair competition. Provisions not concerned by the amendment remain unchanged.

An amendment must be signed while the contract is in force and cannot be retroactive. Therefore it cannot be signed after the parties have fulfilled all their contractual obligations (generally after final payment or after expiry in the case of a framework contract). An amendment signed after this period is not valid. An amendment about the conditions of performance of the contract must be signed in due time as well and in any case during the period of performance.

An amendment must always be financed on the same budget line as the source of financing of the initial contract (or the corresponding budget line). Amendments have to be implemented during the period of validity of the relevant budget line and within the limits of the budgetary authorisation.

Amendments can only modify the contract. Changes to internal data, such as the Final Date of Implementation (FDI) in ABAC, or the share of maximum ceiling between contracting authorities in an interinstitutional contract (in ABAC Contract) do not necessitate an amendment because they do not appear in the contract itself.

All amendments do not necessarily affect all contractors in the case of multiple framework contracts. Hence, in this case, the exchange is between the contracting authority and the contractor concerned, with registered mail and acknowledgement of receipt.

##### Extension of the duration of tasks of the contract

The change of duration of performance of the tasks (in a direct or specific contract) must take into account the principles of transparency, equality of treatment, and initial conditions of competition. In other words, in many cases, such duration should not be extended as this is a substantial aspect of the contract and changing it changes the initial conditions of the procedure, so this should remain exceptional and be justified.

Besides, the processing of the final invoice and the final payment (or the recovery procedure) are not part of the execution of tasks so the contract does not need to be extended if these are done after that period. It is however strongly recommended to include the period of approval of interim deliverables in the period of execution of the tasks, as the contractor will be awaiting feedback during this time and any delay caused by the contracting authority should not have a negative effect on the contractor.

##### Formalism

An amendment may take two forms:

- formal amendment** signed by both parties on the same document;
- exchange of letters** with signed acknowledgement of receipt.

Both types of amendments produce the same legal effects, only the procedure is different.

As there may be several amendments to one contract, it is also necessary to register and number the amendments in chronological order and to archive them. The responsible service should be able to produce the original contract and all its amendments at all times, for contract management, in case of audit or in case of litigation.

For the procedure, exchange of letters are lighter but they require more follow up in the document management and archiving since there are two (or more) documents per amendment and not a single one. For this reason, it is usually advised to proceed with formal amendments.

##### Procedure for formal amendments

1. Any party can request an amendment.

2. The contracting authority drafts the amendment (regardless of who initiates it, in order to ensure uniformity and consistency of the form of amendments), after having agreed on the changes with the contractor.
3. The contracting authority sends two originals to the contractor for signature.
4. The contractor signs both originals and sends them back to the contracting authority.
5. The contracting authority signs both originals and sends one back to the contractor.

**Procedure for amendment by exchange of letter**

1. The contractor sends to the contracting authority (or vice versa) a letter requesting amendment with clear reference to the contract and with a date of entry into force of the amendment.
2. The contracting authority (the authorising officer) sends a response by letter to the contractor to accept the amendment (or vice-versa if the contracting authority asks for the modification in step 1), bearing precise reference to the letter of request and describing the accepted terms of the modification.
3. These two letters together constitute an amendment by exchange of letters and are numbered and annexed to the contract.

It is vital that the party sending the answer letter under point 2 does it in such a way that the receipt of such letter can be proven. This is in fact the only element that, in case of conflict over the validity of the amendment, allows proving that the amendment was actually concluded. Hence, if the contracting authority is the sender under point 2, it shall make sure that its answer letter will involve an acknowledgement of receipt or equivalent.

A [model for contract amendment](#) is available on BudgWeb.

## 5.8. Possible reactions to problems connected with contractors or tenderers

### 5.8.1. General overview

Two different types of penalties can be used against the contractors:

- **Administrative sanctions** as provided for in Article 105a FR are not part of the contractual clauses, but stem from regulatory provisions.
- **Liquidated damages - Contractual penalties** - (“Dommages intérêts / Pénalités contractuelles”)<sup>21</sup>, provided for in the contract, are imposed in cases of late performance of tasks or failure to comply with other contractual obligations or deadlines.

### 5.8.2. Administrative sanctions based on regulations

The contracting authority may impose **regulatory**, as opposed to contractual, **administrative sanctions** on candidates, tenderers and contractors, namely:

- **decision of exclusion** from receiving Union funding for a certain duration (Articles 105a to 108 FR);
- **financial penalties**, as an alternative or in addition to a decision of exclusion depending on the cases (Article 106(13) FR).

Administrative sanctions can be imposed on economic operators who are in a specific situation of exclusion listed in Article 106(1) FR. This includes the case of a contractor declared to be in serious breach of obligations under an earlier contract with the European Union. This can take place only after a contradictory procedure.

Once a breach of contract has been established by the contracting authority, the file should be handled with due diligence. In particular, written records of all the breaches of contractual obligations should be kept. In case of dispute, they could be used as documentary evidence. Moreover, a written request to remedy the problem should be sent within a reasonable time.

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

### 5.8.3. Protective measures based on the contract

The model contracts provide for the following types of measure in case of problems with execution of the contract:

- **liquidated damages**: this clause should be adapted in the special conditions to the specific purchase, and can be used if the contractor fails to deliver according to the time-limit set out in the contract after a contradictory procedure;
- **reduction of payments** in proportion to the scale of the failure is possible where the contractor does not fully deliver as expected or delivers with lower quality than expected (partial payment); this necessitates a contradictory procedure;
- **termination of the contract** is possible, among other reasons, if the contractor is in breach of his contractual obligations; if three specific contracts are terminated for breach, then the framework contract can also be terminated.

In case of suspicion of fraud, it is possible to use the following measures:

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<sup>21</sup> To distinguish them from penalties based on the regulations, contractual penalties are referred to in the standard model contracts as “Dommages intérêts” in French and “liquidated damages” in English.



- **suspension of the contract** in order to verify if presumed substantial errors or fraud have really occurred;
- **termination of the contract** without justification with a short notice (in the special conditions). This article is specifically written for cases of suspicion of fraud where the image of the contracting authority could be damaged by continuing a contractual relation even though fraud has not been proven. It should not be used for any other situation. The article is balanced (the contractor can also terminate at short notice with no reason) as having a one-sided clause would be abusive.

The measures taken should be proportionate so that, in the event of a legal dispute, they might not be considered unjustified or too strict by the courts.

#### 5.8.4. Liquidated damages

Liquidated damages are compensation for the losses suffered by the contracting authority and are calculated from the day following the due date for delivery.

The formula for calculation of liquidated damages indicated in the model contracts may be replaced with a different one depending on the subject of the contract. It is generally recommended to check whether the formula provided really fits the needs of the purchase, or if it should be modified, e.g. to provide for a shorter time reference if timely delivery is key to the service delivered, as for press releases. For liquidated damages to be applied, it is necessary that the date of delivery be clear in the contract. A precise schedule of delivery will prevent dispute.

If so, the new clause should be inserted in the special conditions of the contract, and derogate to the general conditions. It can be a tailor-made clause on liquidated damages if violation of particular articles of the contract is expected and/or more specific conditions need to be established in this context, or a modification of the formula provided in the general conditions, or both. Depending on the specific case, it is up to the authorising officer to decide whether and how a specific clause on liquidated damages should be inserted, taking due care not to cumulate too quickly liquidated damages that would represent a disproportionate share of the global value of the contract, unless the service rendered or the supply provided has indeed become useless after the delay.

The decision imposing liquidated damages must describe the failure to comply with the deadline and refer to the contractual provision violated and to the provision on liquidated damages. The notification must be sent by registered letter with acknowledgement of receipt or equivalent.

The procedure for applying the liquidated damages provided for in the standard contracts stipulates a contradictory procedure which must always be respected. The formula used in the general conditions of the contract is very proportionate and should normally be acceptable to a judge.

Indeed, in some national legal systems liquidated damages can be cancelled or reduced by the courts, particularly in the case of unfair terms.

Under Belgian law, for example, a clause is considered unfair if the contractual penalty includes a deterrent or punitive element or if it threatens to impose a penalty in case of non-compliance and is not a simple estimate in advance of the loss likely to be suffered. The authorising department may increase the liquidated damages proposed by means of a special clause, but it must ensure that the amount is justified in relation to the contract concerned.

Depending on the contract and on applicable law, the contracting authority may also decide to provide for other contractual penalties to compensate the Commission for any damage which, according to its estimates, might occur if certain contractual obligations, such as the level of performance or the quality of the supplies or services are not met (see, in particular, the *service-level agreement* used in the field of IT). This possibility must be assessed case by case and, because of its specific nature, could not be included in the standard contracts.

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

[Model letters with means of redress](#) are available on Budgweb.

### **5.8.5. Reduction of payment**

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

Two main aspects must be taken into account:

- the expected quality level of the output must be very precisely defined in the tender specifications, otherwise the rejection of output for low quality will be challenged by the contractor, leading to long discussions and possibly no reduction of price;
- a breakdown of the price per output is helpful to estimate the reduction of price; this can be requested in addition to the global price in a financial tender and should strictly be linked to output (i.e. raw data for one country , first interim report covering X topics, etc.) and not to input (man-days, time to gather data).

## Part 6. Reference documents

### 6.1. Legislation

The Financial Regulation and the Rules of Application are available on Budgweb:

[https://myintracomm.ec.testa.eu/budgweb/EN/leg/finreg/Pages/leg-020\\_finreg2012.aspx](https://myintracomm.ec.testa.eu/budgweb/EN/leg/finreg/Pages/leg-020_finreg2012.aspx)

Directive 2014/24/EU for Annexes X (social and environmental conventions), XIII (legal acts used for life-cycle costing) and XIV (services subject to competitive procedure with negotiation):

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN>

### 6.2. Specific guidance

All specific guidance on procurement is available on BudgWeb:

<https://myintracomm.ec.testa.eu/budgweb/en/imp/procurement/pages/imp-specific-guidance.aspx>

### 6.3. Model documents

All model contracts and other model documents on procurement are available on BudgWeb:

[https://myintracomm.ec.testa.eu/budgweb/en/imp/procurement/pages/imp-080-030-010\\_contracts.aspx](https://myintracomm.ec.testa.eu/budgweb/en/imp/procurement/pages/imp-080-030-010_contracts.aspx)