EU PUBLIC SECTOR PROCUREMENT DIRECTIVE 2014/24/EU

GUIDELINE FOR AUDITORS

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The user is recommended to check periodically the websites mentioned in Appendix VII and, of course, to use the text of the most recent version of the Public Sector Directive 2014/24/EU.

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INTRODUCTION

The Treaty on the Functioning of the European Union (EU) provides for free movement of goods, freedom of establishment and freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency, all in order to implement an internal single market.

Public procurement has always accounted for a significant proportion of EU expenditure. In 2015, the 28 EU Member States spent around 2 015,3 billion euros, representing 13,7% of GDP, on government procurement of works, goods and services. In the same year, the estimate of total public procurement expenditure, excluding utilities and defence, represented 13,1% of the EU GDP, the highest value for the last 4 years[1], and the value of tenders published in the *Official Journal of the European Union* (TED supplement), excluding utilities and defence, amounted to 349,18 billion euros. According to the European Commission's estimation[2], every year, over 250 000 public authorities in the EU spend around 14% of GDP (2 000 billion euros) on the purchase of services, works and supplies.

Therefore, EU public procurement policy is a key instrument in establishing the single market and ensuring the efficient use of public funds, while increasing productivity in the supply industries and improving participation in and access to such markets by enterprises.

The EU has been adopting Public Procurement Directives to set out in law what Member States must do in exercising the public procurement function, to give effect to the principles of the Treaty and to implement the benefits of the internal market. These directives have been based on the ideas that transparent, fair and competitive public procurement across the EU's single market generates business opportunities, drives economic growth and increases employment. Improved governance, the simplification of procedures and the greater use of electronic tools in public procurement are also recognised as important tools for fighting fraud and corruption.

In 2014, a set of three new directives on public procurement were adopted with the view to ensuring that all the above principles are given practical effect and that open and fair competition is applied. Furthermore, they promote that Member States adopt appropriate measures to ensure compliance with social, environmental and labour law obligations established by EU law, national law, collective agreements or international obligations[3].

The provisions of the new Directives are consistent with the Europe 2020 strategy for: i) a smart growth, founded on an economy based on knowledge and innovation, ii) a sustainable growth, promoting a more resource efficient, greener and more competitive economy and iii) an inclusive

1 Source: European Comission, *Public Procurement Indicators 2015*, 19 December 2016. Up to now, there is no update available on these concrete indicators.

2 See https://ec.europa.eu/growth/single-market/public-procurement_en and COM(2017) 572, on 3.10.2017.

3 Article 18 (2) of Directive 2014/24/EU

growth, fostering a high employment economy delivering social and territorial cohesion[4].

In light of the above, the role of the Supreme Audit Institutions (SAIs) of the EU Member States regarding the audit of public procurement contracts is very important.

Revision of Directives

In 2014, the European Parliament adopted three directives that revise and update the public procurement law to be transposed into the national law of all Member States of the EU. This set, the "*fourth generation*" of public procurement directives, includes:

i) *Directive 2014/23/EU* of the European Parliament and of the Council, of 26 February 2014, on the award of concession contracts

ii) *Directive 2014/24/EU* of the European Parliament and of the Council, of 26 February 2014, on public procurement, repealing Directive 2004/18/EC as from 18 April 2016, and

iii) *Directive 2014/25/EU* of the European Parliament and of the Council, of 26 February 2014, on procurement by entities operating in the water, energy, transport and postal service sectors, repealing Directive 2014/17/EC as from 18 April 2016.

The stated objectives of these new directives are to increase the efficiency of public spending, to reinforce legal certainty and to integrate the case law that the Court of Justice of the European Union (CJEU) has produced about public procurement.

This guideline summarises the main features and provisions of Directive 2014/24/EU, as the basic public procurement directive, governing how public authorities should award public contracts of works, supplies and services.

For the first time, there is a separate directive (the 2014/23/EU) covering works and services concession contracts. Previously, directives did not cover service concessions, which were only subject to Treaty principles. Now, a specific directive for concessions sets out a common legislative framework for all concession contracts, which are based on the transfer of an operating risk to the concessionaire. Although principles of the EU rules are common for all contracts, there are differences comparing with the other two regulations that govern procurement award in the public sector and the utilities sector. A relatively light touch regime is applicable, including different thresholds, different requirements and design in procurement procedures and also differences in award criteria[5].

The utilities Directive 2014/25/EU covers entities operating in the water, energy, transport and postal services sectors. The directive also covers private entities operating under special or exclusive rights in the utilities sector. The utilities directive, when compared with the public sector one, provides more flexibility in tendering procedures, reflecting the more commercial remit of the entities covered. This flexibility is now enhanced, by clarifying what is meant by special or

4 COM(2010) 2020 final of 3 March 2010, 'Europe 2020— A strategy for smart, sustainable and inclusive growth'.
[5] See Appendix VIII

exclusive rights and by allowing Member States or utility bodies to apply for exemptions where there is sufficient competition in the sector.

Neither the public contracts directive nor the utilities directive apply to contracts in the field of defence and security, which either fall within the scope of Directive 2009/81/EC[6] or are excluded by it.

This guideline does not include guidance related to the concessions, utilities and defence or security contracts.

For additional guidance, the user is directed to the additional information provided in the appendices.

European Commission's activities regarding public procurement

The European Commission's involvement in the public procurement area is very broad and covers legislative as well as non-legislative actions. It is based on a public procurement strategy, which focuses on six strategic policy priorities:

- Ensuring wider uptake of innovative, green, and social procurement
- Professionalising public buyers
- Increasing access to procurement markets, notably by small and medium entreprises (SMEs)
- Improving transparency, integrity and data
- Boosting the digital transformation of procurement, and
- Cooperating to procure together.

DG Grow (Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs), is responsible for setting the legislative framework and providing related support, i.e. providing advice on how to transpose correctly the directives into national legislation. Currently, DG Grow is assisting Member States in improving the review of procurement decisions by promoting networking between first instance review bodies, and by providing special legal and technical assistance to Member States willing to create or strengthen specialised first instance administrative review bodies.

DG Grow, along with Member States, plan to improve the transparency and quality of national procurement systems by the establishment of contract registers covering the whole life cycle of contracts.

In October 2017, DG Grow announced an initiative with the aim of carrying out procurement more efficiently and in a sustainable manner, while making full use of digital technologies to simplify and accelerate procedures[7]. The initiative has four main strands focusing on:

- Encouraging the use of innovative, green, and social criteria and improving access by SMEs;

[6] See Appendix IX

[7] See http://ec.europa.eu/growth/content/increasing-impact-public-investment-through-efficient-and-professional-procurement-0_en

- Managing complex infrastructure projects by ex-ante evaluation by the Commission;
- Making procurement more professional, and
- Consultation on stimulating innovation through public procurement.

In order to assist Member States with addressing public procurement related issues, Directorates-General responsible for implementing the European Structural and Investment (ESI) funds (Regio, Empl, Agri, and Mare) included in partnership agreements specific conditions for public procurement systems that must have been fulfilled by Member States by the end of 2016 at the latest (so called ex-ante conditionality). The aim was to ensure that Member States' public procurement mechanisms are ready to absorb ESI funds.

Besides, under the Directorate-General for Employment, Social Affairs and Inclusion (DG Empl) management, the Member States were advised to use *Arachne* – an anti-corruption IT data mining tool, which can examine the public procurement side of EU-funded projects' management.

In 2014, DG Regio's' (Directorate-General for Regional Policy) directors endorsed an internal action plan for the public procurement area with 12 short, medium and long-term non-legislative measures. As of mid-2017, this action plan increased to 18 measures and all the shared management Directorates-General (Regio, Empl, Agri, and Mare) as well as DG Grow are cooperating in carrying out these measures. Almost one half of the action plan is already completed.

One of the actions was to produce and publish guidance on public procurement. This guidance was updated in 2018: *Public Procurement Guidance for Practioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds*, and is available on DG Regio web site.[8]

[8] http://ec.europa.eu/regional_policy/sources/docgener/guides/public_procurement/2018/guidance_public_procurement_2018_en.pdf

GENERAL ASPECTS

1. Main changes introduced by Directive 2014/24/EU

The changes introduced by Directive 2014/24/EU are intended to provide a more flexible approach than the existing one, allowing the public procurement processes to be faster, less costly, and more effective for business and procurers.

At the same time, they intend to facilitate the involvement of small and medium enterprises (SMEs) in public procurement, to promote integrity as a means to prevent of fraud and corruption and to enhance the role of public procurement as a tool for public policies, mainly in the social, environmental and labour areas.

The key changes, detailed in subsequent sections, refer to the following:

- **Use of public procurement as an instrument of wider public policies, notably in the social, environmental and labour areas,** for example, by requiring economic operators to comply with social and labour law obligations, by admitting that contracts are reserved for sheltered workshops or sheltered employment programmes, by allowing selection criteria related to environmental and labour requirements, by ruling the possibility of requiring certifications and labels, by explicitly admitting social and environmental criteria for the award phase or by allowing social and environmental performance conditions;

- **Facilitate the involvement of SMEs in public procurement,** for instance, by encouraging contracting authorities to divide contracts into lots to facilitate SMEs' participation, by limiting company turnover requirements and by establishing a central on-line point where suppliers can find out the type of documents and certificates which they may be asked to provide in any EU country (e-Certis);

- **Introduce simpler processes to assess bidders' credentials**, by promoting the use of supplier self-declarations, creating a European single procurement document and a European database for procurement documents, and by stating that only the winning bidders should have to submit various certificates and documents to prove their status;

- **Reinforce electronic procurement,** by ensuring electronic versions of the procurement documentation, by progressively implementing full electronic communication at all stages of procedure, by integrating data-based approaches at various stages of the procurement process, by simplifying rules on dynamic purchasing systems and by encouraging electronic catalogues;

- **Clarify the situations where public-public cooperation falls outside the scope of the procurement rules** (in-house contracting and inter-administrative cooperation);

- **Improve integrity and safeguards against corruption,** by requiring contracting authorities

to put in place appropriate safeguards against conflicts of interests, by including new provisions on grounds for exclusion of economic operators (which allow their exclusion for collusive practices or poor performance), by introducing time limits for the exclusion of suppliers and by stating that suppliers who have been excluded from public procurement for bad practices can be included again if they demonstrate that they acted to prevent misconduct and wrongdoing ("*self clean*");

- **Encourage market consultations,** by introducing a preliminary consultation mechanism for a better preparation of the procurement;

- **Allow more freedom to negotiate,** by creating a flexible competitive procedure with negotiation and by regulating the conditions for negotiations in several procedures such as the competitive dialogue and the innovation partnership;

- **Allow more scope for innovative ideas,** by introducing the "i*nnovation partnership*" procedure, where research for new products and services is encouraged;

- **Encourage central purchasing, framework agreements, dynamic purchase systems and joint procurement;**

- **Facilitate faster processes,**by reducing by about a third minimum time limits in which suppliers have to respond to advertised procurements and submit tender documents;

- **Introduce a new light-touch regime for social and health and some other services[9],** replacing the former distinction between priority and non-priority services**;**

- **Explicit inclusion of proportionality amongst the general principles of public procurement**, especially regarding the procedural and substantial requirements to the subject-matter of the contract[10];

- **Selection of suppliers based on their ability to perform the contract;**

- **Stronger focus on the quality of the performance through adopting a new concept for the most economically advantageous tender as the award criteria,** by using a cost-effectiveness approach, such as life-cycle costing, by including the best price-quality ratio to be assessed on the basis of factors that may include qualitative, environmental and/or social aspects and by clarifying the possibility of considering the relevant skills and experience of individuals where relevant;

- Contracting authorities will be able to **reserve the award of certain services contracts to mutuals/social enterprises for a time-limited period;**

- **Incorporation in rules of the case law of the Court of Justice of the European Union (CJEU)** (examples: concepts, *in house* providing, modifications to contracts);

[9] See Appendix III, for the list of services with a special regime
[10] See article 18

- **Extension of the scope of the procurement rules beyond the award and conclusion of a contract,** by including provisions to regulate the modification and termination of contracts;
- **New approach to allowed modifications to contracts,** by distinguishing substantial from non-substantial changes;
- **Possibility of imposing conditions to the performance of the contract;**
- **Need to appoint a national public body to oversee public procurement.**

2. Principles governing public procurement

EU Treaty principles include the free movement of goods, the freedom of establishment and the freedom to provide services.

In public procurement, the respect for these fundamental freedoms within the EU space and the EU single market implies that any potential tenderer should be able to access any procurement, that the whole market is opened up to competition and that impartiality of the procedures is ensured. The objective is, therefore, to prevent public contracts being directly awarded to local providers without any competition.

This means that public procurement should be governed by the principles of *competition*, *equal treatment* and *non-discrimination*. The principles of equal treatment and non-discrimination imply an obligation of *transparency* which consists in ensuring, for the benefit of any potential tenderer, a degree of *advertising* sufficient to enable the market to be opened up to competition.

These principles, and the adequate conducts to apply them, have been extensively studied and elaborated by the case law of the CJEU and by the guidance of the European Commission.

Equal treatment, non-discrimination and transparency are long recognised. The current directive mentions them and reinforces them, notably by including a specific provision concerning the principles of procurement. Article 18 mentions that "*contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner*".

One particular area of reinforcement concerns conflicts of interest. Article 24 demands that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures, thus avoiding the influence of financial, economic or other personal interests and reinforcing impartiality. For this purpose, the directive states that the concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority, who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure, have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

Other articles strengthen the transparency requirements, for instance concerning information disclosure.

Proportionality is now explicitly mentioned as a principle in public procurement. The importance of proportionality regards mainly the procedural and substantial requirements set up by contracting authorities. They are allowed to establish requirements for suppliers and for tenders, to define which documents are needed, to set up deadlines, to design selection and award criteria, etc. All these will only be acceptable if they concern the subject-matter of the contract and if they are proportionate. They must not be superfluous, they must make sense and they must not be excessive, imposing too much or unjustified burdens over economic operators. Otherwise, sound competition would be endangered.

The directive states that the design of the procurement shall not be made with the intention of artificially narrowing *competition*. According to article 18, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

But, for the first time, the directive also recognises the need to use public procurement to stimulate other public policies. To enhance development, it provides incentives towards cross-border public procurement and to the participation of SMEs in the public procurement market. To stimulate an environmental policy, it promotes the use of environmental specifications, requirements and criteria and it encourages the analysis of life cycle costing of products (which includes their elimination and recycling). To promote social and labour policies, it allows the protection of businesses employing vulnerable and less favoured people and demands that social and labour laws are complied with by bidders. The directive explicitly considers this as a principle, since article 18(2) prescribes that "*Member States shall take appropriate measures to ensure that in the performance of public contracts, economic operators comply with applicable obligations in the fields of environmental, social and labour law*".

3. Subject-matter and Scope of Directive 2014/24/EU

The directive is applicable to many but not to all public contracts.

Determining whether the directive applies to a specific contract has always been a key question. Directive 2014/24/EU refines the concepts that are relevant to solve it, in the face of the increasingly diverse forms of public action and CJEU case law. Articles 1 and 2 and recital of the directive include the relevant concepts and definitions and a significant number of clarifications to apply them. Similar provisions are included in the utilities directive. Sections 2, 3 and 4 of the directive set out the scope of the directive as regards thresholds and exclusions.

The most important criteria to determine whether the directive applies are:

Is there a public contract?

Procurement within the meaning of the directive is now expressly defined as "*the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose*"[11].

"*Public works contracts*" means public contracts having as their object primarily the execution or both the design and execution of works related to activities specified in Annex II of the Directive or of a work, meaning the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function. It also includes the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work.

"*Public supply contracts*" means public contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products. A public supply contract may include, as an incidental matter, siting and installation operations.

"*Public service contracts*" means public contracts having as their object the provision of services other than works. The previous distinction between categories of services (priority and non-priority services) has been abolished. Therefore, all above threshold service contracts are subject to the procurement rules with the exception of a new light-touch regime for health and social services as well as a limited number of other specified services, e.g. cultural services, listed in Annex XIV of the directive.

The directive is also applicable to design contests organised by contracting authorities.

Is the contract awarded by a contracting authority?

Even if the contract matches one of the types described, it will only fall within the scope of the directive if it is awarded by a contracting authority.

The notion of "*contracting authorities*" and in particular that of "*bodies governed by public law*" have been repeatedly examined in the case-law[12] of the CJEU.

For the purposes of the directive, "*contracting authorities*" means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law. This definition covers not only the executive authority of the state, but all state entities. The directive introduces the distinction between central government authorities and sub-central contracting authorities.

"*Bodies governed by public law*" means bodies that meet cumulatively the following three criteria:

i. They are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
ii. They have legal personality; and

[11] See article 1(2)
[12] See Appendices X and XI

iii. They are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

In this context, a body operating in normal market conditions, with the aim to make a profit and bearing the losses resulting from the exercise of its activity should not be considered as being a "*body governed by public law*". The needs this body should meet, even if they are of general interest, can be deemed to have an industrial or commercial character.

As regards criteria iii), payments from users, which are imposed, calculated and collected in accordance with rules of public law, should be considered as public funding.

In specific cases, the procurement of a contract may fall within the scope of the directive even if the contract is not awarded by a contracting authority. When some works and service contracts are subsidised by contracting authorities by more than 50%, the directive may apply, even if they do not themselves award the contract or if they award it for or on behalf of other entities[13].

Does the value of the contract meet the applicable threshold?

The directive only applies if the estimated value of the contract placed by a contracting authority reaches the financial thresholds explicitly mentioned in article 4 of the directive. These thresholds vary according to types of contracts and types of contracting authorities. Article 74 sets a specific threshold for contracts for social and other specific services.

The thresholds applying from 1 January 2018 to 31 December 2019 are set out in Appendix II.

The thresholds are revised by the Commission, under the terms of the directive, in order for them to stay aligned with the thresholds defined in the Agreement on Government Procurement (GPA), within the framework of the World Trade Organisation. The revision of the thresholds is made at two-yearly intervals and is published in the OJEU[14].

The Public Contracts Directive includes a binding commitment on the Commission to review the economic effects of the thresholds on the internal market, which is expected to be completed by 2019.

The calculation of the procurement's estimated value is made according to rules laid down in article 5 of the directive. The following is highlighted:

- The estimation is made at the moment at which the call for competition is sent or at which the contracting authority commences the procurement procedure (depending on cases);
- The estimation is net of value-added tax (VAT);
- Any form of option and any renewals thereof, as explicitly set out in the procurement

[13] See article 13. This provision applies only to specific cases as defined by the directive, such as civil enginnering works and works in some specific sectors

[14] See article 6

documents, shall be taken into account;

- The method used to estimate the value of a procurement should not be selected with the intention of excluding the procurement from the scope of the directive;
- The estimation can be based on a subdivision of the procurement only where justified by objective reasons;
- When a proposed work or service may result in contracts being awarded in the form of separate lots, account should be taken of the total estimated value of all such lots. Where the aggregate value of the lots is equal to or exceeds the threshold laid down in article 4, the directive shall apply to the awarding of each lot.

Contracts with no pecuniary interest[15] as well as non-economic services of general interest do not fall within the scope of the directive.

Does any exclusion apply to the concrete procurement?

Directive 2014/24/EU shall not apply to a large number of contracts specified in articles 7-17, among which, by way of illustration, contracts:

- In the water, energy, transport and postal services sectors
- Awarded pursuant to international rules
- Awarded on the basis of an exclusive right
- Between entities within the public sector
- Involving defence and security aspects

The public sector directive, as well as the utilities directive, include a number of new specific exclusions for service contracts, such as legal services, loans, civil defence, civil protection and danger protection services, public passenger transport services by rail or metro, political campaign services and specific research and development services.

4. Public contracts between entities within the public sector

One of the exclusions is explicitly established in law for the first time. It concerns contracts conducted between public sector entities. In this respect, article 12 codifies the CJEUs extensive case-law regarding "*in-house exemptions*"[16].

These exemptions constitute the Member States and their public authorities' right to perform the public service tasks conferred on them by using their own organisation and resources, which includes the possibility of cooperating with other public authorities.

However, it should be ensured that any exempted public/public cooperation does not result in a distortion of competition in relation to private economic operators in so far as it places a private provider of services in a position of advantage vis-à-vis its competitors. Thus, contracts between

[15] See article 1(6)

[16] See article 12 and the following CJEU cases: C-107/98, *Teckal*, C-480/06, *Commission v Germany,* C-26/03, *Stadt Halle,*C-231/03, *Coname*, C-458/03, *Parking Brixen*, C-340/04, *Carbotermo*, 22 C-295/05, *Asemfo v Tragsa,* C-573/2009, *Sea Srl*,, and C-324/07, *Coditel*

contracting authorities do not automatically fall outside the scope of the European public procurement law. Only two types of exemptions are allowed, as follows.

Institutionalised cooperation

The first type of exemption is referred to as "*institutionalised cooperation*" or "*quasi in-house exemption*". In this case the performer of a service is a legally separate entity, which is dependent on the relevant public authority or contracting authorities. Cooperation between contracting authorities based on the institutionalised exemption does not necessarily have to involve services derived from the public interest.

The "*institutionalised*" in-house procurement is regulated in detail in article 12(1)-(3). Three conditions for exemption are laid down, namely control, activity and ownership:

i. As far as the control exercised by the contracting authority over a legal person is concerned, the said control is defined as similar to that which the contracting authority exercises over its own departments (subparagraph a);
ii. With respect to the activity requirement, the controlled entity's activities must be performed at a percentage of 80% for the controlling contracting authority or for other legal persons controlled by the latter (subparagraph b);
iii. With regard to the third condition, any form of direct private capital participation in the controlled legal person is not permitted, with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, which do not exert decisive influence on the controlled legal person (subparagraph c). This means that indirect private capital is allowed.

Article 12(2) covers both "reverse vertical" and "horizontal" institutionalised cooperation, as exempted awards of public contracts. The first notion refers to a "bottom-up contract award", meaning that the controlled entity awards a contract to the controlling parent, while the second one refers to a contract awarded between two in-house entities controlled by the same parental entity.

Article 12(3) specifies that a contracting authority may award a public contract directly to an entity over which it exercises the control jointly with other contracting authorities, even if it cannot control the economic operator individually. It is accepted that joint control cannot be identical to the control a public authority exercises over its own departments but this control must at least be effective[17]. In the exercise of joint control the following conditions must be fulfilled:

i. The decision-making bodies of the controlled legal person should be composed of representatives of all participating contracting authorities;
ii. The contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and
iii. The controlled legal person is not allowed to pursue any interests which are contrary to those of the controlling contracting authorities (second subparagraph).

In the joint control situation "reverse vertical" and "horizontal" institutionalized cooperation are not provided for.

[17] See CJEU case C-324/07, *Coditel*, par. 46.

Non-institutionalised cooperation

The second type of exemption concerns "*non-institutionalised horizontal cooperation*" between contracting authorities based on a public interest task, which rests on all of these authorities. In these cases, also referred to as "*public/public*" cooperation, two or more contracting authorities, such as bodies governed by public law that may have private capital participation, may establish horizontal cooperation for the provision of a public task, without creating a jointly controlled in-house entity.

According to article 12(4), in order for the contract to be exempted from the directive, all of the following conditions must be fulfilled:

i. The contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that the public services they have to perform are provided with a view to achieving the objectives they have in common;
ii. The implementation of that cooperation is governed solely by considerations relating to the public interest; and
iii. The participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation.

Article 12(5) establishes the basic rules for calculating the above mentioned percentages of activities.

5. Contracts excluded from the scope of EU public procurement directives

According to the ruling of the public procurement directives, some contracts are not subject to them, for example because the type of contract is not covered or because their estimated value falls below the relevant threshold.

The CJEU case law states that the award of these contracts is, however, subject to a basic set of standards derived directly from the rules and principles of the Treaty[18]. EU Treaty-based or derived principles include equal treatment, non-discrimination, mutual recognition, proportionality and transparency. The application of these principles imply sufficient advertising, preventing public contracts from being directly awarded to local providers without any competition[19].

Nevertheless, the CJEU case law considers that these standards apply only to the award of contracts that have a sufficient connection with the functioning of the internal market. It is recognised that in some cases (e.g. such as a very modest economic interest at stake) a contract award would be of no interest to economic operators located in other Member States.

It is the responsibility of the individual contracting authorities to decide whether an intended contract award might potentially be of interest to economic operators located in other Member

[18] See CJEU cases C-324/98, *TeleAustria*, C-231/03, *Coname*, C-458/03, *Parking Brixen*, C-59/00, *Bent Mousten Vestergaard*, C-264/03, *Commission v. France* and C-234/03, *Contse*.
[19] See Appendix IV

States, based on an evaluation of the individual circumstances of the case (e.g. subject matter of the contract, estimated value, size and structure of market, geographic location of the place of performance). Where the authority considers that a contract is likely to attract cross-border interest, it is obliged to publish a sufficiently accessible advertisement to ensure that suppliers in other Member States can have access to appropriate information before the award.

According to the CJEU case law, the principles of equal treatment and non-discrimination imply an obligation of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the market to be opened up to competition. Contracting authorities are responsible for deciding the most appropriate medium for advertising their contracts. Their choice should be guided by an assessment of the relevance of the contract to the internal market. The greater the interest of the contract to potential bidders from other member states, the wider the coverage should be. Nevertheless, selective approaches and passive publicity are not considered as suitable.

6. Publications in the Official Journal of the European Union (OJEU)

As already mentioned, the principles of equal treatment and non-discrimination imply an obligation of transparency, which is strongly ensured by a sufficient degree of advertising. According to Annex XI, 30% of errors found in the tendering phase of public procurement processes related to non-compliances with publication and/or transparency requirements. These cases are mostly those where contracting authorities fail to publish all the required information.

Advertising the procurement

One of the obligations the directive imposes on contracting authorities is to advertise the procurement and its requirements in the OJEU.

Advertising is very important for public procurement because it facilitates competition, promotes transparency and helps in the battle against corruption.

Notices for contracts that are subject to the directive must be advertised, where applicable, in the Supplement to the OJEU, in accordance with the standard forms provided by the European Commission[20]. A free online version of the Supplement to the OJEU, called Tenders Electronic Daily (TED), is available.

Many EU Member States may also require advertising at national or local level. In such a case, this publication must not take place before the contract notice has been published in the OJEU, unless the contracting authorities have not been notified by the EU Publications Office of the publication in the OJEU within 48 hours of the confirmation of receipt of the notice[21]. Advertising at national level must not contain information other than that contained in the OJEU contract notice[22].

[20] Regulation (EC) No 2015/1986 of 11 November 2015, establishing standard forms for the publication of notices in the field of public procurement

[21] See article 52(1)

[22] See article 52(2)

Advertising is necessary:

i. Before the start of the formal procurement process[23], to avoid the awarded contract being considered ineffective[24];
ii. At the end of a contract-specific procurement process, within 30 days of the conclusion of a contract[25]; and
iii. On the modification of a contract during its term for additional necessary works, services or supplies where a change of contractor cannot be made and where the need for modification has been brought about by circumstances that a diligent contracting authority could not foresee (provided that the respective requisites are fulfilled)[26].

Prior information notices

According to article 48 of the directive, contracting authorities may make known their intentions of planned procurements through the publication of a prior information notice (PIN). Previously, they were encouraged to do so when their aggregated procurement exceeded certain thresholds. These thresholds are no longer applicable.

PINs allow contracting authorities to inform the market in advance of what they intend to buy in the future. They have three main functions:

- Contracting authorities can use them to check the market and find out what is available before launching a tender;
- They can be used to reduce the timescales of a subsequent public procurement procedure in case certain requirements are met;
- Sub-central contracting authorities can use them effectively as contract notices. In this case, a PIN may be used as a call for competition for the restricted or competitive procedure with negotiation. Additional information must be included in the PIN if used for this purpose.

A PIN shall be published either by the EU Publications Office or by the contracting authorities on their *buyer profiles*.

A contracting authority can keep the market informed of future potential procurement opportunities by setting up its own internet-based "*buyer profile*". The buyer profile includes general information about the contracting authority together with information about ongoing invitations to tender, scheduled purchases, contracts concluded, and procedures cancelled. In some cases, these buyer profiles may be used as an alternative to publication, mainly at national level.

7. Common Procurement Vocabulary

Common Procurement Vocabulary (CPV) is a hierarchically structured nomenclature, divided into divisions, groups, classes, categories and subcategories. It establishes a single classification system

[23] See article 49
[24] See Remedies Directives 89/665/EEC and 92/13/EEC
[25] See article 50
[26] See article 72(1)

for public procurement aimed at standardising the references used by contracting authorities and entities to describe procurement contracts.

The nomenclature was adopted by Regulation (EC) No 2195/2002 of the European Parliament and of the Council and amended by European Commission Regulation (EU) No. 213/2008, issued on 28 November 2007. It can be accessed on the http://simap.ted.europa.eu/ website and the appropriate code should be used for describing the subject of the contract when advertising in the OJEU[27].

As for May 2018, CPV is being revised (see https://ec.europa.eu/docsroom/documents/27821) and, so, the site of the European Commission should be consulted for information on the review process or for the up to date version of this nomenclature.

8. Tendering Procedures

To set in forth the principles of the Treaty, the directive imposes on contracting authorities the obligation to use procurement procedures that provide open and transparent competition.

Articles 25 to 32 describe how Members States should provide that contracting authorities choose the tendering procedures when awarding public contracts. As mentioned in Annex XI, the incorrect selection of the tendering procedure to follow accounts for 12,5% of errors found in public procurement processes.

The directive permits six tendering procedures, as described below. The open and the restricted procedures are still the basic procedures that may be used freely by contracting authorities without the requirement to satisfy conditions.

(i) Open procedure [28]

Under this procedure, any interested economic operator may submit a tender in response to a call for competition. Information on tenderers' capacity and expertise may be sought and, in this case, only the tenders of those deemed to meet minimum levels of technical and financial capacity and expertise are evaluated. If there are minimum requirements, it is important that they be made clear in the notice or the request for tenders to avoid unqualified bidders incurring the expense of preparing and submitting tenders.

(ii) Restricted procedure [29]

This is a two-stage process where only those parties who meet minimum requirements in regard to professional or technical capability, experience and expertise and financial capacity to carry out a project are invited to tender.

[27] See article 23
[28] See article 27
[29] See article 28

As a first step, the requirements of the contracting authority are set out through a contract notice in the OJEU and expressions of interest are invited from potential tenderers. The contract notice may indicate the relevant information to be submitted or the information may be sought via a detailed questionnaire to interested parties. The second step involves issuing the complete specifications and tender documents with an invitation to submit tenders only to those who possess the requisite level of professional, technical and financial expertise and capacity.

As a basis for pre-qualifying candidates, only the criteria relating to personal situation, financial capacity, technical capacity, relevant experience, expertise and competency of candidates set out in the Directive[30] are permissible. The CJEU and the EU Commission have ruled clearly on this.

Contracting authorities may opt to shortlist-qualified candidates if the contract notice indicates this intention and the number or range of candidates indicated. Shortlisting of candidates who meet the minimum qualification criteria must be carried out by non-discriminatory and transparent rules made known to candidates. The directive requires that a number sufficient to ensure adequate competition is invited to submit bids and indicate a minimum of five (provided there is at least this number who meet the qualification criteria)[31].

(iii) Competitive procedure with negotiation [32]

The competitive procedure with negotiation has been substantially amended by the new directive, in what regards conditions for its use, time limits for submission of requests to participate and tenders, content of procurement documents and scope and procedures for negotiation.

This procedure is also a two-stage procedure that starts with a call for competition.

A selection is firstly made of those candidates who respond to the advertisement. The selection is made on the basis of pre-qualification criteria (with the same described characteristics).

Secondly, only the selected candidates (at least three) are invited to submit a tender for the contract. The difference towards the restricted procedure is that, in this case, the tender presented by the candidate will be an initial one, since the contracting authority will then open negotiations with the tenderers to seek improved offers. In the procurement documents, contracting authorities must indicate a description of the needs and characteristics required, the minimum requirements to be met by all tenders and the contract award criteria. These are not subject to negotiations. Negotiation may take place in successive stages, with a possible reduction of the number of tenders. Pre-defined objective criteria and equal treatment are key during the whole process.

The 2014 directive allows contracting authorities more flexibility to choose a procurement procedure and, so, the limitations to use a competitive negotiation procedure are less strict than in the previous directive. However, this procedure should not be used for off-the-shelf services or supplies that can be provided by many different operators on the market. In fact, this procedure may be used for complex purchases relating to products or services that are not currently available in the

[30] See articles 56-58
[31] See articles 65 and 66
[32] See article 29

market. Adaptation and design efforts through negotiations will guarantee that the supply or service in question corresponds to the needs of the contracting authority. It could also be used where an open or restricted procedure resulted only in irregular or unacceptable tenders, in order to obtain regular and acceptable tenders through negotiation[33].

(iv) Competitive Dialogue [34]

The conditions under which this procedure may be adopted are the same conditions described for the competitive procedure with negotiation. Competitive dialogues is, however, mainly designed for those cases where the contracting authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions[35]. This procedure is applicable for complex contracts, such as for example public private partnerships (PPP's).

If follows the main steps of the restricted procedure and of the competitive procedure with negotiation: pre-qualification of candidates and invitation only to those selected. In this case, the selected ones will be invited to participate in a dialogue to develop solutions.

The dialogue can be developed in successive stages and follows the key principles of negotiations (equality of treatment and respect for the intellectual property rights of all candidates). It is specifically targeted at identifying and defining the means best suited to satisfying the needs of the contracting authority. This means that, during the dialogue, all aspects of the procurement may be discussed with the chosen participants and that the dialogue will continue until the contracting authority identifies the solution or solutions that are capable of meeting its needs.

Having declared that the dialogue is concluded and having so informed the remaining participants, the contracting authority shall ask each of them (at least three[36]) to present their final tenders on the basis of the solutions or solutions presented and specified during the dialogue. The provisions related to the conduct of competitive dialogue have been amended, in particular concerning the extent to which it is permitted to clarify final tenders; and the nature of negotiations that are permitted with the tenderer identified as having submitted the best tender. Aspects of tenders may be clarified or fine-tuned provided that there is no distortion of competition or discrimination against any tenderer. The tenders received will be assessed against the defined award criteria, necessarily based on the best price-quality ratio.

(v) Innovation partnership [37]

Innovation partnership is a new concept and a new procedure introduced by the 2014 directive to provide flexibility for the development of an innovative product, work or service not available on the market. The innovation partnership cannot be used if the product, work or service is already

[33] See article 26
[34] See article 30
[35] See article 26
[36] See article 65
[37] See article 31

available on the market.

An innovation partnership is implemented through a three-stage procurement process (prequalification, negotiation, delivery). The contracting authority buys both research and development services to develop an innovative solution and the resulting innovative products, services or works.

In the procurement phase, the innovation partnership is based on the steps and procedural rules that apply to the competitive procedure with negotiation. The contracting authority selects candidates, through a pre-qualification process (in this case, selection criteria should concern the candidate's capacity in the field of research and development and of developing and implementing innovative solutions). The negotiated approach is then used to invite suppliers to submit ideas to develop the innovative works, supplies or services. When satisfied with the best means of meeting its requirements, the contracting authority must specify them and invite at least three candidates to submit tenders. Equality of treatment and respect for the intellectual property rights of all candidates must be ensured during the whole process. Aspects of tenders may be clarified or fine-tuned, provided that there is no distortion of competition or discrimination against any tenderer. The contracts are awarded on the sole basis of the best price-quality ratio, which is most suitable for comparing tenders for innovative solutions.

Innovation partnerships are intended to be long-term partnerships that allow for both the development and subsequent purchase of new and innovative products, services or works. An innovation partnership combines in one process (i) the appointment of one or more innovation partners; (ii) parallel innovative development work where there is more than one innovation partner; (iii) the reduction of the number of partners during the process where there is more than one partner at the outset; and (iv) the option for a contracting authority to purchase the innovative supplies, services or works developed as a result of the innovation partnership.

The innovation partnership shall be structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works. The innovation partnership shall set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments.

(vi) Negotiated procedure without prior publication [38]

Through a negotiated procedure without prior publication of a contract notice, contracting authorities approach one or more suppliers, directly and without any advertising, seeking to negotiate the terms of the contract with them.

This procedure is a departure from the core principles, has detrimental effects on competition and is exceptional. Thus, it should only be used in the limited circumstances set out in article 32[39]. Contracting authorities must ensure that these precise circumstances exist before deciding on the

[38] See article 32
[39] See article 26(6)

use of this procedure and must justify the use of the exemption: they must provide reasons why there are no reasonable alternatives or substitutes, such as using alternative distribution channels, including those outside the respective Member State, or considering functionally comparable works, supplies and services. The CJEU and the EU Commission interpret definitions used in the described exemptions in a very strict way.

The main instances where this procedure may be used are:

- When an open or restricted procedure has not attracted suitable tenders (provided the specifications of the requirement are not altered substantially);
- When, for technical or artistic reasons or due to the existence of exclusive rights, there is only one possible supplier or service provider (provided that no reasonable alternative or substitute exists and that the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement);
- In cases of extreme urgency (provided that factors giving rise to urgency are unforeseeable and outside the control of the contracting authority);
- Where supplied products are manufactured purely for the purpose of research (provided that the supply does not include quantity production to establish commercial viability or to recover research and development costs);
- For additional deliveries by the original supplier, as a partial replacement or extension of existing supplies, under specified conditions;
- For supplies quoted and purchased on a commodity market;
- For the purchase of supplies on particularly advantageous terms, from either a supplier definitively winding up a business or the receiver or liquidator of a bankruptcy, an arrangement with creditors or similar legal or regulatory procedure;
- For public service contracts following a design contest;
- For works and services contracts repeating similar requirements (according to the indications of a basic project).

9. Procurement instruments

Central purchasing bodies

Contracting authorities may purchase through central purchasing bodies (CPBs)[40]. CPBs may act as a 'wholesaler' – supplying an authority on the basis of contracts it has itself awarded and/or provide contracting authorities with access to framework deals or dynamic purchasing systems it has established. Member States have the option of requiring certain kinds of procurement to be carried

[40] See article 37

out by using a central purchasing body or bodies. A new requirement establishes that all procurement conducted by CPBs is to be performed using electronic means.

A contracting authority is responsible, however, for fulfilling its own obligations with regard to the parts of those procedures that it conducts itself. The contracting authority is responsible when it:

- Awards a contract under a dynamic purchasing system;
- Re-opens a competition under a framework agreement;
- Determines which economic operator is to be awarded a contract under a framework agreement when competition is not re-opened.

The new directive includes more extensive provisions on central purchasing, differentiating central purchasing activities from "*ancillary purchasing activities*". Ancillary purchasing activities are activities that support purchasing activities, such as the provision of technical infrastructure, advice on the conduct or design of public procurement activities, and preparation and management of procurement processes. Contracting authorities may award contracts for carrying out these activities to a central purchasing body without having to apply the procedures provided in the directive.

Framework agreements

The directive provides for specific systems of procurement applicable to continuous purchases during a certain period. Through "*framework agreements*", the contracting authorities enter into arrangements with suppliers or service providers to supply goods or services under agreed conditions for a given period of time, usually no longer than four years[41]. This is a a tool that is recommended for established and repetitive needs when the contracting authority does not know in advance either the contract amount or exactly when their need will occur.

Frameworks may be agreed between one or more contracting authorities and one or more economic operators through competitive processes. The different cases will determine differences on the process to award contracts based in the framework agreements. Contracting authorities have to follow the rules of procedure for all phases up to that award.

The new directive introduces clarifications of the rules on frameworks relating mainly to transparency. Thus, contracting authorities must not use a framework unless clearly identified in the notice as permissible users and contracting authorities must be transparent about the methods of call off to be used. The directive confirms that a contract awarded under a framework may have a completion date after the end of the framework.

Dynamic purchasing systems[42]

A dynamic purchasing system is similar to a framework agreement in the fact that it is also an instrument for continuous purchases during a certain period, without the need to advertise in the OJEU each time the contracting authorities wish to award a contract under the system. The

[41] See article 33
[42] See article 34

differences are that this system is to be run as a completely electronic process and that new suppliers can join at any time.

The dynamic purchasing system is applicable for commonly used purchases generally available on the market.

In order to procure under a dynamic purchasing system, contracting authorities shall follow the rules of the restricted procedure, with the following specificities:

- The system will be valid for the indicated period;
- The system can be divided into categories of products, works or services objectively defined (the characteristics may include reference to the maximum allowable size of the subsequent specific contracts or to a specific geographic area in which subsequent specific contracts will be performed);
- All the candidates satisfying the selection criteria shall be admitted to the system (the number of candidates shall not be limited);
- The purchasing system shall be open throughout the period of validity to any economic operator that satisfies the selection criteria;
- Assessment of requests to participate is finalised within 10 working days following their receipt;
- The procurement documents indicate the nature and estimated quantity of the purchases envisaged;
- All communications shall only be made by electronic means;
- The procurement documents indicate how the system operates, the electronic equipment used and the technical connection arrangements and specifications;
- Unrestricted and full direct access is offered as long as the system is valid;
- Contracting authorities shall simultaneously invite all admitted participants to submit a tender for each specific procurement under the system;
- They shall award the contract on the basis of the award criteria set out in the contract notice for the dynamic purchasing system.

Joint procurement

Articles 38 and 39 of the directive allow two or more contracting authorities or contracting authorities from different Member States to agree to perform certain specific kinds of procurement jointly.

The provisions refer to allocation of responsibility between the participating contracting authorities, to the applicable national provisions and to the internal organisation of the procurement procedure. An agreement between the participating contracting authorities concerning these aspects may be needed.

Electronic procurement

The directive keeps the pace of allowing and encouraging the use of electronic purchasing techniques by contracting authorities.

Contracting authorities may decide that the award of a public contract is preceded by an ***electronic auction*** in open, restricted or competitive procedures with negotiation, as well as in framework agreements or in dynamic purchasing systems[43].

Electronic auctions are only applicable when the content of the procurement documents, in particular the technical specifications, can be established with precision. The auction is based on prices and/or new values of the features of tenders.

Electronic reverse auctions are those conducted electronically where the buyer indicates its requirements and suppliers progressively bid downwards. The most common objective is to drive prices down. The lowest bidder wins the right to supply. Since the evaluation is done electronically, it can only be done by means of an algorithm. Thus, only the elements suitable for automatic evaluation by electronic means, without any intervention or appreciation by the contracting authority, namely elements that are quantifiable so that they can be expressed in figures or percentages, may be the object of electronic auctions.

Before proceeding with an electronic auction, contracting authorities shall make a full initial evaluation of the tenders in accordance with the award criterion or criteria and with the weighting fixed for them. Then they will simultaneously invite bidders to submit new prices or new values by electronic means in successive phases, until the closing of the auction. The mathematical formula to be used in the electronic auction to determine the automatic re-rankings on the basis of the new prices and/or new values submitted must be included in the invitation.

On the other hand, the public contracts directive provides helpful confirmation that ***electronic catalogues*** can be used as a basis for tenders for contracts or frameworks. According to article 36, where the use of electronic means of communication is required, contracting authorities may require tenders to be presented in the format of an electronic catalogue or to include an electronic catalogue.

Electronic catalogues are a format for the presentation and organisation of information in a manner that is common to all the participating bidders and which lends itself to electronic treatment. Safeguards are established to ensure that:

- The catalogue that is transmitted in response to a given procurement procedure contains only products, works or services that the economic operators estimated - after an active examination - correspond to the requirements of the contracting authority;
- Where tenders have been generated by the contracting authority, the economic operator concerned is given the opportunity to verify that the tender does not contain any material errors and, in that case, is not bound by the generated tender;
- Contracting authorities avoid unjustified obstacles to economic operators' access to procurement procedures in which tenders are to be presented in the form of electronic catalogues.

[43] See article 35

10. Time limits for replies

The European directives on public procurement have always imposed minimum time limits for submission of expressions of interest and tenders, in order to ensure that economic operators from several Member States have enough time to be made aware of the existence of the procurement, to obtain and study the procurement documents and to be able to prepare a serious offer.

The current directive reduces the minimum time limits in almost all situations, with the aim of increasing flexibility and because, in the current electronic environment, the existing minimum time limits were unnecessarily long. In certain circumstances, these minimum time limits can be shortened further where the requirement is urgent or where sufficient information has already been provided by a prior information notice.

Minimum time limits are set down for different stages of the particular contract award procedure chosen. Contracting authorities are allowed to determine the time limits at those different stages according to their own needs, provided that they respect the defined minimum. When fixing the timescale for submitting requests to participate or tenders, contracting authorities should take account of the complexity of the contract and allow sufficient time for submitting the necessary information and preparing tenders.

The **main minimum time limits** are described in Appendix V [44].

These time limits are reckoned from the date of dispatching the notice to the OJEU or, where a prior information notice is used as a means of calling for competition, from the date the invitation to confirm interest is sent. In all cases, the times are specified in calendar days.

Time limits for the receipt of tenders shall be extended in the cases where[45]:

- A visit to the site or an on-the-spot inspection of the documents is needed;
- Necessary additional information is not provided on time;
- Significant changes are made to the procurement documents.

Sub-central contracting authorities (not covered by GPA) may agree on shorter time limits for the receipt of tenders in the restricted procedure and in the competitive procedure with negotiation[46]. In the absence of an agreement, the minimum time limit for the receipt of tenders is 10 days.

The contracting authority must substantiate matters of urgency, demonstrating that they have been caused by unforeseeable events outside the control of the contracting authority, that they derive from no delay or inaction on its part and that they render impracticable the normal time limits[47].

[44] See articles 27-31 and 47
[45] See article 47
[46] See articles 28(4) and 29(1)
[47] See articles 27, 28 and CJEU case law (e.g. cases 194/88, *R. Commission v. Italy*, C-24/91, *Commission v. Spain*, and C-394/02, *Commission v. Greece*)

CONDUCT OF THE PUBLIC PROCUREMENT PROCESS

11. Preparing the procurement

The European regulation regarding the preparation of the procurement and the content of the procurement documents is mainly targeted at safeguarding the principle of non-discrimination. The objective is to ensure all suppliers established in countries covered by the rules are treated on equal terms, avoiding obstacles to the single market and to the fundamental freedoms of the Treaty.

Favouring or disfavouring economic operators when identifying and describing the needs that the procurement aims at meeting or when designing the rules and criteria of the procurement would distort competition and equality among competitors. It would also be a factor of corruption in public procurement.

On the other hand, this design phase cannot neglect that, besides safeguarding equality for competitors, the procurement intends to meet public needs. The best definition and achievement of those often requires room for flexibility and for convenience concerns. Public procurement is also increasingly recognised as an instrument to implement public policies, such as promoting development and ensuring compliance to environmental, social and labour requirements.

Scope of the procurement

Methods for defining the procurement and estimating its value have long been influenced by the idea that they should not be used with the intention of excluding the procurement from the scope of the directive. This led to the principle that a procurement should not be subdivided with the effect of preventing it from falling within the scope of the directive, unless justified by objective reasons[48].

Nevertheless, the current generation of directives encourages contracting authorities to divide public contracts into lots so as to increase the participation of small and medium-sized enterprises in the public procurement market, with objectives of economic development.

Article 46 promotes that a contract should be divided into separate lots. This is done by allowing the contracting authorities to do so, determining the size and subject matter of such lots, and by demanding from them, when they do not do it, to provide an indication of the main reasons for their decision not to subdivide into lots (reasons to be included in the procurement documents and in the contract report). Members States are encouraged to make the use of lots obligatory.

[48] See article 5(3)

Other provisions permit contracting authorities to limit the number of lots for which a tenderer may bid and to combine the award of more than one lot. An optional provision allows a contracting authority to limit the number of lots that a tenderer can win.

However, this does not mean that the aggregation principle for the purposes of applying the directives is no longer valid. According to article 5(8), where a proposed provision of services results in contracts being awarded in the form of separate lots, account shall be taken of the total estimated value of all such lots. Where the aggregate value of those lots is equal or exceeds the threshold laid down in article 4, the directive shall apply to the awarding of each lot. Only specific situations and small value lots may be exempted from this principle, as stated in the following paragraphs of article 5.

Preliminary market consultations

The 2014 directive introduces new provisions that specifically permit the use of preliminary market consultations[49]. Contracting authorities may conduct preliminary market consultations "*with a view to preparing the procurement and informing economic operators of their procurement plans*". An example is included of the search for, or acceptance of, advice from independent experts, authorities or market participants. This process must not distort competition or violate principles of non-discrimination and transparency.

Prior involvement of candidates or tenderers

The directive introduces another new provision that reflects the case law of the CJEU[50]. According to this provision, contracting authorities must take appropriate measures to ensure that competition is not distorted by the participation of a candidate or tenderer having had prior involvement in advising the contracting authority or preparing the procedure. Article 41 includes examples of the sorts of measures that a contracting authority may take in this regard. However, the contracting authorities may only exclude candidates or tenderers on the grounds of prior involvement where there are no other means of ensuring equal treatment. If a contracting authority does decide to exclude on this basis, it must give the candidate or tenderer concerned the opportunity to prove that this prior involvement would not distort competition.

Technical specifications [51]

The technical specifications lay down the characteristics required of works, services or supplies. Those characteristics may also refer to the specific process or method of production or provision of the work, supply or service or to a specific process for another stage of its life cycle. The directive encourages the use of performance specifications.

[49] See article 40
[50] See article 41 and CJEU cases C-21/03 and C-34/03, *Fabricom*.
[51] See article 42

The requirements must be described avoiding brand names and other references, which would have the effect of favouring or eliminating particular providers, products or services.

The key changes in the provisions related to technical specifications, as introduced by the new directive, reflect the increasing emphasis on social and environmental considerations and on the development of CJEU case law on this issue[52].

The directive allows some scope for building into the specifications social/environmental issues (e.g. a requirement to conform to social or environmental labels), equality issues (e.g. access issues for the disabled), production processes and methods (e.g. environmentally friendly means of production or disposal of a product or production process in accordance with fair trade principles) and accessibility criteria.

The described requirements must be linked to the subject matter of the contract and be proportionate. A principle of equivalence applies: contracting authorities must accept products that satisfy the requirement by any appropriate means.

According to article 43, technical specifications may now refer to specific labels. A contracting authority may require a specific label, or part of a label, as proof that the works, supplies or services correspond to specific environmental, social or other characteristics. The requirement for a specific label may be included in the technical specifications, award criteria or contract performance conditions. Where a contracting authority does specify a particular label, it may only do so when a number of conditions are met. These conditions are set out in article 43(1) (a) to (e). The application of the principle of equivalence means that contracting authorities must accept equivalent labels and other appropriate means of proof.

12. Receipt, opening and clarification of tenders

The new directive does not regulate in detail the requirements for opening of the tenders. Requirements relating to tools and devices for the electronic receipt of tenders, requests for participation as well as plans and projects in design contests are dealt with in Annex IV of the directive. They must at least guarantee, through technical means and appropriate procedures that certain requirements are fulfilled as stated in the Annex IV, such as the exact time and date of the receipt of tenders. Paragraph 21 of Annex V-Part C establishes that in open procedures the date, time and place of the opening of tenders must be disclosed. All in all the procedure adopted should ensure that, in the case of any dispute, there is a clear and formal independently vouched report of the tenders received. Tenders received after the closing time for receipt of tenders should not be accepted.

According to article 56(3), where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may, unless otherwise provided by the national law implementing the directive, request the economic operators concerned to submit, supplement, clarify or complete the

[52]See CJEU case C-368/10, *Commission v. Netherlands*, concerning the use of fair trade and environmental requirements and labels.

relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.

13. Electronic communication

A major emphasis in the 2014 directive is placed on communication using electronic means. The initial presumption is that all communication and information exchange is conducted by using electronic means. The time limits in tender processes are calculated, in general, on the assumption that electronic means are used and, if that is not the case, those time limits should be prolonged[53].

The directive requires electronic submission of OJEU notices, full, unrestricted and free electronic availability of procurement documents at the time of notice publication, and electronic communication and information exchange for all communication, subject to specified exclusions. Full electronic communication (with some exceptions) will become mandatory for public contracts in established deadlines.

Procurement documents that should be available electronically are defined in article 2(13). They are "*any document produced or referred to by the contracting authority to describe or determine elements of the procurement or the procedure, including the contract notice, the prior information notice where it is used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents*".

Contracting authorities must ensure that the tools and devices used for electronic communication meet certain requirements set out in the directive. Article 22 provides that tools and devices used for electronic communication must be non-discriminatory, generally available and interoperable with technology in general use. In the event that contracting authorities do require the use of tools that are not generally available, they must then offer suitable alternative means of access.

Contracting authorities are required to ensure that in all communication, exchange and storage of information the integrity of data and the confidentiality of tenders and requests to participate are preserved.

Member States have the option of providing for the acceptance of electronic signatures. Article 22(6)(c) contains detailed provisions related to the use of electronic signatures.

Responses to requests for information or additional information, requested in good time, must be issued at least six days before the deadline fixed for the receipt of tenders. In order to avoid giving unfair advantage, additional information supplied to one party in response to a request should be supplied to all interested parties if it could be significant in the context of preparing a tender[54].

[53] See article 53
[54] See articles 47 and 53(2)

14. Selection of suppliers

Exclusion grounds

The directive describes a number of grounds for excluding economic operators from participating in a procurement procedure, based on evidence of their unsuitability. Reasons for exclusion may be mandatory or optional. Significant changes have been made to both the grounds for exclusion and to the approach that contracting authorities must adopt when excluding candidates or tenderers[55].

Mandatory grounds for exclusion of economic operators from procurement include:

- Criminal conviction for certain serious offences (participation in criminal organisations, corruption, fraud and money-laundering and, as added in the new directive, terrorism, terrorist financing, child labour and other forms of human trafficking);
- Failure to pay taxes or social security contributions, where the breach has been established by a judicial or administrative decision having final and binding effect.

Optional grounds for exclusion mean that the contracting authorities may exclude or may be required by Member States to exclude an economic operator from participating in a procurement. These grounds have been amended and expanded by the new directive and include:

- Breach of obligations related to the payment of taxes or social security contributions, where demonstrated by any appropriate means;
- Previous poor performance which has led to early termination, damages or other comparable sanctions;
- Non-compliance with environmental, social and labour law;
- Plausible indications of an agreement between economic operators aimed at distorting competition;
- Conflict of interest arising in the conduct of the procurement process, which cannot be remedied by measures that are less intrusive than exclusion;
- Distortion of competition due to prior involvement of economic operators in the preparation of the procurement procedure, which cannot be remedied by measures that are less intrusive than exclusion;
- Situations where the economic operator has sought to unduly influence the decision-making process, to obtain confidential information, or to negligently provide misleading information.

The 2014 directive incorporates a new principle of mitigation or "*self-cleaning*", which should benefit economic operators facing the prospect of exclusion from the tender process. Provisions on this respect now oblige contracting authorities to consider, on a case-by-case basis, evidence from tenderers that may justify a decision to not exclude them. Article 57(6) provides that an economic operator has the right to provide evidence demonstrating its reliability despite the existence of mandatory or optional grounds for exclusion. If such evidence is considered by the contracting authority to be sufficient, then the economic operator shall not be excluded. The article lists the types of evidence that may be sufficient to demonstrate the reliability required. Such provisions are

[55] See article 57

in line with the case law of the CJEU, which requires certain grounds for exclusion to be considered on a case-by-case basis and casts doubt on the legality of using automatic exclusion lists.

Member States may provide for a derogation from the mandatory grounds for exclusion, on an exceptional basis, "*for overriding reasons relating to the public interest such as public health or the protection of the environment*" or where an exclusion would be clearly disproportionate.

There are also statutory limits to the duration of any exclusion period.

Assessment of suppliers

The contracting authorities may set out selection criteria for economic operators as requirements for their participation in the procurement[56]. In this case and for this purpose, those suppliers not excluded will then be assessed on the basis of their economic and financial standing, suitability to pursue the professional activity and/or technical and professional ability.

The definition of the selection criteria is a key issue. As mentioned in Annex XI, almost a third of errors made in the tendering phase relate to contracting authorities setting up unlawful or discriminatory selection or award criteria.

Articles 58 to 64 describe the several possible selection criteria and the means of demonstrating they are fulfilled. The contracting authorities shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject- matter of the contract.

When bidders are requested to meet proportionate levels of financial soundness, the directive requires that where this is judged on the basis of turnover this should not normally exceed twice the value of the contract. This provision intends to avoid overly demanding requirements that could constitute an unjustified obstacle to the involvement of SMEs in public procurement. Contracting authorities should also be able to request information on the ratios, for instance, between assets and liabilities in the annual accounts. A positive ratio showing higher levels of assets than of liabilities could provide additional evidence that the financial capacity of economic operators is sufficient.

Suppliers may also be assessed on their technical capacity and ability, e.g. that they will be adequately equipped to do the job and that their track record is satisfactory. Environmental management criteria are also possible. Bidders can be asked to present related certificates.

Since many economic operators, and not least SMEs, find that a major obstacle to their participation in public procurement consists in administrative burdens deriving from the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria, the directive establishes the use of a *European Single Procurement Document* (ESPD)[57]. The ESPD consists of an updated self-declaration, as preliminary evidence in replacement of certificates issued

[56] See articles 56(1) (b) and 58
[57] See article 59

by public authorities or third parties confirming that the relevant economic operator fulfils the required conditions.

Contracting authorities are able to request all or part of the supporting documents at any moment (particularly in the case of two-stage procedures) and the tenderer winning the contract should be required to provide the relevant evidence.

The access to relevant databases and the use of documents from earlier procurement procedures are also envisaged. The European Commission provides and manages an electronic system, e-Certis, which is currently updated and verified on a voluntary basis by national authorities[58]. The aim of e-Certis is to facilitate the exchange of certificates and other documentary evidence frequently required by contracting authorities. So far, voluntary updating and verification is insufficient to ensure that e-Certis can deliver its full potential for simplifying and facilitating documentary exchanges for the benefit of SMEs in particular. Maintenance is rendered obligatory in a first step. Recourse to e-Certis will be made mandatory at a later stage.

15. Evaluation of tenders and award of contract

Award criteria

European directives impose that contracts are awarded on the basis of clear and objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous one.

As already mentioned, almost a third of errors made in the tendering phase relate to unlawful or discriminatory selection or award criteria. The most serious infringements found are those where contracting authorities set up those criteria in such a way that in effect the criteria hampered the competition leading to direct award "in disguise". Less serious are those cases where contracting authorities set up discriminatory or illegal criteria, but there was still sufficient competition maintained, or those criteria did not change the outcome of tender procedures.

The award criteria must follow some basic principles:

- They must be clearly defined beforehand;
- They must be self-explanatory and allow no room for unrestricted freedom of choice;
- They must be unbiased; and
- They must be linked to the subject matter of the contract

To ensure compliance with the principle of equal treatment in the award of contracts, contracting authorities have to create the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements that will be applied in the contract award decision. Thus, procurement documents must indicate the chosen criteria for awarding the contract and the

[58] See article 61

weighting of the respective factors[59]. In duly justified cases where the weighting cannot be established in advance, in particular because of the complexity of the contract, contracting authorities must indicate the criteria in decreasing order of importance. New or amended criteria must not be introduced in the course of the contract award procedure.

The previous directive provided that contracts were to be awarded by using one of two criteria, either (i) the most economically advantageous tender or (ii) the lowest priced tender. The 2014 directive changes the approach and places more emphasis on the combined evaluation of qualitative and quantitative criteria other than simply the price. Article 67(2) of the new directive states that "*contracting authorities shall base the award of public contracts on the most economically advantageous tender*", which is now the only criterion.

The concept of the most economically advantageous tender has also changed. Contracting authorities may use a "*price-quality ratio*" approach that is the equivalent of the "*most economically advantageous tender*" under the 2004 directive. But the concept has been enlarged and is now explained as follows: "*The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of price or cost, using a cost-effectiveness approach, such as life-cycle costing (...) and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects linked to the subject matter of the public contract in question (...).*"Article 67(2) provides examples of criteria that may be used.

The change is somewhat apparent since, according to this wording, it is still possible to use only price or only cost as the award criterion. In fact, contracting authorities are free to set adequate quality standards by using technical specifications or contract performance conditions instead of quality award criteria. However, under an article 67(2)'s optional provision, Member States have the option of stipulating that contracting authorities may *not* use price only or cost only as the sole award criterion, in order to encourage a greater quality orientation of public procurement.

The major changes are the requirement to use a "*cost-effectiveness approach*" in the evaluation of cost and the new requirements in article 68 concerning "*life-cycle costing*". Life-cycle costing is an example of a cost-effectiveness approach where costs over the lifecycle of a product, service or work are considered (costs of acquisition, use, maintenance and end of life collection and recycling as well as costs imputed to environmental externalities). This could encourage more sustainable and/or better value procurements which might save money over the long term despite appearing on initial examination to be more costly. Where contracting authorities use a life-cycle costing approach, they must include in the procurement documents information on the data to be provided by economic operators and on the method that the contracting authority will use to assess that data.

When assessing the best price-quality ratio, contracting authorities should determine the economic and qualitative criteria linked to the subject-matter of the contract that they will use for that purpose. Article 67(3) confirms that award criteria are to be considered as linked to the subject matter of the contract where they relate to any stage in the life cycle of the works, supplies or services to be procured. That life cycle may include specific processes of production, provision or trading. In the context of the best price-quality ratio, a non-exhaustive list of possible award criteria,

[59] See article 67(5)

which include environmental and social aspects, is set out in the directive. The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

The *Public Procurement Guidance for Practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds* includes useful guidance and examples of good and bad practice in defining award criteria and methods.

Abnormally low tenders

Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services. The explanations may relate, for instance, to the economics of the manufacturing process, the services provided, the construction method, the technical solutions chosen or any exceptionally favourable conditions available to the tenderer, the originality of the work, supplies or services proposed or the possibility of the tenderer obtaining State aid[60].

Under the 2004 directive, a contracting authority was under the obligation to investigate a tender that seemed to be abnormally low only if it had the intention of rejecting that tender. The 2014 directive requires a contracting authority to investigate all abnormally low tenders, irrespective of its intention to accept or reject such a tender.

The contracting authority shall assess the information provided by consulting the tenderer. It may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed. Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable environmental, social and labour law or agreements[61]. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer and where the latter is unable to prove that the aid in question was compatible with the internal market within the meaning of Article 107 TFEU.

Evaluation of tenders

The contracting authority must verify that the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents[62].

Tenders must be evaluated objectively and transparently solely against the published weighted criteria. Objectivity and transparency are best achieved by the use of a scoring system or marking

[60] See article 69
[61] See article 18(2)
[62] See articles 45 and 56

sheet based on the weighted criteria, indicating a comparative assessment of tenders under each criterion.

Under two-stage procedures, care should be taken to ensure that pre-qualification criteria are not used in the tender evaluation process. Tenderers will be deemed to have met the minimum requirements concerning their capacity to perform the contract. Tenders should be assessed solely on the basis of how they meet the award criteria.

Where contracting authorities exercise the option of reducing the number of tenders to be negotiated as provided for in Article 29(6) or of solutions to be discussed as provided for in Article 30(4), they shall do so by applying the award criteria stated in the procurement documents[63].

16. Disclosure of information

For transparency reasons and also to guarantee the rights of unsuccessful candidates and tenderers to react against unlawful decisions, certain information must be disclosed after the award of a contract.

Notifying tenderers and standstill period

According to article 55, on request from the candidate or tenderer concerned, the contracting authority shall as quickly as possible, and in any event within 15 days from receipt of a written request, inform:

(i) Any unsuccessful candidate, of the reasons for the rejection of its request to participate;

(ii) Any unsuccessful tenderer, of the reasons for the rejection of its tender, including the reasons for its decision that the works, supplies or services do not meet the technical specifications or the performance or functional requirements;

(iii) Any tenderer that has made an admissible tender, of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement,

(iv) Any tenderer that has made an admissible tender, of the conduct and progress of negotiations and dialogue with tenderers.

Contracting authorities may decide to withhold certain information, where the release of such information would impede law enforcement or would be contrary to the public interest, would prejudice the legitimate commercial interests of a particular economic operator, or might prejudice fair competition between economic operators.

After the award of a contract, the conclusion of a framework agreement or the admittance to a dynamic purchasing system, contracting authorities shall as soon as possible inform each candidate and tenderer of decisions reached. This notification includes the grounds for any decision not to conclude or to recommence the procedure[64].

[63] See article 66
[64] See article 55

To allow suppliers to seek effective review of contracting authorities' decisions, contracting authorities are required to include a 10/15 day standstill period between the point when the decision on the award of the contract is made and the signature of the contract. The standstill letter must provide certain information about the contracting authority's decision. There are detailed requirements for this process[65]. On January 2017, the European Commission published a report recognising that economic operators are using the remedies directives' mechanisms, such as this standstill period, to challenge deviations from public procurement rules.

Contract award notices and reports

Following the decision to award or conclude a contract or a framework agreement, contracting authorities shall send a contract award notice for publication in the OJEU on the results of the procurement procedure[66]. This contract award notice shall be sent no later than 30 days after the conclusion of the contract and shall contain the information set out in Annex V, part D, of the directive. Notices shall be published no later than five days after they are sent.

The new directive has shortened the timeframe to produce this notice.

Contracting authorities may group notices on contracts based on dynamic purchasing on a quarterly basis and Member States may require them to publish, on a quarterly basis, contract award notices relating to the award of contracts under framework agreements.

Certain information may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of a particular economic operator, public or private, or might prejudice fair competition between economic operators.

Contracting authorities must also draw up a written report for every contract or framework agreement and every time a dynamic purchasing system is established[67]. The content requirements of the report include, among other aspects, the subject matter and value, the substantiation of the choice of procedure, the results of qualitative selection, the reasons for rejection of tenders, identified conflicts of interests, the identification of the selected tender and the reasons for the selection. They must also keep documentation concerning all the decisions taken during the process.

The report, or its main elements, shall be communicated to the European Commission or the national monitoring authorities, bodies or structures where they so request[68].

Contracting authorities no longer have to submit detailed annual statistics on their procurement activities. The Commission will collect this information directly from the online system, thereby freeing up valuable time and resources for contracting authorities.

[65] See Remedies Directive 89/665/EEC, amended by Directive 2007/66/EC and CJEU cases C-81/98, Alcatel v. Austria 1 and 2.
[66] See articles 50 and 51
[67] See article 84
[68] See also article 83

17. Contract performance

Subcontracting

The provisions on subcontracting under the new directive are much more extensive than in the previous directives. As before, contracting authorities are allowed or required to request that a tenderer indicates any share of the contract that it intends to subcontract and any proposed subcontractors. But article 71 includes now other provisions related to subcontracting.

The main contractor is required to provide details of subcontractors, and changes in subcontractors, working at a facility under the direct oversight of the contracting authority. This requirement applies after the award of the contract and at the latest by the time the performance of the contract commences. Contracting authorities have discretion to extend these requirements, for example to subcontractors further down the subcontracting chain.

Compliance with obligations under environmental, social and labour law and other grounds for exclusion includes, where applicable, mechanisms of joint liability and verification that the relevant grounds for exclusion do not apply to subcontractors. It also concerns obligations on the main contractor to replace a subcontractor that is subject to other grounds for exclusion.

Member States may put into place measures permitting direct payment by the contracting authority to a subcontractor, with or without a request from the subcontractor.

It is unclear whether it is permissible under the directive for contracting authorities to require the subcontracting of a specific minimum or maximum share of a contract.

Modification of contracts during their term

The 2004 directive had very limited provisions concerning the modification of contracts during their term. Those provisions related to circumstances where the use of the negotiated procedure without prior publication of a contract notice was allowed. Article 72 of the current directive includes far more extensive provisions, some of which are linked to and expand upon CJEU case law.

This is a risk area that auditors should look into. As mentioned in Annex XI, 20% of errors found in public procurement processes relate to amendments to contracts. These include unjustified substantial modifications to contracts without a new procurement procedure.

In principle, a new procurement procedure is required in cases of material or substantial changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties. Such changes demonstrate the parties' intention to renegotiate essential terms or conditions

of that contract. This is particularly the case if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.

Modifications to contracts without the need to carry out a new procurement procedure are considered as acceptable as long as they comply with the relevant conditions laid down in the directive, which are briefly described below. They mainly relate to minor changes below defined thresholds, modifications already envisaged by review or options clauses, replacements or extension of existing services, supplies or installations, unforeseen external circumstances and internal reorganisation of undertakings.

However, most exceptions will not apply in cases where a modification results in an alteration of the nature of the overall procurement, for instance by replacing the works, supplies or services to be procured by something different or by fundamentally changing the type of procurement since, in such a situation, a hypothetical influence on the outcome may be assumed.

Under the 2014 directive, contracts or framework agreements may be modified without a new procurement procedure in six circumstances:

1. ***Where the modifications have been provided for in the initial procurement documents.***
   Review clauses must be clear, precise and unequivocal and they must state the scope and nature of possible modifications or options as well as the conditions under which they may be used. The clauses shall not provide for modifications or options that would alter the overall nature of the contract or the framework agreement and they can refer to price revision or options.

2. ***For additional necessary works, service or supplies where a change of contractor cannot be made*** for economic or technical reasons and would cause significant inconvenience or substantial duplication of costs for the contracting authority.
   Any increase in price shall not exceed 50% of the value of the original contract for each modification. Any consecutive modifications must not aim at circumventing the application of public procurement rules.

3. ***Where the need for modification has been brought about by circumstances that a diligent contracting authority could not foresee.***
   This modification is permitted where it does not alter the overall nature of the contract and the increase in price is not higher than 50% of the value of the original for each modification. Any consecutive modifications must not aim at circumventing the application of public procurement rules.

4. ***Where a new contractor replaces the one to which the contracting authority had initially awarded the contract*** as a consequence of either:
   (i) An unequivocal review clause or option;
   (ii)Universal or partial succession into the initial contractor following corporate restructuring e.g. takeover, merger;
   (iii) If the contracting authority assumes the contractors obligations towards its subcontractors.

5. ***Where the modifications, irrespective of their value, are not substantial***.

Substantial modifications are changes that make the contract materially different in character from the original contract. Article 72(4) includes a non-exhaustive list of modifications that will always be considered as substantial and will therefore require a new procurement procedure, such as:

(i) The modification introduces conditions which had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected, acceptance of a tender other than that originally selected or would have attracted additional participants in the procurement procedure;

(ii) The modification changes the economic balance of the contract in favour of the contractor in a manner that was not provided for in the initial contract;

(iii) The modification extends the scope of the contract considerably;

(iv) Where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under item above.

6. ***Low value modifications.***

Modifications representing values below 10% of the initial contract value for service and supply contracts or below 15% of the initial contract value for works contracts, all below the thresholds set out in Article 4, may be introduced even if they are considered as substantial. However, they cannot alter the overall nature of the contract. In this case, where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.

Termination of contracts

The 2014 directive includes new provisions covering circumstances where contracting authorities have the possibility of terminating a contract. These circumstances are described in article 73.

Member States should ensure that a contract may be terminated at least under the following circumstances and under the conditions determined by the applicable national law:

- Where it has been subject to a substantial modification that would have required a new procurement procedure;
- Where one of the mandatory grounds for exclusion listed in article 57(1) applied to the contractor at the time of the contract award, and
- Where the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the directive that has been declared by the CJEU.

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