



## Brief 10

September 2016

### Public Procurement

# Public Procurement Procedures

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## Introduction

The basic presumption in public procurement is that contracts of a specified type and value will be procured by using an advertised, competitive procedure that is open, fair and transparent, ensuring equal opportunity and treatment for all candidates and tenderers. Only limited circumstances permit the use of a procedure without advertised competition.

The main competitive procurement procedures available under the Public Sector Directive (the Directive)<sup>1</sup> are the open procedure, restricted procedure, competitive dialogue procedure, competitive procedure with negotiation, and innovation partnership procedure.

The open procedure and the restricted procedure are the preferred procedures, as they can be used without satisfying any conditions. The competitive dialogue procedure, competitive procedure with negotiation, and the innovation partnership procedure may only be used where specified conditions are satisfied. A special procedure, the design contest, is also set out in the Directive.

The Directive sets out the processes to be followed by a contracting authority when using each of the above competitive procedures. The level of detail set out in the Directive differs depending on the procedure.

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 tools are framework agreements, electronic auctions, dynamic purchasing systems and electronic catalogues.

If a contracting authority wishes to award a contract without competition, using what is known as the “negotiated procedure without prior publication”, it must meet the specific conditions set out in the Directive. The Court of Justice of the European Union (CJEU) has ruled that these conditions have been too narrowly interpreted and that the award of a contract without competition should only occur in exceptional circumstances.

## Main types of competitive procedures available

Five main types of competitive procedures are available to contracting authorities:

- open procedure
- restricted procedure
- competitive dialogue procedure
- competitive procedure with negotiation
- innovative partnership procedure.

**Open procedure:** The open procedure is a single-stage process. A contracting authority advertises the contract opportunity and then issues full tender documents, including the specifications and contract, to all economic operators that request to participate. All procurement documents must be available by electronic means, free of charge, on the date of publication of a Contract Notice. All procurement documents must be complete and comprehensive so that economic operators will no longer need to ask for documentation; they will simply download all of the relevant documents.

Economic operators submit both selection (qualification) information and tenders at the same time in response to the contracting authority’s advertised requirements. The contracting

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<sup>1</sup> Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, 26 February 2014.

authority may receive a large number of tenders; it cannot determine in advance the number of tenders that it will receive, but not all of those tenders will necessarily be considered.

Only tenders from suitably qualified economic operators that have submitted the required documents and that meet the selection criteria are considered. Tenders are 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.

**Restricted procedure:** The restricted procedure is a two-stage process. The contracting authority advertises the contract opportunity, and economic operators submit requests to participate and then provide selection stage (pre-qualification) information, which is used by the contracting authority to establish whether the economic operators are qualified to perform the contract. The contracting authority then selects the economic operators that are to be invited to tender.

The contracting authority is permitted to limit the number of economic operators that it invites to tender and to draw up a shortlist of economic operators, which means that not all of the economic operators that qualify will necessarily be invited to tender.

The contracting authority issues the full invitation to tender, together with the specifications and contract, to the economic operators that it has selected or shortlisted. Unlike the open procedure, the restricted procedure thus allows the contracting authority to limit the number of tenders that it receives.

Tenders are 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.

**Competitive dialogue procedure:** The competitive dialogue procedure is a two-stage process. The contracting authority advertises the contract opportunity, and after submitting requests to participate, the economic operators first submit pre-qualification and selection stage information, which is used by the contracting authority to establish whether the economic operators are qualified to perform the contract and to select the economic operators that are to be invited to tender.

The contracting authority is permitted to limit the number of economic operators that it invites to tender and to draw up a shortlist of economic operators.

The contracting authority issues the invitation to participate only to the economic operators that it has shortlisted, and it then enters into a competitive dialogue phase with those economic operators.

During the competitive dialogue phase, 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. Once the contracting authority is satisfied that it will receive proposals that will meet its requirements, it declares the competitive dialogue phase closed and invites the economic operators to submit their tenders.

Tenders can only be evaluated on the basis of the best price/quality ratio.

The contracting authority is permitted to negotiate with the tenderer presenting the best price/quality ratio, but only in order to confirm financial commitments or other terms in the tender, subject to safeguards.

**Competitive procedure with negotiation:** The competitive procedure with negotiation is a two-stage process. The contracting authority advertises the contract opportunity, and the economic operators first submit pre-qualification and selection stage information, which is

used by the contracting authority to establish whether the economic operators are qualified to perform the contract. The contracting authority then selects the economic operators that are to be invited to tender.

The contracting authority is permitted to limit the number of economic operators that it invites to tender and to draw up a shortlist of economic operators.

The contracting authority issues the invitation to negotiate only to the economic operators that it has shortlisted. It receives initial proposals and then enters into negotiation with the shortlisted tenderers in respect of those proposals.

Tenders are evaluated on the basis of the most economically advantageous tender.

**Innovation partnership procedure:** The innovation partnership procedure is a new procedure introduced by the 2014 procurement reforms. It is a two-stage process and is loosely based on the procedural rules that apply to the competitive procedure with negotiation.

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, to draw up a shortlist of economic operators, or to invite only one economic operator to participate in the innovation partnership.

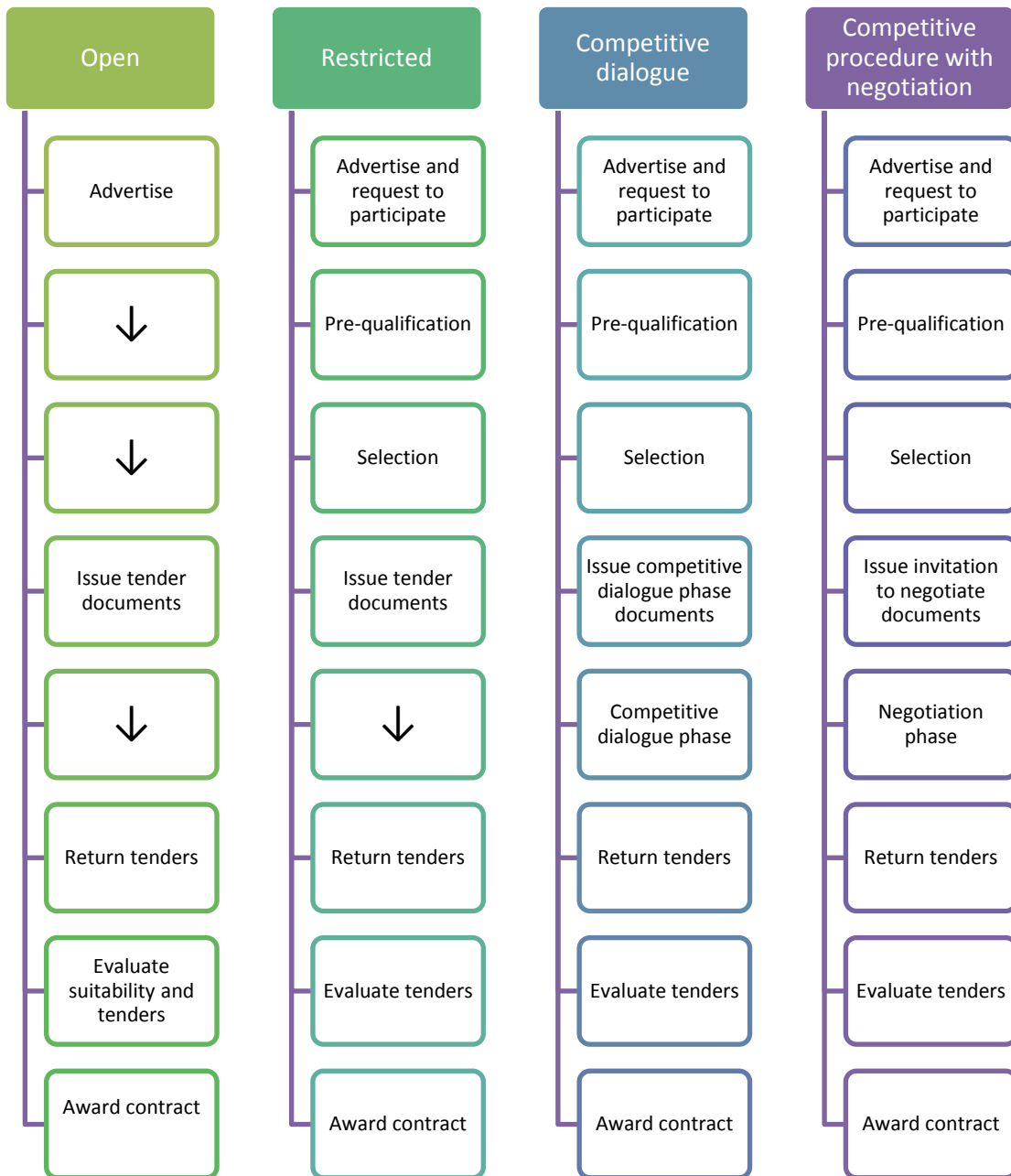
The rules on the conduct of negotiation phase of the innovation partnership procedure are flexible, and the way in which the procedure is conducted can therefore vary considerably. An underlying principle is that the procedure is conducted in successive phases, which must be structured in the sequence 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.

The contracting authority has the option of purchasing the final products, services or works that have been 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.

Flowchart 1. The main competitive procedures (excluding the innovation partnership procedure)



**Design contest procedure:** This competitive procedure involves the use of a jury to judge the designs submitted. The outcome of the procedure may be the award of the design contract, prizes or both. There are no detailed requirements relating to the number of stages to be used, or to the process. However, there are rules about the way in which the jury is constituted and operates. This procedure can only be used for the design of public works and is commonly used in the fields of town and country planning, architecture and engineering, or data processing. The design contest that is used to acquire the plans for such financial engineering could also stipulate that the subsequent service contracts for the realisation of the engineering design would be awarded to the winner or to one of the winners of the design contest by means of a negotiated procedure without prior publication.

### When can each of the main competitive procedures be used?

**Open and restricted procedures:** A contracting authority is free to choose between the open procedure and the restricted procedure. No legal conditions apply to the circumstances in which either of these two procedures may be used, and a contracting authority is not required to use one procedure in preference to the other and therefore has complete freedom of choice.

#### Open or restricted? Choosing which procedure to use

As part of the procurement planning process, the contracting authority should carefully consider which of the procedures is the most appropriate for the particular procurement. In the majority of cases it will be a choice between the open procedure and the restricted procedure.

For more complex procurement, the contracting authority may need to consider whether it can use the competitive dialogue procedure or the competitive procedure with negotiation. For specialised procurement, other procedures described in this section may be appropriate.

**Advantages of the open procedure:** The open procedure provides for the maximum amount of competition. It is also the most transparent procedure, as the contracting authority has no discretion in selecting a provider. The potential for corruption, where for example a particular economic operator is favoured, is lower. In general, collusion between economic operators is less likely.

The statutory time limits are also shorter under the open procedure than under the restricted procedure.

**Disadvantages of the open procedure:** The overall costs to the contracting authority when using the open procedure can be high, as it must issue full tender documents to all parties (although these costs can be significantly reduced if the documents are available electronically). The contracting authority may have to evaluate many applications if a large number of economic operators are interested, and these evaluations can be costly and time-consuming. In addition, economic operators may be less keen to participate in an open procedure if the contract is more complex, and as a result the tender documents cannot be routinely prepared, as they require a high level of input. The cost of preparing a full tender can be a disincentive to participation where the likelihood of success is lower due to the high level of competition.

**Advantages of the restricted procedure:** By restricting the number of economic operators participating at the tender stage, the contracting authority's costs can be lower and the time spent in evaluation may be less than under the open procedure. The restriction of the number of tenderers can help to avoid unnecessary costs related to unsuitable economic operators. This restriction can also result in more interested economic operators that submit

better quality tenders, thereby facilitating more effective competition.

**Disadvantages of the restricted procedure:** The potential for corruption under this procedure is greater due to the increased exercise of discretion by the contracting authority, and the possibility of collusion may be higher. The statutory time limits are also longer under the restricted procedure than under the open procedure.

## Good practice

The open procedure is generally suitable for routine, straightforward and commodity-type purchases.

The restricted procedure can also be used for routine, straightforward and commodity-type purchases where the contracting authority is of the view that benefits will be derived from limiting the number of tenderers. The restricted procedure is particularly suited to more complex procurement and to non-routine purchasing.

In determining which procedure to use, the contracting authority needs to weigh a range of factors, including the costs of running the procedure, the benefits of full, open competition, the advantages of restricting competition, and the likely risk of corruption and/or collusion.

**Competitive dialogue procedure and competitive procedure with negotiation:** The competitive dialogue procedure and the competitive procedure with negotiation can only be used where specific conditions are met. No legal provisions in the Directive require a contracting authority to use one of these procedures in preference to the other, and the same conditions apply to both procedures.

The circumstances and conditions, which are equally applicable to works, supplies and services contracts, can be summarised as follows:

- In response to an open or a restricted procedure, only irregular and unacceptable tenders are received.

**Irregular tenders:** The Directive stipulates that “tenders which do not comply with the procurement documents, which were received late, where there is evidence of collusion or corruption, or which have been found by the contracting authority to be abnormally low, shall be considered as being irregular”. This list is not exhaustive.

**Unacceptable tenders:** The Directive stipulates that “tenders submitted by tenderers that do not have the required qualifications, and tenders whose price exceeds the contracting authority’s budget as determined and documented prior to the launching of the procurement procedure shall be considered as unacceptable.” This list is not exhaustive.

In the case of irregular and unacceptable tenders, the contracting authority is not required to publish another Contract Notice, provided that it includes in the procedure “all of, and only, the tenderers which satisfy all the criteria [for qualitative selection] and which, during the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the procurement procedure”. In that event, new economic operators are not invited to participate in the subsequent process, and there is neither an expression of interest stage nor a selection stage.

### Example

A contracting authority in the health sector launches a restricted procurement process for a contract to supply an x-ray machine. Four tenders are submitted and evaluated, but all four tenders include minor variations of the technical specifications, none of which are permitted.

The contracting authority decides to initiate a competitive procedure with negotiation, inviting the four economic operators that had submitted the original tenders to participate in the negotiations. The contracting authority negotiates with all of the tenderers the tenders that they initially submitted. The aim of the negotiations is to adapt the submitted tenders to the requirements that the contracting authority has set out in the Contract Notice, specifications and additional documents in order to obtain regular and acceptable tenders.

- 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 technical specifications cannot be established with sufficient precision by the contracting authority with reference to defined standards, common technical specifications or technical references.

For works contracts, situations covered by one or more of the three bullet points above may include works that are not standard buildings or where works include design or innovative solutions. For services or supplies, relevant situations will be those that require adaptation or design efforts, which are particularly necessary in the case of complex purchases involving sophisticated products or intellectual services, such as consultancy services, architectural services, engineering services, or major information and communications technology (ICT) projects. In those cases, negotiations may be necessary to guarantee that the supplies or services in question correspond to the needs of the contracting authority. With regard to off-the-shelf services or supplies that can be provided by various operators on the market, the competitive procedure with negotiation or the competitive dialogue procedure should not be used.

### Example

A local authority wishes to award a contract for the construction of a new office building in the centre of a town, where it is known that archaeological remains are likely to be found, which will need to be protected during the construction process. The local authority does not know how much risk economic operators are prepared to take in relation to the impact of protecting the archaeological remains on the cost and timing of construction. This issue will require negotiation with the economic operators

### Good Practice

A project leader should be appointed to ensure co-operation between the economic operators and the contracting authority during the award procedure

- 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 those circumstances.

## Innovation partnership procedure

The innovation partnership procedure is a new procedure established by the Directive. It may be used in particular when a need cannot be met by purchasing products, services or works



that are already available on the market and, consequently, a solution involving innovation is required.

The innovation partnership is a procedure aimed explicitly at the development of innovative products, services or works and the subsequent purchase of those supplies, services or works.

In the definition of “**innovation**”, reference is made to “the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations inter alia with the purpose of helping to solve societal challenges or to support the Europe 2020 Strategy for smart, sustainable and inclusive growth<sup>2</sup>”.

In all situations, the innovation partnership must be structured in such a way that it can provide the necessary "market pull", motivating the development of an innovative solution without foreclosing the market.

### Rules on the conduct of competitive procedures

The Directive contains detailed rules on the conduct of competitive procedures, covering issues such as advertising, the selection process and criteria to be used, the content of tender documents, tender evaluation criteria as well as statutory timescales that apply to each of the processes.

**Statutory timescales:** The main statutory timescales relate to the following:

- the time between the publication of the Contract Notice in the *Official Journal of the European Union (OJEU)* and the closing date for receipts of requests to participate;
- the time between the dispatch of the invitation to tender and the return of tenders;
- the standstill period following a contract award decision.

Statutory timescales also apply to the provision of information to economic operators in specific circumstances.

Examples of how statutory timescales affect a procurement process are provided in the flow chart below, which is based on the restricted procedure tender process.

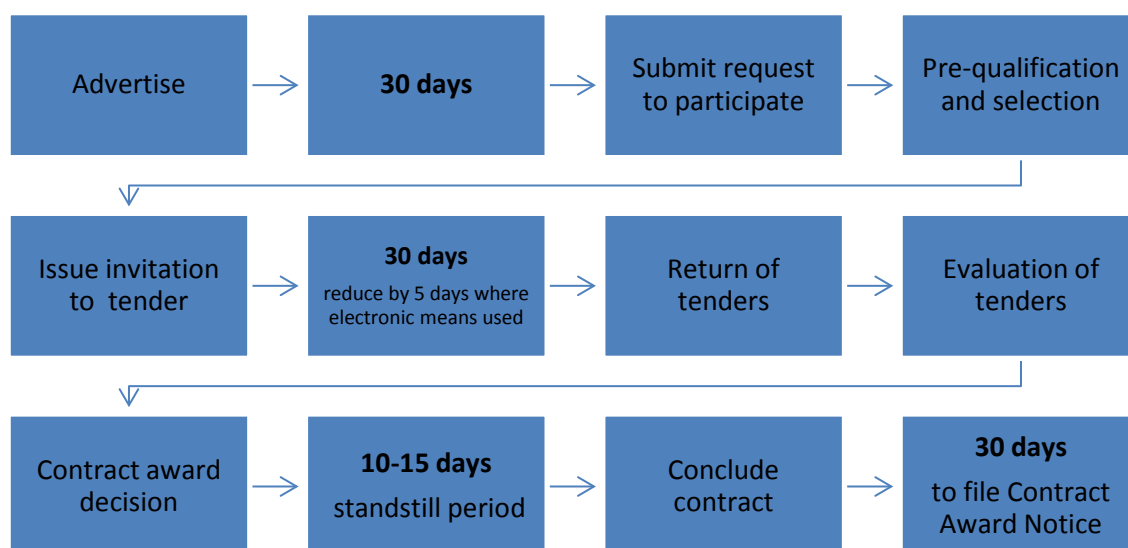
In certain circumstances, such as emergency situations and situations where a Prior Information Notice has been published or where the contracting authority is a sub-central authority, it is possible to reduce the statutory timescales. Such a reduction is subject to meeting a number of conditions, which are set out in the Directive. These circumstances are not included in the flow chart below.

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[EUROPE 2020. A European strategy for smart, sustainable and inclusive growth](#)

## Restricted procedure – key statutory timescales



### Utilities

**Choice of advertising:** Utilities have a free choice between five main forms of competitive procedure: the open procedure, restricted procedure, competitive dialogue procedure, negotiated procedure with prior call for competition, and innovation partnership procedure. Utilities generally have more flexibility in terms of how they advertise.

**Conduct of the procurement process:** The provisions in the Utilities Directive<sup>3</sup> covering the conduct of the procurement process are generally less detailed and less proscriptive than the rules applying to the public sector. For example, there is no exhaustive list of selection stage criteria, and there are provisions allowing for the time limit for receipt of tenders to be set by mutual agreement.

### Negotiated procedure without publication of a Contract Notice

Contracting authorities should start with the assumption that a competitive process with prior publication of a Contract Notice in the *OJEU* is required. Only in very limited circumstances – where a contract is of a particular type and value and is subject to the full provisions of the Directive – may a contract be awarded without prior publication of a Contract Notice and without the use of a competitive process.

**Warning!** The case law of the CJEU makes it clear that the availability of derogations from the requirement to advertise by using a Contract Notice in the *OJEU* and by running a competitive process is very narrowly interpreted. The burden is on the contracting authority to demonstrate compliance with the conditions justifying such an approach.

**What are the derogations from the obligation to publish a Contract Notice and use a competitive process?** The derogations vary according to the type of contract and the circumstances. In summary:

<sup>3</sup> Directive 2014/25/EU on procurement by entities in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, 26 February 2014.

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

- **No tenders/requests to participate or no suitable tenders/requests to participate have been received**, in response to an open procedure or a restricted procedure, provided that the conditions of the contract are not substantially altered.
  - **Tender that is not “suitable”**: The Directive provides that “a tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority’s needs and requirements as specified in the procurement documents”.
  - **Request for participation that is not “suitable”**: The Directive provides that “a request for participation shall be considered not to be suitable where the economic operator concerned is to be or may be excluded pursuant to [exclusion grounds] or does not meet the selection criteria set out by the contracting authority”.
  - **Warning!** Note the difference between the concept of no “suitable” tenders or requests to participate, as in this case, and the concept of “irregular” and “unacceptable” tenders, which permit the use of the competitive dialogue procedure and the competitive procedure with negotiation.
- **Artistic or technical reasons or protection of exclusive rights**: Where “the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance”, where competition is absent for technical reasons or for reasons connected with “the protection of exclusive rights, including intellectual property rights”, the contract can only be awarded to a particular economic operator.
  - Exceptions for technical reasons or protection of exclusive rights only apply when:
    - no reasonable alternative or substitute exists;
    - the absence of competition is not the result of an artificial narrowing of the parameters of the procurement.
- **Extreme urgency**: Due to “events unforeseeable by the contracting authority”, the time limits available for the open or restricted procedure cannot be complied with. These grounds are only to be used where it is “strictly necessary” to do so.
  - The circumstances invoked to justify extreme urgency “shall not in any event be attributable to the contracting authority”. Poor planning cannot be accepted as a justification for applying the negotiated procedure without publication of a Contract Notice.

### Derogations for public supplies contracts:

- **Products manufactured for research and development purposes only**: The products involved are manufactured purely for the purpose of research, experimentation, study or development. These grounds do not apply where there is quantity production to establish commercial viability or to recover research and development costs.
- **Additional deliveries from an original supplier**: The derogation applies to “additional deliveries by the original supplier which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations” where:

- “a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance”;
- “the duration of such contracts as well as that of recurrent contracts shall not, as a general rule, exceed three years”.
- Supplies quoted and purchased on a commodity market
- **Purchase of supplies on particularly advantageous terms:** The derogation applies to supplies that can be purchased on particularly advantageous terms from:
  - a supplier that is winding up its business; or
  - a liquidator in an insolvency procedure, an arrangement with creditors, or a similar procedure under national laws or regulations.

#### Derogations for public services contracts:

- **Following a design contest:** The derogation applies where the contract concerned is to be awarded, in accordance with the rules of a design contest, to the successful candidate(s). The derogation is permitted provided that, where there are two or more successful candidates, the negotiation is undertaken with all successful candidates.

#### Derogations for public works and public services contracts:

- **Repetition of works or services:** The derogation applies to “new works or services consisting of the repetition of similar works or services” entrusted to the same economic operator under the original contract. It is permitted “provided that such works or services are in conformity with a basic project for which the original contract was awarded” pursuant to a procedure under which a call for competition was published. The basic project must have indicated “the extent of possible additional works or services and the conditions under which they would be awarded”.

#### Special provisions on the modification of contracts during their term

The Directive clarifies when modifications to a contract during its performance are possible and indicates how to proceed with making these changes. For further information, see SIGMA Public Procurement Brief 38, *Contract Modifications*.

Taking into account the relevant case law of the CJEU, the general rule remains unchanged, namely that **a new procurement procedure is required in case of material changes to the initial contract** (or framework agreement). Such changes demonstrate the parties’ intention to renegotiate the essential terms or conditions of that contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.

## Further information

### Publications

SIGMA (2015), *Public Procurement Training Manual* – Module C4, OECD Publishing, Paris,  
<http://www.sigmaweb.org/publications/public-procurement-training-manual.htm>

### Public Procurement Briefs

<http://www.sigmaweb.org/publications/key-public-procurement-publications.htm>

SIGMA (2016), *Contract Modifications*, Brief 38, OECD Publishing, Paris