



**SIGMA**

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Creating Change Together

# **SIGMA**

# **Public Procurement**

# **Training Manual**

## **Update 2015**

## **Module C**

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**SECTION 1 - INTRODUCTION**

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**1.5 INFORMATION HELPFUL TO HAVE AT HAND**

This section will link to other areas referring more closely to legal information.

**Additional information**

[SIGMA Public Procurement Briefs:](#)

[No. 26, Organising Central Public Procurement Functions](#)

[No. 30, 2014 EU Directives: Public Sector and Utilities Procurement](#)

**SECTION 2 - NARRATIVE**

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14	Strategy to deliver deliverables	<p>This strategy should state:</p> <ul style="list-style-type: none"> <li>• which of the public procurement procedures are going to be adopted for this requirement - open, restricted, <del>competitive procedure with negotiation</del>, competitive dialogue, <a href="#">innovation partnership procedure</a> or <a href="#">particular procurement regimes used for the procurement of social and other specific services</a></li> <li>• which of the tools will be used, such as framework agreements, electronic auctions, dynamic purchasing systems, <a href="#">e-catalogues</a> or a central purchasing body</li> </ul>	<p>The procurement officer running the procurement in conjunction with <a href="#">the</a> persons named in <a href="#">the</a> box and <del>others</del> as necessary</p>

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*Insert at bottom of page PDF C-18*

Note: Article 46 of the 2014 Directive concerns the division of contracts into lots to encourage SME participation. It requires contracting authorities to state the main reasons for a decision to not divide a contract into lots, either in the procurement documents or in the individual report required under article 84. See Modules E3 and E4 for more information on the requirement to consider whether or not to divide a contract into lots.



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## SECTION 1 - INTRODUCTION

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### 1.5 LEGAL INFORMATION HELPFUL TO HAVE AT HAND

#### [The 2014 Directive](#)

[In this context it is helpful to look at both the recitals to the 2014 Directive and the relevant articles:](#)

- [Recitals 1 and 2: context for the new 2014 Directive, facilitating in particular SME participation](#)
- [Recitals 37 and 40 and Article 18, principles of procurement: compliance of economic operators in the performance of public contracts with environmental, social and labour law established by European Union law, national law or collective agreements or by the international environmental, social and labour law provisions listed in Annex X](#)
- [Recital 36 and Articles 20 and 77: reserved contracts for sheltered workshops and other social businesses whose main aim is to support the social and professional integration or reintegration of disabled and disadvantaged persons, such as the unemployed and members of disadvantaged minorities or otherwise socially marginalised groups](#)
- [Article 42: technical specifications, environmental characteristics and accessibility criteria for people with disabilities](#)
- [Article 43: use of labels as proof that the works, supplies or services correspond to specific environmental, social or other characteristics](#)
- [Article 46: provisions on lots, with the aim of encouraging contracting authorities to divide contracts into lots and thus increase SME participation](#)
- [Article 62: quality assurance standards and environmental management standards](#)
- [Article 67: contract award criteria](#)
- [Article 71: provisions on subcontracting requiring the main contractor to provide details on subcontractors and their changes as well as compliance of subcontractors with obligations under environmental, social and labour law and the optional provision for Member States of direct payment to subcontractors](#)
- [Article 72: modifications of contracts during their term \(see Module G1 for more information on these new provisions\)](#)
- [Articles 74 to 77: particular procurement regimes for social and other specific services, including reserved contracts for certain "light regime" services](#)

Regulation (EC) N°593/2008 ("Rome 1") on choice of applicable law

United Nations Convention for the International Sale of Goods ("Vienna Convention" 1980)

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In this context it is helpful to look at both the recitals to the Directive and the relevant articles:¶

<#>Recital 1: context for the new Directive¶

<#>Article 23: technical specifications¶

<#>Recital 28: involvement of shelters for disabled people ¶

<#>Recital 29 and article 23: technical specifications, environmental characteristics and accessibility criteria for people with disabilities¶

<#>Recital 32: involvement of small companies through subcontracting¶

<#>Recital 33: vocational training and recruitment of long-term jobseekers and disabled persons ¶

<#>Recital 34: cross-border employment of workers ¶

<#>Recital 43: national legislation on the environment or on equal treatment of workers¶

<#>Recital 44: evidence of economic operator's technical abilities – environmental management measures¶

<#>Recital 46 and article 53: award criteria to be listed¶

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[Additional information](#)  
[SIGMA Public Procurement Briefs:](#)  
[No. 30, 2014 EU Directives: Public Sector and Utilities Procurement](#)

**SECTION 2 - NARRATIVE**

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**2.1 BASICS OF A CONTRACT**

Within a commercial environment, a contract for the supply of goods is an agreement by which the supplier (known as an “economic operator” under [the 2014 Directive](#), transfers or agrees to transfer the property in the goods to the buyer (known as the “contracting authority” under [the 2014 Directive](#), for money consideration, called the price.

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**2.3 The proper specification of the works, supplies or services**

It is usual practice for the supplies, works or services to be defined within a document or series of documents forming part of the contract and known as the technical specification(s).

Annex [VII of the 2014 Directive](#) states that “technical specification” [means one of the following](#):

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“(a) in the case of public works contracts, the totality of the technical prescriptions contained in particular in the [procurement](#) documents, defining the characteristics required of a material, product or supply, [so](#) that it fulfils the use for which it is intended by the contracting authority; [those](#) characteristics include levels of environmental [and climatic](#) performance, [\[continue as in original\]](#)... marking and labelling, [user instructions](#) and production processes and methods [at any stage of the life cycle of the works](#); [those characteristics](#) also include [\[continue as in original\]](#).....”

and

“(b) in the case of public supply or service contracts, a specification in a document defining the required characteristics of a product or [a service](#), such as quality levels,

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environmental and climatic performance levels, design for all requirements (including accessibility for disabled persons) *[continue as in original]*..... production processes and methods at any stage of the life cycle of the supply or service and conformity assessment procedures.”

What does the 2014 Directive require of a technical specification?

1. “Technical Specifications should take into account accessibility criteria for disabled people, whether general public or staff of the contracting authority” [art. 42(1)];
2. “They should not have the effect of creating unjustified obstacles to free competition” [art. 42(2)];
3. “Without prejudice to mandatory national rules (e.g. earthquake resistance requirements), they shall be formulated either
  - a. in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject matter of the contract and to allow contracting authorities to award the contract; or
  - b. by reference to technical specifications as defined in Appendix VII and in order of preference to:
    - national standards transposing European standards
    - European Technical Assessments
    - common technical specifications
    - international standards; or

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- c. in terms of performance or functional requirements, as referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements; or
  - d. by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements referred to in point (a) for other characteristics.” [art. 42.3]
4. “Unless justified by the subject matter of the contract, technical specifications shall not refer to a specific make or source, or to a particular process which characterises the products or services provided by a specific economic operator or to trademarks, patents, types or a specific origin or production, with the effect of favouring or eliminating certain undertakings or products. Such references shall be permitted, on an exceptional basis where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to paragraph 3 is not possible. Such reference shall be accompanied by the words ‘or equivalent’.” [art. 42(4)]

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It may seem evident that the party procuring the works, supplies or services (the “Contracting Authority” in [the 2014 Directive](#) should properly specify the works, supplies or services that it is seeking to procure.

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2.6 PRICE AND PAYMENT

The answer to each of these questions will have an impact on the offers (referred to as “tenders” in [the 2014 Directive](#) received from economic operators (referred to as “tenderers” or “candidates” in [the 2014 Directive](#)).

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Recital [90](#) of [the 2014 Directive](#) states:

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“Contracts should be awarded on the basis of objective criteria [that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender. It should be set out explicitly that the most economically advantageous tender should be assessed on the basis of the best price-quality ratio, which should always include a price or cost element. It should equally be clarified that such assessment of the most economically advantageous tender could also be carried out on the basis of either price or cost effectiveness only. It is furthermore appropriate to recall that contracting authorities are free to set adequate quality standards by using technical specifications or contract performance conditions.](#)” Recital 90 goes on to say:

Deleted: and which guarantee that tenders are assessed

Deleted: As a result, it is appropriate to allow the application of two award criteria only: ‘the lowest price’ and ‘the most economically advantageous tender’.

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“To ensure compliance with the principle of equal treatment in the award of contracts, [contracting authorities should be obliged to create](#) the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied [in the contract award decision](#). [Contracting authorities should therefore be obliged](#) to indicate the [contract award](#) criteria and the relative weighting given to each of those criteria.”

Deleted: to identify the most economically advantageous tender.

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Article [67](#) of [the 2014 Directive](#) requires the criteria to be listed in the contract notice or the contract documents, together with the relative weighting attached to the criteria. [Article 67 provides as follows:](#)

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1. “Without prejudice to national laws, regulations or administrative provisions concerning the [price of certain supplies or the remuneration of certain services](#), contracting authorities shall base the award of public contracts [on the most economically advantageous offer.](#)”

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2. “The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject matter of the public contract in question.”

Deleted: <#>shall be either:¶ <#>when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject matter of the public contract in question – for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or¶ the lowest price only.

3. “The contracting authority shall specify in the procurement documents the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone...”

Deleted: <#>Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a), the contracting authority shall specify in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting it gives to each of the criteria chosen to determine the most economically advantageous tender....¶

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2.8 SOCIAL AND ENVIRONMENTAL ISSUES

(see module C5 for a detailed explanation)

The 2014 Directive encourages contracting authorities to integrate environmental protection measures into their procurement activities.

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Recital 36 and article 20 state that Member States may reserve the right to participate in public contracts to workshops providing sheltered employment for people with disabilities.

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Articles 42 and 43 refer to the possibility for contracting authorities to lay down environmental characteristics within technical specifications and to use eco-labels. It also calls for technical specifications to take account of accessibility criteria for disabled persons.

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Recitals 78 and 79 as well as articles 46 and 71 encourage the involvement of small and medium-sized undertakings through provisions on lots and subcontracting.

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Recital 99 and article 76 allow for award criteria or contract performance conditions intended to favour on-site vocational training, to encourage the recruitment of long-term job-seekers, or to recruit more handicapped persons than are required under national legislation, provided that they relate to the works, supplies or services to be provided under the contract.

- Deleted: 33
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Recital 101 and article 57 mention the possible exclusion from the procedure for the award of public contracts of economic operators which have proven unreliable, for instance because of violation of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violation of competition rules or of intellectual property rights.

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The same is stated with respect to a failure to observe national provisions concerning equal treatment of workers. Under article 57 the commission of such an offence or such grave misconduct may result in the economic operator being excluded from participation in the contract.

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Recital 43 states that a final conviction for failure to respect national environmental legislation may be considered an offence concerning the professional conduct of an economic operator, or grave misconduct.

Recital 75 and article 58 foresee the possibility of environmental management measures being required of the economic operator.

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Although the contract drafter should not modify these general conditions because of copyright considerations .....in the direction suggested by the 2014 Directive ...

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▽ Sentence 3 in final paragraph on page PDF C-64 ▽

With the advent of European standards, such problems occur much less frequently, and under the 2014 Directive, a contracting authority is obliged to accept an equivalent technical standard and must be able to provide a reason for any decision that equivalence does not exist in a given case (art. 42).

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### 2.12.1 The ICC Model International Sale Contract

*Insert at the start of paragraph*

**Important note:** [The ICC Model International Sale Contract has been updated. A new edition was published in 2013. The narrative in Module C2 on the ICC International Sale Contract has not been updated to reflect changes introduced in the 2013 edition of the ICC International Sale Contract.](#)

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### Shipment and delivery

*Insert at the start of paragraph*

**Important note:** [INCOTERMS are periodically updated. The eighth version, Incoterms® 2010, was published on 1 January 2011. The narrative below has not been updated to reflect changes introduced in Incoterms® 2010. The narrative below refers to INCOTERMS 2000.](#)

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### 2.13.3 The ICE conditions of contract - Minor works

**Important note:** [In 2009 the ICE terminated its involvement in the administration of the ICE conditions of contract. The ICE now endorses the use of the NEC3 suite of contract documents \("New Engineering Contract"\). See the ICE website for further information:](#)

<https://www.ice.org.uk/disciplines-and-resources/professional-practice/nec-contracts-and-ice-conditions-of-contract>

[The narrative below has not been updated to reflect these changes.](#)

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## SECTION 4 - SELF-TEST QUESTIONS

**Note on amendments to Self-Test Questions:** *the Trainer's Manual has not been updated to reflect the amendments below.*

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- 2. How should national standards be handled when preparing a technical specification under [the 2014](#) Directive?
- 3. Can the drafter of a Technical Specification under [the 2014](#) Directive list approved manufacturers of products to be supplied under the contract?

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## SECTION 1 - INTRODUCTION

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### 1.5 LEGAL INFORMATION HELPFUL TO HAVE [AT](#) HAND

*Insert at end of SECTION 1 - INTRODUCTION*

#### Additional information

#### SIGMA Public Procurement Briefs:

[No. 30, 2014 EU Directives: Public Sector and Utilities](#)



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## SECTION 1 - INTRODUCTION

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### 1.5 LEGAL INFORMATION HELPFUL TO HAVE AT HAND

The legal requirements relating to the type of procedures are set out in [Directive 2014/24/EU](#), articles 26 to 32 and articles 74 to 82:

- [Article 26 confirms that contracting authorities may apply the open, restricted or innovation partnership procedures. No conditions are specified for the use of those procedures in article 26.](#)
- [Article 26 sets out the conditions for the use of the competitive dialogue procedure and competitive dialogue. The conditions are the same for both procedures. Article 26 also contains some provisions on the form of call for competition.](#)
- [Article 27 concerns the conduct of the open procedure.](#)
- [Article 28 concerns the conduct of the restricted procedure.](#)
- [Article 29 concerns the conduct of the competitive procedure with negotiation - this procedure has been significantly revised and renamed by the 2014 Directive.](#)
- [Article 30 concerns the conduct of the competitive dialogue procedure.](#)
- [Article 31 concerns the conduct of the innovation partnership procedure – introduced by the 2014 Directive.](#)
- [Article 31 sets out the limited conditions where the use of the negotiated procedure without prior publication is permitted.](#)
- [Articles 74 to 77 cover the rules applying to the award of contracts for social and other specific services – introduced by the 2014 Directive.](#)
- [Articles 78 to 82 cover the rules applying to design contests.](#)

Numerous other articles in the [2014](#) Directive set out more detailed provisions on how the procedures are conducted, including how to advertise, statutory timescales, the minimum number of economic operators to be invited to tender, and how to select economic operators and award tenders.

The legal requirements relating to the types of procurement technique are set out [in](#):

- [Article 33 on framework agreements](#)
- [Article 34 on dynamic purchasing systems](#)
- [Article 35 on electronic auctions](#)
- [Article 36 on electronic catalogues – introduced by the 2014 Directive](#)

## SECTION 2 - NARRATIVE

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▼Note:▼ .....which means that they are subject to the full application of [the 2014](#) Directive, and the term ‘contract’ should be interpreted accordingly. For commentary on contracts falling outside the

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<#>Article 28 sets out the basic assumption that the open or restricted procedures are preferred and that competitive dialogue and negotiated procedures may only be used where specific conditions are met¶

<#>Article 29 sets out the conditions for use of the competitive dialogue procedure, and how to conduct that procedure¶

<#>Article 30 sets out the conditions for use of the negotiated procedure with prior publication of the contract notice, and how to conduct that procedure¶

<#>Article 31 sets out the conditions for use of the negotiated procedure without prior publication of the contract notice ¶

<#>Article 34 sets out special rules applying to public works contracts for subsidised housing schemes¶

<#>Articles 56 to 61 cover the rules applying to works concession contracts¶

<#>Article 62 covers the rules applying to contracts awarded by concessionaires that are contracting authorities¶

<#>Articles 63 to 65 cover the rules applying to contracts awarded by concessionaires that are not contracting authorities¶

Articles 66 to 74 cover the rules applying to design contests¶

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Article 54 on electronic auctions¶

Article 33 on dynamic purchasing systems

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application of the [2014](#) Directive or only partially covered by the [2014](#) Directive, see module D3. For low-value (sub-threshold) contracts, see below.

The main competitive procurement procedures available under the [2014](#) Directive are the open procedure, restricted procedure, competitive dialogue procedure, [competitive procedure with negotiation](#), and the innovation partnership procedure. The 2014 Directive (1) updated the negotiated procedure with prior publication of a contract notice and renamed it the “competitive procedure with negotiation”; (2) introduced the new “innovation partnership” procedure; and (3) removed the provisions in the 2004 Directive on subsidised housing schemes and public works concessions. [Concession contracts for works and services are subject to the Concessions Directive 2014/23/EU](#). There are also [particular procurement regimes](#) set out in the [2014](#) Directive, which [are to](#) be used for the procurement of [social and other specified services](#) and [for](#) design contests.

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The Directive also includes provisions covering procurement tools that a contracting authority may choose to use in conjunction with the competitive procedures, where permissible. These are framework agreements, electronic auctions, [dynamic purchasing systems](#), and [electronic catalogues \(“e-catalogues”\)](#). The 2014 Directive added the provisions on e-catalogues, and the provisions on dynamic purchasing systems were substantially amended to make them more user-friendly.

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OVERVIEW OF CONTENT

- [Electronic catalogues: The 2014 Directive introduced the concept of electronic catalogues \(“e-catalogues”\), which are documents in electronic format submitted in place of tenders or as part of a tender.](#)

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Overview

Delete references to [forms of procedure not allowed under local legislation](#).

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There are [five](#) main competitive procedures:

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- Open procedure
- Restricted procedure
- Competitive dialogue procedure
- [Competitive procedure with negotiation](#)
- [Innovation partnership procedure](#)

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The first four procedures are shown in flow charts on the next page. A short explanation of the innovation partnership procedure, introduced by the 2014 Directive, is set out later in this section.

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Key features of each of the five main competitive procedures are as follows:

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- Competitive dialogue procedure: this is a 'two-stage' competitive procedure that can be used subject to fulfilling certain conditions. Under the 2014 Directive the conditions for using the competitive dialogue procedure and the competitive procedure with negotiation are the same.
- Competitive procedure with negotiation: this is a 'two-stage' competitive procedure that can be used for some works, supplies and services contracts, subject to fulfilling certain conditions. Under the 2014 Directive the conditions for using the competitive dialogue procedure and the competitive procedure with negotiation are the same.
- Innovation partnership procedure: this is a "two stage" competitive procedure that can be used where the contracting authority has a need for an innovative product, service or work that is not available on the market.

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- There is a particular procurement regime for the procurement of social and other specific services. Public contracts for the award of social and other specific services listed in Annex XIV of the 2014 Directive are to be awarded in accordance with national provisions, which must comply with the basic principles set out in articles 74 to 76 of the 2014 Directive (see Module D3 for further information on this procurement regime).

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**Deleted:** Subsidised public housing contracts procedure: this is a competitive procedure with no detailed requirements relating to the number of stages to be used, which can only be used for specified types of contracts relating to the procurement of subsidised public housing schemes.

**Good practice note: The importance of thorough preparation before advertising**  
The 2014 Directive introduced a requirement for all procurement documents to be available by electronic means, free of charge, on the date of publication of a contract notice or when an invitation to confirm interest is sent (as appropriate). All procurement documents must be complete and comprehensive.

**Deleted:** Works concessions procedure: this is a competitive procedure with no detailed requirements relating to the number of stages to be used, which can only be used for works concession contracts.

**Deleted:** Procedures for contracts awarded by concessionaires: these are competitive processes with no detailed requirements relating to the number of stages to be used, which can only be used for contracts awarded by concessionaires

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2.1.2 Flowchart 1: Four main competitive procedures:

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Open procedure      Restricted procedure      Competitive dialogue procedure      Competitive procedure with negotiation

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The five main competitive procedures can be summarised as follows:

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**Open procedure**

Tenders must be evaluated on the basis of the most economically advantageous tender. No negotiations are permitted with economic operators, although contracting authorities may clarify aspects of the tender with tenderers.

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**Restricted procedure**

Tenders must be evaluated on the basis of the most economically advantageous tender. No negotiations are permitted with economic operators, although contracting authorities may clarify aspects of the tender with tenderers.

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**Competitive dialogue procedure**

Once the contracting authority is satisfied..... Under this procedure, tenders can only be evaluated on the basis of the best price-quality ratio. Under the 2014 Directive the contracting authority is specifically permitted to negotiate with the tenderer presenting the best price-quality ratio in order to confirm financial commitments or other terms in the tender, subject to safeguards.

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**Competitive procedure with negotiation**

Tenders must be evaluated on the basis of the most economically advantageous tender.

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Tenders can be evaluated on the basis of either lowest price or most economically advantageous tender.

**2.1.2.1 Innovation partnership procedure**

The innovation partnership procedure is a two-stage process. The contracting authority advertises the contract opportunity. The economic operators submit information, which is used by the contracting authority to establish whether the economic operators are suitable, from a qualitative perspective, to participate in the innovation partnership process. The contracting authority is permitted to limit the number of economic operators that it invites to participate and to draw up a shortlist of economic operators or to invite only one economic operator to participate in the innovation partnership. The rules

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on the conduct of negotiation phase of the innovation partnership procedure are flexible, and the way in which the procedure is conducted can therefore vary considerably. An underlying principle is that the procedure is conducted in successive phases, which must be structured in the sequence of steps in the research and innovation process, which may include the manufacture of products, provision of services or completion of works. During the innovation partnership, all aspects of the project can be discussed with the economic operators, and the number of solutions can be reduced as part of the process. It is possible for the contracting authority to purchase the final product, service or work developed through the innovation partnership, but it is not obliged to do so. Under this procedure, contracts can only be awarded on the basis of the best price-quality ratio.

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### 2.1.3 WHEN CAN EACH OF THE MAIN COMPETITIVE PROCEDURES BE USED?

Article 26 of the 2014 Directive covers the circumstances where the main competitive procedures can be used.

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PDF C-127

**Competitive dialogue and competitive procedure with negotiation:** The competitive dialogue and competitive procedure with negotiation can only be used where specific conditions are met. These conditions are set out in article 26 for the competitive dialogue procedure and for the competitive procedure with negotiation, and the same conditions apply for both procedures. There are no legal provisions in the Directive requiring a contracting authority to use one of these procedures in preference to the other.

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As mentioned above, the conditions in the 2014 Directive for the use of the competitive dialogue and the competitive procedure with negotiation are identical [article 26(4)]. According to recital 42, these conditions are intended to be broader than those in the 2004 Directive. In summary, the conditions are as follows:

- The needs of the contracting authority cannot be met without the adaptation of readily available solutions.
- The works, supplies or services to be procured include design or innovative solutions.
- The contract cannot be awarded without prior negotiations due to specific circumstances related to the nature, complexity or legal and financial make-up or because of the risks attached to them.
- The technical specifications cannot be established with sufficient precision with reference to defined standards or technical specifications.
- Only irregular or unacceptable tenders were submitted in an open or restricted procedure.

Examples of irregular or unacceptable tenders, provided in article 26 (4)(b), are tenders that do not comply with the procurement documents, tenders that were received late, tenders where there is evidence of collusion or corruption, tenders that have been found by the contracting authority to be abnormally low, tenders that were submitted by tenderers that do not have the required qualifications,

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or tenders with a price exceeding the contracting authority's budget, as determined and documented prior to the launching of the procurement procedure.

This narrative now examines in more detail the four main competitive procedures: (1) open procedure, (2) restricted procedure, (3) competitive dialogue procedure, and (4) competitive procedure with negotiation. A short explanation of the fifth competitive procedure, the innovation partnership procedure introduced by the 2014 Directive, is provided later in this section.

This narrative now explains in more detail each of the four main competitive procedures.

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#### 2.1.4 Open procedure

ADVERTISING

A key objective of the 2014 Directive is to ensure the accessibility of contract opportunities. Accessibility could be jeopardised if contracting authorities set very short time limits for responses, therefore certain minimum response time limits are required in articles 46 to 48. Article 45 makes clear that contracting authorities must take into account the complexity of the contract and the time required for economic operators to respond.

In order to increase efficiency, the 2014 Directive nevertheless introduces shorter minimum statutory time limits for the receipt of tenders. The time limit is 35 days from the date of dispatch of the contract notice to the office of the OJEU. This 35-day minimum time limit can be reduced in the following circumstances:

- to a minimum of 15 days, where a suitable prior information notice (PIN) has been published, which (a) includes all of the information required for a standard contract notice insofar as the information was available at the time the PIN was dispatched for publication, and (b) is dispatched no less than 35 days and no more than 12 months before the date on which the contract notice for the contract is dispatched (see Module E2 for further information on prior information notices).

**Deleted:** Economic operators that wish to participate in the process can request the tender documents from the contracting authority or may access them from the website specified in the contract notice, if that form of electronic procurement is being used. Statutory time limits apply for the period from the dispatch of the contract notice to the return of tenders¶

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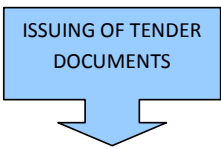

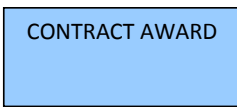
**Deleted:** <#>The 52-day time limit can be shortened by seven days where the OJEU contract notice is prepared in the standard format and dispatched electronically (article 39(5)).¶ <#>The 52-day time limit can be further reduced, by five days, where the contracting authority offers unrestricted and full, direct access by electronic means to the contract documents and to any supplementary documents as from the date of publication of the OJEU contract notice. ¶

**Deleted:** The 52-day time limit can also be reduced

**Deleted:** (see module E2 for further information about prior information notices).

**Deleted:** Where a prior information notice was sent for publication between 52 days and 12 months prior to the date on which the contract-specific notice was sent, then the 52-day time limit can be shortened, as a general rule, to 36 days. It may be possible to reduce this time limit even further, but in no circumstances may the time limit be reduced to fewer than 22 days

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	<ul style="list-style-type: none"> <li>• <a href="#">to a minimum of 15 days</a> from the date of dispatch of the contract notice in the event of urgency. Under the 2014 Directive, a contracting authority may, for the first time, use an accelerated open procedure in the case of urgency [recital 46 and article 27 (3)].</li> <li>• <a href="#">to a minimum of 30 days</a> if documents are available electronically. Article 53 require contracting authorities to ensure by electronic means "full direct access free of charge to the procurement documents" from the date of publication of the notice. Where such access cannot be provided, the minimum time limit for submission of tenders in the open procedure must be increased by five days. This increase does not apply when the time limits have been reduced for duly substantiated urgency [(art. 25 (3))].</li> </ul>
	<p>▽Where the specification and supporting documents are not available by electronic .....▽ [(art. 53(2))].</p> <p>▽Where the specification and supporting documents are not made available within the six-day time limit .....▽ (art. 47)</p>
	<p>▽The information received from tenderers is evaluated. ▽ Secondly, the tender information is evaluated on the basis of the most economically advantageous tender <a href="#">as redefined in the 2014 Directive [see also Module E4 (Narrative)]</a>, using the pre-disclosed award criteria and weightings.</p>
	<p>▽See <a href="#">Module F1</a> for further discussion of the statutory standstill requirements. ▽<a href="#">Article 50 requires the contract award notice to be sent within 30 days of the conclusion of the contract.</a></p>

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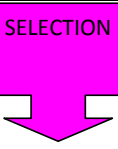
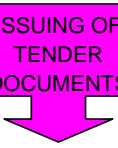
**Flow chart 2 Open procedure - statutory time limits: summary**

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The flow chart is replaced by a new, consolidated "Minimum statutory time periods flow chart" - see later, page PDF C-150

PDF C-134 & C-135

### 2.1.5 Restricted procedure

 <p>ADVERTISING AND REQUESTS TO PARTICIPATE</p>	<p><u>A key objective of the 2014 Directive is to ensure the accessibility of contract opportunities. Accessibility could be jeopardised if contracting authorities set very short time limits for responses. The time limit for receipt of requests to participate remains at 30 days (article 29). Article 45 makes it clear that contracting authorities must take into account the complexity of the contract and the time required for economic operators to respond.</u></p> <p><u>In case of urgency, the 30-day period for receipt of requests to participate can be reduced to a minimum of 15 days.</u></p>
 <p>SELECTION</p>	<p>The contracting authority must invite a minimum of five economic operators to submit tenders, provided that there are five suitably qualified candidates (article 65(2)). The number of economic operators invited to participate must be sufficient to ensure genuine competition and so in certain circumstances five candidates may not be sufficient.</p>
 <p>ISSUING OF TENDER DOCUMENTS</p>	<p><u>Restricted procedure without a PIN: A statutory time limit of 30 days applies for the period extending from the dispatch of invitation to tender until the return of tenders (article 29).</u></p> <p><u>Restricted procedure with publication of a standard PIN: Where contracting authorities publish a suitable prior information notice (PIN), the 30-day period can be significantly reduced, to 10 days. The time limit can only be shortened if (i) all of the required information has been set out in the PIN, and (ii) the PIN was sent for publication between 35 days and 12 months before the dispatch of the contract notice.</u></p> <p><u>In the case of urgency the time limit for the receipt of tenders can be reduced from 30 days to a minimum of 10 days.</u></p> <p><u>If electronic documents are available, the time limit for the receipt of tenders can be shortened to 25 days. Article 53 requires contracting authorities to ensure "full direct access free of charge to the procurement documents" by electronic means. Where such access cannot be provided, the minimum time limit for submission of tenders must be increased by five days. This increase does not apply when the time limits have been reduced for duly substantiated urgency [article 26(6)].</u></p>

**Deleted:** Statutory time limits apply for the period from the dispatch of the contract notice to the return of requests to participate (article 38

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**Deleted:** Under the restricted procedure, the contracting authority must allow 37 days from the date of dispatch of the contract notice to the deadline date for the receipt of requests to participate.¶

The 37-day time limit can be shortened by seven days where the OJEU contract notice is prepared in the standard format and dispatched electronically

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The 40-day time limit can be reduced by five days where the contracting authority offers unrestricted and full, direct access by electronic means to the contract documents and to any supplementary documents as from the date of publication of the OJEU contract notice. ¶

The 40-day time limit can also be reduced where a prior information notice has been published (see module E2 for further information on prior information notices). Where a prior information notice was sent for publication between 52 days and 12 months prior to the date on which the contract-specific notice was sent, then the 40-day time limit can be shortened, as a general rule, to 36 days. It may be possible to reduce this time limit even further, but in no circumstances may the time limit be reduced to fewer than 22 days.¶

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	<p><a href="#">See the note below on further flexibility available for sub-central authorities</a></p> <p><a href="#">According to article 54</a>, the invitation to tender must be in writing and issued simultaneously to the selected candidates. It must include, at least:</p> <hr/> <ul style="list-style-type: none"> <li>a copy of the specification(s) plus any supporting documents or a reference to where those documents can be accessed by electronic means.</li> </ul>
RETURN OF TENDERS	<p>Where the specification and supporting documents are not available by electronic means... (article 53(2)).</p> <p>Where the specification and supporting documents are not made available within the six-day time limit.... (article 47)</p>
EVALUATION OF TENDERS	<p>The contracting authority evaluates the tenders on the basis of the most economically advantageous tender, as redefined in the 2014 Directive, using the pre-disclosed award criteria and weightings.</p>
CONTRACT AWARD	<p>See Module F1 for further discussion of the statutory standstill requirements. Article 50 requires the contract award notice to be sent within 30 days of the conclusion of the contract.</p>

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### Flow chart 3 - Restricted procedure - statutory time limits: summary

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The flow chart is replaced by a new, consolidated "Minimum statutory time periods flow chart" - see later, page PDF C-150

PDF C-138, C-139 & C-140

#### 2.1.6 Competitive dialogue procedure

ADVERTISING AND REQUEST TO PARTICIPATE	<p>A key objective of the 2014 Directive is to ensure the accessibility of contract opportunities. Accessibility could be jeopardised if contracting authorities set very short time limits for responses. The time limit for receipt of requests to participate remains at 30 days (article 29). Article 45 makes it clear that contracting authorities must take into account the complexity of the contract and the time required for economic operators to respond.</p>
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Deleted: Delete this section if competitive dialogue is not permitted under local legislation



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	<u>In cases of urgency, the 30-day period for receipt of requests to participate can be reduced to a minimum of 15 days.</u>
<b>SELECTION</b> ↓	∇The contracting authority must invite a minimum of three economic operators.....∇ [article <u>65(2)</u> ].
<b>ISSUING OF COMPETITIVE DIALOGUE PHASE</b> ↓	<u>According to article 54, the invitation to tender must be in writing and issued simultaneously to the selected candidates. It must include, at least:</u> <ul style="list-style-type: none"> <li>• ∇a copy of the specification or of the descriptive document, .....∇</li> </ul>
<b>COMPETITIVE DIALOGUE PHASE AND INVITATION TO TENDER</b> ↓	Article <u>30</u> does not contain detailed rules about how a contracting authority is to run the competitive dialogue phase, .....  The invitation to tender must be in writing and must include, at least:
<b>EVALUATION OF TENDERS</b> ↓	The contracting authority evaluates the tenders on the basis of the most economically advantageous tender, <u>as redefined in the 2014 Directive</u> .  Following conclusion of the competitive dialogue phase, there are limits on any further discussion with tenderers, <u>but the final tenders may be clarified, specified and optimised at the contracting authority's request.</u>
<b>CONTRACT AWARD</b>	∇See <u>Module F1</u> for further discussion of the statutory standstill requirements. ∇ <u>Article 50 requires the contract award notice to be sent within 30 days of the conclusion of the contract.</u>

**Deleted:** Statutory time limits apply for the period from the dispatch of the contract notice to the return of requests to participate (article 38). Under the restricted procedure, the contracting authority must allow 37 days from the date of dispatch of the contract notice to the deadline date of receipt of requests to participate.¶ The 37-day time limit can be shortened by seven days where the OJEU contract notice is prepared in the standard format and dispatched electronically (article 39(5)).

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PDF C-141

**Flow chart 4 - Competitive dialogue procedure - statutory time limits: summary**

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The flow chart is replaced by a new, consolidated "Minimum statutory time periods flow chart" - see later, page PDF C-150

PDF C-142

**Commentary on the competitive dialogue procedure**

*Insert at end of the commentary box*

In the consultation phase leading to the preparation of the 2014 Directive, according to recital 42 "a great need for contracting authorities to have additional flexibility to choose a procurement procedure which provides for negotiations", was identified. The recital explains that "use of the competitive dialogue has significantly increased in terms of contract values over the past years. It has shown itself to be of use in cases where contracting authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions. This situation may arise in particular with innovative projects, the implementation of major integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing." The use of procedures involving negotiation is thus positively encouraged.

PDF C-143

**2.1.7 Competitive procedure with negotiation**

**Note on the competitive procedure with negotiation, where procurement has previously failed:**

The procedure outlined in the flow chart below applies to the circumstances where the competitive procedure with negotiation is being used and where there has been no prior competitive process.

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Article 26(4)b of the Directive confirms that a contracting authority is permitted to publish a contract notice.....

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In these circumstances a contracting authority is to negotiate with tenderers .....

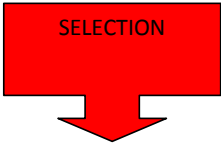



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<b>ADVERTISING AND REQUEST TO PARTICIPATE</b>	<p>The contracting authority must allow 30 days from the date of dispatch of the contract notice to the deadline date of receipt of requests to participate. In cases of urgency, the 30-day period may be reduced to 15 days.</p>
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	<p><a href="#">See the note below on further flexibility available for sub-central authorities.</a></p>
	<p>The contracting authority must invite a minimum of three economic operators to participate in the negotiation, provided that there are three suitably qualified candidates [article <a href="#">65(2)</a>].</p>
	<p><a href="#">According to article 54, the invitation must be in writing and simultaneously issued to the selected candidates and must include, at least:</a></p> <ul style="list-style-type: none"> <li>• <a href="#">∇ a copy of the specification or of the descriptive document,...</a> ∇</li> </ul>
	<p>∇ See note above on the conduct and purpose of the negotiation phase..... ∇ [article <a href="#">26(4)b</a>].</p> <p>In other cases, the Directive does not contain detailed rules about how a contracting authority is to run the negotiation phase. The contracting authority is responsible for deciding how the <a href="#">negotiation</a> phase will be conducted. <a href="#">Negotiations are permitted to improve initial and subsequent tenders, subject to a proviso that minimum requirements cannot be negotiated and to an obligation to ensure equal treatment of all tenderers.</a></p> <p>Article <a href="#">29(6)</a> confirms that the procedure can take place in successive stages ....</p> <p style="text-align: center;"><i>Insert at end of this box on the Negotiation Phase</i></p> <p><a href="#">The contracting authority may award contracts on the basis of the initial tenders without negotiation where this was indicated in the contract notice or in the invitation to confirm interest. See box below on "Evaluation of Tenders" for principles that apply to the evaluation.</a></p> <p><a href="#">When the contracting authority intends to conclude negotiations, it shall inform the remaining tenderers and set a common deadline to submit revised tenders... [article 29(7)]. No negotiations are permitted after the receipt of the final tenders.</a></p>
	<p>Economic operators return tenders within the specified time limits and in</p>

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The 37-day time limit can be shortened by seven days where the *OJEU* contract notice is prepared in the standard format and dispatched electronically (article 39(5)).

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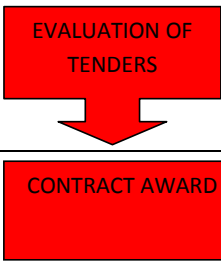

**Deleted:** subject to ensuring that the process is conducted in a manner that complies with the general law and Treaty principles, in particular ensuring an open, fair and transparent process that treats all tenderers equally

**Deleted:** In all cases, article 30(3) confirms that during the negotiations contracting authorities are to ensure the equal treatment of all tenderers.

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C	PREPARATION OF PROCUREMENT	PART 4	PROCEDURES AND TOOLS
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	<p>the format specified by the contracting authority.</p> <p><b>Competitive procedure with negotiation without a PIN:</b> Statutory time limits apply for the period from the dispatch of invitation to tender to the return of tenders. The contracting authority must allow <u>30</u> days from the date of dispatch of the contract notice to the deadline date for the receipt of tenders</p> <p><b>Competitive procedure with negotiation with the publication of a standard PIN:</b> <u>Where contracting authorities publish a standard prior information notice (PIN), the 30-day period can be significantly reduced to 10 days. The time limit can only be shortened if all of the required information has been set out in the PIN and if the PIN was sent for publication between 35 days and 12 months before the dispatch of the contract notice.</u></p> <p><u>In the case of urgency the time limit for the receipt of tenders can be reduced from 30 to a minimum of 10 days.</u></p> <p><u>If electronic documents are available, the time limit for the receipt of tenders can be shortened to 25 days. Article 53 requires contracting authorities to ensure "full direct access free of charge to the procurement documents" by electronic means. Where such access cannot be provided, the minimum time limit for submission of tenders must be increased by five days. This increase does not apply when the time limits have been reduced for duly substantiated urgency [article 26(6)].</u></p>
	<p>The contracting authority evaluates the tenders on the basis of either the most economically advantageous tender, <u>as redefined in the 2014 Directive</u>, using the pre-disclosed award criteria and weightings.</p>
	<p>∇ See <u>Module F1</u> for further discussion of the statutory standstill requirements. ∇ <u>Article 50 requires the contract award notice to be sent within 30 days of the conclusion of the contract.</u></p>

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Flow chart 5

Negotiated procedure with prior publication of a notice - statutory time limits summary

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The flow chart is replaced by a new, consolidated "Minimum statutory time periods flow chart" - see later, page PDF C-150

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### 2.1.8 Innovation partnership procedure

The innovation partnership procedure: The 2014 Directive establishes a new competitive procedure, the innovation partnership procedure. The intention is to "allow contracting authorities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works, provided that such innovative product or service or innovative works can be delivered to agreed performance levels and costs... the innovation partnership should be structured in such a way that it can provide the necessary "market pull", incentivising the development of an innovative solution without foreclosing the market..." (recital 49).

Article 31 sets out the rules for this new procedure, which consists of three phases: a first phase in which the partners are chosen, a second "innovation phase", and a third phase involving the purchase of the outcome of the innovation phase. The innovation partnership may be terminated without all of the phases being completed.

The innovation partnership, like the competitive dialogue, provides for only a minimum time scale for receipt of requests to participate of 30 days; a further acceleration in the case of urgency is not allowed. There are no explicit time scales for the invitation to submit tenders or a deadline for final tenders, and there are relatively limited provisions concerning the conduct of the innovation phase of the procedure.

The contract or contracts are concluded after the standstill period; the contract award notice has to be dispatched within 30 days after the conclusion of the contract.

When can the innovation partnership procedure be used? The procedure can be used when a solution involving innovation is required. The definition of "innovation" in Directive 2014 refers to "the implementation of a new or significantly improved product, service or process...with the purpose of helping to solve societal challenges or to support the Europe 2020 Strategy for smart, sustainable and inclusive growth" [article 2(22)]. Article 31(1) refers to the contracting authority's identification of a need "that cannot be met by purchasing products, services or works already available on the market".

### 2.1.9 Reducing statutory time limits

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Accelerated open and restricted procedures, as well as accelerated competitive procedure with negotiation

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In certain circumstances the 2014 Directive allows for an "accelerated" procedure in the case of duly substantiated urgency. Under the 2014 Directive it is possible for contracting authorities to not only reduce the statutory time limits described above for the restricted procedure and for the competitive procedure with negotiation but also, for the first time, for the open procedure. The contracting authority must point out in the contract notice the reason why a procedure with a normal minimum time scale is impracticable.

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In the case of the open procedure, the minimum time scale for submission of tenders can be reduced from 35 days to a minimum of 15 days from the date of dispatch of the contract notice [article 27(3)].

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In the case of the restricted procedure [article 28(6)] and the competitive procedure with negotiation [Article 29(19)]:

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- the normal minimum time limit for receipt of requests to participate of 30 days can be reduced to a minimum of 15 days; and
- the normal time limit for the receipt of tenders can be reduced from 30 days to a minimum of 10 days.

In the case of competitive dialogue (article 30) and innovation partnership (article 31), reduction of the time limit is not allowed.

The statutory standstill time limit still applies.

The contracting authority is required to indicate its reasons for using an accelerated procedure in section V.C.19 of the standard form contract notice.

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**Flow chart 6 - Accelerated restricted procedure- statutory time limits summary**

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*The flow chart is replaced by a new, consolidated "Minimum statutory time periods flow chart" - see later, page PDF C-150*

PDF C-149

**Flow chart 7 - Accelerated restricted procedure with prior publication of a notice - statutory time limits summary**

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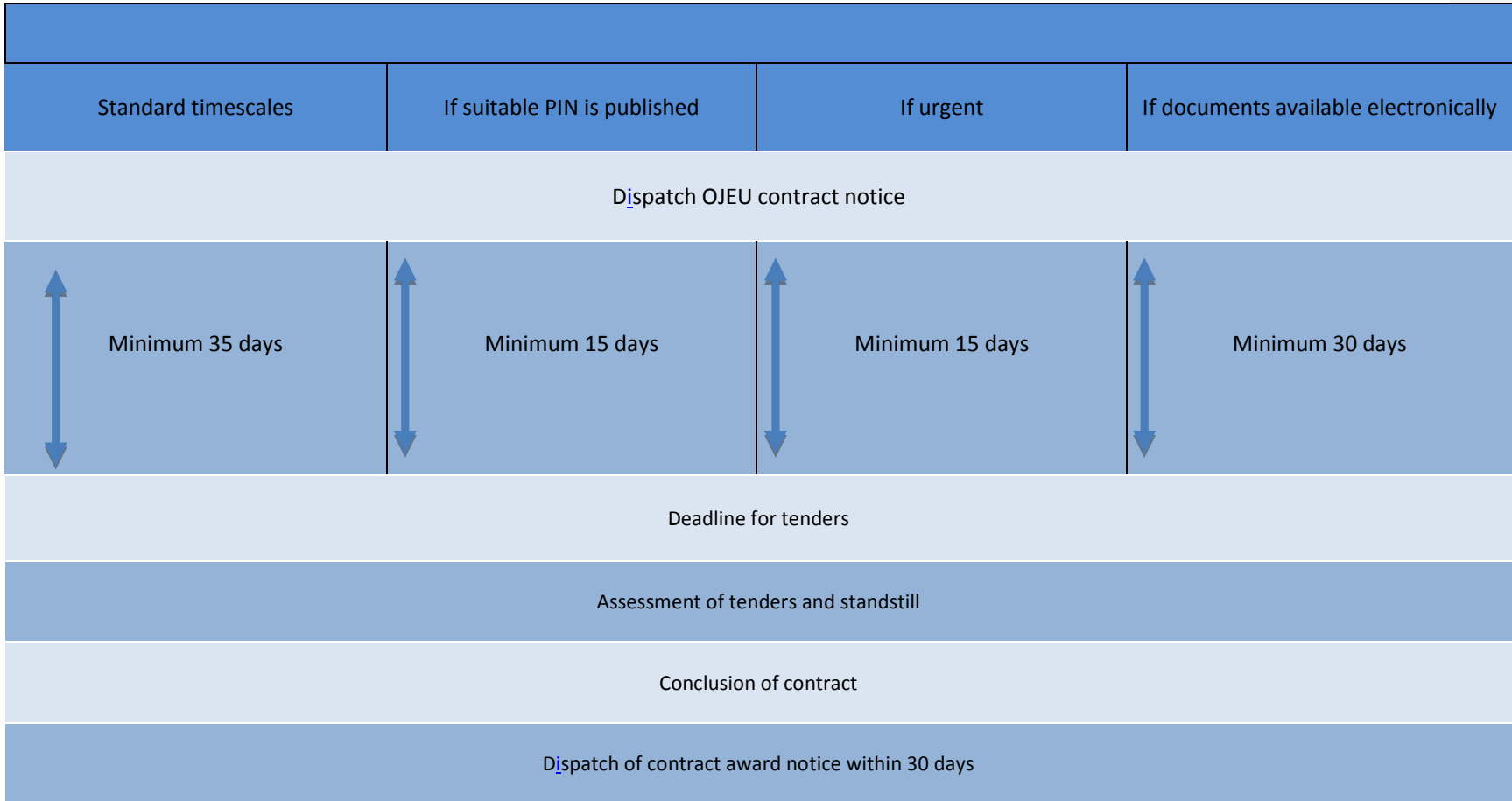
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PDF C-150 - new consolidated flow charts showing statutory minimum periods



Minimum timescales - Restricted procedure and Competitive procedure with negotiation					
Standard timescales	If suitable PIN is published	If urgent	If electronic documents available	Sub-central authority (where permitted)	
				Normal	If urgent
Dispatch of contract notice					
 Minimum 30 days	 Minimum 30 days	 Minimum 15 days	 Minimum 30 days	 Minimum 30 days	 Minimum 15 days
Deadline for expression of interest					
Selection of tenderers					
Dispatch of invitation to tender					
 Minimum 30 days	 Minimum 10 days	 Minimum 10 days	 Minimum 25 days	 By agreement with tenderers or, if no agreement, minimum 10 days	 By agreement with tenderers or, if no agreement, minimum 15 days
Deadline for tenders					
Assessment of tenders and standstill					
Conclusion of contract					
Dispatch of contract award notice within 30 days					

<b>Minimum timescales - Restricted procedure and Competitive procedure with prior negotiation - with PIN as a call for competition</b>
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Standard timescales	If urgent	If electronic documents available	Sub-central authority (where permitted)	
			Normal	If urgent
Despatch of PIN as call for competition				
↕ No explicit timescale	↕ No explicit timescale	↕ No explicit timescale	↕ No explicit timescale	↕ No explicit timescale
Deadline for expression of interest				
Request to confirm interest				
↕ Minimum 30 days	↕ Minimum 15 days	↕ Minimum 30 days	↕ Minimum 30 days	↕ Minimum 30 days
Deadline for confirmation of interest				
Selection of tenderers				
Dispatch of invitation to tender				
↕ Minimum 30 days	↕ Minimum 10 days	↕ Minimum 25 days	↕ By agreement with tenderers <u>or</u> , if no agreement, minimum of 10 days	↕ By agreement with tenderers <u>or</u> , if no agreement, minimum of 10 days
Deadline for tenders				
Assessment of tenders and standstill				
Conclusion of contract				
Dispatch of contract award notice within 30 days				

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**Comment and practice note**

*Insert at the start of paragraph 2*

[Recital 46](#) points out that the contracting authority need not prove that the urgency has been brought about by unforeseeable events and is not attributable to the authority. The [2014 Directive](#) itself does not give examples of what may constitute appropriate urgent circumstances, but it is generally assumed that .....

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**Further flexibility measures available for sub-central contracting authorities:**

Sub-central authorities are contracting authorities that are not central government authorities as listed in Annex 1, for example local government authorities.

- Agreement of shorter time limits for the receipt of tenders in the restricted procedure [article 28(4)] and in the competitive procedure with negotiation [article 29(1)]: Directive 2014 allows Member States for the first time to decide whether they allow only specific categories of sub-central contracting authorities or all of these authorities to vary the standard minimum times for tendering, in agreement with tenderers. The sub-central authority may set the time limit for the receipt of tenders by mutual agreement between the contracting authority and the selected tenderers, provided that it ensures that all economic operators are given the same time to prepare and submit their tenders. If there is no mutual agreement, the time limit must be at least 10 days from the date on which the invitation to tender is issued.
- Prior information notice (PIN) as a call for competition: Directive 2014 allows Member States for the first time to decide whether they allow specific categories of sub-central contracting authorities or all of these authorities to use a PIN as a call for competition instead of a contract notice in the restricted procedure and in the competitive procedure with negotiation. The PIN as a call for competition must meet the conditions set out in article 48. Economic operators interested in tendering for the contracts described in the PIN as a call for competition must express an interest in one or a number of contracts by responding to that PIN. There is no requirement to publish another contract notice prior to starting the tendering process. The contracting authority invites those economic operators that have expressed an interest in response to the PIN.

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This narrative now examines special types of procedures that can be used in specified circumstances:

- Design contests
- "Light" regime for the procurement of social, health and other specific Annex XIV services, introduced by the 2014 Directive

Deleted: <#>Public works contracts for subsidised housing schemes¶  
Public works concessions

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**2.1.10 Design contests – Articles 78 to 82**

A design contest is defined in article [2\(21\)](#) of the [2014](#) Directive as a process that enables the contracting authority to acquire a plan or a design as a result of a competition, [with or without the award of prizes](#). This process is mainly, although not exclusively, used in the field of town and country planning, architecture, engineering or data processing.

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The contracting authority advertises the design contest, using a standard form contract notice, in the *Official Journal of the European Union* and then conducts the process in accordance with articles [78 to 82](#) of the [2014](#) Directive.

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PDF C-152

**Overview of articles in the [2014](#) Directive covering the conduct of design contests**

Articles [78 to 82](#) of the [2014](#) Directive set out the rules applying to the conduct of design contests.

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The articles are summarised as follows:

**Article [78](#)** requires design contests to be run in accordance with the rules set out in articles [78 to 82](#).

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**Article [78](#)** contains provisions relating to the scope of design contests.

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Deleted: **Article 68** sets out the exclusions from the scope of design contests.

**Article [79](#)** covers the requirements to advertise by using an *OJEU* contract notice, both to advertise the opportunity to participate in the competition and following the appointment of the successful participant(s). [Where contracting authorities intend to award a subsequent service contract in a negotiated procedure without prior publication \[article 32\(4\)\], this intention has to be indicated in the contest notice.](#)

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Deleted: **Article 71** contains provisions covering the means of communication, including the electronic receipt of plans and projects.

**Article [80](#): Selecting participants**

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Articles **81 and 82**: The jury and conduct of the evaluation

Deleted: 73 and 74

PDF C-153

- **▼**When the opinion or decision has been made (*and the successful candidates announced*),... **▼** the contracting authority must publish a contract award notice in accordance with article **79(2)**.

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PDF C-153 and 154

*The 2014 Directive does not contain provisions governing the award of subsidised housing schemes. Section 2.1.10 is no longer applicable and the full text of 2.1.10 on pages PDF C-153 and PDF C-154 is deleted.*

Deleted: 2.1.10 - PUBLIC WORKS CONTRACTS FOR SUBSIDISED HOUSING SCHEMES - ARTICLE 34 ¶

*The deleted text is not shown below.*

PDF C-155 to C-158

*The 2014 Directive does not contain provisions governing the award of public works concessions. Concessions contracts for works and services are subject to the new 2014 Concessions Directive. The section on public works concessions on pages PDF C-155 to C-158 is no longer applicable and the full text is deleted.*

Deleted: Public works concessions - Articles 56 to 65¶

*The deleted text is not shown below.*

#### **2.1.11 “Light” regime for the procurement of social, health and other specific Annex XIV services, introduced by the 2014 Directive**

**Services covered by the light regime:** The 2014 Directive abolishes the distinction between Annex II A and Annex II B services. The 2014 Directive introduces a **“light” procurement regime** in articles 74 to 77, to be used for the **procurement of social, health and other specific services**, listed in Annex XIV of the 2014 Directive. Services not listed in Annex XIV are subject to the full application of the 2014 Public Sector Directive. Although the list of services in Annex XIV is similar to the list in Annex II B, the lists are not identical.

**Financial threshold:** Services listed in Annex XIV are subject to a light regime, where the value of the contract exceeds a threshold of EUR 750 000.

**Process for procuring light regime services:** The 2014 Directive contains only a few provisions governing the process for procuring light regime services. Member States are required to put into place national provisions concerning the process for procuring light regime services. The limited provisions in the 2014 Directive include a requirement to advertise the contract opportunity in the *OJEU*, using a contract notice or PIN, and to publish a contract award notice in the *OJEU*. In addition, the principles for awarding contracts must comply with the principles of transparency and equal treatment of economic operators. Contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, and a number of other listed factors. See Module D3 for further information.

#### **2.1.12 The 2014 Concessions Directive**

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[Prior to the 2014 Concessions Directive, the award of public works concession contracts was subject to articles 56 to 65 of the 2004 Public Sector Directive. Services concessions were not regulated by the Public Sector Directive. That is no longer the case. The 2014 Concessions Directive intends to provide clear and simple rules at EU level governing the award of public and utilities works and services concessions above specified thresholds. It aims to improve legal certainty by creating a firm regulatory basis for the uniform application of the Treaty principles by all Member States to both works concessions and services concessions. However, the Member States remain free to structure the provision of works or services according to their needs, by either using their own resources, co-operating with other authorities, or outsourcing to third parties. The 2014 Concessions Directive, for the first time, gives adequate judicial protection to candidates and tenderers in concession award procedures by bringing these procedures under the scope of the Remedies Directives 89/665/EEC and 92/13/EEC.](#)

[For more detailed information, see also SIGMA Brief No. 31, 2014 EU Directives: Concessions.](#)

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**SECTION 2.2  
PROCUREMENT TOOLS**

- Framework agreements (article [33](#))
- Electronic auctions (article [35](#))
- Dynamic purchasing systems (article [34](#))
- [Electronic catalogues \(article 36\), introduced by the 2014 Directive](#)

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**FRAMEWORK AGREEMENTS**

Prior to the adoption of the [2004](#) Directive, there were no specific provisions covering the establishment and operation of framework agreements in the public sector (there were provisions, however, applying to the utilities sector).

The provisions in the [2004](#) Directive set out the manner in which framework agreements may be established and operated. EU member states [had the option](#) to adopt these provisions.

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[In the 2014 Directive, the provisions of framework agreements have been strengthened to require increased transparency, particularly in relation to the identification of the contracting authorities that are party to the framework agreement and the way in which contracts are awarded under framework agreements.](#)

PDF C-160

A framework agreement is defined in article [33\(1\)](#) as:

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“an agreement between one or more contracting authorities 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”.

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**Comment: Identifying contracting authorities that will participate in the framework**

The [Public Sector Directive 2004](#) is silent on this issue.

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*New paragraph at end of comment box*

[This aspect has been clarified in recital 60 combined with article 33 of the 2014 Directive; the contracting authorities that are party to a specific framework agreement from the outset should be clearly indicated either by name or by other means, such as a reference to a given category of contracting authority within a clearly delimited geographical area, so that the contracting authorities concerned can be easily and unequivocally identified.](#)

[Likewise, once the framework agreement has been concluded, it should not be open to the entry of new economic operators.](#)

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The contracting authorities that are party to the framework agreement remain fixed for the duration of the agreement, and therefore new authorities may not join the framework once it has been established (article [33](#) of the [2014 Directive](#)).

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**What procedure is used for procuring a framework agreement?**

Article [33\(1\)](#) of the Directive provides that any [competitive](#) procedures [provided for in the Directive](#) may be used for procuring a framework agreement.

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**Good practice note**

Although it is possible to use any [procedures provided for in the Directive](#) to procure a framework agreement, in practice there is little likelihood of using the competitive dialogue or [the competitive procedure with negotiation](#).

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**How is a framework agreement advertised?**

A framework agreement is advertised using the standard form *OJEU* contract notice [\[see Annex V, Part C \(13\)\]](#).

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Under the Public Sector Directive 2004 the minimum number of economic operators for a framework agreement involving several economic operators was three, provided that there were three suitably qualified economic operators [article 32(4)]. This requirement was eliminated in the 2014 Directive, making it possible for contracting authorities to conclude framework agreements with only two economic operators, even where other admissible tenders have been submitted.

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No changes in the membership of a framework agreement can be made, other than the exceptions specified in the 2014 Directive: the economic operators that are party to the framework remain fixed for the duration of the framework. Article 72 of the 2014 Directive allows for an economic operator to be changed in specific circumstances, such as insolvency. See article 72(1)d(ii) for the specific circumstances and conditions that must be met.

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- Deleted: , and therefore new economic operators may not join the framework once it has been established (article 32(2) of the Directive)

Amendments to a framework agreement: For the first time, the 2014 Directive permits modifications to a framework agreement. Article 72 sets out the circumstances and conditions where modifications are permitted. See Module G1 for further information on the provisions concerning contract modification in article 72 of the 2014 Directive.

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**Awarding contracts under the framework agreement**

**Agreement with one economic operator (single-provider agreement) [article 33(3)]**

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▼ Where the framework agreement is a single-provider agreement, ...▼ [article 33(3)].

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Article 33(2) indicates that .....

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**Agreement with more than one economic operator (multi-provider agreement) [article 33(4)]**

- Deleted: There is a further reminder in article 32(2) that "contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition".

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**Award following a mini-competition**

Article 33(5) of the Directive sets out the requirements for the conduct of the mini-competition:

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- The contract is to be awarded to the tenderer that has submitted the best tender on the basis of the award criteria set out in the [procurement documents for](#) the framework agreement.
- **▼**The award must not be made improperly or in such a way as to prevent, restrict or distort competition. **▼**

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[The 2014 Directive introduces for the first time the concept of using electronic catalogues for regulated procurement, such as framework agreements. Where a multi-provider agreement has been set up using e-catalogues, contracting authorities may provide that the mini-competition processes for call-offs are to take place on the basis of updated catalogues \[article 36\(4\)\].](#)

**[Framework agreement where both mini-competitions and award without a mini-competition may be used](#)**

[According to the 2014 Directive, a framework agreement with more than one economic operator can include more than one type of procedure to award a contract. Mini-competitions between the suppliers and an award based on the terms of the framework agreement can both be used in the same framework agreement. The choice of the method to be used must be made in accordance with objective criteria set out in the procurement documents \(article 33\(4\)b and recital 61\).](#)

**ELECTRONIC AUCTIONS (ARTICLE [35](#))**

[The provisions on e-procurement in the 2014 Directive represent a change in approach from the 2004 Directive. Recital 52 indicates that "electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes". Electronic means should become the standard means of information exchange in procurement procedures. Article 53 obliges contracting authorities to offer full and unrestricted access, free of charge, to the relevant procurement documents as from the date of publication of the contract notice \(or where a PIN is used as a call for competition, as from the date when the invitation to confirm interest was issued\).](#)

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**Deleted:** where contract notices are submitted electronically and tender documents are available from the date of despatch of the notice, then the statutory time limits can be reduced.

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**Definition:** An electronic auction is defined in article 1(7) of the [2004 Directive](#). [\(There is no definition of an electronic auction in the 2014 Directive. However, lengthy provisions on electronic auctions are set down in article 35 of the 2014 Directive\)](#)

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**Exclusions**

Article [35\(1\) and recital 67](#) exclude certain types of contracts: "...certain [public](#) service contracts and certain [public](#) works contracts having as their subject matter intellectual performances, such as the design of works, [which cannot be ranked by using automatic evaluation methods, shall not](#) be the object of electronic auctions."

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**Practice note**



There will be other types of purchases, in addition to those specified in article [35\(1\)](#), .....

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**Competitive processes that may be used prior to an electronic auction [article [35\(2\)](#)]:**

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- an open procedure
- a restricted procedure
- a [competitive procedure with negotiation](#)

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Conduct of electronic auctions: Article [35](#) contains detailed provisions [concerning the way in which](#) electronic auctions are to be conducted.

Deleted: Appropriate use: Article 54(8) of the Directive contains a specific provision emphasising the need for appropriate and proper use of electronic auctions:¶

**Basis of award [article [35\(3\)](#)]:** Electronic auctions can be based [on](#):

- [prices alone](#), but only where the contract is awarded on the [sole](#) basis of price; [or](#)
- prices and/or new values of the features indicated in the [procurement documents](#), when the contract is awarded on the basis of the [best price-quality ratio or of the lowest cost using a cost-effectiveness approach](#).

¶ “Contracting authorities may not have improper recourse to electronic auctions nor may they use them in such a way as to prevent, restrict or distort competition or to change the subject matter of the contract, as put up for tender in the published contract notice and defined in the specification.”

**Notification [article [35\(4\)](#)]:**

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**Specifications;**

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**Full initial evaluation [article [35\(5\)](#)]:**

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**Inviting electronic bids;**

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**Note on the mathematical formula**  
([article 35\(6\)](#) of the Directive)

**Successive phases [article [35\(5\)](#)]:**

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Instantaneous communication of relative ranking [\[article 35\(7\)\]](#):

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Closing the auction [\[article 35\(7\)\]](#):

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Award of the contract [\[article 35\(9\)\]](#):

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Dynamic Purchasing Systems [\(article 34\)](#)

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A dynamic purchasing system [\(DPS\)](#) is defined in article [34\(1\)](#) of the [2014](#) Directive as follows:

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[A dynamic purchasing system may be used:](#)

[“For commonly used purchases the characteristics of which, as generally available on the market, meet the requirements of the contracting authorities..”, contracting authorities may use a dynamic purchasing system.](#)

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[A dynamic purchasing systems is:](#)

[“ a completely electronic process and shall be open throughout the period of validity of the purchasing system to any economic operator that satisfies the selection criteria. It may be divided into categories of products, works or services that are objectively defined on the basis of characteristics of the procurement to be undertaken under the category concerned. Such characteristics may include reference to the maximum allowable size of the subsequent specific contracts or to a specific geographic area in which subsequent specific contracts will be performed.”](#)

Deleted: for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification.”

Contracting authorities must not use a dynamic purchasing system to prevent, restrict or distort competition.

Deleted: EU Member States can opt to provide for dynamic purchasing systems.

Deleted: (article 33(7))

How is a dynamic purchasing system set up?

**Procedure:** To set up a dynamic purchasing system, the contracting authority must have an electronic, Internet-based system. The contracting authority must follow the rules of the [restricted](#) procedure [\[article 34\(2\)\]](#), [with a selection process that will operate at the DPS set-up, but also allows for new suppliers to join the DPS during the lifetime of the DPS.](#) [The requirement of the 2004 Directive that indicative tenders must be submitted in each award process has been removed in the 2014 Directive, to simplify the DPS and make it more user-friendly.](#)

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**Advertising:** The contracting authority starts the process by publishing a [call for competition](#) for the establishment of the system in the required format [\[article 34\(4\)\(a\)\]](#).

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The contracting authority must include in the specification the following details:

- nature [and quantities](#) of the purchases envisaged;
- necessary information concerning the electronic purchasing system;
- electronic equipment used, technical connections and specifications.

[\[article 34\(4\)\(b\)\]](#)

[Contracting authorities shall also indicate any division into categories of products, works or services and the characteristics defining them \[Article 34\(4\)\(c\)\].](#)

▼ The contracting authority must offer unrestricted, direct and full access to the specification.....▼ [\[article 34\(4\)\(d\)\]](#).

▼ The contracting authority evaluates tenderers' submissions. ▼ The tenderers that are permitted to join the dynamic purchasing system are those that [have satisfied the selection criteria](#).

**Operation of the system**

**New economic operators:** New economic operators may access [the DPS throughout its validity period \[article 34\(5\)\]](#). [New suppliers can request to participate in the DPS under the same conditions as the original entrants. These requests must be decided upon within 10 working days after their receipt unless there are reasons, such as the review of additional documentation, that justify an extension to 15 working days.](#)

The contracting authority is obliged to inform the tenderer applying for membership of the system of its decision to admit or reject its application 'at the earliest possible opportunity' [\[article 34\(5\)\]](#).

[PDF C-176](#)

*Delete all information in the Comment box: **Comment: Membership of contracting authorities***

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▼ **Awarding a contract:** Each contract that a contracting authority wishes to award in the framework of a dynamic purchasing system must be the subject of a separate invitation to tender. ▼ [There is no requirement, as in the 2004 Directive, to publish a contract notice for each contract that a contracting](#)

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**Deleted: Duration:** A dynamic purchasing system may not last for more than four years, except in duly justified exceptional cases (article 33(7)). The Directive is silent as to what may constitute a duly justified exceptional case. ¶

**Costs:** A contracting authority is not permitted to request the payment of any charges by economic operators wishing to join or that have joined the system (article 33(7)), and therefore all documents must be made available free-of-charge and no charges may be made for administration or other costs.

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**Deleted:** the specification and any additional documents at any time at the address indicated in the contract notice, and they are entitled to submit an indicative tender

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**Deleted:** Existing economic operators are also entitled to improve their indicative tenders at any time (article 33(1)).¶

**Deleted:** Whenever a contracting authority receives a new indicative tender it is obliged to complete evaluation within 15 days of the date of submission of the tender. This evaluation time limit can be extended, provided that no invitation to tender is issued during the evaluation period, as this could result in a new potential provider missing a contract opportunity (article 33(4)).

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authority wishes to award. According to the 2014 Directive, the process is as follows [articles 34(2)(b) and 34(6)]:

- The contracting authority invites all admitted participants in the DPS to submit a tender for the specific procurement, in accordance with the provisions of article 54 (Invitations to candidates),
  - Where the DPS has been divided into categories, the contracting authority shall then invite all participants admitted to the category corresponding to the specific procurement.
- The contracting authority shall award the contract to the tenderer that submits the best tender on the basis of award criteria set out in the contract notice (or in the invitation to confirm interest where a PIN as call for competition was used).
  - Those criteria may, where appropriate, be formulated more precisely in the specific invitation to tender

**Comment**

▽ The concept of an online system.....▽ Unfortunately, the requirement under the 2004 Directive to advertise each individual contract opportunity meant that the system had significant built-in delay and was not truly 'dynamic'.

Contracting authorities have found that this requirement did not necessarily provide for a speedy and efficient purchasing system, and therefore the take-up of this procurement tool by contracting authorities was limited.

The 2014 Directive, as described above, aims to simplify the DPS and thus encourage contracting authorities to use a combination of DPS and e-catalogues for the purchase of commodity items.

*New paragraphs at end of PDF C-176*

**Electronic catalogues (Article 36)**

The 2014 Directive introduced electronic catalogues (e-catalogues) as a new electronic purchasing technique (recital 68).

Where e-catalogues are required in a procurement process, contracting authorities must indicate in the contract notice that e-catalogues are required and give all the necessary information on the format, electronic equipment used and the technical connection arrangements and specifications for the catalogue.

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**SECTION 2.3**

**NEGOTIATED PROCEDURE WITHOUT PRIOR PUBLICATION OF A CONTRACT NOTICE**

**Deleted:** articles 33(5) and 33(6)

**Deleted:** <#>The contracting authority must first publish a simplified OJEU contract notice in the specified standard format, inviting all interested economic operators to submit an indicative tender. A special short form contract notice is provided for this purpose.¶  
 <#>The contracting authority issues a contract-specific invitation to tender, which may include more precisely formulated award criteria based on those set out in the contract notice used to advertise the setting up of the dynamic purchasing system.¶  
 <#>The date for submission of the indicative tender may not be earlier than 15 days from the date that the simplified notice was sent to the OJEU office.¶  
 <#>The contracting authority must evaluate all indicative tenders received by the deadline and admit any new economic operators to the system.¶  
 <#>The contracting authority then invites all economic operators in the system to submit a tender for the specific contract and sets a time limit for that submission. ¶  
 The contract is awarded to the tenderer that submitted the best tender on the basis of the award criteria set out in the contract notice for the establishment of the system and which may have been more precisely formulated in the contract-specific invitation to tender

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The permitted derogations [have been amended in the 2014 Directive](#), in article [32](#) and are summarised below.

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**Practical note**

The derogations in article [32](#) .....

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**Derogations for public works, public supplies and public services contracts:**

**No tender/request to participate or no suitable tenders/requests to participate were received:** A derogation to apply the negotiated procedure without prior publication [may](#) be given in cases where an open or restricted procedure has already been conducted and [no tender/request to participate or no suitable tender/request to participate was](#) received; the negotiated procedure may be used, provided that the conditions of the contract are not substantially altered [and that a report is sent to the Commission where it so requests](#) [article [32\(2\)\(a\)](#)]. [The 2014 Directive provides a definition of an unsuitable tender or request to participate.](#)

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- **Technical or artistic reasons** [\[article 32\(2\)\(b\)\(i\)\]](#) or protection of exclusive rights, **including intellectual property rights:** A derogation may be granted where for technical or artistic reasons or for reasons connected with the protection of exclusive rights the contract can only be awarded to a particular economic operator. [The exceptions for technical reasons or protection of exclusive rights only apply when no reasonable alternative or substitute exists and when the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement](#) [article [32\(2\)\(b\)](#)].
- **Extreme urgency:** A derogation may be given [in the case of](#) events that were unforeseeable by the contracting authority, where [the](#) time limits available for the open or restricted procedure [or for competitive procedures with negotiation](#) cannot be complied with, [or](#) where [the derogation](#) is judged to be strictly necessary [article [32\(2\)\(c\)](#)].

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**Derogations for public supplies contracts:**

- **▽ Products manufactured for research and development purposes only:** ▽ [article [32\(3\)\(a\)](#)]

Deleted: 31(2)

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- **▽ Additional deliveries from an original supplier:** ▽ [article [32\(3\)\(b\)](#)]

Deleted: 31(2)

- **▽ Supplies quoted and purchased on a commodity market:** ▽ [article [32\(3\)\(c\)](#)]

Deleted: 31(2)

- **▽ Purchase of supplies on particularly advantageous terms:** ▽ [article [32\(3\)\(d\)](#)]

Deleted: 31(2)

**Derogations for public services contracts:**

- Following a design contest: [article 32(4)]

Deleted: 31(3)

**Derogations for public works and public services contracts**

**Additional requirements:** for works or services that were not included in the project that was originally considered or in the original contract.

Note: Under the 2014 Directive, an adapted version of this provision is included in article 72(1) on the modification of contracts during their term, and it applies to works, supplies and services contracts. See Module G1 for further information on the provisions on contract modification in article 72 of the 2014 Directive.

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the circumstances leading to the additional requirements must be unforeseen; ¶  
the additional requirements must be necessary for the performance of the contract; ¶  
the award can only be made where either the additional requirements cannot be technically or economically separated from the original contract without major inconvenience to the contracting authorities or, although separable from the original contract, they are strictly necessary for its completion; ¶  
the value of contracts awarded in these circumstances may not exceed 50% of the amount of the original contract.

PDF C-179

• **Repetition of works or services:**

- o the total estimated cost of the repeated works or services [article 32(5)].

PDF C-181

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**Utilities – Procurement procedures and tools**

**Utilities**

The main legal requirements relating to the choice and conduct of competitive procedures and the use of purchasing tools are set out in the 2014 Utilities Directive. It also comprises five competitive procedures. The procedures are the same as those listed in the 2014 Directive except for the third procedure, which in the 2014 Utilities Directive is still referred to as the "negotiated procedure with prior call for competition", as in the 2004 Utilities Directive. The ways in which some of the procedures in the 2014 Utilities Directive can be used are more flexible than under the 2014 Directive, which was also the case under the 2004 directives.

**Procedures**

- **Article 44** confirms that contracting entities may use the open, restricted or negotiated procedure with a prior call for competition. Member States must also ensure that contracting entities have the freedom to use the competitive dialogue or innovation partnership procedures. No conditions apply to the use of these competitive procedures, where negotiation is permitted.
- **Article 66** sets out the time limits for receipt of requests to participate and for the receipt of tenders, and covers the time limits applying to the provision of additional documents and information during the course of a procurement procedure.

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Article 46

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C	PREPARATION OF PROCUREMENT	PART 4	PROCEDURES AND TOOLS
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- **Article 74** governs the issuing and content of invitations to submit a tender or to negotiate.
- **Articles 76 to 83** set out rules relating to the conduct of the procurement procedure, including rules on selection and tender award criteria as well as life-cycle costing.
- **Article 89** covers the modification of contracts during their term.
- **Articles 95 to 98** set out the rules on the conduct of design contests.

**Purchasing tools**

- **Framework agreements:** Article 51 permits contracting entities to set up and operate framework agreements.
- **Dynamic purchasing systems:** Article 52 covers the establishment and operation of dynamic purchasing systems.
- **Electronic auctions:** Article 53 contains the provisions relating to the conduct of electronic auctions.
- **Electronic catalogues:** Article 54 contains the provisions relating to electronic catalogues.

**Qualification systems:** In addition, contracting entities may set up and operate qualification systems; this provision is covered by article 77 of the Utilities Directive.

A qualification system is a system in which economic operators interested in contracting with the contracting entity may apply to be registered as potential providers. The contracting entity then registers some or all of those economic operators in the system. The registered economic operators form a pool from which the contracting entity may draw those operators that are invited to bid or negotiate on contracts.

**Choice of advertising:** Contracting entities have a free choice between five main forms of competitive procedure: the open procedure, restricted procedure, negotiated procedure with a prior call for competition, competitive dialogue, and innovation partnerships. Contracting entities generally have more flexibility in terms of how they advertise, which is referred to in the Utilities Directive as a 'call for competition'. See Module E2 for details of advertising requirements.

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**SECTION 4 - THE LAW**

*Insert new paragraphs at the start of SECTION 4 - THE LAW*

**Important Note:** This SECTION 4 - THE LAW has not been updated to reflect the changes in the 2014 Directive. See below for general information on where relevant provisions can be found in the 2014 Directive.

2014 Directive

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In this context it is helpful to look at the following recitals and articles of Directive 2014/24/EU:  
[Recitals 42 to 50 and Article 26: choice of procedure](#)

[Recitals 42 and 43 and Article 30: competitive dialogue](#)

[Articles 78 to 82: design contests](#)

[Recitals 60 to 62 and Article 33: framework agreements](#)

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## SECTION 5 - CHAPTER SUMMARY

### SELF-TEST QUESTIONS

*Note on amendments to Self-Test Questions: the Trainer's Manual has not been updated to reflect the amendments below.*

#### Choice of procedures

- 1 What are the five main types of competitive procedure?
- 2 Which of the five main types of competitive procedure is a single-stage procedure?

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- 10 Are there conditions that apply to use of the competitive procedure with negotiation?

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#### The competitive procedure with negotiation

- When can the competitive procedure with negotiation be used? What conditions must be met? Think of some examples of the types of projects and circumstances where this procedure may be used.

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Delete all of the questions on public works contracts for subsidised housing schemes and public works concessions.

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#### Negotiated procedure without prior publication

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## SECTION 2A INTRODUCTION AND OVERVIEW

### 1 - INTRODUCTION

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#### 1.5 LEGAL INFORMATION HELPFUL TO HAVE AT HAND

The legal requirements relating to the type of procedures are set out in **Directive 2014/24/EU**. In this context, it is helpful to look at both the recitals to the Directive and the relevant articles:

- Recital [2](#) and [Article 18](#): context for the new Directive - [enabling procurers to make better use of public procurement in support of the common societal good](#)
- Recitals [37 to 40](#) and [Article 58](#): integration of environmental, [social and labour](#) protection requirements [into public procurement procedures and observance at the](#) relevant stages of the procurement process
- Recital [74](#) and [Article 42](#): technical specifications, environmental characteristics and accessibility criteria for people with disabilities
- [Recital 74 and Article 43: use of labels such as the European eco label](#)
- Recitals [97, 98 and 104](#) and [Article 70](#): conditions for [the](#) performance of contracts
- [Recital 101 and Article 57: possibility to exclude economic operators that have proven unreliable, for instance due to the violation of environmental or social obligations, including rules on accessibility for disabled persons and](#) provisions relating to taxes, environmental protection, employment protection provisions and working conditions
- [Article 60\(4\) and Annex XII, Part II\(g\)](#): evidence of [an](#) economic operator's technical abilities – environmental management measures
- Recital [97](#) and [Article 67\(2\)](#): [contract award criteria, including qualitative environmental and social characteristics linked to the subject matter of the contract \(for instance, design for all users, innovative characteristics, trading and its conditions, qualifications of staff assigned to the contract performance, and production process\)](#)
- [Article 68: life-cycle costing](#)
- [Recitals 113 to 117 and Articles 74 to 76: particular procurement regimes for "services to the person", such as certain social, health and educational services](#)
- [Recital 118 and Article 77: contracts reserved for specific services](#)

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Deleted: Recital 26 and article 19: reserved contracts

#### Additional information

[SIGMA Procurement Briefs:](#)

[No. 30: 2014 EU Directives: Public Sector and Utilities Procurement](#)

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## SECTION 2 - NARRATIVE

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*Note: Except where specified otherwise, the narrative in this module C5 discusses the rules applying to contracts that are of a type and value subject to the full application of Directive [2014/24/EU](#) (“the [2014 Directive](#)”), and the term “contract” should be interpreted accordingly.*

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**Note on 2014 directives and Europe 2020:** [The 2014 directives place much greater emphasis than previous procurement directives on the ability to incorporate social and environmental considerations into procurement. This development reflects the increasing importance of these issues at an EU level as well as the targets and priorities of Europe 2020. Public procurement is one of the tools that can be used to meet the aims of Europe 2020.](#)

[Europe 2020 is the European Union’s ten-year jobs and growth strategy. It was launched in 2010 to create the conditions for smart, sustainable and inclusive growth. Five headline targets for the EU to achieve by the end of 2020 were agreed. These targets concern employment, research and development, climate/energy, education, social inclusion and poverty reduction. For further information, see: <http://ec.europa.eu/europe2020/>](#)

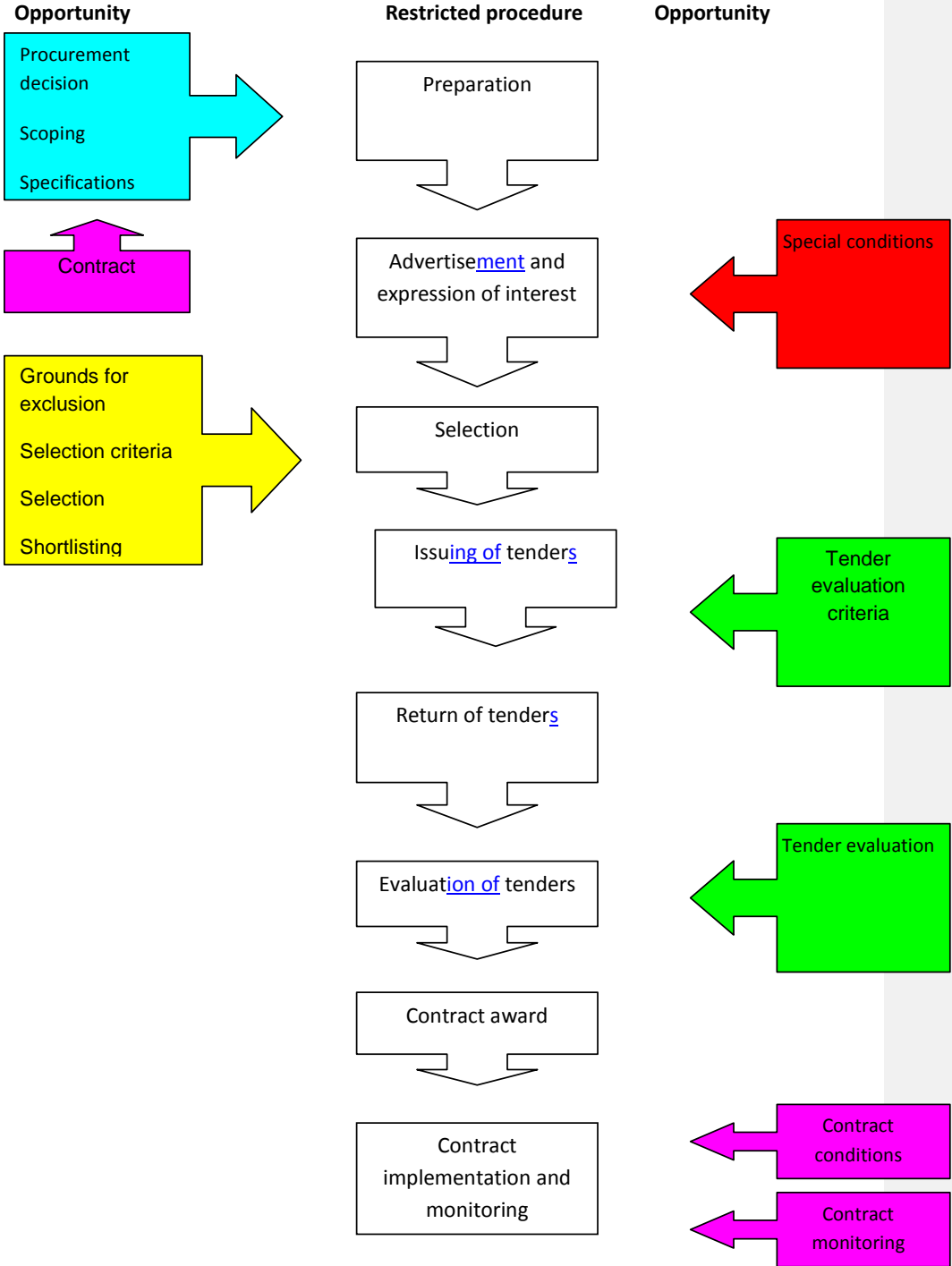
#### PDF C-214

#### **Opportunities for social and environmental considerations in procurement**

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**Opportunities for social and environmental considerations in procurement**



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SECTION 2B - ENVIRONMENTAL CONSIDERATIONS

Change of approach in the 2014 directives: As has already been explained, public procurement was seen as a market-based instrument for the achievement of Europe 2020, a strategy for smart, sustainable and inclusive growth, while ensuring the most efficient use of public funds. Some of the provisions in the 2014 directives are aimed at enabling procurers to make better use of public procurement in support of common societal goals, including the consideration of environmental aspects.

WHAT DOES THE 2014 DIRECTIVE SAY ABOUT ENVIRONMENTAL CONSIDERATIONS?

- Recital 2: context for the 2014 Directive
- Recitals 37 to 40: integration of environmental protection requirements
- Recital 74 and Article 42: technical specifications and environmental characteristics
- Recitals 97, 98 and 104 and Article 70: conditions for performance of contracts
- Recital 101 and Article 57: information to economic operators about provisions relating to taxes and environmental protection, including reference to the potential for non-compliance with environmental legislation amounting to an offence involving the professional misconduct of the economic operator or grave misconduct
- Article 60(4) and Annex XII, Part II(g): evidence of the economic operator’s technical abilities – environmental management measures
- Recital 97 and Article 67(2): contract award criteria, including qualitative environmental characteristics linked to the subject matter of the contract
- Article 68: life-cycle costing

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These provisions are explained in more detail in the following paragraphs:

Context for the new Directive:

Recital 2 provides some background on the reasons why the new 2014 Directive was prepared. The recital refers specifically to the modernising of public procurement rules "in order to increase the efficiency of public spending, facilitating in particular the participation of SMEs and to enable procurers to make better use of public procurement in support of common societal goals. There is also need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case law of the Court of Justice of the EU."

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**Comment**  
The 2014 directives make this clear, as does the case law and guidance.

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Integrating environmental protection requirements:

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Recital 40 confirms that "control of the observance of the environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure, when applying the general principles governing the choice of participants and the award of contracts, when applying the exclusion criteria and when applying the provisions concerning abnormally low tenders".

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Deleted: "under Article 6 of the Treaty, environmental protection requirements are to be integrated into the definition of Community policies and activities...in particular with a view to promoting sustainable development. This Directive therefore clarifies how the contracting authorities may contribute to the protection of sustainable development, whilst ensuring the possibility of obtaining best value for money for their contracts".

The specific provisions in the 2014 Directive are as follows:

Technical specifications – environmental characteristics:

Recital 74 provides that technical specifications "need to allow public procurement to open competition as well as to achieve objectives of sustainability. To that end, it should be possible to submit tenders that reflect the diversity of technical solutions, standards and technical specifications in the marketplace, including those drawn up on the basis of performance criteria linked to the life cycle and sustainability of the production process of the works, supplies and services".

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Article 42 sets out the relevant provisions. Article 42(3)(a) states that...

Deleted: refers to the ability of contracting authorities to lay down environmental characteristics in technical specifications for a given contract and also to the availability of eco-labels.

These parameters..... the contract

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Article 43(1) sets out some further provisions.....

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- The label requirements only concern criteria that are linked to the subject matter of the contract and that are appropriate to define the characteristics of the works, supplies or services that are the object subject matter of the contract.
- The requirements for the label are drawn up on the basis of objectively verifiable and non-discriminatory criteria.
- The eco-labels are adopted using an open and transparent procedure in which all relevant stakeholders, such as government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, can participate.
- The label requirements are accessible to all interested parties.
- The label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

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Contracting authorities must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body (recognised bodies are defined in article 44(1)).

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See section 4 (The Law) and Module E5 for further information on eco-labels, test reports, certification and other means of proof.

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Conditions for performance of contracts:

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”

Recitals 97 to 99 and 104 state that “with a view to the better integration of social and environmental considerations in the procurement procedures, contracting authorities should be allowed to use award criteria or contract performance conditions relating to the works, supplies or services to be provided under the public contract in any respect and at any stage of their life cycles from extraction of raw materials for the product to the stage of disposal of the product, including factors involved in the specific process of production, provision or trading and its conditions of those works, supplies or services or a specific process during a later stage of their life cycle, even where such factors do not form part of their material substance”...and  
“Contract performance conditions might also be intended to favour the implementation of measures for the promotion of equality of women and men at work,... the protection of the environment or animal welfare...”.

The recitals confirm that contract performance conditions are “compatible with this Directive provided that they are not directly or indirectly discriminatory and are linked to the subject matter of the contract, which comprises all factors involved in the specific process of production, provision or commercialisation...the contract performance conditions should be indicated in the contract notice, the PIN used as a means of calling for competition or the procurement documents”.

**Article 70** sets out the relevant provision:

“Contracting authorities may lay down special conditions relating to the performance of the contract.” provided that:

- they are linked to the subjectmatter of the contract, and
- they are indicated in the contract notice or in the procurement documents.

These conditions “may include economic, innovation-related, environmental, social or employment-related considerations”.

However, the condition of a link with the subject matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production or provisions of the purchased works, supplies or services.

**Evidence of an economic operator’s technical abilities - Environmental management measures:**

**Article 60(4) and Annex XII Part II(g)** provides that contracting authorities may ask for.....

**Article 44** refers to the bodies and schemes that contracting authorities may refer to....

**Deleted: Recital 33** states that contract performance conditions are compatible with the Directive “provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents”. ¶  
 ¶  
 Importantly, this recital explains that contract performance conditions must be intended to assist “the protection of the environment

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**Deleted:** These conditions “may, in particular, concern social and environmental considerations”,

**Deleted:** the special conditions are compatible with Community law

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**Article 27** permits a contracting authority to state in the contract documents from which bodies economic operators may obtain information relating to obligations in force in the member state, region or location where a works or services contract is to be performed. This information relates to taxes, environmental protection, employment protection provisions, and working conditions applying to the delivery of the contract

**Deleted: Recital 44** confirms that where the nature of the works or services justifies applying environmental management measures or schemes during the performance of the contract then the application of such measures or schemes may be required. ¶

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**Environmental characteristics as evaluation criteria:**

**Recital 97** refers to economic and qualitative criteria for the award of the contract and mentions as examples the use of criteria “such as meeting environmental requirements”.

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**Article 67(2)** sets out a non-exhaustive list of criteria on which a contracting authority may base its award for the most economically advantageous tender, as redefined in the 2014 Directive. This list refers specifically to “environmental and/or social characteristics”. The criteria used must be “linked to the subject matter of the contract”.

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**PDF C-218**

**Impact on Directive 2014/24/EU:** Article 67(2) of the Directive lists “environmental characteristics” among the non-exhaustive list of award criteria.

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**Relevance:**

During the negotiations on the draft Directive 2004/18 (2004 Public Sector Directive), there was a considerable amount of debate on this issue. A significant outcome of the negotiations on the 2004 Public Sector Directive was that the position changed, with the incorporation of a number of provisions addressing environmental issues and the inclusion of a number of principles derived from case law. The 2004 Public Sector Directive was not comprehensive in tackling the issue of when environmental considerations could or could not be used.

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The Commission’s Interpretative Communication was issued prior to the issuing of the 2004 Public Sector Directive, and further decisions of the ECJ on issues relating to the incorporation of environmental criteria were taken into consideration in the drafting of both the 2004 public procurement directives and the 2014 directives. The Interpretative Communication nevertheless provides a useful background to the Commission’s thinking on these issues prior to the issuing of the 2004 directives. It can help to explain some of the changes introduced in the 2014 directives.

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**General comment:** Two articles in the 2014 Directive concern specifically the conduct of the pre-advertisement stage. These provisions relate to preliminary market consultation (article 40) and prior involvement of candidates or tenderers (article 41). See Module E6 for further information on these provisions. The 2014 Directive’s general focus is on the conduct of the competitive procurement process.

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**Example of the impact of environmental considerations on the packaging of a procurement process:**



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Subdivision into smaller lots can facilitate SME participation, as they may correspond better to the production capacities of SMEs. Subdivision into specialist lots may correspond better to the particular expertise of SMEs. A construction contract could be divided into smaller general lots or a contracting authority could choose to award contracts – separately – concerning some specialist aspects, such as solar panels, heating systems, and energy management systems.

**Deleted:** Provided that it makes good economic sense to do so and is not in breach of Treaty principles, contracting authorities may decide to package contracts in such a way as to make the opportunities more appealing to SMEs. ¶  
A good example is the decision to subdivide a contract into lots.

Article 46 of the 2014 Directive places a significant emphasis on the importance of considering whether or not a contract should be divided into lots. Contracting authorities are still free to decide how to package a contract, but where they decide not to divide a contract into lots they must provide the reasons for that decision in the procurement documents or in the report required under article 84. This requirement is aimed at encouraging SME participation in procurement processes. See Modules E3 and E4 for further information.

Contracting authorities must keep in mind that they must not use this type of approach in such a way as to impair competition or favour particular economic operators.

**Deleted:** Making it possible for economic operators to tender for an unlimited number of lots has the advantage of not discouraging general or larger contractors from participating.

**PDF C-226**

**Preparation - Technical specification**

Technical specifications are defined in Annex VII to the 2014 Directive ..... of the contract.

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**Incorporating national technical rules:** Article 42 provides that technical specifications may be formulated in specified ways “without prejudice to mandatory national technical rules to the extent that they are compatible with Union law.” This means that, provided that national legislation/rules are compatible with EU law, they can include requirements linked to environmental considerations.

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**Characteristics of the contract:** Article 42 permits a contracting authority to include environmental and climatic characteristics in the technical specifications.

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**Specifying basic or primary materials:** The definition of technical specifications in Annex VII of the 2014 Directive refers specifically to materials as part of the technical specifications.

**PDF C-227**

**Specifying the use of specific production processes:** Annex VI of the 2014 Directive refers to means of production as part of the technical specifications.

The following examples are not permitted. A requirement for:

- ;

**Deleted:** a food supplier to only provide Fair Trade products, as this is not linked to a characteristic of the product itself or to a method of production

**Eco-labels:**

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Article [43](#) permits contracting authorities to use eco-labels when laying down environmental characteristics in terms of performance or functional requirements.

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#### PDF C-228

#### Selection Phase 1: Exclusion

The grounds on which candidates must be excluded are listed in article [57\(1\)](#) of the Directive. They cover convictions for participation in a criminal organisation, corruption, fraud, [money laundering, terrorist offences, child labour and other forms of human trafficking](#).

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The grounds on which a candidate may be excluded from participation are listed in article [57\(2\)](#). They include bankruptcy/winding-up (and equivalent situations), conviction for an offence related to professional conduct, grave professional misconduct, failure to pay social security contributions, and failure to pay taxes. [Article 57\(2\)\(a\) provides that candidates may be excluded “where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations.... in Article 18\(2\)”. Obligations in article 18\(2\) are those “in the fields of environmental, social and labour law...” \(see Module E3 for further information\).](#)

#### PDF C-229

#### ∇Exclusion on the grounds of [grave professional misconduct](#)∇

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Recital [101](#) refers to the potential for non-compliance with environmental legislation to amount to an offence [involving the grave professional misconduct](#) of the economic operator.

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Under article [57\(4\)\(d\)](#) an economic operator can be excluded [when “the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable”](#).

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Deleted: when it has been convicted of “any offence concerning professional conduct” or “been guilty of grave professional misconduct”, proven by any means that the contracting authority can demonstrate.

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*Insert at end of Selection Phase 1: Exclusion*

#### [Exclusion relating to prior poor performance of a public contract](#)

[Under article 57\(4\)\(g\) an economic operator can be excluded where it has shown “significant or persistent deficiencies in the performance of a substantive requirement under a public contract... which led to early termination of that prior contract, damages or other comparable sanction”.](#)

[It is possible that non-compliance with environmental requirements in a public contract could constitute grounds for exclusion on this basis.](#)

[See Module E3 for further information on these and other grounds for exclusion.](#)

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### Selection Phase 2: Selection of Tenderers

The contracting authority applies selection criteria that assess the candidates in terms of:

- "economic and financial standing" [article [58\(1\)\(b\)](#)]; and
- "technical knowledge and/or professional ability" [article [58\(1\)\(c\)](#)]

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PDF C-230

### TENDER EVALUATION

#### Overview

[Contracting authorities have to base the award of public contracts on the most economically advantageous tender, as redefined in the 2014 Directive \[article 67\(1\)\]. The contracting authority will have decided, at the procurement planning stage, how to identify the most economically advantageous tender.](#)

Deleted: The contracting authority will have decided at the procurement planning stage whether it will award the contract on the basis of (1) lowest price only; or (2) the most economically advantageous tender. The basis for the award must be stated in the contract notice.

It is possible to include environmental considerations in tenders to be awarded on the basis of [price or cost only \(using a cost-effectiveness approach, such as life-cycle costing\)](#) by [incorporating](#) the relevant requirements into the technical specifications and contract conditions. As the [price or cost](#) is the [sole](#) award criterion, there is no opportunity to include criteria relating to environmental considerations.

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[See also Modules E4 and E5 for further information on setting the award criteria.](#)

PDF C-231

### The 2014 Directive

Article [67\(2\)](#) sets out an illustrative list of tender evaluation criteria:

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

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[A specific reference is made](#) to environmental criteria.

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### Setting award criteria

As explained in [Module E4](#), article [67\(1\)](#) of the [2014](#) Directive refers to.....

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### When are criteria linked to the subject matter of the contract?

Article [67\(3\)](#) states that the criteria chosen must be "linked to the subject matter of the public contract in question"

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**Abnormally low tenders:** Article [69](#) of the Directive permits a contracting authority to reject abnormally low tenders.

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Article [69\(2\)](#) sets out an illustrative list of the details that a contracting authority may request. These [details](#) include information on the technical solutions and also, according to article [69\(2\)\(d\)](#), "compliance with the provisions relating to [environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X](#)".

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Deleted: employment protection and working conditions in force at the place where the work, service or supply is to be performed"

**CONTRACT CONDITIONS**

**Incorporating environmental contract conditions**

Article [70](#) of the Directive specifically states that "contracting authorities may lay down special conditions relating to the performance of a contract, provided that [they are linked to the subject matter of the contract within the meaning of article 67\(3\) and indicated in the call for competition or the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations](#)".

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Deleted: these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing performance of a contract may, in particular, concern social and environmental considerations.

Recital [97](#) provides further guidance and states that contract performance conditions are compatible with the Directive "provided that they are not directly or indirectly discriminatory and are indicated in the [call for competition](#) or in the [procurement documents](#)".

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**Utilities**

To a large extent the same legal rules apply under the [2014](#) Directive ([2014/24/EU](#)) and the [2014](#) Utilities Directive ([2014/25/EU](#)).

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**What does the Directive\* say about environmental considerations?**

\*References to the Directive are to the [2014](#) Utilities Directive, unless indicated otherwise.

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- **Recitals [52 and 96](#):** integrating environmental protection requirements ([recital \[37\]\(#\) in the \[2014\]\(#\) Directive](#))
- **Recital [42](#) and Article [60](#):** technical specifications and environmental characteristics ([recital \[74\]\(#\) and article \[42\]\(#\) in the \[2014\]\(#\) Directive](#))

Deleted: Importantly, this recital explains that contract conditions "may, in particular, be intended to favour ..... the protection of the environment".¶

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- [Article 61: use of labels, including eco-labels](#)
- [Article 62: use of test reports, certification and other means of proof](#)
- [Article 76: general principles for the choice of participants and award of contracts](#)
- [Recital 55 and Article 80](#): potential for non-compliance with environmental legislation amounting to an offence [involving the](#) professional misconduct or grave misconduct of the economic operator ([recital 101 and article 57\(4\)\(c\) in the 2014 Directive](#))
- [Recital 93 and Article 81](#): evidence of [an](#) economic operator's technical abilities – environmental management measures ([article 60\(4\) and Annex XII, Part II\(g\) in the 2014 Directive](#))
- [Recital 102 and Article 82](#): environmental characteristics as [award](#) criteria ([recital 97 and article 67\(2\) in the 2014 Directive](#))
- [Recital 109 and Article 87](#): conditions for performance of contracts ([recital 97 and article 70 in the 2014 Directive](#))

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**Preparation - Technical specifications**

The [2014 Utilities](#) Directive contains parallel provisions to those in [the 2014](#) Directive on the incorporation of environmental considerations into the technical specifications. The same legal principles also apply.

**Selection – Phase 1: Exclusion**

This is one of the main areas where the legal provisions in the [directive](#) applying to utilities are different to the legal provisions in [the 2014](#) Directive applying to public sector contracting authorities.

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Grounds for obligatory exclusion: Article [80](#) stipulates that a utility that is a contracting authority must comply with the provisions of article [57\(1\) and \(2\)](#) of Directive [2014/24/EU](#). Article [57\(1\)](#) obliges contracting authorities to exclude candidates from participation in the procurement process where these candidates have been found guilty of specified offences.

Utilities that are not contracting authorities are [not](#) obliged to exclude candidates from participation in the procurement process under the provisions of article [57\(1\)](#) of [the 2014](#) Directive. However, they may choose to do so.

Deleted: <#>Recital 44 and Article 38: conditions for performance of contracts (Recital 33 and Article 26 in Directive 2004/18/EC)¶  
<#>Article 39: informing economic operators about provisions relating to taxes, and environmental protection (Recital 27 in Directive 2004/18/EC)¶  
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Grounds for discretionary exclusion: All utilities may choose to exclude candidates on the discretionary grounds set out in article [57](#) of [the 2014 Directive](#), but they are not obliged to do so.

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Recital [106](#) refers to non-compliance with environmental legislation.....

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**Selection – Phase 2: Selection of tenderers**

The Utilities Directive does not set out an exhaustive list of the criteria to be used for the selection of tenderers. This is very different to the position under [the 2014 Directive](#), where there is a detailed and exhaustive list of the criteria that can be used and the information that can be requested.

Under article [78](#) utilities are required, when selecting economic operators, to use “objective rules and criteria”.

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The same principles of selection apply to the selection of economic operators to participate in qualification systems (see article [77](#)).

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**Tender evaluation**

The [contracting entity](#) will have decided, at the procurement planning stage, [how](#) it would award the contract on the basis of [the most economically advantageous tender, as redefined in the 2014 Directive. The most economically advantageous tender shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing, in accordance with article 83, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative environmental and/or social aspects, linked to the subject matter of the contract in question.](#) The basis for the award must be stated in the contract notice.

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Where a qualification system is used, the utility is still required to invite tenders by way of a call for competition. The same principles will apply to the use of tender evaluation criteria.

**The 2014 Utilities Directive:** Article [82\(2\)](#) sets out an illustrative list of [contract award](#) criteria: "quality, [including](#) technical merit, aesthetic and functional characteristics, [accessibility, design for all users, social,](#) environmental [and innovative](#) characteristics [and trading and its conditions...](#), after-sales services, technical assistance, delivery date and delivery period or period of completion". [The 2014 Utilities Directive makes](#) a specific

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reference to environmental criteria.

**Contract conditions**

Article [87](#) of the [2014 Utilities](#) Directive specifically states that "contracting entities may lay down special conditions relating to the performance of a contract, provided that [these conditions are linked to the subject matter of the contract, within the meaning of article 82\(3\)](#), and indicated in the [call for competition](#) or in the [procurement documents](#). The conditions governing performance of a contract may [include economic, innovation-related, environmental, social or employment-related](#) considerations".

Recital [102](#) provides further guidance.....

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**SECTION 2C - SOCIAL CONSIDERATIONS**

[Change of approach in the 2014 Directives:](#) As has already been explained, public procurement was seen as a market-based instrument for the achievement of Europe 2020, a strategy for smart, sustainable and inclusive growth, while ensuring the most efficient use of public funds. Some of the provisions in the 2014 Directives are aimed at enabling procurers to make better use of public procurement in support of common societal goals, including social considerations.

**WHAT DOES THE [2014](#) DIRECTIVE SAY ABOUT SOCIAL CONSIDERATIONS?**

- [Recital 2](#): context for the [2014](#) Directive
- [Recital 36 and Article 20](#): reserved contracts
- [Recital 74 and Article 42](#): technical specifications and accessibility criteria for people with disabilities
- [Recitals 97, 98 and 104 and Article 70](#): conditions for performance of contracts
- [Recital 101 and Article 57](#): informing economic operators about provisions relating to taxes, employment protection provisions and working conditions and referring to the potential for non-compliance with the Directive's provisions relating to equal treatment to amount to an offence involving the professional misconduct or grave misconduct of the economic operator
- [Recitals 94 and 97 to 99 and Article 67\(2\)](#): contract award criteria, including qualitative social characteristics linked to the subject matter of the contract
- [Recital 36 and Article 20](#): reserved contracts
- [Recitals 113 to 117 and Articles 74 to 76](#): particular procurement regimes for "services to the person", such as specific social, health and educational services
- [Recital 118 and Article 77](#): reserved contracts for specific services

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These provisions are explained in more detail in the following paragraphs.

Context for the [2014](#) Directive:

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**Recital 2** provides some background on the reasons [for the preparation of the 2014 Directive](#). The recital refers specifically [to the modernising of public procurement rules "in order to increase the efficiency of public spending, facilitating in particular the participation of SMEs, and to enable procurers to make better use of public procurement in support of common societal goals"](#).

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[Repeated references are made in the recitals and in the operative provisions of the 2014 Directive to the aims of meeting environmental and social goals. Integration of social considerations into procurement can be regarded as supporting those societal goals.](#)

**Recital 40** confirms that ["control of the observance of the environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure, when applying the general principles governing the choice of participants and the award of contracts, when applying the exclusion criteria and when applying the provisions concerning abnormally low tenders"](#).

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#### Technical specifications – accessibility criteria for people with disabilities:

**Recital 74** provides that [technical specifications "need to allow public procurement to open competition as well as to achieve objectives of sustainability. To that end, it should be possible to submit tenders that reflect the diversity of technical solutions, standards and technical specifications in the marketplace, including those drawn up on the basis of performance criteria linked to the life cycle and sustainability of the production process of the works, supplies and services"](#).

Deleted: Comment:¶ When considering the incorporation of social considerations it is always necessary to consider whether the proposed approach is in compliance with the fundamental Treaty principles. This is the case even where there are specific provisions in the Directive permitting the use of these considerations.¶ The Directive makes this clear as does the ECJ case law and guidance.

**Article 42** sets out the relevant provisions and states that contracting authorities should, whenever possible, lay down technical specifications ["so as to take into account accessibility criteria for persons with disabilities or design for all users"](#).

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#### Conditions for the performance of contracts:

**Recitals 97 to 99** state that ["with a view to the better integration of social and environmental considerations in the procurement procedures, contracting authorities should be allowed to use award criteria or contract performance conditions relating to the works, supplies or services to be provided under the public contract in any respect and at any stage of their life cycles, from extraction of raw materials for the product to the stage of disposal of the product, including factors involved in the specific process of production, provision or trading and its conditions of those works, supplies or services or a specific process during a later stage of their life cycle, even where such factors do not form part of their material substance"...](#)

Deleted: Recital 33 states that contract performance conditions are compatible with the Directive "provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents".

["Contract performance conditions might also be intended to favour the implementation of measures for the promotion of equality of women and men at work, the increased participation of women in the labour market and the reconciliation of work and private life, the protection of the environment or animal welfare and to comply in substance with](#)



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[fundamental International Labour Organisation \(ILO\) conventions, and to recruit more disadvantaged persons than are required under national legislation."](#)

Importantly, [Recital 99](#) explains that contract performance conditions may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, [and](#) the fight against unemployment.

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[Recital 104](#) states that "contract performance conditions should be compatible with this Directive, provided that they are not directly or indirectly discriminatory and are linked to the subject matter of the contract, which comprises all factors involved in the specific process of production, provision or commercialisation...the contract performance conditions should be indicated in the contract notice, the PIN used as a means of calling for competition or the procurement documents".

[Article 70](#) sets out the relevant provision:

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"Contracting authorities may lay down special conditions relating to the performance of the contract, provided that :

- [they are linked to the subject matter of the contract,](#) and
- they are indicated in the contract notice or in the [procurement documents](#).

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[These conditions "may include economic, innovation-related, environmental, social or employment-related considerations"](#). However, the condition of a link with the subject matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production or provisions of the purchased works, supplies or services.

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¶

[Article 27](#) permits a contracting authority to indicate in the contract documents from which bodies economic operators may obtain information relating to obligations in force in the member states, regions or locations where a works or services contract is to be performed. This information relates to taxes, environmental protection, employment protection provisions, and working conditions applying to the delivery of the contract.¶

¶

Where a contracting authority notifies the economic operators in this manner, it may then request tenderers to indicate that they have taken into account in the preparation of their tenders those obligations relating to employment protection provisions and working conditions. ¶

**Social characteristics as evaluation criteria:**

[Article 67\(2\)](#) sets out a non-exhaustive list of criteria on which a contracting authority may base its award for the most economically advantageous tender, as redefined in the 2014 Directive.

[Directive 2014 mentions, for the first time expressly, social \(and innovative\) considerations alongside environmental characteristics as possible award criteria.](#)

[Recital 97](#) refers to economic and qualitative criteria for the award of the contract and mentions as examples the use of "criteria aiming to meet social requirements". [Examples of social considerations can be found in recitals 98 and 99: e.g. social aspects of the production process \(including the protection of the health of the staff involved\), social integration of disadvantaged persons or members of vulnerable groups \(including the employment of long-term unemployed and training measures for young people\).](#)

[Since the 2014 Directive, the organisation, qualification and experience of staff assigned to perform the contract have also expressly been referred to as permissible award criteria. According to recital 94, the quality of staff assigned to perform a contract may affect the](#)

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[overall level of performance of the contract and has consequently an impact on the economic value of the tender. This is especially the case for contracts involving intellectual services, such as consultancy or architectural services \(see also Module E4, Lianakis case\).](#)

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**Contracts reserved for sheltered workshops or sheltered employment programmes for people with disabilities:**

Recital [36](#) explains that employment and occupation are key elements....

EU Member States may therefore limit participation in competition for certain “reserved contracts” to sheltered workshops and [other social businesses whose main aim is to support the social and professional integration or reintegration of disabled and disadvantaged persons, such as the unemployed, members of disadvantaged minorities, or otherwise socially marginalised groups.](#)

Article [20](#) permits EU Member States to have “reserved contracts”, [which](#) are to be performed by sheltered workshops and sheltered employment programmes where [at least 30%](#) of the employees concerned are [disabled or disadvantaged](#) persons who, by reason of the nature or seriousness of their disabilities, cannot exercise occupations under normal conditions.

**Good practice note**

*Changes to [article numbers only](#)*

Article [20](#) on Reserved Contracts

Article [42](#) on technical specifications

Article [70](#) relating to social conditions in the contract

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**Impact on Directive 2004/18 and the 2014 Directive:** Article 26 incorporated [this last point](#) into the [2004 Public Sector Directive](#). [These provisions are now included in article 70 of the 2014 Directive.](#) Contracting authorities can lay down “special conditions” that are compatible with Community law provided that they are referred to in the contract notice or in the [procurement documents](#). [Article 70 confirms that these conditions may include “social or employment-related considerations”.](#)

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Deleted: Article 53(1) sets out a non-exhaustive list of criteria on which a contracting authority may base its award for the most economically advantageous tender. ¶

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**Award criteria:**

Article [67](#) of the [2014 Directive](#) [sets out](#) a non-exhaustive list of award criteria [and specifically mentions social considerations as a possible award criterion.](#)

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**Comment:**

In practice, [however](#), social issues are [more difficult to take into consideration](#) in a procurement process than environmental issues.

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**Relevance:**

During the negotiations on the draft Directive 2004/18 ([2004 Public Sector Directive](#)), [a considerable amount](#) of debate [focused](#) on this issue. [A significant outcome of the negotiations on the 2004 Public Sector Directive was that](#) the position [changed](#), with the incorporation of a number of provisions addressing social issues and the inclusion of a number of principles derived from case law. The [2004 Public Sector Directive](#) [was](#), not comprehensive, however, in tackling the issue of when social considerations [could](#) or [could](#) not be used.

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The Commission's Interpretative Communication was issued before the [2004 Public Sector Directive](#) [was issued](#), and further decisions by the ECJ [have been made](#) on issues relating to the incorporation of social criteria, [which have been taken into consideration in the drafting of both the 2004 public procurement directives and the 2014 directives](#). The Interpretative Communication [nevertheless](#) provides [a useful background to](#) the Commission's thinking on these issues [prior to issuing the 2004 directives](#). [It can help to explain some of the changes introduced in the 2014 directives](#).

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**General comment:** [Two articles](#) in the [2014 Directive](#) specifically [concern](#) the conduct of the pre-advertisement stage. [These provisions relate to preliminary market consultation \(article 40\) and prior involvement of candidates or tenderers \(article 41\)](#). See [Module E6 for further information on these provisions](#). The [general focus of the 2014 Directive](#) is on the conduct of the competitive procurement process.

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**Example of the impact of social considerations on the packaging of a procurement process:**

Encouraging small and medium-sized enterprises (SMEs) to participate in procurement processes may be regarded as a social consideration. SMEs can be disadvantaged if contracting authorities decide to only offer large-value or large-scale contracts. SMEs are often not in a position to meet the selection criteria. [Subdivision into smaller lots](#) can facilitate SME participation, as [they](#) may correspond better to the production capacities of

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Provided that it makes good economic sense to do so and is not in breach of Treaty principles, contracting authorities may decide to package contracts in such a way as to make the opportunities more appealing to SMEs. ¶  
A good example is the decision to subdivide a contract into lots.

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SMEs. Subdivision into specialist lots may correspond better to the particular expertise of SMEs. A contract for catering services could be divided into smaller lots, or a contracting authority could choose to award contracts separately for some specialist aspects so as to encourage participation by SMEs.

Article 46 of the 2014 Directive places significant emphasis on the importance of considering whether or not a contract should be divided into lots. Contracting authorities are still free to decide how to package a contract, but where they decide not to divide a contract into lots they must provide the reasons for that decision in the procurement documents or in the report required under article 84. This requirement is aimed at encouraging SME participation in procurement processes. See Modules E3 and E4 for further information.



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**Technical specifications**

Technical specifications are defined in Annexe VI to the 2014 Directive .....

**Incorporating national technical rules:** Article 42 provides that technical specifications may be formulated in specified ways “without prejudice to mandatory national technical rules to the extent that they are compatible with Union law.”

**Accessibility:** Article 42(1) of the directive requires contracting authorities,.....

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**Characteristics of the contract:** Article 42(1) permits a contracting authority to define characteristics in the technical specifications, which "refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle, even where such factors do not form part of their material substance, provided that they are linked to the subject matter of the contract and are proportionate to its value or its objectives".

**Advertising**

- If the contract is reserved under article 20 to sheltered workshops/employment programmes, it must be indicated in the contract notice.

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**Selection – Phase 1: Exclusion**

**Deleted:** Contracting authorities must keep in mind that they must not use this type of approach in a way that impairs competition or favours particular economic operators. Making it possible for economic operators to tender for an unlimited number of lots has the advantage of not discouraging general or larger contractors from participating

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The [2014 Directive](#) sets out in articles [57\(1\) and 57\(2\)](#) the grounds on which candidates expressing an interest must be excluded and [in article 57\(4\)](#) the grounds on which they may be excluded.

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The grounds on which candidates must be excluded cover convictions for participation in a criminal organisation, corruption, fraud, [terrorist offences](#), [money laundering](#), [child labour](#), [human trafficking](#) and, in certain cases, [non-payment of taxes or social security contributions](#).

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The grounds on which a candidate may be excluded from participation are listed in article [57\(4\)](#). These grounds include bankruptcy/winding-up (and equivalent situations), [violation of applicable obligations in the fields of environmental, social and labour law](#), grave professional misconduct, [prior poor performance of a contract and, in certain cases](#), failure to pay social security contributions or taxes.

**Exclusion on the grounds of grave professional misconduct:** It may be possible to argue that a candidate can be excluded for a past failure to comply with social policy, particularly where there was a deliberate and documented breach of contract terms requiring compliance with that policy.

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Recital [101](#) refers to the potential for non-observance of [social obligations](#) amounting to an offence concerning the [grave professional misconduct](#) of the economic operator.

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Under article [57\(4\)\(d\)](#), any economic operator can be excluded where “the authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct that renders its integrity questionable”.

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*Insert at end of Selection Phase 1: Exclusion*

#### **Exclusion relating to prior poor performance of a public contract**

Under article 57(4)(g), an economic operator can be excluded where it has shown “significant or persistent deficiencies in the performance of a substantive requirement under a public contract... which led to early termination of that prior contract, damages or another comparable sanction”.

It is possible that non-compliance with social requirements could constitute grounds for exclusion on this basis.

See Module E3 for further information on these and other grounds for exclusion.

#### **Selection - Phase 2: Selection of Tenderers**

- "economic and financial standing" [article [58\(1\)\(b\)](#)]; and

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- "technical knowledge and/or professional ability" [article [58\(1\)\(c\)](#)].

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## TENDER EVALUATION Overview

[Contracting authorities must base the award of a public contract on the most economically advantageous tender, as redefined in the 2014 Directive \[article 67\(1\)\]. The contracting authority will have decided, at the procurement planning stage, how to identify the most economically advantageous tender.](#)

Deleted: The contracting authority will have decided at the procurement planning stage whether it will award the contract on the basis of (1) lowest price only; or (2) the most economically advantageous tender. The basis for the award must be stated in the contract notice

It is possible to include social considerations in tenders to be awarded on the basis of lowest price [or cost \(using a cost-effectiveness approach, such as life-cycle costing\)](#) by incorporating the relevant requirements into the technical specifications and contract conditions, [as appropriate](#).

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[See Modules E4 and E5 for further discussion on setting the award criteria.](#)

### The [2014 Directive](#)

Article [67\(2\)](#) sets out an illustrative list of tender evaluation criteria:

- "quality, [including](#) technical merit, aesthetic and functional characteristics, [accessibility, design for all users, social, environmental and innovative characteristics, and trading and its conditions](#);
- [organisation, qualification and experience of staff assigned to perform the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or](#)
- [after-sales service and technical assistance as well as delivery conditions, such as delivery date, delivery process and delivery period or period of completion"](#).

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There [are](#) specific references to environmental criteria [and](#) social criteria.

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### Setting award criteria

As explained in [Module E4](#), article [67\(1\)](#) of the [2014 Directive](#) refers to the tender.....

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### When are criteria linked to the subject matter of the contract?

Article [67\(3\)](#) states that the criteria chosen must be "linked to the subject matter of the public contract in question".

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**Abnormally low tenders:** Article [69](#) of the Directive permits a contracting authority to reject abnormally low tenders.

Article [69\(2\)](#) sets out an illustrative list of the details that a contracting authority may request. These [details](#) include information on the technical solutions and also, according to article [69\(2\)\(d\)](#), “compliance with the provisions relating to [environmental, social and labour law established by Union law, national law, and collective agreements or by the international environmental, social and labour law provisions listed in Annex X](#)”.

**CONTRACT CONDITIONS**  
**Incorporating social contract conditions**

Article [70](#) of the Directive specifically states that "contracting authorities may lay down special conditions relating to the performance of a contract, provided that [they are linked to the subject matter of the contract within the meaning of article 67\(3\) and indicated in the call for competition or the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations](#)".

Recital [97](#) provides further guidance and states that contract performance conditions are compatible with the Directive “provided that they are not directly or indirectly discriminatory and are indicated in the [call for competition](#) or in the [procurement documents](#)”.

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**Utilities**

To a great extent the same legal rules apply under the [2014 Directive \(2014/24/EU\)](#) and under the [2014 Utilities Directive \(2014/25/EU\)](#). These directives have many similar or parallel provisions, and the European Court of Justice has tended to apply the same interpretation to both public sector contracting authorities and [contracting entities](#).

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**What does the [2014 Utilities Directive](#) say about social considerations?**

The [2014 Utilities Directive \(2014/25/EU\)](#) contains a number of provisions that refer specifically to the [Fation](#) of social considerations into the procurement process.

- **Recital [52](#):** integrating social [and labour](#) requirements ([recital \[37\]\(#\) of the 2014 Directive](#))
- **Article [60\(1\)](#):** [defining](#) technical specifications and accessibility criteria for people with disabilities ([recital \[74\]\(#\) and article \[42\]\(#\) of the 2014 Directive](#))
- **Recital [55](#) and Article [80](#):** potential for non-compliance with [environmental, social](#)

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- Deleted: Importantly, this recital explains that contract conditions “may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment”.¶  
¶  
The recital goes on to refer to examples of measures for the recruitment of long-term job-seekers, provision of training for the unemployed and young persons, compliance with the International ...
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[and labour law provisions](#) amounting to an offence [involving](#) the professional misconduct or grave misconduct of the economic operator ([recital 101 and article 57\(4\)\(c\) of the 2014 Directive](#))

- [Recital 102 and Article 82](#): social characteristics as [award criteria](#) ([recital 97 and article 67\(2\) of the 2014 Directive](#))
- [Recital 51 and Article 38](#): [contracts reserved for sheltered workshops](#) ([recital 36 and article 20 of Directive 2014/24/EU](#))
- [Recitals 102 to 104 and Article 87](#): [setting up conditions for the performance of contracts](#) ([recital 97 and article 70 of the 2014 Directive](#))
- [Articles 91 to 94](#): [award of light regime services](#)

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**Preparation - Technical specifications**

The [2014 Directive](#) contains parallel provisions to those in [Directive 2014/24/EU](#) on the incorporation of social considerations into the technical specifications. The same legal principles also apply.

**Contracts reserved for sheltered workshops or sheltered employment programmes for people with disabilities:**

[Recital 51](#) explains that employment and occupation are key elements in guaranteeing equal opportunities for all and contributing to integration into society. Sheltered workshops, sheltered employment programmes [and other social businesses](#) help to facilitate.....

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[Article 38](#) permits EU Member States to have “reserved contracts” [that](#) are to be performed by sheltered workshops [and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or who may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers](#).

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**Selection – Phase 1: Exclusion**

This is one of the main areas where the legal provisions in the Directive that apply to [contracting entities](#) differ from the legal provisions in [the 2014 Directive](#) applying to public sector contracting authorities. There is also a distinction between [contracting entities](#) that are public sector contracting authorities and those that are not.

**Grounds for obligatory exclusion:** [Article 80](#) provides that a [contracting entity](#) that is a

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contracting authority must comply with the provisions of article [57\(1\) and \(2\)](#) of Directive [2014/24/EU](#). Article [57\(1\) and \(2\)](#) obliges contracting authorities to exclude candidates from participation in the procurement process if they have been guilty of specified offences.

[Contracting entities](#) that are not contracting authorities are not obliged to exclude candidates from participation in the procurement process under the provisions of article [57\(1\)](#) of [the 2014](#) Directive, but they may choose to do so.

**Grounds for discretionary exclusion:** All [contracting entities](#) may choose to exclude candidates on the discretionary grounds set out in article [57\(1\) and \(2\)](#) of [the 2014](#) Directive, but they are not obliged to do so.

Recital [106](#) refers to non-compliance with [social and](#) environmental legislation as potentially constituting an offence [involving the](#) grave [professional](#) misconduct of the economic operator.

See the main narrative section for more information on the grounds for obligatory exclusion and discretionary [\(optional\)](#) exclusion.

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**Selection – Phase 2: Selection of tenderers**

The Utilities Directive does not set out an exhaustive list of the criteria to be used for the selection of tenderers. This is very different to the position under [the 2014](#) Directive, where there is a detailed and exhaustive list of the criteria that can be used and of the information that may be requested.

Under article [78](#) of the Directive, [contracting entities](#) are required, when selecting economic operators, to use “objective rules and criteria”. Those objective rules and criteria must be available to the interested economic operators.

[Contracting entities therefore](#) probably have more flexibility.....

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The same principles of selection apply to the selection of economic operators to participate in qualification systems (see article [77](#)).

**Tender evaluation**

Once the economic operators have been selected, the [contracting entity](#) moves on to invite

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tenders from the shortlisted economic operators. The contracting entity evaluates tenders received and awards the contract.

The contracting entity will have decided, at the procurement planning stage, how it would award the contract on the basis of the most economically advantageous tender, as redefined in the 2014 Utilities Directive (in the same terms as in the 2014 Directive). The basis for the award must be stated in the contract notice.

See the main narrative section for more information on the opportunities for incorporating social considerations into tender awards based on the most economically advantageous criterion, as redefined by the 2014 Utilities Directive.

Where a qualification system is used, the contracting entity is still required to invite tenders by way of a call for competition.

**The 2014 Utilities Directive:** Article 82(2) sets out an illustrative list of contract award criteria: "quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions..., after-sales services, technical assistance, delivery date and delivery period or period of completion". In the 2014 Directive, for the first time a specific reference is made to social (and innovative) criteria alongside with environmental criteria.

Since the issuing of the 2014 Directive, the organisation, qualification and experience of staff assigned to performing the contract have also been referred to expressly as permissible award criteria.

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**Contract conditions**

Article 87 of the 2014 Utilities Directive specifically states that "contracting entities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject matter of the contract within the meaning of article 82(3) and indicated in the call for competition, or in the procurement documents. The conditions governing performance of a contract may include economic, innovation-related, environmental, social or employment-related considerations".

Recital 102 provides further guidance.....

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Where a utility proposes to award a contract on the basis of the most economically advantageous tender, then there are more opportunities to incorporate environmental considerations and to include those considerations as award criteria. ¶
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## SECTION 2D - SMALL AND MEDIUM-SIZED ENTERPRISES (SMEs)

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### SME-friendly approach in the 2014 Directive

Recital 78 of the 2014 Directive clearly indicates that "public procurement should be adapted to the needs of SMEs. Contracting authorities should be encouraged to make use of the Code of Best Practices set out in the Commission Staff Working Document of 25 June 2008, entitled "European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts", which provides guidance on how they may apply the public procurement framework in a way that facilitates SME participation. To that end and to enhance competition, contracting authorities should ... be encouraged to divide large contracts into lots" (see also article 46).

Recital 124 recognises the potential of SMEs for job creation, growth and innovation and emphasises the importance of the encouragement of SME participation in public procurement.

Article 46(1) encourages contracting authorities to divide contracts into lots as one of the means of facilitating SME participation in public procurement. It obliges contracting authorities to provide an indication of the main reasons for their decision not to subdivide into lots. According to article 46(2), contracting authorities must indicate in the contract notice or in the invitation to confirm interest, whether tenders may be submitted for one, several or all of the lots. Even where tenders may be submitted for several or all lots, contracting authorities may limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest.

SMEs often participate as subcontractors in public procurement contracts. Fair and transparent provisions on subcontracting are therefore of vital importance for SMEs, and this consideration is reflected in the 2014 directives. Article 71 contains provisions on subcontracting that require the main contractor to provide details on subcontractors and their changes as well as on the compliance of subcontractors with obligations set out under environmental, social and labour law and on the optional provision for Member States to make direct payments to subcontractors.

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## SECTION 4 - THE LAW

Important Note: This SECTION 4 - THE LAW has not been updated to reflect the changes in the 2014 Directive. See below for general information on where relevant provisions can be found in the 2014 Directive.

### 2014 Directive

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[In this context it is helpful to look at both the following recitals and articles of Directive 2014/24/EU:](#)

[Recital 74 and Article 43: eco-labels](#)

[Recital 78 and Article 46: lots](#)

[Recital 101 and Article 57: social conditions as criteria for exclusion](#)

[Recitals 97 and 98 and Article 67: award criteria](#)