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Guide to the EU public procurement rules

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Introduction

This Guide provides an overview of the EU public procurement rules. These are the set of EU rules that require the advertising and competitive tendering of contracts for works, goods or services by public sector bodies and certain utilities operating in the water, energy, transport and postal services sectors.

If you would like any further information on the rules as they apply in a particular jurisdiction please contact the relevant member of the team using the **Key Contacts** list at the back of the Guide.

On our website you will also find our **e-Guides** covering individual jurisdictions. These e-Guides detail how the EU Directives have been transposed into the national laws of the individual Member States.





The Directives

Across the EU, public expenditure on works, goods and services accounts for around 14% of EU GDP, with an annual value of nearly €2 trillion. The opening up of these public procurement markets to competition is a key objective of the EU's Single Market.

To achieve this objective, the EU has adopted a series of directives requiring Member States to advertise contracts above certain threshold values in the Official Journal of the European Union (**OJEU**) and to award them in accordance with a common set of prescribed contract award procedures.

The principal EU public procurement rules are contained in four Directives:

- **Directive 2014/24** on the award of public works contracts, supply contracts and services contracts (the **Public Sector Directive**);
- **Directive 2014/25** on the award of contracts by entities operating in the water, energy, transport and postal services sectors (the **Utilities Directive**);
- **Directive 2014/23** on the award of concession contracts both by public sector bodies and certain utilities (the **Concessions Directive**); and
- **Directive 2009/81** on the award of contracts in the fields of defence and security (the **Defence Directive**).

The Directives are based on the EU Single Market rules and the principles of the Treaty on the Functioning of the European Union (**TFEU**). These principles include the free movement of goods, freedom of establishment and freedom to provide services as well as the principles deriving therefrom, namely the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

In order to speed up procurement practices and to facilitate competition, the Directives require that all public procurement processes be conducted electronically by October 2018.

While the European Commission can take infringement proceedings against Member States for failures to comply with the Directives, the four principal directives do not

make provision for remedies. This is consistent with the general position under EU law that third party remedies are left to Member States to provide for under their own systems of national law (subject to general principles of equivalence and effectiveness). However, in order to ensure a degree of consistency in the remedies available to companies and other 'economic operators', the EU has adopted two additional directives specifically on remedies, one for the public sector and one for utilities:

- **Directive 89/665** (public sector)
- **Directive 92/13** (utilities)

The Remedies Directives were substantially amended by **Directive 2007/66**.

As amended, the Remedies Directives set minimum national review standards to ensure that rapid and effective means of redress are available in all EU countries. These rules include a minimum 10 or 15 day standstill period between the award and the signature of a contract, and make it necessary to inform all tenderers about the outcome of tender procedures.

As the Directives are adopted as EU Single Market rules, they are applied in the EFTA EEA Member States (Norway, Iceland and Liechtenstein) under the EEA Agreement.



Contracts subject to the Directives

In general terms, the rules apply to the award of a contract where the following three conditions are met:

- the contract is being awarded by a public body falling within the definition of a **'contracting authority'** (or a **'contracting entity'** in the case of the Utilities Directive);
- the contract has as its object the procurement of **works, supplies or services** (or the award of a works or services concession contract for the purposes of the Concessions Directive); and
- the estimated value of the contract exceeds the relevant **EU threshold**.

The following sections consider each of these three conditions.

Contracting authorities/entities

For the purposes of the Public Sector Directive, **'contracting authorities'** are defined as:

- the State (i.e. government departments);
- regional or local authorities; and
- bodies governed by public law or associations formed by one or several of such authorities.

'Bodies governed by public law' are defined as bodies that have all of the following characteristics:

- they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- they have legal personality; and
- they have any of the following characteristics:
 - they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law;
 - they are subject to management supervision by those authorities or bodies; or
 - they have an administrative, managerial or supervisory board, more than half of whose

members are appointed by the State, regional or local authorities, or by other bodies governed by public law (the financing test should be considered each year, for example in the case of universities).

For the purposes of the Utilities Directive, **'contracting entities'** are defined as entities engaged in one of the prescribed regulated utility activities and being: (a) a 'contracting authority' (satisfying the definition above); (b) a 'public undertaking' (essentially a public owned or controlled commercial entity); or (c) a private undertaking operating on the basis of 'special or exclusive rights' granted by a competent authority of a Member State. For the purposes of this Guide, we refer to contracting entities as **'utilities'**.

Contracts for the procurement of works, supplies or services

The rules apply to contracts for pecuniary interest concluded in writing having as their object the execution of works, the supply of products or the provision of services.

Works contracts

Works contracts are contracts which have as their object any of the following:

- the execution, or design and execution; or
- the realisation, by whatever means, of a work corresponding to the requirements specified by the authority or utility exercising a decisive influence on the type or design of the work.

For these purposes, 'a work' means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function.

Supply contracts

Supply contracts are defined as contracts which have as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products, whether or not the contract also includes, as an incidental matter, siting and installation operations.

Service contracts

Service contracts are defined as contracts which have as their object the provision of services other than those incidental to a works contract. All service contracts are subject to the full application of the relevant procurement rules, unless they either form part of the 'light-touch regime' or are included in the list of excluded services.

Works or services concession contracts

For the purposes of the Concessions Directive, these are defined as contracts for pecuniary interest concluded in writing by means of which:

- one or more authorities or utilities entrusts the execution of works or provision of services to one or more economic operators; and
- the consideration for which consists either solely in the right to exploit the works or the services that are the subject of the contract, or in that right together with payment.

Concession contracts are common in network industries and for the delivery of services of general economic interest. Concession holders may, for example, build and manage motorways, provide airport services, or operate water distribution networks.

Special regime for social, health and specific services ('light touch regime')

The Public Sector, Utilities and Concessions Directives all make provision for a so-called 'light touch regime' for certain social, health and other specific services which, by their nature, have limited cross-border dimension.

This light touch regime covers the following services:

- Health, social and related services
- Administrative social, educational, healthcare and cultural services
- Compulsory social security services
- Benefit services
- Other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services
- Religious services
- Hotel and restaurant services
- Legal services
- Other administrative services and government services
- Provision of services to the community
- Prison-related services, public security and rescue services
- Investigation and security services
- International services
- Postal services
- Miscellaneous services

Framework agreements

The Public Sector Directive and Utilities Directive also apply to framework agreements. A 'framework agreement' is defined as an agreement between one or more authorities or utilities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

The rules contain specific provisions governing the setting up and use of framework agreements, including rules governing 'call off' contracts awarded under them. The rules on public sector framework agreements are stricter than the utilities sector rules.

Provided authorities / utilities do not use framework agreements improperly or in such a way as to prevent, restrict or distort competition, call-off contracts procured under them do not have to go through any separate OJEU compliant tender process.



Dynamic purchasing systems (DPS)

The Public Sector Directive and Utilities Directive also make provision for DPSs. A DPS is an entirely electronic system designed to facilitate the repeat procurement of commodity goods or services, such as office supplies and stationery. It is similar to an electronic framework agreement, except that new suppliers must be able to join at any time provided they satisfy the selection criteria.

Once a DPS is set up, an authority or utility entitled to use it may award specific contracts under it by inviting all suppliers admitted to the relevant category to tender.

Design contests

Finally, both the Public Sector Directive and the Utilities Directive also make provision for specific rules on the running of design contests, where authorities or utilities put out to competition requests to produce a design, particularly in the fields of planning, architecture, civil engineering and data processing. There are special valuation rules and thresholds for these contests.

Excluded contracts

All four EU Directives include a series of general and specific exclusions. Any reliance on these exclusions needs to be considered carefully as they are construed narrowly. Moreover, any reliance on an exclusion needs to be recorded at the time the decision is taken, not after the event.

The principal exclusions under the Public Sector Directive are:

- utilities contracts (which are covered instead by the Utilities Directive)
- contracts for the provision or exploitation of public communications networks or to provide one or more electronic communications services
- contracts governed by separate international procurement-related rules
- certain specified services contracts (relating to the acquisition or rental of land; for the acquisition, development and production of broadcasting programmes and broadcasting time; for arbitration and conciliation services; for legal services in the

ambit of litigation, arbitration or judicial proceedings, as well as document certification and authentication services provided by notaries and legal services provided by trustees or appointed guardians; for financial services in connection with the issue, purchase, sale or transfer of securities or other financial instruments; employment contracts; for public passenger transport services by rail or metro; and political campaign services),

- service contracts awarded on the basis of an exclusive right
- certain forms of contracting between the public sector bodies (forms of ‘public-public cooperation’ recognised by the CJEU as not involving the award of a public contract) and
- research and development contracts (now defined by reference to CPV codes), but these are only excluded where (i) the benefits under the contract do not accrue exclusively to the authority or utility for its use in the conduct of its own affairs and (ii) the service provided is not being wholly remunerated by the authority i.e. own research by authorities or utilities, not collaborative R&D.

Current EU thresholds

The principal EU thresholds are set out in the table below. The thresholds are revised once every two years, and the current thresholds apply from 1 January 2016.

The rules require that the estimated contract value is calculated on the basis of the full duration of the contract (net of VAT), including any options to extend. They include specific provisions for estimating the value of contracts having an indefinite duration, and contracts that include a mix of works, supplies and services.

Authorities and utilities must not be attempt to reduce the value with the intention of avoiding the rules. There are also specific provisions to prevent the artificial splitting of contracts to avoid an OJEU tender process.

	Supplies	Services / design contests	“Light touch” social and other specified services	Works	Works or services concessions
Central Government authorities	€135,000	€135,000	€750,000	€5,225,000	€5,225,000
Sub-central contracting authorities	€209,000	€209,000	€750,000	€5,225,000	€5,225,000
Utilities	€418,000	€418,000	€1,000,000	€5,225,000	€5,225,000



Advertising requirements

The Directives require authorities and utilities to advertise contracts in an open and transparent manner so as to ensure equal access to contract opportunities across the EU.

This requires contracts meeting the relevant threshold value to be advertised in prescribed forms in the OJEU via a form of '**call for competition**'.

Prior Information Notice

The purpose of the Prior Information Notice (**PIN**) is to provide the market with advance notice of contracts that an authority intends to put out to competitive tender over the next 12 months. By including details of a contract in a PIN, the authority is able to reduce time limits for receipt of tenders following issue of a Contract Notice.

There is however no obligation to issue a PIN unless it is to be used as a call for competition. Only sub-central authorities (such as local or regional authorities) are entitled to use a PIN as a call for competition. However, they can only rely on a PIN as a call for competition when using either the restricted procedure or the competitive procedure with negotiation (see below), and only when sufficient details of the contract have been included in the PIN. In addition, where a PIN is used as a call for competition, the invitations to tender or to negotiate must be issued not earlier than 35 days and not later than 12 months from the date the PIN is submitted to the OJEU for publication.

A PIN may also be used as a call for competition when procuring under the light touch regime (and must be used in the case of a light touch services concession contract).

The Utilities Directive includes similar rules, though the equivalent notice is termed a '**Periodic Information Notice**'. The other main difference is that the Utilities Directive makes provision for the use of '**qualification systems**', which have their own standard form of OJEU notice.

Contract Notice

Unless a PIN is used as a call for competition, contracts meeting the relevant EU thresholds must be advertised in the OJEU using the relevant European Commission standard forms. The Contract Notice must include sufficient detail as to the nature, scope, duration and value of the contract to be awarded. Most procurements subject to the Directives are advertised using a Contract Notice.

The Concessions Directives makes specific provision for '**Concession Notices**', again in accordance with prescribed standard forms.

Both Concession Notices and Contract Notices can be searched and viewed on the Tender Electronic Database (**TED**).

Contract Award Notice

At the end of the process, the Directives require that not later than 30 days after the award of the contract (or the conclusion of a framework agreement) authorities and utilities must send for publication in the OJEU a Contract Award Notice. The Contract Award Notice is a prescribed form and must contain information including the value and duration of the contract the identity of the successful tenderer.



Technical specifications

The Directives require that technical specifications used in tender documents afford equal access to tenderers and do not create unjustifiable obstacles to the opening up of public procurement to competition.

The basic principle is that it must be possible to submit tenders incorporating any of a number of different technical solutions to satisfy an authority's (or utility's) particular requirement (provided they can be shown to meet that requirement in terms of functionality and performance).

Non-discriminatory performance and functional requirements

Authorities and utilities must draw up the technical specifications in terms of functional and performance requirements or otherwise by reference to a particular European or international standard or, if there is none, to a national standard. Unless justified by the subject matter of the contract, technical specifications must not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific supplier, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain suppliers or certain products. So, for example in relation to IT procurement and the supply of microprocessors, an authority or utility should not require a particular brand (e.g. Intel, AMD).

'or equivalent'

Where an authority or utility uses the option of referring to a technical standard, it must not reject a tender on the grounds that the works, supplies or services tendered do not comply with the standard without giving the supplier the opportunity to demonstrate that its product/solution satisfies that standard in an equivalent manner. Any reference to a technical standard should therefore generally include the words 'or equivalent'.

Labels

Authorities and utilities that wish to set environmental requirements may lay down the environmental characteristics, such as a given production method, and/or specific environmental effects of product groups or services. They can use, but are not obliged to use, appropriate eco-labels, such as the European Eco-label, (multi-) national eco-labels or any other eco-label, provided that the requirements for the label are linked to the subject-matter of the contract, such as the description of the product and its presentation, including packaging requirements. It is furthermore essential that the requirements are drawn up and adopted on the basis of scientific information using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and provided the label is accessible and available to all interested parties.



Contract award procedures

The Directives provide for six main contract award procedures:

- Open Procedure
- Restricted Procedure
- Competitive Procedure with Negotiation
- Competitive Dialogue Procedure
- Innovation Partnership
- Negotiated Procedure without a Call for Competition

Public contracts

Contracting authorities can choose freely between the Open and Restricted procedures. They are also free to choose the Innovation Partnership procedure, although this is intended for very specific circumstances (discussed below).

In order to use the Competitive Procedure with Negotiation or the Competitive Dialogue procedure, they must justify its use on one of the following grounds:

- the needs of the authority cannot be met without adaptation of readily available solutions;
- the works, supplies, or services include design or innovative solutions;
- the contract cannot be awarded without prior negotiation because of specific circumstances related to the nature;
- the complexity or the legal and financial make-up or because of risks attached to them; or
- only irregular or unacceptable tenders have been submitted in response to an Open or Restricted procedure.

The Negotiated procedure without a Call for Competition can only be used in the very specific circumstances.

The key differences between these procedures are summarised in the following pages.

Utilities contracts

Utilities procuring under the Utilities Directive can choose freely between any of the six award procedures.

Light-touch services contracts

For contracts subject to the special regime for social, health and other specific services, authorities and utilities must advertise the contracts in the OJEU (where above the relevant EU threshold). They are however not required to follow one of the six prescribed contract award procedures. They must simply apply a procedure that ensures compliance with the principles of transparency and equal treatment. Specifically, any time limits imposed on tenderers must be reasonable and proportionate and contracts must be awarded in accordance with the procedure the authority or utility has set out in the tender documentation issued to tenderers.

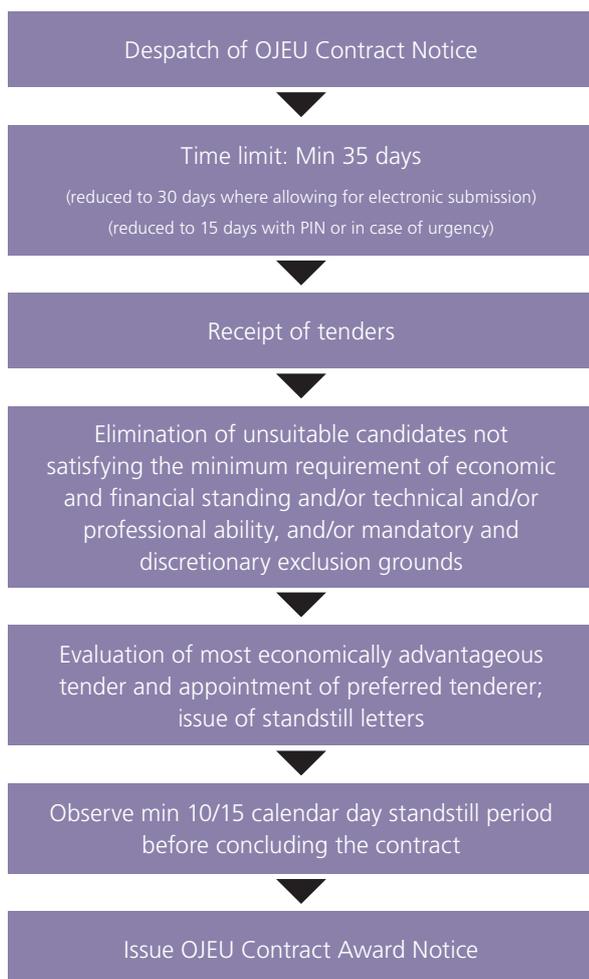
Concession contracts

The Concessions Directive does not include prescribed contract award procedures. Similar to the light touch regime though, it does however require that procedures comply with general principles transparency, equal treatment and proportionality.

Open Procedure

Under this procedure all those candidates that respond to the Contract Notice (or PIN) are entitled to submit a tender for the contract.

There is no initial selection stage limiting the number of candidates to be invited to tender. It may be quicker than the other award procedures but it may also be more onerous in terms of the number of tenders to be evaluated.



Restricted Procedure

This procedure allows the authority or utility to limit the number of candidates to be invited to tender by using an initial selection stage to shortlist a limited number of tenderers.

The selection is performed by means of the European Single Procurement Document (**ESPD**) or other form of PQQ document, which candidates complete and submit. The Restricted procedure requires that a minimum of five qualifying candidates be invited to Tender (**ITT**).



Competitive Procedure with Negotiation (CPN)

This procedure allows the authority or utility to limit the number of candidates to be invited to negotiate the terms of the contract using an initial selection stage to shortlist a limited number of tenderers.

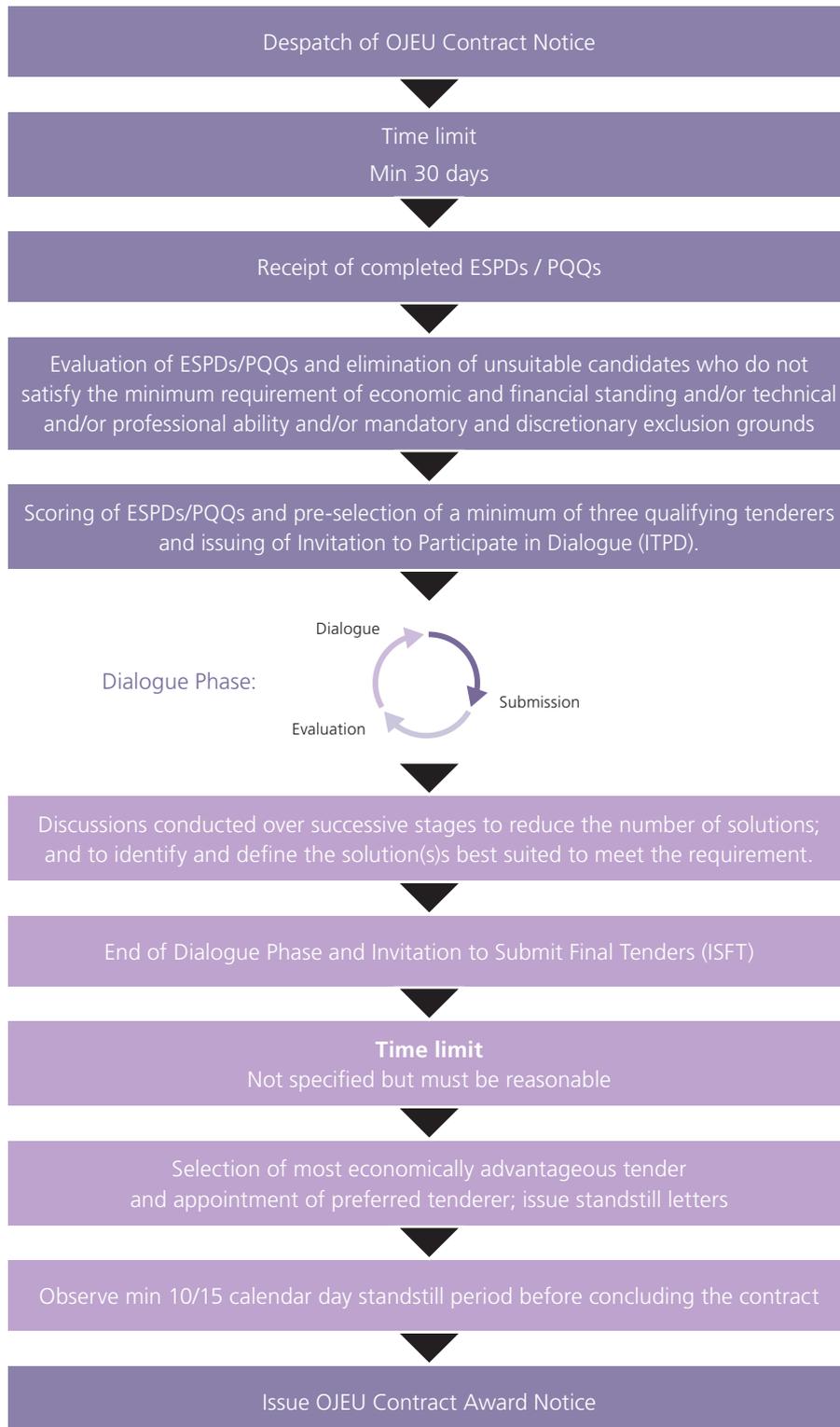
The selection is performed by means of an ESPD or other form of PQQ. The CPN procedure requires that a minimum of three qualifying candidates be Invited to Negotiate (ITN). Contract negotiations are conducted following the submission of Initial Bids.



Competitive Dialogue Procedure (CD)

This procedure allows the authority or utility to limit the number of candidates to be invited to dialogue with the authority or utility as to a solution that would meet the authority's or utility's stated needs and requirements, and which it can invite final tenders on.

The CD procedure is generally used for establishing long-term Public Private Partnerships (PPPs) or for other major infrastructure and IT contracts.



Innovation Partnership Procedure

This procedure is intended for the situation where there is a need for the development of an innovative product or service or innovative works not already available on the market.

It allows authorities or utilities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works without the need for a separate procurement procedure once the product, service or work has been developed.





Selection stage

The Directives identify two distinct evaluation stages. The first is the evaluation of the candidates who have expressed an interest in tendering for the contract ('selection stage'). The second is the evaluation of the tenders then submitted by those tenderers invited to tender ('tender stage').

At selection stage, the Public Sector Directive sets out an exhaustive list of the types of information that authorities can request from candidates for the purposes of setting minimum (pass/fail) requirements and any scored evaluation. The prescribed types of information fall within three broad categories:

- **personal standing (with mandatory and discretionary exclusion grounds)**
- **economic and financial standing**
- **technical and/or professional ability**

Under the Public Sector Directive, the selection stage is generally conducted using an ESPD. The authority will usually prescribe minimum requirements that candidates must satisfy (evaluated on a pass/fail basis) and then score the candidates on the basis of selection criteria relating to their economic and financial standing and their experience and technical and/or professional ability.

The Utilities Directive and Concessions Directive are less prescriptive. Where the utility or the entity granting the concession is a contracting authority (essentially a public body), the authority must apply the mandatory exclusion grounds. However, beyond that, authorities and utilities awarding concession contracts are less restricted as to setting minimum requirements and choice of selection criteria.

Minimum requirements

The Public Sector Directive states that any minimum requirements must relate to the candidate's personal standing, its economic and financial standing and/or its technical and/or professional ability. For example, authorities may wish to set minimum requirements in relation to annual turnover, credit rating, insurance, quality assurance or environmental management standards. Any such minimum requirements must be

related and proportionate to the contract to be awarded and must be disclosed in the Contract Notice (or PIN).

Ranking – scored evaluation

In addition to applying minimum requirements, authorities and utilities using the Restricted, Competitive Dialogue or Competitive Procedure with Negotiation procedures may wish to reduce the number of qualifying candidates to be invited to tender or participate in dialogue or negotiations. This is generally referred to as "ranking" and must be conducted on the basis of objective and non-discriminatory criteria, which must be specified in the Contract Notice (or PIN).

Importantly, authorities and utilities must ensure that the information they request and evaluate at the selection stage is relevant and proportionate to the performance of the contract they are seeking to award.

Personal standing: Exclusion grounds

Under the Public Sector Directive candidates must be excluded from the process if the authority has actual knowledge that the company or a director or other person having powers of representation, decision or control of the company has been convicted within the last five years of an offence relating to:

- participation in a criminal organisation
- corruption
- fraud affecting the financial interests of the European Union
- terrorism
- money laundering or terrorist financing
- child labour
- people trafficking

These are generally referred to as the '**mandatory exclusion grounds**'.

Candidates may be excluded from the process if within the last three years:

- they have failed to comply with EU, national or international environmental, social or labour laws
- they have been declared bankrupt, insolvent, been wound up or has made an arrangement with creditors or is in any similar situation
- they have committed an act of grave misconduct in the course of its business or profession
- the authority has sufficiently plausible indications to conclude they have entered into agreements aimed at distorting competition (e.g. cartels)
- there is a conflict of interest that might compromise the procurement process (and cannot be effectively remedied by other less intrusive measures)
- they have had prior involvement in the preparation of the procurement in a way that could distort competition (and the issue cannot be remedied by other less intrusive measures)
- they have shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract which led to early termination of that prior contract, damages or other comparable sanctions (“poor past performance”)
- they have been guilty of serious misrepresentation in supplying the information, have withheld information or are not able to submit the supporting documents
- they have attempted to unduly influence the decision-making process of the authority or obtain confidential information that may confer upon them undue advantages, or negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award

These are generally referred to as the ‘**discretionary exclusion grounds**’.

Personal standing: Failure to pay tax or social security contributions

Specific provisions apply to the payment of taxes or social security contributions. A candidate must be excluded if the authority is aware that: (i) the candidate is in breach of its obligations relating to the payment of tax or social security contributions; and (ii) the breach has been established by a judicial or administrative decision having a final and binding effect. Alternatively, the authority may exclude the candidate where it can demonstrate by any appropriate means that the candidate is in breach of those obligations.

Personal standing: Self-cleaning

For both the mandatory and discretionary exclusion grounds, a candidate must be permitted to provide evidence to show it has taken measures sufficient to demonstrate its reliability despite the existence of a

relevant ground for exclusion. If the authority considers such evidence to be sufficient the candidate must not be excluded from the process. For that purpose the candidate will have to prove it has:

- paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
- clarified the facts and circumstances in a comprehensive manner by actively collaborating with investigating authorities; and
- taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

Economic and financial standing

Authorities may require that candidates:

- have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract
- provide information on their annual accounts showing the ratios, for example, between assets and liabilities
- have an appropriate level of professional risk indemnity insurance

Alternatively, a candidate may be allowed to demonstrate, for example, through parent company guarantees, that it has the necessary resources at its disposal from another company.

The authority cannot however require candidates to have a minimum turnover exceeding two times the estimated contract value. If an authority wishes to apply higher requirements, it must justify its decision by reference to, for example, special risks attached to the nature of the works, services, or supplies.

Technical and/or professional ability

The requirements for technical and/or professional capabilities can be demonstrated by one or more of the following means (depending on the nature, quantity or importance and use of the works, supplies or services being procured):

- a list of the works contracts performed over the past five years, accompanied by certificates of completion for the most important works (as are relevant to the contract to be awarded)
- a list of the services contracts performed over the last three years (again relevant to the performance of the contract to be awarded), accompanied by certificates or references from the customers
- an indication of the technicians and technical bodies available to the candidate
- a description of the technical facilities and measures used to ensure quality and the candidate’s research facilities

- an indication of the supply chain management and tracking systems that the candidate will be able to apply when performing the contract
- in complex or special purpose procurements, evidence of an independent check or review of specific production capacity or technical capability
- the educational and professional qualifications of the candidate, and its relevant managerial staff/ project managers
- an indication of the environmental management measures to be used by the candidate in performing the contract (where relevant for works and services contracts)
- a statement of the average annual manpower (labour resources) of the candidate and the number of managerial staff in the last three years
- a statement of the tools, plant or equipment available to the candidate for performing the contract
- an indication of the proportion of the contract that the candidate intends to subcontract
- for supplies contracts, samples, descriptions and/or photographs of the products to be supplied and any relevant quality assurance certificates

ESPD and e-Certis

The European Single Procurement Document (**ESPD**) is intended to act as a 'business passport' for companies bidding for tenders anywhere in the EU. It is a self-declaration form designed to replace the various different forms used by the individual EU Member States for proving that a candidate fulfils the relevant exclusion and selection criteria. Any further evidence of compliance with the relevant exclusion and selection criteria should in principle only have to be provided by the tenderer that wins the contract.

The ESPD online service is integrated with **e-Certis**, a mapping tool intended to help identify and compare different certificates requested in procurement procedures across the EU. It is designed to help both candidates and authorities to understand the documents used in different Member States for proving the fulfilment of the exclusion or selection criteria, such as the criminal record and good financial standing.



Tender stage

The tender stage will generally commence with the authority or utility issuing to the shortlisted candidates: an Invitation to Tender (ITT) (in Restricted procedures); an Invitation to Participate in Dialogue (ITPD) (in CD procedures); or an Invitation to Negotiate (ITN) (in CPN procedures).

When using the single-stage Open procedure the selection and award stages are combined and the ITT effectively incorporates any minimum (pass/fail) requirements.

The procurement documents to be issued by the authority or utility will depend on the contract and the award procedure being used but, as a general rule, the authority or utility needs to give the tenderers clear instructions as to:

- **the detail of the contract requirements/ specification**
- **the proposed contract terms and conditions**
- **how the tender process will be conducted**
- **the contract award criteria to be applied when evaluating tenders**

Subject to the rules on technical specifications, the rules afford authorities and utilities a fairly wide degree of discretion as to the specification and the proposed terms and conditions of a contract.

Choice of contract award criteria

While authorities and utilities are afforded wide discretion as to contract award criteria, the Directives provide that the criteria must be objective and must be applied in compliance with the general principles of transparency, non-discrimination and equal treatment, thereby ensuring that all tenders are assessed in conditions of effective competition.

MEAT – sole award criterion

To achieve this, the rules require that authorities and utilities base the award of contracts on the 'most economically advantageous tender' (**MEAT**), as determined from the point of view of the authority or utility.

Cost effectiveness approach – life-cycle costing

MEAT is to be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing (**LCC**).

To the extent relevant, life-cycle costing should cover part or all of the following costs over the life-cycle of a product, service or works, including:

- costs, borne by the authority or utility or other users, such as (i) costs relating to acquisition, (ii) costs of use, such as consumption of energy and other resources, (iii) maintenance costs, (iv) end of life costs, such as collection and recycling costs; and
- costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified.

The method used for the assessment of costs imputed to environmental externalities must fulfil all of the following conditions:

- be based on objectively verifiable and non-discriminatory criteria and, in particular, where not established for repeated or continuous application, they shall not unduly favour or disadvantage certain tenderers;
- be accessible to all interested parties; and
- the data required can be provided with reasonable effort by normally diligent tenderers, including those from third (non-EU) countries party to the GPA or other international agreements by which the EU is bound.

Where authorities or utilities assess costs using a life-cycle costing approach, they must indicate in the procurement documents (i) the data to be provided by the tenderers and (ii) the method which the authority or utility will use to determine the life-cycle costs on the basis of that data.



Whenever a common method for the calculation of life-cycle costs has been made mandatory by the EU, that common method must be applied for the assessment of life-cycle costs.

Best Price-Quality Ratio

The cost effectiveness approach to MEAT may include the 'best price-quality ratio' (**BPQR**). BPQR is in essence price or cost criteria balanced with quality-based criteria, equating to value for money. Such criteria may comprise:

- quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics
- organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on performance of the contract
- after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion

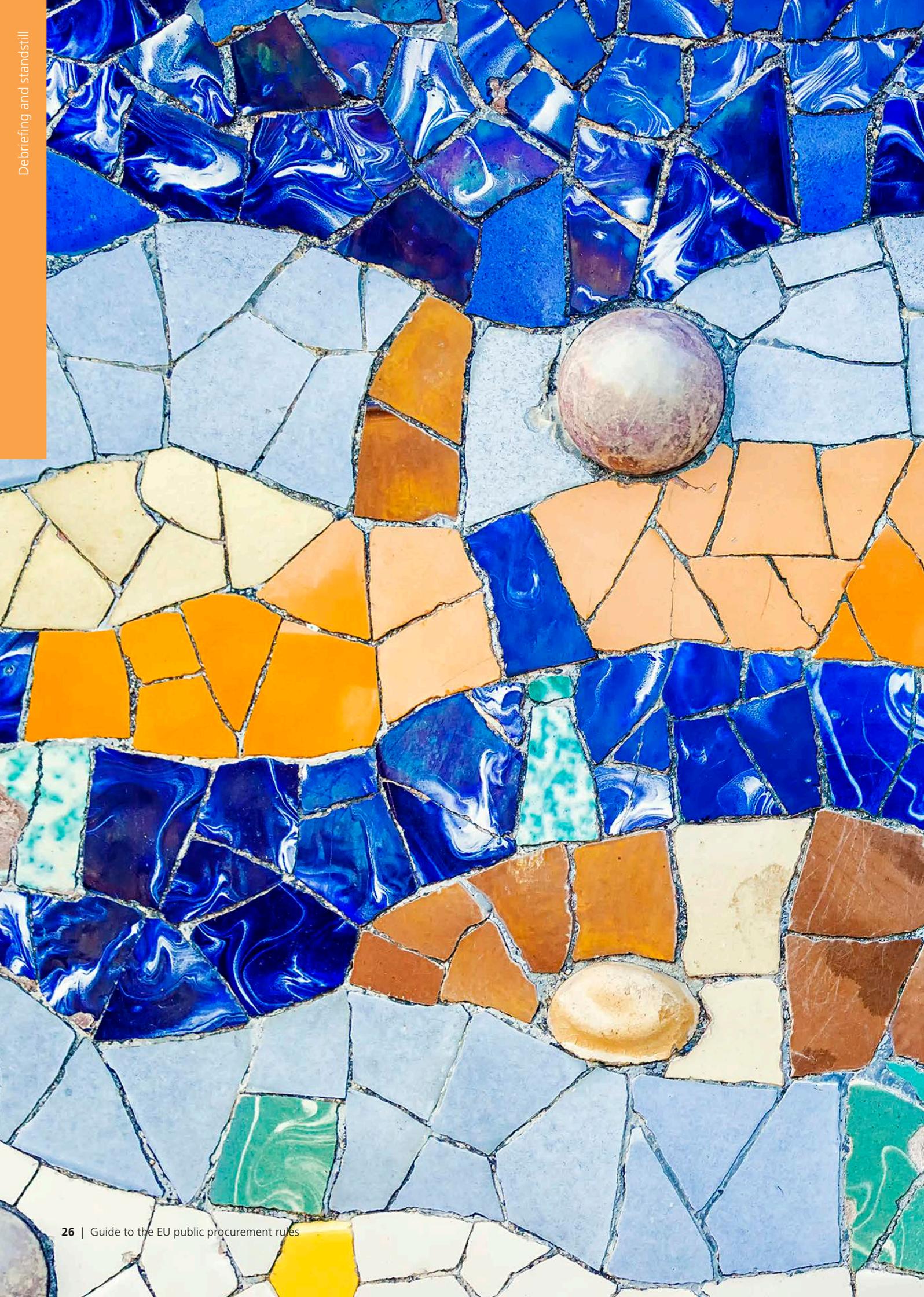
Disclosure of contract award criteria

In order to ensure compliance with the general principles of equal treatment and transparency, authorities and utilities are required to disclose the detail of the contract award criteria and any relative weighting in the procurement documentation issued to tenderers.

It is the responsibility of the authorities or utilities to indicate the award criteria and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. Where weightings are not possible for objective reasons, the authority or utility must list the criteria in descending order of importance.

There is now a large and growing body of case-law on the extent of obligations on disclosure of award criteria - including requirements to disclose of sub-criteria and scoring methodologies - and this is a key area that gives rise to procurement challenges.





Debriefing and standstill

The Remedies Directives (as amended) require that the authority or utility must formerly notify unsuccessful tenderers of the award decision. The authority or utility must also then wait a minimum (standstill) period before concluding the contract with the successful tenderer.

The notice is generally referred to as an 'Alcatel letter' or 'standstill letter' ('Alcatel' after a judgment of the CJEU, which established the principle prior to it being incorporated in the amending Directive 2007/66).

Content of the Alcatel letter

The details vary from Member State to Member State, but the requirements of the Remedies Directives (as amended) are that the letter must include:

- the reasons for any decision to reject a tender on grounds of 'non-equivalence' or its decision that the works, supplies or services proposed do not meet the performance or functional requirements of the authority / utility; or
- where the tender was admissible, the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer; and
- a precise statement of the exact standstill period applicable pursuant to the provisions of the relevant national implementing law.

Please refer to the CMS e-Guides for the precise requirements in each jurisdiction.

To whom?

If a candidate that was not shortlisted following the selection stage of the process has already been informed that they were unsuccessful, the authority or utility does not need to issue an Alcatel letter to them.

The authority or utility generally does not need to issue an Alcatel letter to a tenderer who made it through to the tender stage but has already been definitively

excluded or has otherwise withdrawn from the process prior to award stage.

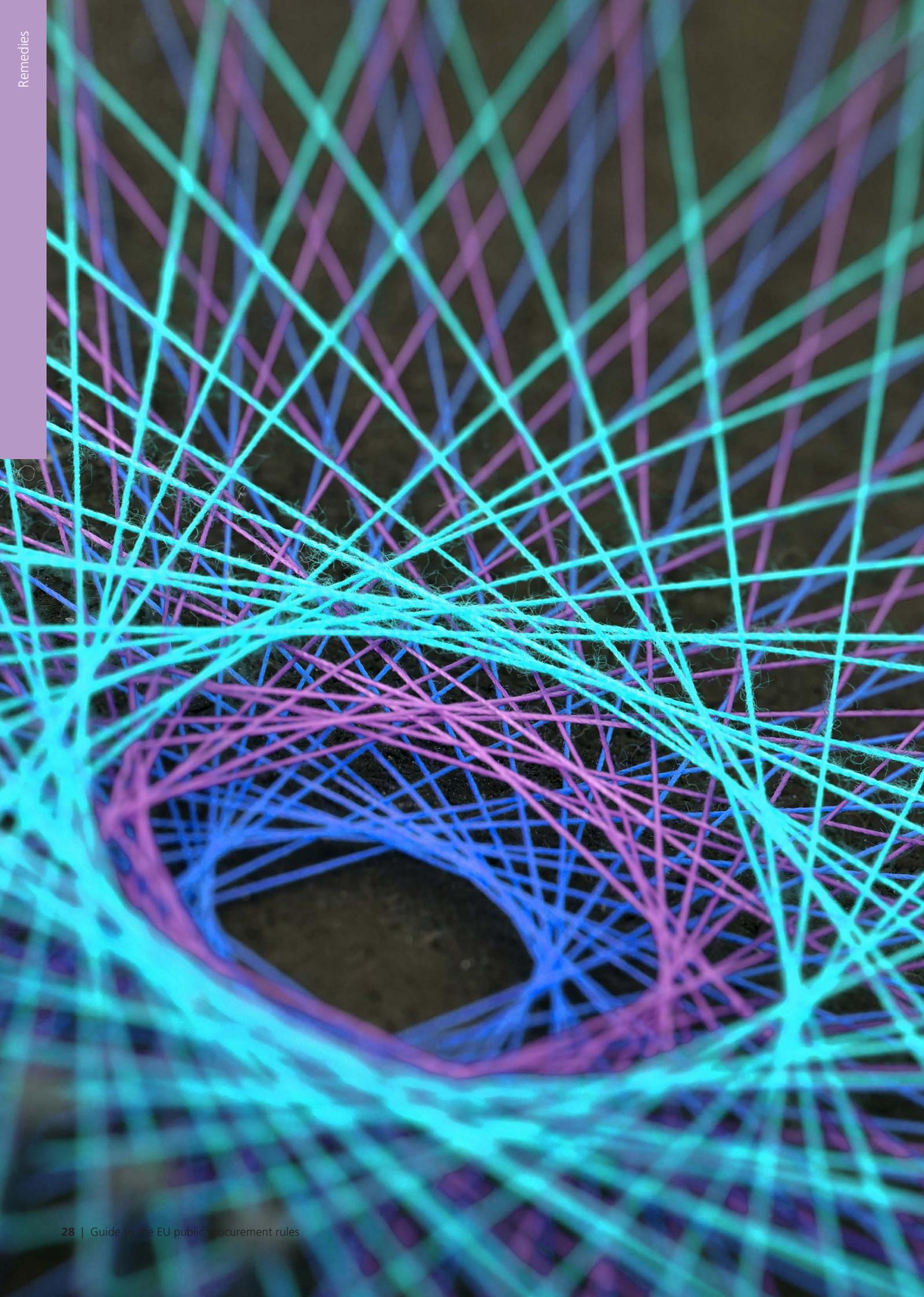
Please refer to our CMS e-Guides for the precise requirements in each jurisdiction.

Standstill period

The Remedies Directives (as amended) require that the authority or utility does not enter into the contract until at least the minimum standstill period has expired. The standstill period should give the tenderers concerned sufficient time to examine the contract award decision and to assess whether it is appropriate to initiate a review procedure.

The relevant provisions require a period of at least 10 calendar days following the date on which the contract award decision is sent to the tenderers concerned via email, fax or other electronic means. Alternatively, if non-electronic means are used, the period is a minimum 15 calendar days.

Failure to comply with the debriefing and standstill requirements may lead to the contract being declared ineffective (see below).



Remedies

The Remedies Directives provide for sanctions for breaches of the EU procurement rules, actionable by any aggrieved tenderer or other third party who, in consequence of that breach suffers or risks suffering loss and/or damage.

The remedies available depend largely on whether a challenge is made before or after the contract (or framework agreement) has been entered into. The precise remedies provisions will also vary from jurisdiction to jurisdiction – please refer to the relevant CMS e-Guides for further information on specific jurisdictions.

Pre-contractual remedies

As a general rule, if proceedings are brought during the tender process or otherwise before the contract (or framework agreement) has been entered into, an unsuccessful tenderer can request the competent review body to:

- **set aside any unlawful decision taken in the process**
- **amend tender documentation (e.g. to correct a discriminatory specification or unlawful selection or award criteria)**
- **make an award in damages for loss or damage suffered as a consequence of the breach**

Importantly, the Remedies Directives provide that where an unsuccessful tenderer has formally challenged a contract award decision the authority or utility shall not enter into the contract until the review body has made its decision. Any failure to comply with this ‘**automatic suspension**’ rule risks the authority or utility having its contract being declared ineffective and possibly being fined (see below).

Post-contractual remedies

If proceedings are brought after the contract (or framework agreement) has been entered into, the remedies are generally limited to:

- **damages for loss or damage suffered as a consequence of the breach**

- **having the contract (or framework agreement) declared ineffective**

Any action in damages needs to be considered within the relevant rules of the jurisdiction (see relevant CMS e-Guide).

The ineffectiveness remedy

The Remedies Directives make specific provision for an ineffectiveness remedy, providing that a contract (or framework agreement) must be rendered ineffective where it has been awarded in serious breach of the relevant rules. In summary, there are three grounds on which the ineffectiveness remedy can be claimed:

- where a contract (or framework agreement) has been awarded without the prior publication of a notice in the OJEU where one was required (**‘illegal direct awards’**)
- where a contract (or framework agreement) is entered without the authority or utility complying with the relevant debriefing and standstill rules (including the automatic suspension rule) and where it is established that there had been a substantive breach of the rules when conducting the tender process that affected the chances of the tenderer winning the contract (**‘aggravated breach’**)
- where a call-off contract is entered into under a framework agreement or DPS in breach of the rules governing the framework agreement or DPS (**‘illegal call-off contracts’**)

The Remedies Directives leave it to the Member States to determine the consequences of a contract being considered ineffective, providing that national implementing laws may provide for retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. As an exception, it also permits Member States to maintain a contract in place where there is a general overriding public interest.

To protect against the risk of an ineffectiveness challenge to a lawful direct award of a contract, the Remedies Directives provide that an authority or utility can publish a Voluntary Ex-ante Transparency Notice (a **VEAT notice**) in the OJEU. The purpose of a VEAT notice is to notify the market of an intention and justification for a direct award. Provided the authority or utility then observes a ten-day standstill period (commencing with the date of publication of the VEAT notice) it may enter into the contract without the risk of an action for ineffectiveness.

The Remedies Directives also provide for alternative penalties where ineffectiveness is not appropriate, noting that these must be effective, proportionate and dissuasive. These include:

- the imposition of fines on the authority or utility; or
- the shortening of the duration of the contract (or framework agreement).

Time limits

Whether considering a challenge pre- or post-contract award a key consideration for any challenger is whether any action may be time barred. The Remedies Directives do not seek to prescribe limitation periods, though there have been proceedings brought against Member States (including the UK) for limitation periods not being clear enough.

The Remedies Directives do however make specific provision for a limitation period for the ineffectiveness remedy, providing that Member States may provide that such actions must be brought within 30 calendar days of the Contract Award Notice being published in the OJEU or the unsuccessful tenderer being informed of the contract award decision, and in any case within 6 months of the conclusion of the contract.

Please refer to the CMS e-Guides for the relevant jurisdiction for further information on procurement challenges and remedies.

European Commission investigations

Finally, it is important to remember that direct action in national courts is not the only remedy available to unsuccessful tenderers and other aggrieved third parties. The European Commission is able to take infringement proceedings against individual EU Member States for specific failures by authorities or utilities to comply with the EU public procurement rules.

Such investigations are conducted under specific TFEU rules and can result in formal proceedings being brought against the Member State before the CJEU. Although it is a lengthy procedure, the European Commission can seek interim measures and the CJEU can ultimately fine the Member State if it refuses to remedy the breach.

In addition, the European Commission may block any EU funding that is related to the contract (e.g. where a contract relates to an infrastructure project that is part-funded by EU funds) or initiate State aid proceedings (e.g. where concessions are awarded without the concessionaire having been appointed pursuant to open and transparent tender process). Where projects involve significant public funds there are often specific audit and 'gateway' review procedures that make it a condition of funding that contractors/partners are appointed pursuant to an OJEU-compliant tender processes.



Modifications to existing contracts during their term

As a result of a series of CJEU judgments there has been uncertainty as to when modifications to existing contracts trigger a requirement for a new OJEU tender process.

To assist authorities and utilities, and to provide a degree of legal certainty, the Public Sector, Utilities and Concession Directives all make provision for six situations where it can be assumed that modifications to existing contracts will not be regarded as sufficiently material to trigger a requirement to conduct a new OJEU compliant tender process.

The six situations are summarised below:

1. Clear, precise and unequivocal review clauses

Where the change, irrespective of its monetary value, has been provided for in the initial procurement documents in clear, precise and unequivocal review clauses. This is provided the review clauses (i) state the scope and nature of the possible changes or options as well as the conditions under which they may be used, and (ii) do not permit changes that would alter the overall nature of the contract.

Importantly, the requirement is not for the review clause to be in the actual contract. It must be in the 'initial procurement documents', a term not defined but which presumably means the tender documents issued to tenderers as part of the original procurement process.

2. Additional works, services or supplies

Where these have become necessary and were not included in the initial procurement and where a change of contractor (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations, and (ii) would cause significant inconvenience or substantial duplication of costs.

However, any increase in price must not exceed 50% of the original contract value and the authority or utility relying on this ground must publish a Modification Notice in the OJEU.

3. Unforeseen circumstances

Where the need for the change (i) has been brought

about by circumstances which a diligent authority or utility could not have foreseen, and (ii) the change does not alter the overall nature of the contract.

However, any increase in price must not exceed 50% of the original contract value and the authority or utility must publish a Modification Notice in the OJEU.

4. New contractor

Where a new contractor replaces the one that was initially awarded the contract, but only where as a consequence of (i) an unequivocal review clause or option meeting the requirements of the first situation above, or (ii) universal or partial succession into the position of the initial contractor (including corporate restructuring, merger or acquisition or insolvency) provided that the new contractor meets the original pre-qualification criteria and the appointment does not result in other substantial changes to the contract and is not aimed at circumventing the rules.

5. "New Presetext"

The test developed by the CJEU in the *Presetext* case (the main CJEU judgment dealing with contract modifications) has now been codified into the Directives. The new codified rules provide that a modification will not be substantial where – irrespective of its value – it does not result in one or more of (i) the contract being materially different in character from the one initially concluded, (ii) the change introducing conditions which, if they had been included in the original procurement, would have allowed admission of other candidates or the acceptance of another tender or



attracted additional participants in the procedure, (iii) the change impacting the economic balance of the contract in favour of the contractor in a way that was not provided for in the contract, (iv) the change considerably extending the scope of the contract, or (v) a new contractor replacing the contractor originally awarded the contract in circumstances not permissible under the fourth situation above.

6. De minimis thresholds

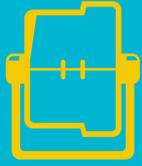
Where the change does not exceed both of (i) the relevant works, services or supplies threshold, and (ii) either 15% of the original contract value for works contracts or 10% of the original contract value for service and supply contracts, but provided always that the change does not alter the overall nature of the contract. Unlike changes made relying on the second or third situations above, these thresholds must be applied cumulatively to successive modifications.

Termination rights

Finally, the Directives also require that authorities and utilities must ensure that every contract they award contains provisions enabling the authority or utility to terminate the contract where:

- the contract has been subject to a 'substantial modification' (i.e. a modification not permitted by the Directives);
- where post-award it is discovered the contractor should have been excluded from the procurement process on certain mandatory exclusion grounds (including fraud or corruption offences); or
- the CJEU has declared the contract was awarded in 'serious infringement' of the authority's or utility's obligations under EU law in infringement proceedings brought by the European Commission against the Member State concerned.





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