



EUROPEAN COMMISSION

European Structural and Investment Funds

Public Procurement

Guidance for Practitioners **on the avoidance of common errors in ESI Funded** **projects**

DISCLAIMER:

"This is a working document prepared by the Commission services. On the basis of applicable EU law, it provides technical guidance for bodies involved in the monitoring, control or implementation of ESI Funds on how to interpret and apply EU rules in this area. The aim of this document is to provide Commission services' explanations of the said rules in order to facilitate programme implementation and to encourage good practice(s). This guidance is without prejudice to the interpretation of the Court of Justice and the General Court or decisions of the Commission."

This document contains guidance on how to avoid errors commonly seen in public procurement involving EU grant funds. Users are reminded that the text of the relevant Public Procurement Directives and their transposition into national legislation is the only authentic legal reference and that the information in this document does not constitute legal advice. The European Commission does not accept any liability with regard to the contents of this document.

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Glossary of acronyms

CA: Contracting Authority

CoI: Conflict of Interest

CPV: Common Procurement Vocabulary

ESIF: European Structural and Investment Funds

ITT: Invitation to Tender

MEAT: Most Economically Advantageous Tender

OJEU: Official Journal of the European Union

PQQ: Pre Qualification Questionnaire

VFM: Value for Money

WLC: Whole Life Costs

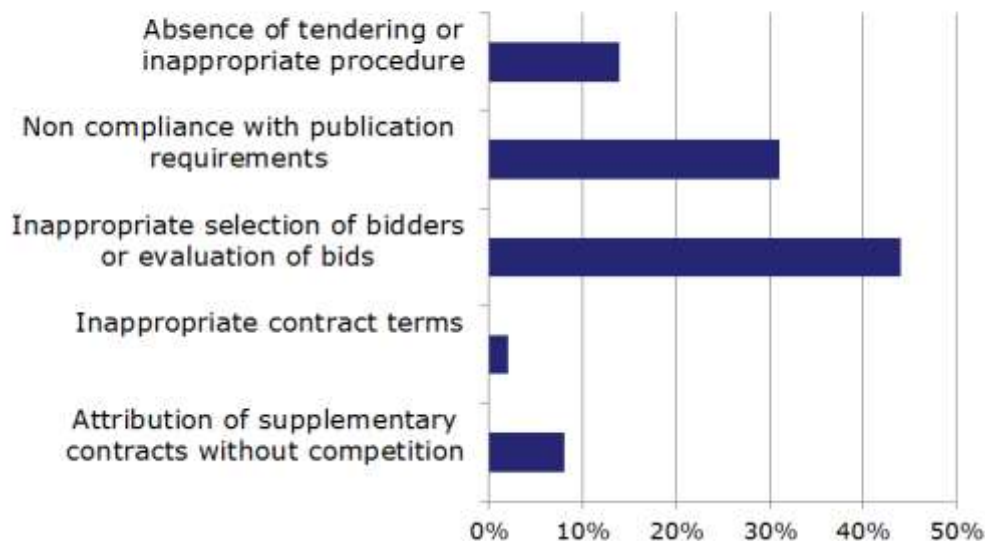
Ideas for an Infographic ...

Errors in public procurement ...

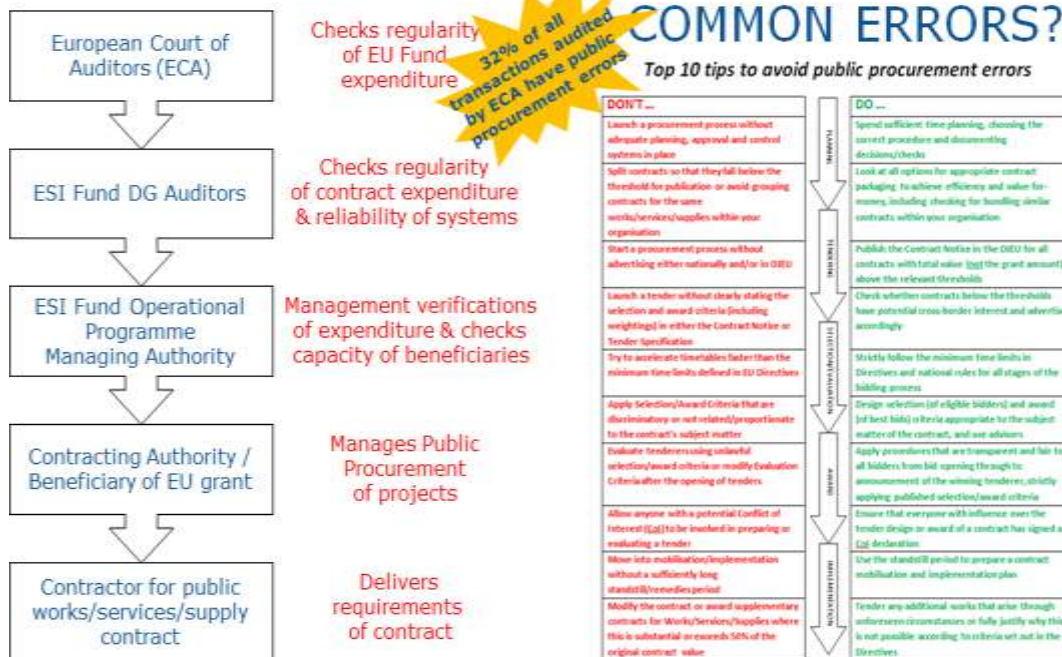
...and how to avoid them!

WHERE ARE MOST ERRORS DETECTED?

% of errors detected by ECA



WHO DOES WHAT? HOW TO AVOID THE MOST COMMON ERRORS?



Foreword

The purpose of this guidance is to help public procurement practitioners in contracting authorities in EU Member States avoid the most commonly seen errors when procuring works, services or supplies involving co-financing from European Structural and Investment (ESI) Funds. Errors in applying public procurement rules are the single largest source of irregularities detected by national and EU auditors when checking how EU grant funds have been spent. Depending on the seriousness of the error, this can lead to financial corrections¹ of up to 100% of the grant amount, potentially causing severe problems for public budgets.

The European Commission is committed to assisting Member States to achieve the sound management of ESIF, leading to reduced error rates, as well as through feedback and dissemination of guidance documents. The present guidance captures lessons from audits over many years examining how public procurement rules have been applied in practice. The guidance is designed to assist procurement practitioners at different levels of local and national public administrations or utilities running public tenders involving EU funds. It highlights where mistakes commonly occur and what can be done to avoid them, particularly the critical role of pre-procurement planning. The guidance should also be of assistance to ESI Fund Managing Authorities with front line responsibility for verifying that public procurement rules are complied with in all EU co-financed projects.

¹ The term "financial corrections" covers the actions taken by the Commission or by the Member State to exclude from co-financing EU budget expenditure which does not meet the conditions of funding because of irregularity. See the latest (19.12.2013) guidelines on public procurement errors and financial corrections here:

http://ec.europa.eu/regional_policy/sources/docoffic/cocof/2013/cocof_13_9527_en.pdf

How to use this guidance

Audience, Structure

This guidance is aimed at procurement officers within a “contracting authority”, i.e. the individual responsible for planning and delivering a compliant, efficient, value-for-money purchase of public works, supplies or services. Contracting Authorities may also find the Guidance useful when conducting management verifications on public procurements carried out by beneficiaries of EU grants, particularly the checklist in [Toolkit 11](#).

From a practical perspective, the procurement process is broken down into 6 stages:

1. Preparation and planning
2. Invitation to bid
3. Submission and selection of bids
4. Evaluation of bids
5. Awarding the contract
6. Contract implementation

This document has 2 parts:

- **Guidance** structured around the 6 stages of a public procurement process from planning through to closure, highlighting issues to look out for and potential mistakes to avoid, with links through to a more detailed Toolkit.
- **Toolkit** of resource documents addressing specific topics in greater depth and giving concrete good practice examples on what to do and what not to do during the procurement cycle.

The Guidance will take a Procurement Officer step-by-step through the process - including the all-important planning stage - highlighting along the way areas where mistakes are typically made and how to avoid them. Wherever additional resources are available, via the Toolkit or other useful documents available on the Internet, a hyperlink is provided.

At the end of the section covering each stage there is a list of the most common errors encountered, some examples of how they occur, and links to relevant Toolkits.

Explanation of symbols

Throughout the text of the Guidance, symbols flag critical areas:



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



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



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

Works, Supplies or Services?

There are three types of public contracts to which EU Directives 2004/18/EC and 2004/17/EC apply: works, supply and services. Public works contracts are public contracts having as their objective either the execution, or both the design and execution, of works as specified in Annex I of Directive 18/2004/EC. A 'work' means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function, such as a road or a sewage plant. Public supply contracts have as their object the purchase, lease, rental or hire with or without option to buy, of products, such as vehicles or computers. Public service contracts are public contracts other than public works or supply contracts having as their object the provision of services, such as consultancy and training.

The principles and steps that need to be followed for sound procurement are essentially the same for works, supplies and services. However, in addition to the differences in threshold values above which contracts have to be advertised in the Official Journal of the EU (OJEU), there can be implications for processes between the different types of contracts (works, supplies or services) - these are noted in the text where relevant.

Contract v Project Management

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

Compliance with internal rules and national legislation

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

It is, of course, imperative that any public official involved in the procurement process complies with his/her organisation's internal rules, any national legislation, as

well as the EU rules (both the Directives and the Treaty principles). This applies equally to contracts above and below the thresholds for OJEU publication.

The New Directives

The Guidance covers EU funded contracts for procurement of works, supply and services as set out in the current EU public procurement Directives (2004/18/EC and 2004/17/EC). The Directives, applicable thresholds and interpretative communications on specific topics (such as *Framework Contracts* and *Procurement below the thresholds*) can be found on EU website see [Toolkit 12](#)

New Public Procurement Directives² were adopted in April 2014 and, depending on the speed of transposition into national legislation, these new public procurement rules will come into force by April 2016 in all Member States. Procurement officers must always check that they are applying the correct version of the rules applicable in their country.

The new Directives aim to give greater clarity and simplify procedures compared to current rules. They also gradually introduce mandatory e-procurement and give greater flexibility for adopting procedures and criteria favourable to green procurement, procurement of innovation, greater involvement of small and medium sized enterprises and integration of social and ethical considerations, all of which support the EU Horizon 2020 policy agenda.

² The package of 3 new Directives cover public works ([Public Sector Directive 2014/24/EU](#)), concessions ([Concessions Directive 2014/23/EU](#)) and utilities ([Utilities Directive 2014/25/EU](#))

1. Preparation and planning

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

In general, a competitive tender process carried out in an open, objective and transparent manner should achieve best value for money in public procurement. This is in line with EC Treaty principles and the EC Directives on public procurement. Essential principles to be observed in conducting procurement for a public contract include: non-discrimination, equal treatment, transparency, mutual recognition, proportionality, freedom to provide service and freedom of establishment for potential tenderers from all EU Member States. The Directives impose legal obligations on public bodies in regard to advertising and the use of highly regulated tendering procedures for contracts above certain value thresholds.

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

Depending upon the size and complexity of the contract, this stage of the process might take months before the tender notice is due to be published. Good planning should minimise the risk of needing contract modifications or variations. The biggest (and potentially most costly) and most common errors on contracts result from inadequate planning.

The contracting authority must be able to demonstrate that the procurement was planned appropriately to deliver the required outputs following procedures that are in line with the relevant public procurement rules. The use of standard templates for communication with bidders and recording key decisions is considered good practice. This is the stage of the procurement process where extremely critical issues including scoping, packaging, selection and evaluation criteria, budget and contingencies, timetabling, and stakeholders should be considered. This should take place within a clear governance framework of organisational responsibilities so that there are checks and balances on critical decisions, with approvals at the appropriate level in the contracting authority.

✗ Planning is crucial. If the Contracting Authority gets this part of the process wrong then mistakes and problems will inevitably follow. Many errors can be traced back to inadequate planning.

1.1 Preliminary scoping

The following steps and questions should be considered from the outset.

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

 **Failure to recognise the need for involvement of (external) stakeholders is a common criticism of many contracts and this often has a negative impact on the contract's success, sometimes resulting in additional costs to rectify omissions or errors.**

However such important involvement and consultations should not jeopardise the independence of the contracting authority decision making process and/or create potential conflict of interests situations;

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

Options Appraisal: Has an Options Appraisal been carried out to look at different ways of meeting the identified needs? Consider, for example, whether to buy, lease, or rent whatever it is we intend to procure; should we use traditional procurement or a Public Private Partnership? Should we be looking for an innovative solution to our needs?

Budget and funding: Defining a realistic budget for a contract to achieve the desired results and then securing the funds to finance the contract is another critical activity. This should be based on a clear scope of requirements and up to date market price information. Depending upon the nature of the contract, an appropriate level of contingencies should be included. The budget and contingencies should be reviewed at critical stages throughout the life of the contract.

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

Affordability: Does the contracting authority have the budget for the contract as currently estimated? Affordability also relates to the fact that the contract costs may escalate to a point that they may exceed available budgets, which needs to be addressed through contingency plans. If future costs arising from a new or enhanced public service will be passed on to users, can they afford it?

Setting up benchmarks: In the case of abnormally low tenders, there is an obligation to ask the tenderer for an explanation of those parts of the tender found to be abnormal. The tender may, of course, be rejected if the explanations are not satisfactory. To assist this process it helps if a series of predetermined benchmarks have been set showing what would be considered as an acceptable offer (often referred to as a 'dummy bid'). This needs to be considered at the pre-procurement stage to ensure that the necessary data is collected.

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

Market sounding: When determining what to buy, estimating costs and before developing selection and award criteria in a procurement procedure, it is often helpful for purchasers to understand the market. Market sounding can provide information on the availability of products or services which meet the contracting authority's requirements, allowing the most appropriate procurement approach to be determined. A dialogue with the market before the procurement process begins can help identify innovative solutions or new products or services which the public authority may not have been aware of. It can also assist the market in meeting the criteria which will be applied in the procurement process, by providing information about the public authority's expected requirements. However, the market must be approached in a way that ensures respect for the principles of transparency and equal treatment, avoiding disclosure of privileged information and/or creating expectations among the potential suppliers. Pre-Commercial Procurement (PCP) and the Competitive Dialogue procedure introduced under Directive 2004/18/EC offer greater opportunities for public authorities to engage in market dialogue. One way of initiating a dialogue with the market is by publication of a Prior Information Notice (PIN) in the Official Journal of the EU (OJEU), in which the public authority outlines its requirements and describes the consultation process.

■ **Good practice shows that a dialogue with the market and other key stakeholders 6-12 months before Contract Notice publication can be extremely beneficial for developing a high quality Specification.**

Innovation: Could the contracting authority design the procurement in a way that attracts novel/innovative solutions? What may be innovative in a national sense may

be more commonplace internationally. Innovative Procurement that is comprises the Pre-commercial procurement (PCP) and Public Procurement of Innovative Solutions (PPI) is fully compatible with the EU policy agenda to promote innovation, and is indeed encouraged.

Pre-commercial procurement (PCP) means procurement of research and development services involving risk-benefit sharing under market conditions, and competitive development in phases, where there is a separation of the research and development phase from the deployment of commercial volumes of end-products. PCP as it is procurement of R&D services is excluded from the scope of the EU Procurement Directives. It has also to be highlighted that pursuant to new state aid rules PCP implementation according to the EC Communication COM (2007) 799, 14/12/2007 does not constitute state aid.

Public Procurement of Innovative solutions (PPI) is procurement where contracting authorities act as a launch customer for innovative goods or services which are not yet available on a large-scale commercial basis, and may include conformance testing. Public procurement of innovative solutions does not include the procurement of R&D and falls under the scope of the EU Procurement Directives.

✚ See the Digital Agenda of Europe (DAE) webpage on Innovation Procurement: [Toolkit 12](#)

✚ See the PPI platform website: [Toolkit 12](#)

Innovative Procurement can be used as tool to achieve goals that are set in the framework of the Thematic Objectives of the Operational Programs at regional level and are related to almost every domain of public interest. Moreover Horizon 2020 (H2020) foresees support through co-financing for the procurers that are interested in implementing Innovative Procurements to face concrete public challenges. In the current programming period synergies between the ESIF and H2020 on Innovation Procurement implementation are not only allowed but also encouraged. (For more info see p.91-98 of the Guide for policy makers and implementing bodies with the title "Enabling Synergies between European Structural and Investment Funds, Horizon 2020 and other research innovation and competitiveness related Union Programmes" that was published by DG Regional and Urban Policy.)

Contract packaging: A critical early decision is whether and how to combine or split contract package(s). On the one hand, combining the packages can lead to economies of scale and scope. On the other hand, excessive bundling of contracts with no obvious functional relationship and then setting very high financial selection criteria for bidders may reduce or eliminate market participation by smaller or more specialist contractors. Equally, artificial splitting of contracts to avoid OJEU publication is illegal. Decisions made about contract packaging need to be carefully

justified and may be examined during audits of the project. See more in [Toolkit 7 & 11](#) and paragraph 1.5

Frameworks: Framework contracts are used widely in certain EU countries. They can lead to substantial savings both in time, product cost and resources. If the intention is to set up a framework contract then the tender documents must as minimum reflect the terms for the contract period, products/service number of suppliers and method of ordering direct ordering/mini tender. Historical data on volumes is a crucial factor in all procurements but even more so in the setting up of framework contracts, where the more certainty a supplier can be given as to the expected volume of call offs (orders to the supplier) will thus be reflected in better priced bids.

See the DG MARKT explanatory note on Frameworks Agreements: See [Toolkit 12](#)

Timetable: A realistic timetable for the entire procurement process, through to contract award and then to implementation needs to be drawn-up during the planning stage. Over-optimistic timetables are common and cause errors in the further implementation phases for instance it often result in the failure of the procurement process or severe implementation problems, due to unrealistic bid preparation periods limiting the number of bids and affecting their quality.

Public procurement of works, supplies or services involving ESI grants often takes place in the context of a larger EU grant funded project that may be delivered through the co-ordination of several contracts, delays in one contract affecting implementation of the other contracts. The timing of grant approvals and payments may impact on budget approvals and the overall contracting process, which needs to be taken into account by the contracting authority. EU grants may also have implications for deadlines regarding eligibility of the contract expenditure and consequently its reimbursement. Being realistic rather than over-optimistic at this stage can avoid later problems.

1.2 Contract/Project Management

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

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

 **See [Toolkit 3](#) on use of Gateways**

Resources: Have adequate human resources been allocated to deliver the procurement? Are people with the right profile available to be on the Evaluation Committee from the Contracting Authority, as well as Project Management, Procurement, Legal, Finance, Technical, Audit and other skill sets? Who will take ultimate responsibility for key decisions and for allocating budgets? Has he/she been identified, briefed and accepted the role of contract/project owner? If the contract is complex or high cost/ risk consideration should be given to setting up a Steering Committee to oversee the contract. The Steering Committee would approve all key decisions and would typically comprise people not involved with the actual delivery of the contract.

Evaluation Committee: The Evaluation Committee should be established as soon as a decision has been taken to proceed with procurement and be established no later than the publication of the contract notice. The Committee needs to have a permanent core of Members. Procurement, financial and legal persons **MUST** be a permanent member. Technical staff will be members depending on the type of contract (each of whom has signed a Conflicts of Interest Declaration Form). Anyone with a potential conflict of interest should not have any role in the procurement. As a guide, it should comprise members experienced in each of the areas to be examined in the tender. It would normally be chaired by the contract/project manager and be subject to rules and procedures that will lead to a balanced judgement derived from the individual evaluations of its members and ensure confidentiality of the process. It is also possible to have representation from external organisations that are stakeholders in the outcome of the contract duly appointed by the contracting authority. Decisions should be based purely on the criteria published and be demonstrably free from political and any other influence. Politicians or any persons with organisational or financial links to each other or potential bidders **MUST NOT** sit in the committee. It is advisable that the work of the Evaluation Committee is adequately recorded (at least with the attendance list and the summary of the meeting deliberations / minutes).

✘ Discovery of an undeclared Conflict of Interest may put in doubt the impartiality of the procurement process and lead to financial corrections.

Integrity and Conflicts of Interest (CoI): A conflict of interest occurs when an individual or organisation has more than one interest in a contract, leading to a possibility of biased or corrupt activity or decision making. Examples include any financial or personal relationships between anyone involved in preparing tender documents or evaluating bids and/ or potential bidders. Systems, controls and training should be in place to make sure that all key actors capable of influencing decisions about the scope or award of a contract are aware of their responsibility to act impartially and with integrity, and should have signed a CoI declaration. At the start of the procurement process, the Evaluation Committee should be asked to declare any current or potential future conflicts of interest. Those declarations should be recorded and kept on the contract file. The new ESI Fund regulations (Article 125.4.c of the CPR) place an increased emphasis on having appropriate and proportionate anti-fraud and anti-corruption measures in place to avoid and identify such risks. The most powerful tool to fight fraud and corruption in public procurement is transparency and applying the principles of good governance, which each contracting authority should have in place.

✚ See **OECD principles on integrity in Public Procurement:** [link](#)

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

1.3 Developing the business case

Business Case: The business case needs to set down the justification for carrying out the contract and the benefits to be realised. The Evaluation Committee should arrange for the Business Case to be prepared within the department initiating the procurement request and approved by that department's Senior Management Team. In the case of very high risk procurement contracts the project owner might need to refer the Business Case to the Organisation's Corporate Management Team. For high value procurements, the Business Case should include a risk register.

✚ See **Toolkit 1 for a Business Case checklist.**

Contingency planning, risk management and escalation plans: What are the key risks and how will they be allocated? Can/should they be managed via the contract? What would be the impact of failure? As soon as possible after the Evaluation Committee is established,(see above requirements for members) the Committee should arrange for the Contract/Project Manager to carry out a risk assessment of the whole contract and establish appropriate contingency and escalation plans. The

Contract/Project Manager should ensure that a Contingency Plan is prepared during the early stages of the contract lifecycle and that the plan is approved by the Evaluation Committee and included in the Risk Register. The plan should set out the arrangements that need to be put in place should the project be aborted, not be completed on time or fail during the implementation stage; the responsibility for providing contingency funding, and the actions required to activate the plan. One area with important implications for potential irregularities during the implementation stage is to plan how any need for modifications to the contractual terms will be dealt with.

✚ See [Toolkit 2](#) on developing a Risk Register and Contingency Plan

1.4 Selecting the procedure

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

There are 3 options:

- **Open:** is a process where all providers interested in the contract and who have responded to an advertisement can submit tenders. All such tenders must be considered without any prior selection process. The selection and evaluation is carried out after the submission of the tenders.
- **Restricted:** is a two-stage process where only those providers who have been invited may submit tenders. The selection and shortlisting are usually carried out on the basis of a Pre-Qualification Questionnaire (PQQ). The Directive indicates that between 5 and 20 candidates should be shortlisted.
- **Negotiated/Competitive Dialogue:** where the organisation may, in certain circumstances, negotiate the terms of a contract with one or more suppliers of its choice. Ordinarily negotiation/dialogue should be with not less than 3 candidates provided that there are a sufficient number of candidates available. The candidates with which to hold a competitive dialogue may be selected through a restricted procedure.

The Open or Restricted Procedures are the usual methods of procurement for works, services or supplies of a routine nature. Of the two, the Restricted Procedure is generally used where there is a high degree of competition in the marketplace and where the Contracting Authority wishes to draw up a shortlist. As a first step, the requirements of the Contracting Authority are set out in a contract notice published (in the OJEU if above the relevant thresholds) and expressions of interest are invited from potential tenderers. The contract notice may indicate the relevant information to be submitted or the information may be sought via a detailed pre-qualification questionnaire (PQQ) sent to interested parties. The second step involves issuing the tender documents with an invitation to tender (ITT) being sent only to those pre-selected as having the requisite level of professional, technical and financial expertise and capacity.

The advantages and disadvantages of the Open and Restricted procedures are summarised in the Table below.

PROCEDURE	PROS	CONS
OPEN	<ul style="list-style-type: none"> • highly competitive due to the unlimited amount of bids; • all documentation from bidders received at the same time for evaluation; • both selection criteria and award criteria indicated in advance in the contract notice (or ITT); • the rapidity of the procedure itself; • complaints seeking remedies are less likely, since the actions and decisions of the Contracting Authority are related only to a 'one-process' procedure. 	<ul style="list-style-type: none"> • the process can seem to take a long time due to the possibility of a huge quantity of responses, all to be examined by the Contracting Authority. This would result in slowing the awarding procedure, possibility of mistakes while evaluating documents as well as possible risks of fraud. • resource intensive for the Contracting Authority, • possibility of mistakes in pricing- more often than not these contracts are for a large amount of products which is resource intensive for suppliers and can lead to mistakes (which cannot be corrected)
RESTRICTED	<ul style="list-style-type: none"> • limited number of tenders to evaluate, and therefore less resource intensive for the evaluation panel / contracting authority; • possibility to restrict participation only to market operators with high level of specialization;(inthe case of complex contracts for which preparing a bid involves significant costs, limiting the number of tenderers through pre-qualification can make the tender more attractive, as the chance to win the bid is higher for pre-qualified tenderers than in an open procedure.) 	<ul style="list-style-type: none"> • less competition due to the limited number of tenderers; (risk of collusion amongst bidders) • more possibilities for complaints seeking remedies since the actions and decisions of the contracting authority are related to a two-process procedure.

The Negotiated Procedure can only be used only in exceptional circumstances set out in the 2004/17/EC and 2004/18/EC Directives. In all cases use of the procedure must be properly justified.

The contracting authority MUST be aware that the principles of fairness, non-discrimination and transparency should in any case be respected. In particular, particular attention should be given to the equal treatment of bidders.

There are two types of negotiated procedure:

- 1) Article 30 (2004/18/EC) Contracting authorities advertise and negotiate the terms of the contract. This process should normally involve the submission of formal tenders by at least three candidates (pre-qualified on the same basis as for the restricted procedure described above, provided there are at least this number who meet the minimum qualification criteria) with negotiation on final terms in a competitive process. This procedure may be used:
 - where the nature of the requirement does not permit overall pricing;
 - where it is not possible to specify requirements for a service with sufficient precision to enable tenderers to respond with priced tenders;
 - works which are performed solely for purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs.

where an open, restricted or competitive dialogue procedure has not attracted acceptable tenders. (Irregular tenders such as not conform to the specification when the tender price is not fixed under normal competitive conditions, or when the tender include clauses unconscionable. Unacceptable tender is tenders submitted late, tenders from tenderers who do not have requisite qualifications or whose price is either too high in relation the contracting authority budget or abnormally low.)

Contracting authorities need not publish a contract notice where they include in the negotiated procedure all of, and only, the tenderers which satisfy the criteria of Articles 45 to 52 and which, during the prior open or restricted procedure or competitive dialogue, have submitted tenders in accordance with the formal requirements of the tendering procedure
- 2) Article 31 (2004/18/EC) Contracting authorities negotiate, without advertising, the terms of the contract directly with one or more parties. This is a departure from the core principles of openness, transparency and competition and is a very exceptional procedure. The main instances where this procedure may be used are:
 - in cases of extreme urgency;
 - when, for technical or artistic reasons or due to the existence of special or exclusive rights, there is only one possible supplier or service provider;
 - when an open or restricted procedure has not attracted appropriate tenders – unsuitable tenders - (provided all those who submitted tenders are included in the negotiations and the specifications of the requirement are not altered substantially); By unsuitable tenders means tenders that can be equated with a lack of tenders because the tender has no relevance to the contracting authority's procurement requirement and thus totally

unsuitable to meet the contracting authority purpose, as described in the tender documents.

- extension of existing contracts and repeat contracts subject to certain conditions;
- 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.

Contracting authorities should ensure that the precise circumstances justifying negotiation, as set out in the Directive, exist before deciding on the use of this procedure. It is vital that any proposal to use the Negotiated Procedure is justified by detailed reference to the Directive and augmented by legal advice (with a written record to that effect). Note that definitions of 'exceptions' and 'urgency' are strictly interpreted by the Commission and the Courts. Factors giving rise to urgency must be unforeseeable and outside the control of the Contracting Authority.

The **Competitive Dialogue** procedure is aimed at providing a certain amount of flexibility during the procurement of "particularly complex" projects, which can occur (Article 1.11.c) where the Contracting Authority is not objectively able to:

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

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

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

1.5 Thresholds and advertising

Whether and how to advertise is another key strategic decision. The test of whether a procurement is subject to the EU public procurement regime (and hence requires EU level publicity and tender procedures) is a monetary value one. If the value of the contract is above a certain threshold (which is amended every two years) then Directive 2004/18/EC must be followed. The thresholds for supplies and services are much lower than for works contracts. Applicable thresholds differ between central government contracts and all other entities (municipalities etc).

The latest values for the thresholds can be found here http://ec.europa.eu/internal_market/publicprocurement/rules/current/index_en.htm

For **mixed contracts** which combine works, supplies and/or services in a single contract, the principle is that the relevant threshold should be determined based on the main purpose of the contract; one factor in determining this being the relative value of works, services and/or supplies. If in any doubt, Contracting Authorities should seek specialist advice on which rules to apply for mixed contracts (and, as a general rule in public procurement always err on the side of caution).

Above the thresholds, advertising in the Official Journal of the European Union (OJEU) is mandatory. Other choices of media for advertising will depend on the strategy for the procurement. The OJEU adverts can only be placed electronically and in a standard format. Where contracts below the EC thresholds have a potential cross-border interest, the safest course of action to avoid any risk of financial corrections is to advertise the contract in the OJEU.

✘ Failure to advertise adequately is one of the most common and most serious errors. If in any doubt, advertising in the OJEU is recommended as a way of ensuring EU wide visibility and competition.

Artificial splitting of contracts: The Public Procurement Directives apply to all public contracts having as their object supplies, works and services whose estimated value is equal to or exceeds the thresholds as specified regularly. The characteristics that determine the type of procedure to be used, and the various legal obligations are:

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

In particular, the Contracting Authority must not artificially split larger requirements into smaller units to avoid the aggregation rules and thresholds. Collaborative multi-partner projects must consider public procurement requirements at the level of the project i.e. not at individual partner level which could be judged as avoidance of the aggregation rules.

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

Phasing: The Contracting Authority can divide the contract into phases provided the tender documents state as much and the bidding process is fair, open and transparent. For works, there must be an amalgamation of all separate contracts where there is a functional and timing relationship between them. In general, if the contracts together serve to achieve the same objective the values **MUST** be aggregated together. For example a road project can be divided in several phases and contracts if it is implemented over a long timeframe.

Division of contracts into lots: It is also possible to divide a contract into lots in order to increase competition, provided the overall contract is advertised

appropriately. Contracting authorities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots. Contracting Authorities should indicate, in the contract notice or in the invitation to confirm interest, whether tenders may be submitted for one, for several or for all of the lots.

1.6 Operational requirements to launch tender

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

- Preparation of the Specification (this should include the drafting of the Specification, consultation with customers/users and other stakeholders and approval for the final Specification by the Evaluation Committee)
- The capture of any data/information necessary to quantify the Specification (including any ICT database requirements)
- Specification of any additional requirements must be dealt separately from the main requirements. Any additional and enhanced requirements must also be dealt with separately when drafting the Pricing Schedules (or Bills of Quantity) but must be calculated with the main requirements to estimate the total contract volume.
- Calculation of a realistic pre-bid estimate of the cost of the contract to be procured
- Confirmation that the levels and standards specified can be afforded within the available budget provision
- Consultation with the market on the proposed Specification, procurement proposals, bidding requirements and timescales
- Benchmarking the proposed levels and standards against similar provision elsewhere

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

1. Direct award of a contract with inadequate justification for non- publication of a Contract Notice

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

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

2. Artificial splitting of Works/Services/Supplies contracts

Example: A works project or proposed purchase of a certain quantity of supplies

and/or services is artificially subdivided into several contracts with the intention of ensuring that the value of each contract falls outside the scope of the Directives, i.e., deliberately avoiding its publication in the OJEU for the whole set of works, services or supplies involved.

How to avoid: Make sure that the Business Case (and the Contract Notice) reflects the true scope and value of the project and check that the calculation is done correctly in accordance with Article 9 Directive 2004/18/EC.

3. Cases not justifying use of the Negotiated Procedure with prior publication of a Contract Notice

Example: A contracting authority awards a public contract by negotiated procedure, after publication of a contract notice, but such procedure is not justified by the relevant provisions.

How to avoid: The Negotiated Procedure can only be used in certain very specific circumstances which are stated in Directive 2004/18/EC Articles 30 and 31. Before using the procedure check the Directive for which cases the Negotiated procedures can be used in a legal form and obtain advice from National Public Procurement Authorities if in any doubt. Article 30 is use of the negotiated procedure with prior publication of a contract notice. Article 31 is use of the negotiated procedure without prior publication of a contract notice.

4. Selection/Evaluation Criteria not related/proportionate to the subject matter of the contract

Example: When it can be demonstrated that the minimum capacity levels for a specific contract are not related or proportionate to the subject matter of the contract, thus not ensuring equal access for tenderers or having the effect of creating unjustified obstacles to the opening up of competition.

How to avoid: A part of the initial checklist for the tender should establish the selection and evaluation criteria and methodology, testing its legality and validity and finally checking that it works in practice. Be aware that the Directive 2004/18/EC Articles 44-52 and 53 explain legal criteria to be used. Toolkits 5 and 6 give answers about how to handle the criteria in a legal form.

Actual EXAMPLES

Artificial splitting or “Salami-slicing” to avoid the Directives

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

Example 2: The project works were artificially split into: one contract to be tendered, which amount was 1% below the Directive threshold, and “own works” executed directly by the contracting authority.

2. Invitation to bid

The purpose of this stage is to attract competitively priced bids to deliver a contract with outcomes meeting the needs of the Contracting Authority.

2.1 Publication of EU Notices

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

The standard forms used in European public procurement can be accessed on-line via [eNotices](#). All Notices submitted to the OJEU must use a standard vocabulary. The Common Procurement Vocabulary (CPV) is an 8 digit (with a ninth for verification) classification system which describes all purchases for works, services and supplies. The CPV codes may be accessed online, via the SIMAP website.

Prior Information Notice (the 'PIN'): The publication of a PIN is not mandatory. However, by publishing a PIN it is possible to take advantage of reduced time limits for submission of offers later in the process. The PIN was introduced so that Contracting Authorities could inform the market of all its upcoming contracts. However, more recently, Contracting Authorities have been using the PIN on a contract specific basis. The PIN can also be used to gauge market interest in a contract. It is important to be aware of any other proposed services, works or supplies procurements around and above the EU thresholds within the Contracting Authority's organisation scheduled around same time. Bear in mind that similar procurements in other parts of the Contracting Authority must be aggregated together. The PIN for the following year can be announced in November/December for the year ahead, but must be published at least 52 days and no longer than 1 year before publication of a specific contract.

Contract Notice (CN): If the procurement is above the EU threshold (and therefore falls within the Public Procurement Directives) it is mandatory to publish a Contract Notice. Once the Notice has been published the content such as changes in technical product requirements, volume, time schedules, selection and awarding criteria and contract terms cannot be amended otherwise a cancellation is required. It is critical that the content of these Notices is totally accurate (and follows the Specification requirements). Only minor changes to formal requirements are allowed. If any minor changes occur in the tender phase it is recommended to extend the deadline for submission of the tender

Other than in very specific cases, lack of publication of a Contract Notice for a contract with a value above the thresholds will be considered a breach of EU procurement rules and lead to financial corrections.

Additional Notices: Always inform the market if any changes are made in the documents and the Notices (for example date for receipt of tenders) by publication of a further Notice (and additionally by informing all those that have expressed an interest in the contract). If the Contracting Authority makes substantial changes in the Specification and/or contract terms a cancellation of the process will be necessary.

2.2 Procedures and timetables

2.2.1 Minimum time limits

The choice of procedure should have been made and justified at the planning stage. For procurements above the relevant thresholds the Open and Restricted procedures are the most commonly used and therefore listed in below table.

Regardless of which procedure is chosen, the process is closely regulated in terms of timescales, communication and documentation. The schedule must comply with the timescales set out in Directive 2004/18/EC.

Minimum time limits
(in days from date of OJEU Publication)

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

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

- Allow minimum 52 days from the date on which the notice was despatched to receipt of tenders. This period can be reduced with 12 days in total if the contract notice is transmitted electronically and the contracting authority offers full electronically access to the documents. The period can be reduced to 36 days from the date of the contract notice despatch. To gain this extra flexibility the PIN must have been published within a minimum of 52 days and

a maximum of 12 months before the date upon which the Contract Notice was despatched. If the notices are despatched electronically then. The PIN must contain as much information as the Contract Notice where that information was available at the time (for instance contract volume, awarding criteria and contract period). All responses to questions from Tenderers must be anonymised and sent out to all interested parties at the latest 6 days before the tender submission deadline. (Article 39 in EU – Directive 2004/18/EC). Clarifications should not have the effect of changing the initial specification (including the initial selection and award criteria).

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

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

- Allow a minimum of 37 days (can be reduced to 30 days if electronic notice) from the date on which the Notice was despatched to the date by which requests to participate must be received.
- If the Contracting Authority wishes to limit the number of tenderers under this procedure the number must be minimum 5. The Contracting Authority is however not obliged to specify a limit if it does not intend to apply one.
- The Contracting Authority must then select those who will be invited to tender on the basis of a pre-qualification questionnaire (PQQ) (see below).
- Written invitations to tender must then be issued to those selected allowing a minimum of 40 days from despatch of the invitations for receipt of tenders. This period can be reduced to 35 days if full access to tender documents.
- If a PIN have been published electronically within a minimum of 52 days and a maximum of 12 months before the date on which the contract notice was despatched the deadline for submission of tender can be reduced to 31 days. The PIN must contain as much information as the Contract Notice where that information was available at the time (for instance contract volume, awarding criteria and contract period).
- All responses to questions from bidders must be anonymised and sent out to all interested parties latest 6 days before tender deadline. Article 39 of Directive 2004/18/EC
- When an award has been made a Contract Award Notice must be sent within 48 days of the award to the OJEU for publication.

The timetable and steps of the **Negotiated Procedure with publication of contract notice** are as follows:

- Allow a minimum of 37 days from the date on which the notice was dispatched (*not* the original unsuccessful notice) to the date by which requests to participate must be received.
- All responses to questions from bidders must be anonymised and sent out to all interested parties latest 6 days before the tender deadline. Article 39 in EU – Directive 2004/18/EC
- After that date the Contracting Authority may then negotiate with one or more tenderers
- When an award has been made a contract award notice must be sent within 48 days to the OJEU for publication.

If the use of this procedure is justified then the Contracting Authority is only required to publish a Contract Notice in the OJEU (that the CA use the procedure) if it has received irregular tenders or tenders that have been disqualified following evaluation as a result of use of either the Open or Restricted Procedures and the Contracting

Authority decides not to negotiate with all tenderers. If the Contracting Authority decides to negotiate with all tenderers a Contract Notice in the OJEU is not required.

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

2.2.2 Urgency

The urgency (accelerated) provision enables a Contracting Authority to speed up both the Open, Restricted and Negotiated Procedures. This procedure may be used where the normal time limits under the Open, Restricted or Negotiated procedures would be impracticable. In such cases a Contract Notice must be placed in the OJEU, and in the Notice the use of the "accelerated procedure" must be justified. The deadline for submission of requests to participate is a minimum of 15 days (instead of 37) from the date of despatch of the Contract Notice for publication. The time limit for the receipt of tenders is 10 days. If the Contracting Authority is using the urgency procedure then any additional information requested by bidders concerning the tender documents must be supplied no later than 4 days before the closing date for receipt of tenders.

Application of the urgency processes is a much abused area and the Contracting Authority must be able to justify its use. Not many situations allow this procedure and it can only be used in cases of unforeseeable circumstances beyond the Contracting Authority's control. The Contracting Authority must not have any influence on the circumstances used to justify the use of the urgent procedure.

Urgency can very rarely be substantiated in practice. Any divergence from the minimum timescales set in the Directives for the chosen procedure is likely to lead to a financial correction.

2.3 Tender Documents

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

- a reference to the Contract Notice published
- the criteria for selection and award of the contract if not set out in the notice
- the language in which the tender is to be drawn up.

✗ Contracting authorities should not change the selection or award criteria after publication of the Contract Notice, except by means of a published

erratum, The Evaluation Committee should only use the published criteria and should not add any new criteria or sub-criteria that have not been published.


When starting to design the tender documents the following steps and issues need to be considered:

2.3.1 Setting up Selection Criteria

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

There are a number of common mistakes made at selection stage. Never base the selection on a desire to have local or national suppliers as this is discriminatory and contrary to the fundamental principles of the EU Treaty. The information the Contracting Authority seeks at this stage must be proportionate and relevant to the Contract. For example, insurance and financial requirements should not be set at unreasonably high levels with the effect of effectively automatically eliminating otherwise perfectly competent applicants or (more commonly) set without any real thought as to the effect of the levels set. A common example of this is where contracting authorities set the turnover / sales requirement at a disproportionately high level. Generally, the annual turnover of tenderers should not be set at more than twice the value of the contract.

All selection criteria must be proportionate and relevant to assessing the ability of the tenderer to deliver the contract. **Any criteria that could be interpreted as being discriminatory or disproportionate are not acceptable and may lead to financial corrections. Any changes to the selection criteria once set are unacceptable.**

 **Many Contracting Authorities mix up the selection stage (and criteria) with the evaluation stage (award criteria). Remember that there are two parts to the procurement process - selection (of bidders) and evaluation (of the bids). They are quite distinct and not to be confused. At the selection stage the aim is to select those bidders capable of doing the job. The evaluation stage assesses the best bid received from the selected bidders. It is essential to establish appropriate selection and award criteria at the procurement planning stage.**

 **See [Toolkit 5](#) for more information on selection criteria**

2.3.2 Setting up award criteria and their weightings

Evaluation of the submitted bids is a critical part of the procurement process and for this reason care must be taken to ensure that the outcome is the right one and that it has been arrived at in a fair and transparent manner. Tender evaluation should:

- Have award criteria that are weighted to reflect importance/priority and are focused on the requirements of the Specification
- Be relevant to the contract
- Preferably be based on a model that takes into account a balance between price and quality. Care must be taken to ensure that the price/quality split reflects the requirements of the contract
- Have Evaluation Committee approval for the award criteria, and the evaluation model (including weightings of each criterion) Use an Evaluation Committee made up of appropriate and relevant representation having the necessary experience and technical skills and knowledge. ;

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

The criteria for the awarding of contracts are either:

- lowest price only; or
- **Most Economically Advantageous Tender (MEAT)**

If the MEAT method is used, either the Contract Notice or contract documents must detail all criteria to be used. If a scoring matrix or weightings are being used these must be disclosed in the tender notice or tender documents in addition to the evaluation methodology.

The adoption of the award criteria appropriate to a particular contract should be given serious consideration at the procurement planning stage. The award criteria should be listed in order of importance (with the respective weightings where relevant).

 **See [Toolkit 6](#) on Award criteria**

2.3.3 Pre-Qualification Questionnaire (PQQ)

If it is the intention under the Restricted or Negotiated Procedures or the Competitive Dialogue to have a shortlist of bidders then this must be arrived at by fair and transparent means (and documented) giving equal treatment to all. Information from bidders that will be used for selection can be obtained in a standard format via a PQQ.

Checks should be made that the PQQ to be completed does not conflict with any of the rules relating to openness, transparency, fairness and equal treatment.

Particular attention for the respect of the above principles should be taken if interviews are to be used as part PQQ methodology. The Contract Notice in the OJEU and / or the tender documents should always state that one of the selection criteria will be the information supplied by the applicant in a PQQ. This allows for taking into account the information provided in the PQQ. If a scoring system or weightings are being used these should be disclosed fully in the Contract Notice and in the tender documents. Standard questionnaires (PQQs) should be obtainable from either the Contracting Authority's corporate procurement function or from the national procurement office.

See [Toolkit 4 on PQQs and short-listing](#)

2.3.4 Pricing Schedule

The type of procurement will influence the pricing documents prepared. For example, in construction contracts it is common to have either a schedule of rates or, more likely, a Bill of Materials. It must correlate with the Specification. Best practice would be to prepare, in house, and in detail, a 'dummy' bid based on the pricing document and the Specification. This enables the contracting authority to immediately identify any pricing by bidders where they have identified a mistake in the documents (and thus priced it 'low') upon which they can capitalise later should they be successful. It can also help indicate whether there are errors in the Tender Documents. For example, have one or more bidders clearly misunderstood the requirement as evidenced by the fact that the prices submitted appear to be abnormal? If an abnormally low bid is received, an accurately priced dummy bid, acting as a benchmark, can be critical in justifying the rejection of such a bid.

2.3.5 The Legal Contract

A draft of the contract should be dispatched with the tender documents so that all bidders are bidding on the same basis. No negotiation should take place on the detail of the contract after the successful bid has been decided (to do so would breach the equal treatment principle). Best practice shows that a well drafted contract would include provisions for yearly price indexation (or not), regulation, misconduct, liability, and confidentiality obligations. The contract **MUST** be fair and balanced in terms of risk sharing. In particular leonine clauses or contract terms shifting to the contractor risks that are totally beyond its control must be avoided, as they may limit the number of bids and have a significant impact on the price and lead to contract disputes.

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

Contract Modification Clauses: How the contract deals with the need for changes is a critical area. Planning for the possibility of contract modifications, under what circumstances and within what boundaries of cost and scope needs to be thoroughly considered during the planning stage and then appropriate provisions should be included in the tender and contract documents. Once the contract has been signed, it can only be modified in certain specific circumstances. The level of approvals required for a contract modification, and the scope of permitted changes without requiring a new tender, should normally be indicated in national guidance for public tenders. The underlying principle is that any modifications that change the scope of the contract in terms of value, timetable or scope, to the extent that it might have changed the outcome of the original tender should be treated as “substantial” and should therefore be retendered as a new contract for additional works. The original contract may provide for optional additional works, services or supplies and request applicable prices at the bid stage. See [section 6.4](#) and [Toolkit 10](#)

2.4 Specification and Standards

2.4.1 Specification drafting

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

A well prepared specification should:

- Be precise in the way it describes the requirements
- Be easily understood by the bidders, and all stakeholders alike
- Have clearly defined, achievable and measurable inputs, outputs or outcomes
- Not mention any brand names or requirements which limit competition
- Provide sufficiently detailed information that allows bidders to submit realistic bids
- Have any additional and enhanced requirements identified separately
- Take into account (in so far as it is possible) the views of the Contracting Authority, customers/users, other stakeholders and the market
- Be drafted by the Contracting Authority (or an outside Consultant on its behalf)
- Be approved by the r Evaluation Committee and the Contracting Authority’s senior management.

Many best practice Contracting Authorities now often include details of the budget for the contract in the Specification, as this gives potential bidders a benchmark for pricing. However, the budget must be realistic for the works, services or supplies requested. Moreover, setting a budget for a contract that will be awarded with a high weighting on quality, such as professional services, in practice means that most bids will probably come in at or just below the quoted budget. An open competition without a disclosed budget is always possible, but the tender documents

must state that the Contracting Authority reserves the right not to proceed if no reasonably priced bids are received (or for any other reason). The specification needs to be precisely drafted. The naming of specific brands and products is contrary to the fair and open competition rules. If it is impossible to avoid this provision it is essential that the words 'or equivalent' are added and that any such 'equivalent' offers received are fairly assessed.

Weak drafting of the specification is often the root cause of subsequent contract modifications due to the fact that it has not reflected the true extent of the proposed contract. Once the contract is signed then a significant amount of 'additional' work may be 'added in' (by way of modifications/variations) thus inflating both the size and cost of the contract from that originally envisaged. In these circumstances, if these works are given to the existing contractor without any new tender procedure taking place, the provisions relating to fair and open competition may be breached, because the contract no longer resembles that which was originally advertised. Additional work will be minimised if the procurement planning phase is professionally carried out and the specification expertly written. It is advisable that the Evaluation Committee prioritise each project and calculate enough time to consider all issues and risks by involving, if necessary, in house or external expertise to design the specification and the contract **The Specification is the single most critical document influencing the overall quality and competitiveness of the procurement process. Any terms which can be interpreted as discriminatory, particularly against tenderers from another country or requiring goods that only one supplier (or suppliers from one country) can deliver are not acceptable.**

 **In Specifications, use the term "or equivalent" to avoid restricting competition**

 **See [Toolkit 7](#) for more tips on Specification writing**

2.4.2 Standards

The basic rule is that the procurement must be defined by reference to any European standards which are relevant. Where no European standards exist, the Contracting Authority must consider products from other Member States having equivalent performance with national products. The Contracting Authority is therefore under a duty to use either:

- a national standard implementing a European standard
- European technical approvals
- a common technical specification, i.e. a specification with a view to uniform application in all Member States

2.4.3 Social, ethical and environmental criteria

Increasingly, Contracting Authorities use public procurement as a means of achieving objectives other than strict value-for-money. These can include criteria related to the

environment³, the local economy, social or ethical values. Whilst these objectives can legitimately be pursued via public procurement, care needs to be taken to ensure that any special provisions are fully in line with the EU Directives and national rules to ensure fair and equal treatment of bidders. The new Directives are far more explicit about how such considerations can be incorporated into the tender process.

📌 See different topics on the DG MARKT website: [link](#)

See specific environmental criteria on the DG ENV website: [link](#)

2.4.4 Variants

The bidder must bid on the tender documents as drafted. If a strategic decision is made that in addition to bids based on the tender documents the Contracting Authority would be willing to consider an *additional* bid (a variant bid) then the tender documents must state minimum requirements for the variant bid. In that case the tender awarding criteria must take account of the possibility of variant bids being received in addition to those set out in the tender documents. This is no easy task, requiring greater technical expertise in the Evaluation Committee and needs to be addressed and agreed at the procurement planning phase.

📌 See the section on [Variants in Toolkit 7](#)

2.5 Obtaining and submitting tenders

The Contracting Authority must allow bidders a reasonable time both to obtain the tender documents and submit a bid - *at least* respecting the minimum time limits laid down in Directives 2004/18/EC Article 38. A price may be charged to obtain tender documents, but this should not be disproportionate. Tenders must be submitted in writing, directly or by post. In the case of electronic tendering, which will become increasingly the norm, certain safeguards should be put in place relating to confidentiality and acknowledgement of receipt. Tenders must be submitted by the method set out in the tender documents. The time table should take into account the complexity of the contract. In particular, for complex, design/build or PPP contracts, it is not uncommon to have tender preparation periods in the range of 4-6 months

High, disproportionate charges for tender dossiers can be interpreted as a barrier to competition. Financial correction guidelines provide for a financial correction to be made where the time available for obtaining the tender documents is less than 80% of the time set for submission of tenders.

³ The Commission has developed Green Public Procurement criteria for more than 20 product groups, most of them available in all EU languages, see: http://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm

Any time restriction on the availability of tender documents should be assessed on this basis, in particular where the deadline for submission of tenders has been legally reduced due to electronic publication of the tender notice or the publication of a PIN. For an example if the tender documents is not available during 10 days prior to the deadline for submission of tender. Standard days for submission of a tender in a open tender = 52 days – reduced to 45 due to electronic publication (45 days – 10 days= 35 days) $35/45 = 77 \%$. Less than 80 % a financial correction

2. Complaints and Liability

Should a complaint be lodged either with the EU Commission, competition authority or local courts claiming that the rules (non-discrimination, probity, transparency etc) have not been complied with be upheld, the ramifications can be very serious for both the contracting authority and its staff who may be personally liable in some jurisdictions. It is common practice in the member states that the consequences for violating the Directives will be financial sanctions. Legal advice should be sought as to how a complaint should be handled as this varies in different member states.

Common mistakes leading to financial corrections at the invitation to bid stage are:

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

Example: The description in the contract notice and/or the tender specifications are insufficient for potential tenderers/ candidates to determine the subject-matter of the contract

How to avoid: The specification writer(s) should be sufficiently skilled to be able to define the contract accurately and should involve other stakeholders to enable them to do so. Be aware that Article 23 of Directive 2004/18/EC explains the legal requirements. There is more help on specification writing in [Toolkit 7](#)

6. Lack of publication of a Contract Notice

Example: The contract notice was not published in accordance with the relevant rules (e.g. publication in the Official Journal of the European Union (OJEU) where this is required by the Directive or publication according to National rules below the thresholds)

How to avoid: Check the value of the contract identified in the Business Case against the provisions of Article 9 of Directive 2004/18. If the contract value is over the financial thresholds then it must be advertised via a Contract Notice

7. Non Compliance with minimum time limits for receipt of Tenders & Requests to Participate

Example: The time limits for receipt of tenders (or receipt of requests to participate) were shorter than the time limits in the Directives.

How to avoid: This occurs where the Contracting Authority fails to give tenderers adequate time to fully participate. Directive 2004/18/EC Article 39 cover the time schedules for the tender procedures. Be aware of the time limits before publishing the notice and ensure realistic timetables are set at the planning stage. If use is to be made of the reduced time limits due to publication of a PIN, ensure that the PIN has all of the information needed for the Contract Notice itself, including price and quantity for service and supply contracts. A failure to publish a time extension in the OJEU and only to inform those tenderers who already obtained the tender documents of the extension can result in unequal treatment of potential tenderers who have not been aware of the extension.

8. Lack of Publication of extended time limits for either receipt of tenders or for requests to participate

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

How to avoid: All time extensions need to be published in the OJEU , for contracts where publication of a tender notice for the contract in the OJEU was required

9. Failure to state Selection Criteria and/or Award Criteria (and weighting) in the Contract Notice or in the Tender Specification

Example: The contract notice and / or the tender specifications do not set out the selection and award criteria (including weightings) in sufficient detail.

How to avoid: The Selection and Award Criteria (and weighting) must be stated in the Contract Notice and either in the specification or other tender documents. Checklists and use of proforma Contract Notices and tender documents / specifications help to avoid this happening.

10. Unlawful and/or discriminatory selection criteria in either Contract Notice or Tender Documents

Example: Cases in which operators have been deterred from bidding because of unlawful selection criteria laid down in the Contract Notice or tender documents. For example:- 'obligation to already have an office or representative in the country or region' or- 'tenderers' possession of experience in the country or region'.

How to avoid: The selection criteria cannot be disproportionate or unfair towards economic operators from other Member States All potential operators MUST have equal terms / requirements on which to prepare their offer. If in doubt, legal advice should be sought. Toolkits 5 to 9 give further guidance.

11. Discriminatory Technical Specifications

Example: Setting technical standards that are discriminatory, thus not ensuring equal access for tenderers or having the effect of creating unjustified obstacles to the opening up of public procurement to competition. An example would be the specification of a particular brand name without mentioning 'or equivalent'.

How to avoid: This is a very common mistake that can be avoided by using procurement experts to help draft/review the specification. See Toolkit 7.

12. Negotiated procedure without justification (with or without prior publication of a Contract Notice)

Example: Contracting Authority awards a public contract by Negotiated Procedure, after publication of a Contract Notice, but such a procedure is not justified by the relevant provisions.

How to avoid: Such an occurrence is a fundamental breach of the rules around fair and open competition – always remember to justify the decision of the choice of procedure in the Business Case. Be aware that Articles 30 and 31 of EU Directive 2004/18/EC Article 30 set out the very limited circumstances in which the Negotiated Procedure can be used and the related requirements justifying its use, which are very restrictive.

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

Example: Cases in which operators have been deterred from bidding because of unlawful selection criteria laid down in the contract notice or tender documents. For example: - obligation to already have a standard as for instance ISO 9000 or 14001 without using the words 'or equivalent'

How to avoid: The Contracting Authority must recognize equivalent standards/ qualifications using the term "or equivalent". More advice is given in Toolkits 5 and 6.

14. Discriminatory awarding criteria

Example: Cases in which the Contracting Authority use an operator's previous experience with a similar contract.

How to avoid: Previous experience with a similar contract may not be legal as a MEAT sub criteria in certain circumstances. Only criterion related directly to the contract may be used.


Actual EXAMPLES**Use of illegal local content criteria**

Example 1: Awarding: It was requested as part of one tender that the tenderer already owned an asphalt manufacturing plant in the local area at the time of submission of the tender. The fulfilment of this requirement had a weight of more than 30% in the tender evaluation criteria.

Example 2: Selection: The tender requirements mentioned that any contractor applying for the tender must have an engineer registered in the country's own National Chamber of Engineers at the time of submission of the offers, which was a significant restriction to international competition.

3. Submission and selection of bids

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

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

3.1 Delivery of bid according to instructions

The time and place for delivery of tenders is sacrosanct and cannot be changed. If a bidder requests an extension of time then this should be considered by the Evaluation Committee and a decision made. If the decision is to extend the tender submission date then all tenderers should be informed in writing immediately and a notice sent to the OJEU so that all potential tenderers are made aware of the new deadline, just in case they may be interested in submitting an offer given the extended timeframe. This includes any tenderers who have already submitted bids and they can if they wish submit a replacement bid by the new deadline. Any extension of time by the Contracting Authority should be fully justified and the process open and transparent. Extensions can be justified for instance, if the Contracting Authority requires more time to answer a tenderer query.

The tender invitation should clearly state the place where bids are to be delivered and that no bids will be considered that have been delivered other than as instructed. It is the bidder's responsibility to ensure delivery in accordance with the invitation to tender. Bidders should be told that tender envelopes should bear no markings of the name of the sender (and that delivery agents should be told not to append the name of the person for whom they are delivering).

3.2 Follow tendering instructions

The first task of the Evaluation Committee is to check all bids to ensure that they are 'compliant', in other words that they have followed the Instructions to Tenderers to the letter. If they have not they should immediately be rejected as non-compliant and an explanation given to the bidder as to why it has been rejected. This is important as it creates an ethos amongst bidders that failure to comply will result in rejection and an avoidable waste of their valuable resource input. The Evaluation Committee should then proceed to evaluate all the compliant bids.

3.3 Safe custody of tender documents

The Contracting Authority should ensure that it has a system in place to keep tender submissions confidential and (even if electronically submitted) in safe custody. It is also advisable for Contracting Authorities to issue receipts for tenders delivered in person.

3.4 Opening ceremony

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

3.5 Selection and minimum requirements and additional documentation

If an offer does not fulfil the selection / minimum requirements then the offer must be rejected. At this stage, the contracting authority can only ask bidders to confirm information or to clarify contradictory information for instance if some information is written unclear or is clearly wrong. Article 51 in the directive 2004/17/EC *"Additional documentation and information: The contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted"*.

✚ The selection process is described in [Toolkit 8](#)

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

15. Insufficient time allowed for obtaining tender documents

Example: Time for potential tenderers to obtain tender documentation is too short, thus creating an unjustified obstacle to the opening up of public procurement to competition. This can often be attributed to poor procurement planning

How to avoid: Make sure the Tender Documents allow ample time for bidders to obtain the documents and to put together a competitive bid. Make sure that any deadline for seeking the documents is reduced proportionally for cases where the deadline for submission of offers is legally reduced (e.g. where a PIN has been published). The Financial correction guidelines provide for a financial correction to be made where the time available for obtaining the tender documents is less than 80% of the time set for submission of tenders. Any time restriction on the availability of tender documents should be assessed on this basis, in particular where the deadline for submission of tenders has been legally reduced due to electronic publication of the tender notice or the publication of a PIN.

16. Elimination of candidates/tenderers using unlawful selection/award criteria

Examples:

- Selection criteria being used at both Selection and Award stages, or
- The award criteria (or respective sub-criteria or weightings) stated in the contract notice or tender specifications were not followed, or
- Use of sub-criteria for the award of the contract not related to the actual award criteria in the contract notice/tender specification. (In that event, sub-criteria should also be published).

How to avoid: Better design and testing of selection and award criteria and evaluation methodology combined with Gateway reviews by the Evaluation Committee should help to eliminate these types of error. For complex contracts, Contracting Authorities may decide to employ specialist advisors. See advice in Toolkits 5 to 9.

17.Modification of evaluation criteria after opening of tenders, resulting in incorrect rejection of tenderers

Example:

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

How to avoid: Modification of evaluation criteria after submission of tenders is unlawful and unacceptable.

18.Unclear objective selection criteria used in reducing the number of applicants.

Example:

No objective selection criteria listed and therefore it is unclear how the Contracting Authority will reduce the number of applicants to participate in the final tender procedure.

How to avoid:

Transparent definition of objective selection criteria could be highest revenue per year within the contract over the last 3 years, or 3 experiences closest to the tendered contract. (evaluated and decided by the contracting authority)

4. Evaluation of bids

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

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

4.1 Lowest price

At the procurement planning stage the CA will have taken a strategic decision as to which evaluation method to follow and this should be clear in the Contract Notice and tender documentation. If the lowest price is chosen, then this is the most transparent (and it is hard for bidders to argue against the decision as a result). However, it takes no account of quality (apart from that specified) and innovation. Is the cheapest always the best?

4.2 Most economically advantageous tender (MEAT)

MEAT is increasingly becoming the most popular evaluation method as staff become more skilled in its application. CAs need to have the capabilities to carry out an evaluation based on price and quality; and the bidders equally need to understand how to make a bid on that basis. These are skills required that necessitate high levels of technical competence. If the CA does not possess those skills then training is required as well as support of duly appointed experts independent of any bidders. In an evaluation based on MEAT it is possible (indeed to be encouraged where relevant and desirable) to include matters relating to environmental and/or social issues (this can be particularly attractive for CAs trying to deliver overall social benefits to their local area).

✘ If most economically advantageous tender (MEAT) is to be used, details of ALL the criteria (as well as the proposed evaluation methodology) MUST be included - in order of importance - in either the Contract Notice or the Tender Documents or in both.

⚠ Setting MEAT criteria for a complex contract requires considerable technical skills and Contracting Authorities may need to seek advice from an experienced consultant/expert. Technical advisors can also be non-voting members of evaluation panels, but it is important that they do not have any Conflict of Interest vis-à-vis potential bidders.

➦ See [Toolkit 10](#) on tender evaluation, including MEAT and scoring

4.3 Dealing with abnormally low tenders

This is an area which causes some difficulties for CAs. It is mandatory for the CA, before deciding to reject what it considers to be an abnormally low offer, to first clarify with the tenderer why its offer is so low and whether there are any particular circumstances which would reasonably explain the low offer for example, innovative technical solutions or a strategic decision of entering the market and market share capture. Based upon its analysis of the justification received from the tenderer the CA should then decide if the tender should be rejected or accepted.

Primarily this should be addressed at procurement planning stage - *What will we do if we receive one or more abnormally low bids?* An abnormally low bid may highlight a fault in the specification. Has the bidder misunderstood the specification or is it badly drafted (and therefore open to exploitation once a contract has been signed)

4.4 Clarifications

In carrying out an Open or Restricted Procedure it is possible for the CA to seek clarifications from bidders on aspects of their tenders. However it is not possible to carry out negotiations on those bids. These requests can only have the character of minor clarification of information already submitted by the tenderer.

✘ Clarifications cannot change the already submitted bid in relation to substantial information such as selection documents, pricing, quality and service elements. All communication with bidders must be fully documented.

4.5 Post Tender Negotiations

In Open and Restricted procedures all negotiations with tenderers on fundamental aspects of contracts, including variations which are likely to distort competition, and in particular prices, are not permitted.

4.6 Evaluation Committee decision

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

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

18 Modification of awarding criteria after the opening of tenders resulting in the incorrect acceptance of tenders

Example: The award criteria were modified, resulting in acceptance of a tender that would not have been accepted if the published award criteria had been followed

How to avoid: This is illegal under the directives 2004/17/EC and 2004/18/EC, often

perceived as distorting competition. The Evaluation Committee has to run through of all the criteria (both selection and evaluation) to establish that the methodology works. If either the selection or award criteria need to be modified after Contract Notice publication, the Contracting Authority must either cancel the tender and retender or issue an erratum and possibly an extension of the deadline for submissions. Modification of selection or award criteria after the tender submission deadline is a violation of EU – Directive 2004/18/EC Article 2 Equal – Treatment and Transparency principle.

19 Lack of transparency/equal treatment during evaluation

Example: The scoring given to each bid is unclear/unjustified/lacks transparency or is non-existent and/or the evaluation report does not exist or does not contain all the elements required by the relevant provisions.

How to avoid: Clearly unlawful under the transparency principle, often these cases are the subject of a legal challenge. The chair of the Evaluation Committee must ensure that there is a written justification for each score given in the tender evaluation. The scores and comments for each tenderer must be presented in a written letter to the tenderer and included in the evaluation report.

See more in section 5.2

20 Undisclosed Conflict of Interest

Example: Following a whistle-blower report, a member of a tender Evaluation Committee was discovered to have undeclared links to one of the tenderers.

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

21 Modification of a tender during evaluation

Example: The Contracting Authority allowed a tenderer to modify its tender during evaluation of offers through the submission of additional substantial information.

How to avoid: This is illegal and violates the equal treatment and transparency principle. The procurement officer and chair of the Evaluation Committee must ensure that only information submitted at the time of the bid is evaluated.

22 Negotiation during the award procedure

Example: In the context of an open or restricted procedure, the Contracting Authority negotiated with the bidder(s) during the evaluation stage, leading to a substantial modification of the initial conditions set out in the Contract Notice or tender specification (e.g. a significant change in the scope of the project or the contract price etc).

How to avoid: This is illegal under the rules. Any clarifications or communication with bidders after the tender submission should be in writing. If the CA has concerns about the clarity of the tender documents then it should consider re-launching the tender with a revised specification.

23 Rejection of abnormally low tenders without justification

Example: Tenders appear to be abnormally low in relation to the goods, works or services requested, but the Contracting Authority, before rejecting those tenders, does not request in writing details of the constituent elements of the tender which it considers relevant.

How to avoid: This is a situation in which many Contracting Authorities find themselves. It can be avoided by careful pre-procurement planning, including setting benchmark prices. The Contracting Authority must give tenderers with low offers the opportunity to justify their low offers and they cannot be automatically excluded without first doing this. It is mandatory for the Contracting Authority to claim a written justification from the bidder clarifying the background for the low price offered.

Actual EXAMPLES

Conflict of interest during tender evaluation

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

Major reduction in contract scope during the tender process

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

Significant change in the scope contract during the tender process

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

5. Award

5.1 Award Notice

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

✘ Failure to publish the Contract Award Notice is a relatively common error that can be eliminated through the use of checklists and key stage controls. As soon as it is noticed that a Contract Award Notice has not been published, even after the 48 day period, Contracting Authorities should nonetheless take immediate action to ensure that it is published. This will be taken into account in deciding on any financial correction.

5.2 Standstill and debriefing

The Remedies Directive 2007/66 EU aims to ensure that suppliers and contractors can pursue complaints on a variety of issues and that action can be taken against alleged failures by a Contracting Authority. Remedies include suspending any decision taken by a Contracting Authority, setting aside unlawful decisions, including the contract itself and awarding damages to contractors. In addition, failure to comply with the Remedies Directive could prejudice future EU grants to the organisation, or could lead to reclaiming of grants already made. Letters (known as 'standstill letters') must be sent to all participants once an award decision has been reached stating that an award is imminent and all those involved will have 10 days to object to the process. It is mandatory for the contracting authority to debrief all tenderers of the result of a tender.

The letter MUST contain:

- name of the winner,
- winning **price**,
- points given under each criteria to both the winner and eliminated tenderers
- characteristics of the winning offer.

More details are set out in the EU's Remedies Directive 2007/66/EC. If the tender is aborted/terminated this MUST be notified by a notice to the OJEU and to each single tenderer. Best practice shows the notice to cover information about time schedule for re-tendering

Information can only be withheld on specific grounds:

- release would impede law enforcement, or

- would prejudice the commercial undertakings involved, or
- might prejudice fair competition

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

5.3 Post Procurement Review - lessons learned

This is an opportunity to discuss with the Evaluation Committee (and others involved in the contract such key stakeholders) lessons learned (and to incorporate those lessons in future contracts). This is a critical aspect of organisational learning.

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

24 Negotiation during the award procedure.

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

How to avoid: This is not legal as it changes the nature of the advertised contract and means that the other tenderers have not had the opportunity to make an offer for the 'amended' contract. If the Contracting Authority discovers before signing the contract that it has to be re-scoped, then the Contracting Authority must cancel the tender procedure and retender so that the market gets a new possibility to bid for the contract.

Actual EXAMPLE

Price negotiation with the lowest bidder in an open procedure


Although the price of the winning bid under an open procedure was within the Contracting Authority budget estimate, the Contracting Authority invited the tenderer to a negotiation to further reduce its tender price.

6. Contract implementation

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

6.1 Supplier/contractor relationship

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

 **For a balanced relationship, the staff administering the contract on behalf of the Contracting Authority should be as experienced and competent as those of the Contractor.**

6.2 Contract Implementation Plan

For larger contracts, once the contract has been awarded and the contractor is ready to mobilise, the contract manager needs to revisit and if necessary revise the implementation plan. At this stage, either the Evaluation Committee becomes the Monitoring Committee or a new Monitoring Committee is formed. In the case of a large works contract, the contract implementation plan should set out the requirements for achieving a successful mobilisation period as well as covering the implementation stage through to completion, testing and acceptance by the client.

The contract timetable should be expanded to include the activities of the implementation stages. This will include the allocation of responsibility for carrying out each activity and the timeframe within which each activity has to be completed. In addition to the expansion of the contract timetable, the transition and implementation plan should address the following:

- Identification of the client contract management function, its terms of reference, resources to be allocated to it and the responsibility for its management
- Definition of the contract management framework, including both client and provider roles and responsibilities
- Identification of the scope of involvement of customers/users, other stakeholders, including the responsibility for their management
- Establishment of the necessary lines of communication and how they link into the overall communication plan
- Identification of the key contacts within the various parties involved in the transition and implementation stages.

- Responsibilities and lines of communication for monitoring and communication of progress of contract implementation should be clearly established and documented, taking note of any specific requirements of the ESI Funds' monitoring committee.

6.3 Mobilisation period


Whatever the type and scale of contract, mobilisation is an important part of the transition and implementation stage. This is because the preparation and implementation of a robust and comprehensive mobilisation plan will go a long way towards making both the contractor and client well prepared at the implementation stage of the contract. A mobilization plan should:

- Consider timing of the contract award to fit in with any seasonal factors
- Have well defined roles and responsibilities for the key members of the transition and implementation team (e.g. project manager, client, contractor, current provider and major stakeholders)
- Take account of feedback provided by the market (market consultation) and from bidders during the bidding process
- Take account of plant, machinery, equipment and material requirements and the delays involved with the supply chain in respect of lead times. A well developed, reactive and quality assured supply chain will help the mobilisation process
- Allow time for the new provider to become familiar with the requirements of the contract, especially in the case of area wide and multi-site contracts
- Consider phased implementation
- Take account of any staff recruitment requirements and the status of the local employment market
- Allow for stakeholder awareness
- Fine tune the contract management arrangements
- Prepare the client function for implementation
- Take account of the communication and escalation plans
- Arrangements for transfer of assets (if required)
- Include arrangements for the project manager to monitor and review the plan's progress and the reporting of any changes and issues to the Monitoring Committee.
- The contract timetable should be expanded to include the activities of the transition

6.4 Contract modifications

With good planning, a comprehensive, robust specification, and a well-designed contract prepared by a diligent Contracting Authority, the need for any contract modifications or supplementary contracts for additional works/services/supplies during the implementation stage should be minimised. However, unforeseen circumstances requiring additional or modified works/services/supplies may occur. A

critical issue will be whether a new contract is required or whether the existing contract can be modified. In the case of the latter, there are strict rules about what modifications are permissible and under what circumstances. In the case of a new contract, there are also strict criteria to observe as to when to negotiate with the existing contractor and when and how to go back to the market with a new tender.

 **Modifications of contracts and award of additional works to an existing contractor is one of the most common and serious errors. If additional works/services are essential then a new contract should be tendered other than in very specific circumstances and with strict limits on the additional value.**

 See [Toolkit 10](#) on contract modifications

6.6 Closing the contract

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

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

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

25 Reduction in the scope of the contract

Example: The contract was awarded in compliance with the Directives, but was followed by a reduction in the scope of the contract. During contract implementation, the CA and the contractor agreed to reduce the scope of the works significantly with a corresponding decrease in the contract price. As this involved a significant change in the contract it is likely that other smaller companies would have been interested in bidding for the reduced size contract. A financial correction could be considered in such circumstances due to the fact that the actual contract (i.e. the lower value one) was not advertised and potential tenderers were not made aware of the possibility of bidding for it. Once the reduced size of the contract was known, the Contracting Authority should have cancelled the original tender and re-tendered the reduced size contract.

How to avoid: This is best avoided at the planning stage by involving all stakeholders to review the scope and risks. If the reduction in scope is substantial then the contract has to be re-scoped and the Contracting Authority must cancel the contract and retender so the market gets a new possibility to bid.

26 Award of additional contracts without competition in the absence of justified urgency brought about by unforeseeable events

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

events **How to avoid:** This would be illegal under the directives 2004/17/EC and 2004/18/EC where the justification does not exist. The procurement planning phase needs to be expertly carried out and all risks included in the preparation of the tender documents. **Additional Works/Supplies/Services awarded exceeding the limits laid down in the relevant provisions**

Example: The main contract was awarded in accordance with the provisions of the Directives, but was followed by one or more supplementary contracts exceeding the value of the original contract by more than 50%, to the same contractor, without competition.

How to avoid: Even if the additional works are truly unforeseeable, article 30 in 2004/18/EC directives impose a limit of 50 % of the original contract value. Keeping a risk register and contingency plan updated during the implementation stage should keep the Contracting Authority aware of the risks so that they can plan the necessary new tender. The planning stage should always carefully consider the need for additional works and include such risks when preparing the tender documents, and reflect this possibility in the specification and contingencies. It is recommended to tender all contingencies for works, services and supplies. If the calculated value of the additional works is above the thresholds then the contract for these additional works should be advertised in the OJEU.

REAL WORLD EXAMPLE

GIVE A REGIO EXAMPLE OF A MAJOR COST OVERRUN THAT WAS NOT RETENDERED AND LED TO FINANCIAL CORRECTION

TOOLKITS

TOOLKIT 1 - BUSINESS CASE

Toolkit Description:

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

Common mistakes:

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

Good Practice:

The Contracting Authority should prepare a Business Case that provides a clear rationale as to why the procurement should go ahead and that the key planning aspects have been considered.

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

- Meet organisation's need.
- Choose the most appropriate tender procedure
- Be achievable.
- Be affordable.
- Be a sound commercial arrangement.
- Be legally sustainable

The Business Case should cover:

- The benefits to be realised/ problems that the project will solve
- Outline timescales
- Justification for the project
- Estimated costs and budget availability
- Budget for material need and quantities
- Workforce and customer/user implications
- Major risks.

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

A standard contents/checklist for a Business Case should cover:

1. STRATEGIC FIT

- Alignment of deliverables with internal plans and strategies
- External strategies taken into account
- Project/contract objectives
- Key benefits to be realised
- Key risks identified
- Critical success factors and how they will be measured
- Main stakeholders

2. OPTIONS APPRAISAL

- List of options appraised
- High level cost/benefit analysis
- Non-financial 'soft' benefits
- Preferred option and rationale for choice
- Preferred packaging and rationale for choice
- Is the preferred option available through an already procured contract?

3. COMMERCIAL ASPECTS

- Sourcing options and rationale for selection
- Procurement strategy and rationale for approach

4. AFFORDABILITY

- Available funding and sources
- Outline cost estimate
- Whole life cost

5. ACHIEVABILITY

- High level plan of tasks and timetable to deliver the contract

TOOLKIT 2 - RISK AND CONTINGENCY PLANNING

Toolkit Description:

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

Common mistakes:

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

Good Practice:

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

The Risk Assessment should:

- Be capable of identifying and quantifying all risks associated with the project
- Include the allocation of ownership of individual risks
- Include a Risk Register
- Form an integral part of the Procurement Gateway Review mechanism (when applied). See [Toolkit 3](#)
- Include allocation of responsibilities for:
 - Preparation of the Risk Register
 - Monitoring and reviewing the register on a regular basis

There are six elements to risk assessment, namely:

- Identify potential problems and their causes;
- Assess the probability of occurrence (High/Medium/Low);
- Assess the impact on the business and reputation, if the identified risks were to materialise (High/Medium/Low);

- Evaluate the relative costs and benefits of alternative strategies to minimise risks, and come to a view on whether or not to pursue them;
- Identify which party is best able to manage the risk;
- Devise strategies (with timescales and responsibilities) to manage risks.

Questions to consider for each individual risk include:

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

A contract specific risk register should be developed. When formulating a risk register, the Evaluation Committee should take into account the following:

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

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

- Lack of capacity;

- Key staff on the Contractor-side are redeployed elsewhere, eroding the quality of the service provided;
- The Contractor's business focus moves to other areas after contract award, reducing the added value for the Contracting Authority in the arrangement;
- The Contractor's financial standing deteriorates after contract award, eventually endangering their ability to maintain agreed levels of service;
- Problems within the Contractor's own supply chain.

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

- The Contracting Authority not properly defining the requirement at the outset;
- Demand for a service is much greater than expected and the Contractor cannot cope;
- Demand for a service is too low, meaning economies of scale are lost and operational costs are disproportionately high;
- Staff in Contracting Authority with 'intelligent customer' skills are transferred or move on (same applies to the contractor);
- The Contracting Authority is obliged to make demands that cannot be met, perhaps in response to changes in legislation;
- Force majeure: factors beyond the Contractor's control disrupt delivery, e.g. premises cannot be accessed because of a natural disaster;
- Fundamental changes in the Contracting Authority's requirements, perhaps as a result of changes in policy, make the arrangement a higher or lower priority or change the level of demand for the service;
- The Contracting Authority's inability to meet their obligations under the contract.

The Contingency Plan should:

- Define the contingency arrangements to be put in place
- Identify responsibility for providing the contingency
- Define the implementation arrangements
- Become an integral part of the Project Initiation Document and Transition and Implementation Plan
- Be set out in the Tender Documents.

The key components of contingency planning are:

- Identifying which services must be maintained in which circumstances – i.e. key business functions;
- A business contingency plan is drawn up that specifies how the business will continue its critical services under a range of disaster scenarios;
- The consequent requirements for continuity for each critical service to the business are then derived;
- Service contingency (continuity) plans may then be developed

- Identification of funding in case existing budgets are exceeded

TOOLKIT 3 – GATEWAYS

Toolkit description:

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

Common mistakes:

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

Good practice:

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

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

The Gateways

Depending on which format is used, there can be up to six different gateways. The example below uses four basic ones:

Gateway 0 – Completion of the Planning

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

- **Gateway 1 – Contract Scope and Procurement Strategy**

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

- **Gateway 2 – Shortlisting**

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

- **Gateway 3 – Tender Evaluation**

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

- **Gateway 4 – Contract**

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

TOOLKIT 4 –SHORTLISTING

Toolkit Description:

This toolkit describes how a standard Pre-Qualification Questionnaire (PQQ) can be used for shortlisting applicants in the Restricted, Negotiated and Competitive Dialogue procedures or seeking relevant information on bidder capacity under the Open Procedure

Relevant legal context:

EU Public Procurement Directive 2004/18/EC Articles 44-52 specific 45 - 48 and article 52 – 54 in Directive 2007/17/EC

Common Mistakes:

The major mistake that procurers make is that they

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

Again, this comes back to weak pre-procurement planning.

Good practice:

It is suggested that the Contracting Authority use one standard template for PQQs as this makes it easier to use for both procurers and applicants. Only the criteria relating to personal situation, financial capacity, technical capacity, relevant experience, expertise and competency of candidates set out in the Directive 2004/18/EC Articles 45 to 48 are permissible as selection criteria, but other information may be gathered where needed for future dealings with the applicant during the process.

A PQQ should cover questions and requirements to:

- Organisation profile
- Grounds for exclusion
- Insurance
- Financial information
- Health and safety
- Equality and diversity
- Technical capacity
- References
- Corporate social responsibility
- Undertaking
- Bank references

Contracting Authorities may opt to shortlist only a limited number of qualified candidates if this intention is indicated in the Contract Notice, which should state the

number or range of candidates. Shortlisting of candidates who meet the minimum qualification criteria must be carried out by non-discriminatory and transparent rules and criteria made known to candidates. The Directives require that a number sufficient to ensure adequate competition is invited to submit bids and indicate a minimum of five (provided that there is at least this number who meet the pre-qualification criteria)

The Evaluation Committee should follow the following steps when shortlisting PQQ applicants:

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

Link to a PQQ example in [Toolkit 12](#)

TOOLKIT 5 - SELECTION CRITERIA

Toolkit Description:

To assist practitioners in designing and carrying out a high standard selection of bidders' process

Relevant legal context:

EU Public Procurement Directive 2004/18/EC Articles 44-52

Common mistakes:

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

- Minimum annual revenue required 10 million euro for a contract with annual value of 1 million euro
- Requiring tenderers to have a local office or branch at the time of submission of tenders
- Requiring professional or technical staff of other Member States to provide proof of the recognition of their qualifications at the time of submission of the tenders / expressions of interest.
- Requiring certain standards without mentioning "or equivalent"
- Requiring an unnaturally high or low solvency percentage that tends to favour certain operators
- Requiring no loss in any of the previous 3 years, without taking into account that cumulatively over the 3 years the company may have been profitable. A rational approach should be adopted when setting financial criteria.
- Unclear objective criteria to select the best applicants for instance if the Contracting Authority just ask for previous experience without requiring further details of the reference such as contract type and period, volume and result.
- Requiring establishment of a local office at tender submission time (can only be required at contract date.)
- Requiring registration of a company at tender submission time (can only be required at contract date)

Selection criteria

It is important to note that the selection of economic operators and the award of the contract are two different exercises in the award of a public contract. **Selection is about determining *which* economic operators are qualified to perform the contract to be awarded on the basis of the selection criteria pre-established by**

the Contracting Authority. All relevant selection criteria for a specific contract must be taken into account to ensure that only those economic operators that are capable of fulfilling the contract are selected to pass through to the evaluation of their offers stage. The selection criteria must be:

- compliant with the EU Treaty principles, in particular the principles of transparency, equal treatment, non-discrimination.
- proportionate to the size and nature of the contract
- determined by taking into account the specific need of each tender, and they must be relevant to the specific contract to be awarded. They must not be determined in an abstract way.
- designed in such a way that economic operators, including small medium enterprises (SMEs), that have the potential to be efficient and effective providers would not be deterred from participating.
- formulated in a simple way so that they can be easily understood by economic operators.

Good practice:

Ensure that all criteria being used are:

- compliant with the EU Treaty principles, in particular the principles of transparency, equal treatment, non-discrimination and
- proportionate to the size and nature of the contract

Always mention 'or equivalent' when specifying standards or brands of any type.

Ask for:

- Company history – for example: a definition of the product range; years in business; staff turnover
- Documentation for technical capacity – for example: previous experience, equipment and workforce composition
- Minimum annual revenue of EUR 4 million where the Contract value was EUR 1 million per year (Note that the maximum requirement for yearly turnover from the economic operators will become 2x under the new Directive Article 58).
- Solvency ratios per year the last 3 years (define a minimum level)
- References for similar previous contracts/projects within the last 3 years. Each reference must be detailed - at least two of the references must be fully appropriate to the contract (minimum requirement)
- Valid insurance certificates – documentation that the insurance is in force.

Criteria (or methodologies) that may be applied in order to choose the economic operators to be invited to tender/negotiate/conduct a dialogue from among the

qualified economic operators must be objective and non-discriminatory and may not extend beyond the criteria allowed by the Directive itself.

Joint tenders

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

TOOLKIT 6 - AWARD CRITERIA

Toolkit description:

To assist practitioners in designing a high standard of award criteria in the tender documents

Relevant legal context:

EU Public Procurement Directive 2004/18/EC Articles 53-55

Common mistakes:

The most common mistakes are to mix up selection and award criteria or not to define a range of requirements over which bidders can compete. Typical examples of bad practices seen are:

- Too loose description of criteria, or only minimum requirements defined with no possibility to compete. Examples:

Quality is evaluated:

on the product's durability
a warranty period of 5 years
colour blue
robust material

Service is evaluated:

time of delivery of 7 days
robust consultancy advice
24/7 ordering
training in use of products

- No connection between the award criteria and the subject matter of the contract
- Too many criteria without regard to the scope and need of the contract
- Mixing selection criteria and award criteria (i.e. using selection criteria as award criteria (e.g. previous experience) or using criteria already used at selection stage again at award stage.
- Use of average pricing, whereby offers close to the average of all offers receive more points than offers further away from the average. Although the tender offer price is an objective criterion to use at award stage the use of this

average pricing methodology represents unequal treatment of tenderers, particularly those with valid low offers. The practice is therefore illegal.

Good practice:

The award criteria (Article 53) are the criteria that constitute the basis on which a contracting authority (CA) chooses the best tender – the tender that best meets the requirements set out in the Specification – and consequently awards a contract. These criteria must be established in advance, preferably at the planning stage, and must not be prejudicial to fair competition.

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

- a) **Lowest price** – the contract is awarded on the basis of the price only; or
- b) **Most economically advantageous tender (MEAT)** – other criteria in addition to or instead of price can be taken into account to award the contract, for example, quality, delivery time, after-sales services.

Some cases where it may be considered appropriate to use the **lowest-price** criterion are:

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

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

Using MEAT criterion, as opposed to the lowest-price criterion, presents a series of advantages. It allows Contracting Authorities to take into account qualitative considerations. The MEAT criterion is typically used when quality is important for the Contracting Authority. For those requirements with a long operating life, it allows the Contracting Authority to take into account the life cycle costs (*i.e.* costs over the

life of the product) of the requirement purchased and not only the direct cost of the purchase (or initial purchase price) within the set specifications.

Some cases where it may be considered appropriate to use the **MEAT** criterion:

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

A Contracting Authority may take into account various criteria to determine the MEAT. Article 53(1) of the Directive contains an *illustrative* list of these criteria, which are:

- price
- quality
- technical merit
- aesthetic and functional characteristics
- environmental characteristics
- running cost
- cost-effectiveness
- after-sales service and technical assistance
- delivery date and delivery period or period of completion

However, other criteria may be added according to the nature of the contract. For example, the qualifications and relevant experience of staff proposed to deliver a service contract.

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

- be connected with the subject matter of the tender;
- not give the originator an "unrestricted freedom of choice";
- be listed in either the Contract Notice or contract documents;

- be measurable and a range for each criterion must be defined (competitive spreads), including a minimum acceptable value for the Contracting Authority.
- be designed and expressed in such a way that all participants will interpret the criteria in the same way
- comply with the fundamental principles of EU law, in particular the EU Treaty principles (Equal Treatment; Transparency; Non-discrimination; Proportionality).

The identification of the criteria (and any sub-criteria) to be applied must be carried out with due care at the planning stage and their use in the evaluation process should be worked through for a range of possible offers and combinations of criteria to ensure that they achieve the value-for-money desired. Failure to include relevant criteria or mistakenly including inappropriate ones may mean that the tender offering best value-for-money is not selected. The criteria will generally be scored by using a scoring system or a "scoring rule", which assigns weightings to the criteria used see [Toolkit 10](#).

Also, the criteria must be clearly formulated so that tenderers have a clear, common understanding of them. A bidder must on the basis of the description in the tender documents see how he will organize his offer in order to achieve a good score and the offer must be supplemented by documentation explaining how the bidder will deliver the quality and service offered.

Selection criteria can also be used as Award criteria, provided that the criteria an economic benefit of the bid and is capable of being defined over a competitive range. However, if a criteria is already used in the same way as a selection criterion in the pre-qualification phase, it cannot be used again as an Award criterion.

Bad practice examples	Good practice examples
<ol style="list-style-type: none"> 1. The quality offered by the bidder will be evaluated on the technical specification (it is not legal to evaluate on minimum requirements) 2. The supplier must offer minimum opening hours from 8 am to 16 pm – describe the bidders opening hours – long opening hours will be evaluated positively (long opening hours is not defined by the Contracting Authority for instance 24/7) 3. Describe days of delivery from ordering – short time of delivery will be evaluated positively (Short time of delivery is not defined by the Contracting Authority for instance 4 days) 4. Describe if any extra costs will be added for urgent orders (The Contracting Authority 	<p>The supplier must offer minimum opening hours from 8 am to 16 pm – describe the tenderers opening hours – 24/7 offered will be evaluated and weighted positive. (the tenderer now compete between opening hours from 16 to 24/7)</p> <p>Describe days of delivery from ordering there is a minimum of 12 days delivery from ordering – 4 days offered will be evaluated and weighted positive. (the tenderer now compete between 12 and 4 days – no extra points for a delivery time faster than 4 days)</p> <p>Describe if any extra costs will be added for urgent orders. The estimated number of "urgent</p>

<p>needs to advise an estimated number of “urgent orders” per year to calculate the costs)</p> <p>5. Describe the products durability – minimum durability is 2 years from production date. (No preferred durability is defined by the Contracting Authority)</p>	<p>orders” per year is 500. (now the contracting authority can calculate a total cost per year for urgent orders. – which is transparent and clear)</p> <p>The offered products durability must be at least (minimum criteria) 2 years from production date. A offered durability of 5 years will be evaluated and weighted positive (the tenderer compete between 2 and 5 years in durability – no extra points for a offered durability of more than 5 years)</p>
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TOOLKIT 7 - SPECIFICATION WRITING

Toolkit Description:

To assist practitioners in designing a comprehensive, high quality Specification, through a series of questions and answers, together with a checklist

Relevant legal context:

EU Public Procurement Directive 2004/18/EC Article 23

Common mistakes:

The Specification is without doubt the most important tender document and an area where many mistakes are made, often due to a lack of skills/experience in drafting such documents. The following represents a list of typical areas for mistakes:

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

Question & Answer

What is a specification?

A specification can be defined as "a statement of needs to be satisfied by the procurement of external resources". It is sometimes also referred to as an operational requirement, statement of requirement, or a statement of service requirement specification. Its purpose is to present prospective suppliers with a clear, accurate and full description of the Contracting Authority's needs, and so enable them to propose a solution to meet those needs. The supplier's response to the requirement is evaluated to arrive at an awarded contract. The requirements in the specification subsequently become incorporated into the contract with the successful bidder.

When, how and by whom is it produced?

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

For simple procurements the Specification is drafted before the Contract (OJEU) Notice is placed. For more complex procurements the specification develops from a statement of the business requirements developed during the preparation of the business case. In the case of the Negotiated Procedure or Competitive Dialogue it can be developed as the project develops

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

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

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

What are the different types of Specification?

There are 3 types of specification (sometimes known by different names): Input; Output; and Outcome.

- An **Input** Based Specification (sometimes called a technical specification) is a series of instructions on how to do a job. Largely these have fallen out of fashion (except for basic procurements), because they are inflexible, often do not reflect value-for-money and do not allow the bidder to innovate. Any extras added later will usually be charged at a premium. They are usually used with an evaluation on the basis of lowest price only.

- An **Output** Based Specification focuses on the desired outputs of a service in business terms, rather than a detailed technical specification of how the service is to be provided; this allows providers scope to propose innovative solutions that might not have occurred to the procurement team.
- An **Outcome** Based Specification can be the easiest of all to draft, but the hardest to evaluate (and monitor). It is a statement of benefits to be achieved rather than the contractor's input or deliverables.

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

How will bids to meet the Specification be evaluated?

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

- all information needed for evaluation is requested from suppliers;
- requirements and information requests in the specification are covered by the evaluation;
- supplier responses will be provided in a form that matches the evaluation model.

Are variant bids allowed?

Under Article 24 Contracting Authorities are allowed (if they choose) to include in their documentation the possibility of variant bids. The possibility of variants is included where the CA has drawn up a Specification, but considers that there may be a better, more efficient, value-for-money or innovative way of delivering the project of which it may not be fully aware. Variants relate to the different manner in which responses to the invitation to tender may be completed. Variant tenders are permitted in controlled circumstances by the Directives, but if a bidder submits a variant bid criteria the evaluation plan needs to be ready and able to evaluate it.

Variant bids must be submitted in addition to the bids anticipated by the tender documents. In other words the bidder cannot just submit a 'variant' bid. The tender documents (and Notices) must state clearly whether or not variant bids will be allowed. Where the Contracting Authority offer the possibility of variant bids the bidder must also submit a compliant bid based on the specification (in other words a bidder wanting to submit a variant bid must submit two separate bids at the same time- one compliant with the original requirement plus the variant). If Variant bids are to be allowed, then the Contracting Authority should ensure the following:

- **Planning** - The possibility of variant bids should be addressed at procurement planning stage. Market sounding should reveal whether there is a possibility that the draft specification can be delivered by a contractor by methods other

than those anticipated. If it can, and Contracting Authority are willing to embrace the possibility, then the specification should be drafted accordingly.

- **Specification** - Only in the case of output or outcome based Specifications can the Contracting Authority invite variant bids.
- **Evaluation criteria and methodology** - The evaluation criteria must be designed in such a way that both 'compliant' and 'variant' bids can be evaluated using the **same** criteria. It is critical that the evaluation criteria are thoroughly tested at procurement planning stage. What can and does happen is that the evaluation criteria are not sufficiently robust to enable a fair, open and transparent evaluation; however the evaluation criteria cannot be redrawn once it has been settled at planning stage and published. In extreme cases, this can lead to the tender having to be cancelled and started again.

Specification checklist

The specification is *the* key procurement document. It forms the basis against which the successful bidder will be chosen and will become incorporated into the contract setting out what the successful bidder is to deliver. Its final review and signoff is therefore a key decision point in the procurement process, and it is important that those undertaking it have the necessary knowledge, authority and experience. Sign off of the Specification is normally a key stage in a Gateway review process. The Specification must be Business requirements consistent with:

- Business case
- OJEU published Notices
- Procurement and contract strategies
- Evaluation strategy.

Generally, does the specification.....?

- Support standardisation and rationalisation of supplies/services
- Restrict competition
- Enable contractor to make quick decision as to whether to bid
- Act as a barrier to alternative products/new/advanced technology
- Encourage innovation
- Fit with standard specifications in use in the organisation
- Include items that should be covered better elsewhere through another contract
- Reflect organisational priorities, for example the local SME strategy
- Allow consortia bids
- Identify the procurement route
- Include pain/gain provisions to incentivize performance
- Cover confidentiality and data protection
- Present a realistic timetable for the procurement and implementation
- State start and finish date/contract period and any possible extensions
- Indicate certainty around volumes (or are they banded?)
- Allow sub-contracting
- Have a version control mechanism

Is the specification?

- Uniform for the same or similar requirements
- Clear complete, reliable and proof read
- Readily incorporated into a contract
- Challenge proof
- Not asking for irrelevant information

Has the Contracting Authority?

- Consulted key partners; sector stakeholders; statutory stakeholders; local communities; third sector; trade unions
- Identified user needs including local needs
- Considered how innovation would be incorporated into delivery
- Researched the market - can it deliver; likely cost; timescales
- Considered alternative delivery mechanisms
- Carried out a risk assessment and allocated risks appropriately
- Considered the impact of supplier failure
- Identified what is to be procured and that it will fulfil customer needs
- Reflected the market and stakeholder consultations and corporate priorities in the packaging of the contract
- Determined the scope and the range of goods/ services/ works required
- Determined the selection and evaluation criteria including weightings, scoring mechanism and methodology (and documented them)
- Ensured evaluation criteria are clear to all
- Tried 'dummy' runs to test the selection and evaluation criteria
- Considered collaborating with other procurers
- Ensured that declarations of interest / conflict of interests have or will be made (especially consultants and Evaluation Committee members)
- Considered and identified mandatory/ desirable elements of the specification
- Covered Social Responsibility issues
- Considered division into lots
- Ensured that funding is available
- Have in place a Communication Plan
- Made arrangements to 'freeze' the specification (and budget) at an appropriate time

Reviewing current specification

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

TOOLKIT 8 – SELECTION OF BIDDERS

Toolkit document:

This Toolkit uses Q&A to explain how to develop and apply selection criteria to identify those applicants who will be selected as eligible to submit a tender plus indicative good practice.

Relevant legal context:

EU Public Procurement Directive 2004/18/EC Article 44-52

Common Mistakes:

- Contracting Authorities fail to carry out a dry run of both stages of the process to take out any potential malfunctions at the planning stage and the
- CAs regularly mix up the two stages of the process- once the Selection stage has been completed CA cannot return to it. There are also certain issues that can only be covered at Selection stage (and similarly certain issues that can only be covered at Evaluation stage)

When to develop the conditions for selection criteria and methodology?

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

What are selection criteria?

Conditions for participation are the minimum mandatory conditions that potential suppliers must meet in order for their submissions to be considered. These requirements are assessed as either being 'met' by a supplier in the first stage of evaluation of their submission or not. This stage is about the bidder not the bid. Conditions for selection can include any pre-qualification or pre-registration requirements, although these are limited by the EU public procurement Directives and competition rules. See Toolkit 5 for more on Selection criteria.

As non-conformity with conditions for selection will eliminate a supplier from further consideration, it is important for the Contracting Authority to carefully consider what, if any, should be mandatory (starting with reference to the Directives). For example, in some cases, a supplier meeting a particular level of insurance may need to be mandatory and in others, the level may be desirable but not mandatory.

Think about how to reduce the number of prospective bidders if they all meet the requirements. In the one stage process (Open Procedure) 'selection' and 'evaluation' are all done at the same time.

How to develop the conditions for selection criteria?

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

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

How to develop a selection methodology?

The evaluation methodology used depends on the nature and complexity of the procurement. The methodology selected should enable the Contracting Authority to **objectively** and transparently determine which bidder offers the best option in terms of capacity to deliver (selection) and offers best value for money in the bid (evaluation) by addressing:

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

How to apply a numerical scoring methodology?

After screening out those bidders that do not comply with the minimum selection criteria, a numerical rating is allocated if the number of applicants needs to be reduced to make a shortlist. The Contracting Authority must indicate, in the Contract Notice or in the invitation to confirm interest, the objective and non-discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite and where appropriate, the maximum number. When scoring applicants, the decision on points **MUST ALWAYS** be followed by comments of the evaluation so as to be able to brief the applicants on the result.

Good practice

In practice, good selection criteria are considered to be:

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

TOOLKIT 9 – EVALUATION OF BIDS

Toolkit Description:

This Toolkit describes the methodology for carrying out the Evaluation stage of the procurement process in the form of a Q&A.

Relevant legal context:

EU Public Procurement Directive 2004/18/EC article 53-55

Common mistakes:

Typical errors occurring during evaluation are:

- Failure to adapt the awarding criteria and methodology to the specifics of the contract
- Mixing up the Selection and Evaluation stages of the process
- Failure to divulge the evaluation methodology in the tender documents
- Arithmetic errors when adding up scores and ranking bids
- Elimination of bids for being too low, even though there were no criteria or methodology established in advance to do this

When to develop the evaluation criteria and methodology?

The evaluation criteria and methodology must be finalized, and approved, before the invitation to tender is published.

How to develop the evaluation criteria?

Evaluation criteria are used to assess how well an offer meets the Contracting Authority's requirements and hence to rank bids. The conditions for evaluation criteria selected depend upon the specific nature of the procurement. Develop them alongside the Specification. The **evaluation** criteria must address:

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

See [Toolkit 6](#) for more on Award criteria.

What are the different evaluation methodologies that can be applied?

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

- the degree to which a bid meets qualitative criteria;

- whole-life costs;
- the level of risk associated with selecting a particular quotation;
- criteria **must** be listed (in order of priority) in the documents (usually the specification) with weightings (if any) and scoring methodology.

The main evaluation methods are:

A. Lowest cost

The Lowest Cost methodology is useful for simple or low-cost procurements. It merely involves selecting the lowest price response that meets all of the conditions for participation.

B. MEAT - Price/Quality – numeric scoring

This methodology is useful for evaluating moderately complex purchases where the qualitative criteria are of roughly equal importance. After screening out those bids that do not comply with the conditions for participation, a numerical rating is allocated against each of the desirable non-cost or qualitative evaluation criteria depending on the level of compliance. The ratings are combined for each bid to give an overall quality score. Bids are then ranked according to the ratio of Price/Quality score.

C. MEAT - Weighted scoring methodology

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

D. MEAT - Numerical scoring methodology

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

Can tenderers be contacted during the evaluation stage?

When evaluating the bids, clarifications can be sought from tenderers, but must maintain the requirement of equal treatment and be non-discriminatory. It is best to ask for clarifications in writing and they should refer to the section in the Tender and ask a specific question. Avoid asking questions which essentially give the tenderer the opportunity to submit any extra information. Clarifications must not be confused

with post tender negotiations where the parties negotiate changes to the Tender and resultant Contract. In a restricted or open procedure no negotiations are allowed and the Procurement Officer must take care not to negotiate the terms of the Contract with the Tenderers as any changes could invalidate the evaluation process. If the offers contain a clearly arithmetical error in the bid price the contracting authority may contact the tenderer for clarifying the bid price.

Can interviews be used to evaluate tenders?

An interview might form part of the evaluation if foreseen in the ITT. If any interviews are to take place during the evaluation period it must be made clear to Tenderers whether there will be a score allocated to the interview. This would need to be justified as being relevant to the contract requirements. An interview may help to demonstrate that the personnel to be involved in providing the Contract are experienced and understand the Contract and proposed methodology. As a result the scores for any such aspects can be adjusted accordingly as long as the ITT made it clear that this would happen. A clear record of the questions asked and the answers given should be kept to demonstrate that all candidates were equally treated, and that the changes in score are directly related to the evaluation criteria. It is always best practice to clarify and document in written.

How should the Evaluation Committee reach its decision?

The Evaluation Committee must only score the Tender submissions on the information contained in them and any clarifications received. It is not legal to take into account any other information may already have received by any means, including personal experience.

Each Evaluation Committee member MUST initiate, conduct, and complete an individual evaluation of each Bid. The evaluations will be summarized and consensus score reached for the Committee as a whole. It may develop that members of the Committee will not always arrive at the same conclusions. The Committee can then discuss any individual differences as best as possible, which may include requests for additional material. The resulting discussions or materials may bring consensus or each member may retain his/her independent thinking in his/her rating which can be averaged with the other evaluations.

Insofar as these methods produce an unacceptable result to any member, he/she may, at his/her option, take exception in the final report. Where such differences are matters of fact (mathematical in nature or facts of evidence), and cannot be resolved by consensus, the Committee Chair shall rule and record such events and rulings.

The score sheet should record comments to support the scoring and it should ensure that these are sufficient for the member to be able to explain the score. The member may also mark up a copy of the Tender as he/she review it, but note that such comments may be referred to in any subsequent debrief or challenge. All members

should be conscious of and treat all portions of the evaluation with the knowledge that their comments and recommendation may become part of the public record.

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

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

When scoring Tenders against the evaluation criteria, the scoring rationale should be decided before the members of the Evaluation Committee start evaluating. One suggested approach is to have a graduated approach such as in the following table:

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

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

How should tenderers be informed of the outcome?

When the evaluation process is complete the Tenderers all need to be notified of the outcome. The Regulations require the Contracting Authority to provide all parties the following information:

- the name of the successful Tenderer or Tenderers;
- a reminder of the criteria used to evaluate the Tenders;
- the successful Tenderer's score and characteristics
- the score of the Tenderer being notified.

Clearly some of this information will not be available for those who have only expressed an interest and were not invited to tender. This information must be sent as soon as the decision to award the Contract has been made and at least 10 days expired before the Contract is awarded (the so-called 'Standstill' period).

If any person asks for a de-brief within the first 2 working days the Authority must give the following information in such a time period that the Tenderer or interested party has the information for at least 3 working days before Contract Award. This is

known as an “accelerated debrief” and, if necessary, this means the Contract Award has to be delayed beyond the minimum 10 day period.

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

TOOLKIT 10 - MODIFICATION OF CONTRACTS

Toolkit Description:

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

Relevant legal context:

Directive 2004/18/EC Article 30 and 31 as well as subsequent ECJ case law, as notably **Presstext Nachrichtenagentur GmbH** (ECJ C-454-06), *Spain vs Commission* (ECJ T-540/10 and T-235/11)

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

Common mistakes:

Contracting authorities wrongly assume that any changes required during the implementation stage can simply be accommodated by either modifying the existing contract or concluding an additional contract with the incumbent contractor performing the contract, provided such changes do not increase the value of the contract by more than 50%.

Any additional works can only be allowed if unforeseen circumstances occur. Unforeseen circumstances MUST be interpreted very restrictively and must be fully justified. Situation where Justifications seems fair is when the contracting authority is out of influence of the circumstances for instance like bankruptcy, changes in legal acts or nature impacts.

Good practices:

A number of actions during the procurement cycle can help avoid the risk of modifications or additional contracts. Some or all of these actions may or may not

be appropriate to a particular procurement. The evaluation committee should consider each action and decide which ones are relevant:

- A gateway review that assesses whether all necessary studies and investigations needed before launching the contract are complete;
- Freezing the specification and budget at the procurement planning stage;
- Ensuring that the original contract provides for optional additional works, services or supplies and includes applicable prices at the bid stage;
- The use of standard pro forma contracts which will include clauses controlling modifications and annual price regulations;
- Formal procedures that require modifications to be documented and signed off by the evaluation committee.

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

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

The following questions and answers may help to deal with modifications more satisfactorily.

Q1. When can a Contracting Authority award an additional contract directly during the implementation stage?

A1. Article 31 of Directive 2004/18/EC sets down the circumstances in which a Contracting Authority can use the Negotiated Procedure without publication of a Contract Notice to directly award additional works/services/supplies. Those circumstances are tightly defined, specifically the following conditions must be met (Art. 31.4):

- a) for additional works or services not included in the project initially considered or in the original contract have, through unforeseen circumstances, become necessary for the performance of the works or services described therein, on condition that the award is made to the economic operator performing such works or services:
 - when such additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the contracting authorities, or

- when such works or services, although separable from the performance of the original contract, are strictly necessary for its completion.

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

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

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

Any Contracting Authority seeking to use Article 31 should ensure that the particular circumstances match those set out in the Directive. The provisions of Article 31 have been more narrowly defined by subsequent case law.

Q2. When can a contract be amended without substantial change and how to do it in practice?

A2. In principle, any contract can be amended provided both parties agree during the contract period. Use of standard contracts facilitates this. Most public sector contracts will utilise a 'standard form' published by a recognised and respected professional national or international organisation. The national office with responsibility for public procurement normally issues guidance on contract forms to be used. These sometimes cross borders and use of those standard forms becomes the norm. The advantage of using an international standard form is that the relevant contractors and suppliers in the sector across the EU become familiar and comfortable with the format and the provisions, which reduces risks and encourages competition. Such contracts almost certainly contain a provision for 'modifications' (also referred to as 'variations'). ('variations' should be met from the contingency if such a contingency exists for the particular type of work / supply etc involved in the particular variation order. Once the contingency has been absorbed fully then move to amendments to the contract for which there is no provision / contingency. Not

only do they set down the process to be followed they will also identify who has the power to issue and approve such variations and also how the value of such variations is to be established. These are very common in construction contracts as it is accepted that the contract documents as drawn can very rarely identify exactly what is to be delivered.

However, the EU Public Procurement Directives and case law restrict **substantial** changes to contracts. The facility to make changes after the contract is signed is limited in the same way as in the period from Contract Notice to Award. Changes made after signing the contract could well be seen as attempts to circumvent the Directives. The following guidelines should be borne in mind:

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

The key question becomes: what represents a “substantial” change? The justification for the modification needs to explain how the outcome of the tender would have been the same even if the modification had been included in the original tender document. If the value of the extension of the contract is negligible the changes are not substantial. Therefore only minor changes can be legally done within the contract period.

Q.3. What are the three tests that constitute substantial changes?

A.3 A change to the contract is substantial if it passes one or more of the following tests:

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

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

“Substantial changes” are being introduced in the new EU directive 2014/24/EC.

Q.5. What are “unforeseen circumstances”?

A.4. Unforeseen circumstances are circumstances which a diligent Contracting Authority could not have reasonably foreseen from the beginning and those circumstances are not attributable to actions of the Contracting Authority, such as poor planning. This test should be strictly applied. Unforeseen circumstances should be assessed on a case by case basis, but may include (not exhaustively):

- New law/regulations
- Bankruptcy
- Strike
- Environment issues
- Natural disasters

Q.5. When does the '50%' criteria apply?

A.4. Article 31 of the EU Directive 2004/18 covers a specific situation in the use of the Negotiated Procedure without publication of a Contract Notice, in other words direct negotiation. The ceiling of 50% of the original contract sum is included in the Directive as a caveat. The Contracting Authority can only claim the 50 % option if unforeseen circumstances have occurred, are well documented and a justification is given as to why a new tender is not possible. It is the legal duty of the Contracting Authority to prove the unforeseen circumstances and that these cannot be attributable to the actions of the Contracting Authority. A contract can be modified due to unforeseen circumstances, but only as long as it is not in a substantial form.

Q.6. Are options for additions within the contract the best way to deal with this?

A.6. One way to avoid additional elements in a contract is to have planned for them upfront as optional additional works/services/supplies. The Directive allows options to be part of the contract however these must be clearly specified, calculated and priced as part of the originally proposed contract. An option is a right of the Contracting Authority to purchase additional goods, works or services. An option can be both a right to buy other or more works/services/supplies and a right to extend the current contract. The option must be clearly described in the tender documents for it to be legal. The option must be priced by the tenderers and calculated in the total volume in the awarding process. If a change is not covered by an option, modifications can only be made if they are not substantial. In addition the Contracting Authority should also then refer back to Article 31 in the Directive to see whether it applies or not. The Directives therefore only allow changes if they are covered by an option that allows the change and the option are priced accordingly. A new contract procedure would need to be launched when the variation to the original contract is classed as substantial.

Q.7. How should modifications be approved and document?

A.7. both internal procedures of the Contracting Authority and the contracts themselves should set out the methodology for approving and documenting modifications. Contracts should include a provision for modifications (variations) and

these clauses explain how the modification system will operate. Ordinarily, they can be proposed/approved by the person nominated to manage the contract. In a construction contract this would be the Architect or Engineer, who will order a variation on a standard form to be valued by the quantity surveyor. The contract should include a provision for the contractor to have the ability to challenge the value of the variation, although in reality the value is often established by informal negotiation. Similar control mechanisms should be in place for service contracts. It is good practice for all modifications with an additional cost implication above certain thresholds to require approval at the senior management level within the Contracting Authority.

TOOLKIT 11 - LEGAL COMPLIANCE CHECKLIST

Toolkit Description:

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

Checklist

Planning stage

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

Advertising and tendering stage

- 13) Were the minimum time limits specified in the Directives (depending on whether a PIN was published) complied with?
- 14) Were all the compulsory elements (Annex VII A of Directive 18/2004EC) included in the Contract Notice?
- 15) Was the use of EU grant funding indicated in the Contract Notice (note that this is not compulsory, but is good practice for EU grant supported projects)?
- 16) Does the Contract Notice or related descriptive documents clearly state the criteria to be employed for selecting capable tenderers and evaluating the best bid?
- 17) Where the contract is to be awarded to the most economically advantageous tender (MEAT), were weights for the award criteria listed in the Contract Notice or related descriptive document, or, where this has not been possible, were the criteria listed in descending order of importance?
- 18) Where relevant and possible, do the technical specifications take account of accessibility criteria for disabled users (Art 23.1)?
- 19) Do the technical specifications afford equal access to compete to all tenderers and without creating unjustified obstacles to competition (Article 23), e.g. avoid setting national standards without recognising the possibility for 'equivalent' standards?
- 20) If variants are allowed, are MEAT criteria used and was this referred to in the Contract Notice?
- 21) For restricted procedures, were at least 5 companies (3 for competitive dialogue and negotiated with advertising) selected and invited, in writing and simultaneously (Art 44.3), to submit tenders, negotiate or take part in the dialogue?
- 22) Were requests for information from bidders responded to with equal treatment to all bidders and within the time limits set in the Directive (within 6 days of the request and at least 6 days before the latest date for receipt of tenders)?
- 23) At the tender opening, were all tenders opened together, in the presence of at least 2 officials, correctly recorded, and any received after the closing date/time rejected?

Selection stage

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

- 24) Were the selection criteria used to select the candidates capable of performing the contract limited to those allowed by the Directive, e.g. personal situation, financial capacity, technical capacity, relevant experience, expertise and competency?
- 25) Were the criteria applied those and only those set out in the Instructions to Tenderers and in the Contract Notice?
- 26) Were the selection criteria applied fairly and equally between candidates?
- 27) If some candidates were rejected at the selection stage, were the reasons for rejection valid?

Award stage

- 28) Did the Evaluation Committee carry out a non-discriminatory evaluation procedure following the methodology described in the Contract Notice or related descriptive documents in order to award the contract?
- 29) Were the award criteria used to evaluate the tenders and the related weightings those and only those set out in the Instructions to Tenderers and in the Contract Notice?
- 30) Where a restricted, negotiated or competitive dialogue procedure was used, were any of the criteria used at the pre-selection phase re-used at the evaluation stage?
- 31) If the contract was awarded on the basis of MEAT, were the award criteria are linked to the subject matter of the contract (e.g. quality, price, technical merit, aesthetic, functional or environmental characteristics, running costs, cost-effectiveness, after-sales service, delivery schedule) and not to the capability of bidders?
- 32) If any tenders were rejected due to being 'abnormally low', were the conditions met, namely, that the Contracting Authority requested in writing details of the constituent elements of the tender (Article 55) that it considered relevant in justifying the abnormally low tender price?
- 33) Are all key decisions concerning the contract clearly documented and in particular is there a complete evaluation report signed by all members of the Evaluation Committee?
- 34) Was the contract actually awarded to the tenderer chosen by the Evaluation Committee?
- 35) Was the result of the contract award published in the OJEU within 48 days of the contract signature date?
- 36) Were all unsuccessful tenderers notified with the correct information, within the relevant timescale and a "standstill period" applied before contract signature?

- 37) Did any tenderer submit a complaint or appeal to the Contracting Authority or other relevant body and was there any substance to such a complaint?

Implementation stage

- 38) If any additional works/services/supplies were awarded without competition, did all of the relevant conditions (Article 31.4) apply: (i) 'unforeseen' by the Contracting Authority, (ii) 'not separable' or if separable 'strictly necessary', and (iii) additional value not more than 50% of the original contract value?
- 39) If any additional works/services/supplies have been awarded by negotiation without advertising, would the value of the additional contracts bring the cumulative value of the original and the additional contracts above the relevant threshold in the Directive?
- 40) Did any reduction in the scope of the project occur or were contracted timescales altered in such a way that put into question the original decision to award the contract to the contractor?

TOOLKIT 12 – USEFUL LINKS

The DG MARKT website on Public Procurement is the primary source of information on Public Procurement matters in the EU:

http://ec.europa.eu/internal_market/publicprocurement/index_en.htm

http://ec.europa.eu/dgs/internal_market/index_en.htm

Standard forms used in European public procurement can be accessed on-line via eNotices:

<http://simap.europa.eu/enotices/viewFormTypes.do>

The SIMAP website contains many useful procurement resources, including templates for publications and key documents:

<http://www.simap.eu.int>

The Common Procurement Vocabulary (CPV) explanations and Codes can be found here:

http://ec.europa.eu/internal_market/publicprocurement/rules/cpv/index_en.htm

Procurement Forums

<https://procurement-forum.eu/>

Sustainable Procurement

http://ec.europa.eu/environment/gpp/index_en.htm

http://ec.europa.eu/environment/gpp/buying_handbook_en.htm

<http://www.iclei-europe.org/topics/sustainable-procurement>

Legal texts:

<http://eur-lex.europa.eu/>

<http://uk.practicallaw.com/6-422-3174>

<http://gettingthedealthrough.com/books/33/public-procurement/>

Other Public Procurement Guidance – practical issues around procurement

<http://www.eib.org/epc/resources/epc-procurement-and-cd-public.pdf>

<http://www.scotland.gov.uk/Resource/Doc/116601/0053331.pdf>

<http://www.procurementportal.com/>

<http://www.etenders.gov.ie/generalprocguide.aspx>

<http://www.scotland.gov.uk/Topics/Government/Procurement>

http://www.wandsworth.gov.uk/downloads/file/4441/template_pqq

European Union public procurement links

<http://europeanfundingnetwork.eu/policy/procurement>
http://admin.interact-eu.net/downloads/1909/Public_procurement_in_IPA_cross_border_cooperation_programmes_with_EU_Member_States_in_shared_management.pdf
http://ec.europa.eu/regional_policy/information

Innovation in procurement

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

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