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## Brief 33

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### Public Procurement

# Small and Medium-sized Enterprises (SMEs) in Public Procurement

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## Introduction

Small and medium-sized enterprises (SMEs) are regarded as the backbone of the economy of the European Union (EU), as they have a huge potential for job creation, growth and innovation<sup>1</sup>.

Easy access to public procurement markets can help SMEs in unlocking this potential, while having a positive impact on the economy. Moreover, the strong involvement of SMEs in public procurement allows contracting authorities to considerably broaden their potential supplier base and to thereby secure the positive effects of higher competition for public contracts as a counterbalance to dominant market players.

In order to make public procurement of all sizes as accessible as possible to SMEs, in 2008 the European Commission (EC) published the "European Code of Best Practices facilitating access by SMEs to public procurement contracts"<sup>2</sup>. The Code highlights and elaborates a number of practices within the EU regulatory framework that optimise tenders for the participation of SMEs and ensure equality of opportunity. It also describes best practice and provides guidance to EU Member States and their contracting authorities so that they can fully exploit the potential of the EU public procurement directives. The Code aims to provide a level playing field for all economic operators that wish to participate in public tendering.

In a broad consultation initiated by the EC carried out in 2012, approximately 1 000 SMEs and business organisations identified the public procurement regime as one of the top ten most burdensome EU laws<sup>3</sup>.

During the process of revision of the public procurement directives, the European Parliament requested that the EC make more efforts in facilitating the access of SMEs to procurement markets<sup>4</sup>, in particular by:

- evaluating the impact of the public procurement directives on SMEs in their role as subcontractors and assessing whether further rules on the award of subcontracts are required (with the specific aim of ensuring that SMEs as subcontractors are not subject to worse conditions than the main contractor awarded the public contract);
- simplifying public procurement procedures so as to ensure that contracting authorities and companies are not obliged to spend a large amount of time and money on purely bureaucratic matters.

Against this background, this procurement brief describes measures at the EU level aimed at ensuring that contracting authorities take full advantage of the potential of SMEs in their procurement activities.

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<sup>1</sup> SMEs are independent enterprises or groups of enterprises with fewer than 250 employees and with a total annual turnover not exceeding EUR 50 million or a balance sheet not exceeding EUR 43 million. This definition is the official European definition of SMEs provided by the European Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises [notified under document number C(2003) 1422].

<sup>2</sup> European Commission Staff Working Document SEC(2008) 2193.

<sup>3</sup> European Commission (2013), *Results of the Public Consultation on the TOP 10 Most Burdensome Legislative Acts for SMEs*.

<sup>4</sup> European Parliament (2009), *Report on New Developments in Public Procurement* [2009/2175(INI)].

## General measures to facilitate the access of SMEs to public procurement

When the new public procurement package was introduced in April 2016, the promotion of SMEs was highlighted<sup>5</sup> as one of the five main points of the public procurement reform.

The importance of SMEs is underlined in Recital 124 of the 2014 Public Sector Directive (the Directive)<sup>6</sup>:

“Given the potential of SMEs for job creation, growth and innovation it is important to encourage their participation in public procurement, both through appropriate provisions in this Directive as well as through initiatives at the national level. The new provisions provided for in this Directive should contribute towards an improvement of the level of success, by which is understood the share of SMEs in the total value of contracts awarded. It is not appropriate to impose obligatory shares of success, however, the national initiatives to enhance SME participation should be closely monitored given its importance.”

The measures provided in the Directive to facilitate the participation of SMEs in public tenders can be summarised as follows:

- Contracting authorities are encouraged to divide contracts into lots, making tenders more accessible to SMEs.
- The turnover required to participate in a tender procedure is limited, allowing more SMEs and newcomers to participate.
- The documentation requirements for procurement procedures are considerably reduced and streamlined.
- The mandatory use of e-procurement allows SMEs to exploit the full benefits of the Digital Single Market and will bring efficiency gains.

These measures are explained in more detail below.

### Examples of initiatives at national level

#### United Kingdom

In 2015, the Government of the United Kingdom (UK) set a new target for the amount of central government spending attributed to SMEs. In 2013/2014, the UK central government spent GBP 11.4 billion on collaboration with SMEs (companies or organisations employing 250 employees or fewer). This amount was equivalent to 26% of UK central government spending, of which 10.3% involved SMEs directly and 15.8% indirectly, i.e. through the supply chain that ended with SMEs. By 2020, the UK Government wants to increase this SME spending to one third of central government spending, which would mean an extra GBP 3 billion per year (in 2013/2014 terms) attributed to SMEs directly or indirectly through the supply chain.

The Government has made changes to assist SMEs in bidding for public sector contracts. These changes include:

- requiring that all economic operators in the public sector supply chain be paid within 30 days;
- purchasing in a simpler and quicker way, e.g. by abolishing pre-qualification questionnaires for low-value public sector contracts;

<sup>5</sup> European Commission (2016), *EU public procurement reform: Less bureaucracy, higher efficiency – Overview of the new EU procurement and concession rules introduced on 18 April 2016*.

<sup>6</sup> Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, 26 February 2014

- requiring all contracting authorities to publish information about contract opportunities and contract awards on a national database<sup>7</sup>, [Contracts Finder](#).

Each government department and the dedicated service<sup>8</sup>, the [Crown Commercial Service](#), will need to make sure that the Government meets this target by setting out individual plans and targets for spending with SMEs over the next five years.

More information is available at:

<https://www.gov.uk/guidance/doing-business-with-government-a-guide-for-smes>.

### **Ireland**

In 2013, the Office of Government Procurement (OGP), in conjunction with the Department of Jobs, Enterprise and Innovation, established the High Level Group on SME Access to Public Procurement. The focus of this group is to develop and monitor strategies for SME access to public procurement, ranging from tendering skills development to opportunities to “Meet the Buyer”.

As there is a perception amongst some SMEs that the centralisation of procurement will negatively impact on their sector, the High Level Group aims to address SME concerns by identifying and, where possible, removing structural obstacles to SMEs competing in the procurement space. Another objective of the group is to raise SME awareness of available public sector procurement opportunities.

Since its establishment, the High Level Group has introduced a number of initiatives aimed at assisting and supporting SMEs as they do business with the public sector. Key amongst these initiatives was the publication of *Initiatives to Assist SMEs in Public Procurement* (Circular 10/14). This circular, updating a previous one, set out guidelines for public sector buyers. It also introduced a number of initiatives, which are included in the Directive, that are intended to make it easier for businesses and SMEs to tender for public sector contracts. Another key initiative was the introduction of the pilot Tender Advisory Service, which is available to all tenderers that wish to raise concerns about a tender process.

More information is available at:

<http://www.procurement.ie/>

[http://www.procurement.ie/sites/default/files/initiatives\\_to\\_assist\\_smes\\_in\\_public\\_procurement.pdf](http://www.procurement.ie/sites/default/files/initiatives_to_assist_smes_in_public_procurement.pdf)

## **Specific measures**

### **Reduction of administrative burdens**

Economic operators, especially SMEs, find that a major obstacle to their participation in public procurement is the administrative burden resulting from the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria.

A reduction of the documentary evidence required for participation in procurement procedures is therefore one of the key changes of the Directive that benefits SMEs in particular.

**European Single Procurement Document (ESPD):** With a view to simplifying the procurement process, the Directive (Article 59) has introduced a European Single Procurement Document (ESPD). The ESPD is a standard self-declaration form that an economic operator completes and submits to the contracting authority. The economic operator can use the ESPD to confirm that it fulfils the following conditions:

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<sup>7</sup> <https://www.gov.uk/contracts-finder>

<sup>8</sup> <https://www.gov.uk/government/organisations/crown-commercial-service>

- It is not in one of the situations in which economic operators shall or may be excluded.
- It meets the relevant selection criteria.
- It fulfils, where applicable, the objective rules and criteria that have been established to reduce the number of otherwise qualified candidates to be invited to participate.

The contracting authority must accept the ESPD as preliminary evidence, in replacement of certificates issued by public authorities or third parties. The ESPD contains a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents.

The ESPD also identifies the public authority or third party responsible for providing the supporting documents. Where supporting documents are accessible directly and without charge through national databases, the ESPD must also contain the relevant information about access, such as the internet address of the database, any identification data and, where applicable, the required declaration of consent.

Contracting authorities must accept the ESPD at the time of submission by candidates or tenderers of requests to participate or tenders. A contracting authority may nevertheless request, at any moment during the procedure, that tenderers or candidates submit all or part of the supporting documents. It may do so whenever these documents are necessary to ensure the proper conduct of the procedure. Furthermore, before awarding the contract, the contracting authority must require the tenderer to which it has decided to award the contract to submit up-to-date supporting documents.

The ESPD is to be provided exclusively in electronic form. To allow sufficient time for the transition to this form in all Member States, both electronic and paper versions of the ESPD may co-exist until 18 April 2018.

### EC platform for the ESPD

The EC has developed a free web service for contracting authorities, economic operators and other parties to assist in completion of the ESPD electronically.

The platform can be accessed here:

<https://ec.europa.eu/growth/tools-databases/espd/filter?lang=eng#>

The online form can be completed, printed and sent to the contracting authority together with the remaining documents of the tender.

If the procedure is carried out electronically, the completed ESPD can be exported, stored and submitted electronically.

The use of this platform, in particular once it has reached its full potential through incorporation with relevant national e-procurement solutions, should facilitate the completion of the ESPD by SMEs.

As the introduction of the ESPD simplifies procurement procedures, it is of special importance for SMEs. Administrative requirements were previously very heavy, as all tenderers and candidates had to submit full documentary evidence at the start of the procurement procedure in order to be able to participate. The new rules have significantly reduced that burden, as full documentary evidence is required at the end of procedure and only from the winning bidder. This change has had a direct impact on the resources (time and money) spent on the preparation of tenders.

See SIGMA Public Procurement Brief 7, *Selecting Economic Operators*, for more information on the qualification and selection of operators.

**e-Certis:** Benefits obtained from the introduction of the ESPD have been supplemented by e-Certis, which has been given more importance by the Directive.

E-Certis is an electronic system provided and managed by the EC<sup>9</sup>. It provides a guide to the various documents and certificates required from companies tendering for public contracts in any Member State. The e-Certis system helps:

- economic operators to identify which documents and certificates they need to submit when tendering for a contract in a Member State;
- contracting authorities in Member States to establish which documents they need to request, or can accept, from economic operators.

Usually, such proof takes the form of official certificates issued by national authorities or statements by the tenderer's representative, which may be certified in various ways, for example on oath before a notary or judge.

#### Information on e-Certis

E-Certis is available in 23 official EU languages.

The e-Certis system allows a rapid search, using a range of criteria, including keyword searches in the original language of the document sought.

For each country, information on the most common certificates is organised under common headings, corresponding to the types of documentary evidence mentioned in the Directive.

Under each heading, each national dataset contains a record that is broken down into a number of standard fields. This record describes consistently and in detail, across the national datasets, the certificates issued in a given country for a specific type of evidence.

The system matches equivalent documents across the national datasets. The common, consistent structure permits a fairly in-depth analysis of the various types of documents. Keyword searches, logical field grouping and comparison functions enable everyone involved in procurement procedures to recognise business documents and assess their content.

E-Certis is not new, but under the previous rules Member States were not obliged to update information on e-Certis, and it therefore had a tendency to be out of date. The Directive has introduced obligations for Member States to ensure that the information concerning certificates and other forms of documentary evidence on e-Certis is constantly updated.

The information provided through e-Certis should assist both established SMEs and new entrants to the market in the preparation of tenders. This information is of particular importance for their participation in procurement procedures in Member States where the SME is not established, as e-Certis can help SMEs to understand which information is being requested.

#### Division of contracts into lots

One of the main choices in each public procurement procedure is whether or not a contract should be divided into lots.

Division into lots could be carried out on a quantitative basis, making the size of an individual contract better correspond to the capacity of SMEs. The contract could be divided on a qualitative basis, with the scope of individual lots adapted to reflect the specialised sectors of SMEs. The division of a contract into lots for project phases could also be envisaged, to assist SMEs in managing their workloads.

<sup>9</sup> <http://ec.europa.eu/markt/ecertis/login.do>

The decision to divide contracts into lots is not an easy one. Savings derived from economies of scale may lead to a decision to use a single contract, but the diversity resulting from multiple lots can encourage competition, increase efficiency and boost the participation of SMEs.

The Directive does not oblige a contracting authority to divide a contract into lots. It does require that a contracting authority *consider* whether or not to divide a particular contract into lots. In some cases it may not be practical or appropriate to divide a contract into lots, for example where such a division between different economic operators would create unacceptable operational risks. Where a contracting authority decides not to divide the contract into lots, it is obliged to explain this decision [Article 46(1)].

Member States are permitted to make it “obligatory to award contracts in the form of separate lots under conditions to be specified in accordance with their national law and having regard for Union law” [Article 46(4)]. Some Member States, for example France<sup>10</sup>, had already introduced this obligation of division into lots under the previous procurement rules.

Where contracts are divided into lots, there are a number of ways in which contracting authorities may manage those lots. Contracting authorities are permitted to limit the number of lots for which an economic operator can tender. They may also limit the number of lots that may be awarded to a single economic operator. In this way, they can preserve competition or ensure the reliability of supply, while also facilitating SME participation. Contracting authorities may also permit the submission of tenders for combinations of lots. This option allows contracting authorities to establish whether the tenders submitted by a particular economic operator for a specific combination of lots would fulfil, taken as a whole, the award criteria concerning those lots better than the tenders for the individual lots concerned taken in isolation.

For more information on the division of contracts into lots, see SIGMA Public Procurement Brief 2, *Economic Issues in Public Procurement*, and SIGMA Public Procurement Brief 36, *Division of Contracts into Lots*.

### **Setting of proportionate selection criteria**

The setting of overly demanding selection criteria quite often constitutes an unjustified obstacle to the involvement of SMEs in public procurement. The maintenance of proportionate selection criteria is therefore of core importance for SMEs.

#### **Proportionality**

The principle of proportionality requires any measure chosen to be both *necessary* and *appropriate* in light of the objectives sought. In particular, the selection criteria to be applied must be proportionate to the size, nature and complexity of the contract. Also, the evidence requested must be only that which is strictly necessary to establish whether the set selection criteria are satisfied.

Contracting authorities may impose three possible selection criteria as requirements for the participation of economic operators:

- suitability to pursue the professional activity
- economic and financial standing
- technical and professional ability.

Various means of proof can also be provided as evidence of fulfilment of these criteria.

The Directive explicitly confirms that all requirements concerning selection criteria must be limited to those that are appropriate to ensure that a candidate or tenderer has the legal and

<sup>10</sup> Under the French *Codes de Marchés publics* (2006), the division of a contract into lots is mandatory.

financial capacities and the technical and professional abilities to perform the contract. Furthermore, any such requirements must be related and proportionate to the subject matter of the contract [Article 58(1)].

The Directive introduced limitations on requirements concerning financial standing to avoid unjustified obstacles. In particular, contracting authorities are not permitted to require economic operators to have a minimum turnover that would be disproportionate to the subject matter of the contract. The minimum turnover requirement should normally not exceed, at the most, twice the estimated contract value, except in duly justified circumstances [Article 58(3)]. Even where a higher minimum turnover requirement is applied, it must still be related and proportionate to the subject matter of the contract. Special rules on minimum turnover requirements relate to the award of multiple lots to a single economic operator and in the context of framework agreements and dynamic purchasing systems<sup>11</sup>. The minimum turnover requirement should, in general, facilitate the participation of SMEs in public procurement.

With regard to technical and/or professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate standard throughout the contract period. All requirements must be related and proportionate to the subject matter of the contract. This provision may be beneficial, for example, to SMEs that have a particularly skilled workforce or special technical expertise.

### **Groups of economic operators and reliance on capacities of other entities**

SMEs rarely have adequate financial or technical capacities to perform large and complex contracts as individual tenderers. The options described below can assist SMEs in responding to high qualification levels and financial requirements.

**Grouping:** It is important to emphasise that the Directive, like its predecessor, allows economic operators to group together in order to participate as candidates or tenderers in procurement procedures [Article 19(2)]. Contracting authorities may not require groups of economic operators to have a specific legal form in order to submit a tender or a request to participate. A specific legal form may be required, however, once they have been awarded the contract, where such a change is necessary for the satisfactory performance of the contract.

The possibility of forming a group of economic operators enables SMEs to compete jointly for large and complex contracts, the execution of which surpasses their individual capacities.

**Reliance on capacities of other entities:** The Directive also enables economic operators to rely on the capacities of other entities in order to meet the criteria relating to economic and financial standing and technical and professional ability (Article 63). A group of economic operators may also rely on the capacities of participants in the group or of other entities. Therefore, in the event that the economic operator is a member of a group of economic operators, it is sufficient that the ability requirements that have been set are satisfied by the group of economic operators as a whole rather than by each individual member. This option fosters the participation of SMEs in the procurement process.

Where an economic operator wishes to rely on the capacities of other entities, it must prove to the contracting authority that it will have the necessary resources, for example by providing a written commitment by those entities to that effect.

The contracting authorities may set specific conditions, for example that for the requirement regarding economic and financial standing, the economic operator and the other entities concerned are to be jointly liable for the execution of the contract.

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<sup>11</sup> See SIGMA's *Public Procurement Training Manual* for further information. The full reference and link to this publication are provided at the end of the brief.

## **Setting technical specifications in terms of functional or performance-based requirements**

SMEs have a great potential, not only for job creation and growth but also for innovation. It is therefore very important that contracting authorities endeavour to formulate their technical specifications in a way that both reflects the diversity of technical solutions available on the market and fosters innovative solutions. In that way, the potential for SME participation should increase, resulting in better value-for-money solutions.

The Directive stipulates in Article 42 that technical specifications are to be formulated in terms of performance or functional requirements, or by reference to standards and technical specifications, or by a combination of the two. In general, technical specifications have to be drafted in such a way as to avoid narrowing down competition artificially through requirements that favour a specific economic operator.

Performance-based or functional specifications describe a desired level or target to be achieved, but without prescribing the way in which that level/target is to be reached. Instead of describing the requirement in terms of inputs or detailed characteristics of goods, services or works to be purchased, the requirement is described in terms of outputs. Setting technical specifications in terms of performance or functional requirements generally allows the objective to be achieved in the best possible way because it gives suppliers the flexibility to propose solutions.

There is a fine balance between making sure that the market is perfectly aware of the requirements of the contracting authority and leaving the door open to different and new ways of meeting those requirements. For example, while it is essential for suppliers to know about any environmental standards to which a product or service must conform, it may be possible to specify a performance-based requirement or to use outcome-based specifications, for example by indicating maximum CO<sub>2</sub> or energy or water consumption rather than setting a detailed list of inputs.

Performance-based or functional specifications encourage SME participation, as they favour innovation in public procurement. The more that contracting authorities define their needs in terms of required outputs - using performance-based or functional specifications — the greater the space given to the private sector to draw on their expertise and to innovate. When the private sector is not restricted to pre-determined products, production methods and detailed processes, it is able to innovate and be creative in its processes.

## **Subcontracting opportunities and direct payment to subcontractors**

For large contracts, an SME may not be in a position to be a prime contractor, performing the whole contract, or even to tender jointly with other economic operators because of its small size, specialisation and limited resources. Subcontracting may nevertheless provide good opportunities to SMEs, as they could be perfectly able to perform some of the services or works included in a project. Subcontracting can facilitate the access of SMEs to the public procurement market.

The Directive increases the focus on subcontracting, and the relevant provisions in Article 71 are much more extensive in comparison with previous rules. Generally, contracting authorities may ask tenderers to provide specific information about prospective subcontracting and subcontractors. In particular, the contracting authority may require tenderers to indicate in their tenders any share of the contract that they may intend to subcontract to third parties and any proposed subcontractors. National provisions may also oblige contracting authorities to request this information from tenderers.

The participation of subcontractors in the performance of the contract is without prejudice to the liability of the main contractor for the performance of the whole contract. However, the national law of a Member State may provide for a mechanism of joint liability between subcontractors and the main contractor.

For more information on subcontracting, see SIGMA Public Procurement Brief 37, *Subcontracting*.

The Directive introduced one specific, although optional, measure focused on SMEs: direct payment to subcontractors [Article 71(3)]. Member States may provide, at the request of the subcontractor and where the nature of the contract so allows, for the contracting authority to transfer due payments directly to the subcontractor for services, supplies or works provided to the economic operator that has been awarded the public contract (the main contractor). Such measures may include appropriate mechanisms permitting the main contractor to object to undue payments. All arrangements concerning the mode of payment must be set out in the procurement documents. The Directive also allows Member States to go even further in this regard, for example by providing for direct payment to subcontractors without any request on their part for such direct payment.

Some Member States, such as Croatia and Slovenia, had already introduced and enforced national rules on direct payments to subcontractors even before this option was provided for at EU level.

### **e-procurement**

At its simplest, e-procurement is a catch-all term for the replacement of paper-based procedures for communications and processing in the procurement process, with procedures based on information technology. End-to-end e-procurement means the use of electronic technology and processes at various phases of the procurement process, comprising publication of tender notices, provision of tender documents, submission of tenders and requests to participate, evaluation of tenders, notification of award, ordering, invoicing and payment.

E-procurement can serve as a tool to make procurement more efficient, more effective and more accessible to SMEs. It can significantly simplify the way in which procurement is conducted, reduce waste, and deliver better procurement outcomes (lower price, better quality) by stimulating competition across the EU.

While the previous rules only encouraged the use of electronic means in public procurement procedures, the Directive has set electronic means as the standard means of communication and information exchange in procurement procedures. Elements of the procurement process where the use of electronic means of communications is mandatory are as follows:

- transmission of notices in electronic form (e-notices);
- electronic availability of procurement documents (e-procurement documents);
- electronic submission of requests for participation and tenders (e-submission).

The Directive does not oblige contracting authorities to carry out the electronic processing of tenders, electronic evaluation or automatic processing, but it does have that requirement at its disposal. Likewise, neither the elements of the public procurement process subsequent to the award of the contract nor internal communication within the contracting authority are covered by the obligation to use electronic means of communication.

Even though the Directive does not include obligations related to electronic invoicing, the e-Invoicing Directive<sup>12</sup> obliges Member States to ensure that contracting authorities and entities receive and process electronic invoices that comply with the European standard on electronic invoicing.

While e-notices and e-procurement documents are already in place, the transition to full e-procurement will be completed by the following dates:

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<sup>12</sup> Directive 2014/55/EU on electronic invoicing in public procurement, 16 April 2014.

- October 2018, when e-submission will become mandatory for all contracting authorities;
- November 2020, when e-invoicing will become mandatory for all contracting authorities.

E-procurement can be a powerful means of promoting SME participation and competition, including across borders. E-procurement should reduce administrative burdens and administrative costs and increase transparency, and thereby benefit SMEs. They should find it easier to identify the relevant information on business opportunities and to respond to tender opportunities by using electronic means rather than working in a traditional, paper-based environment. E-procurement reduces distance barriers, distance-related costs of participation, and information gaps that could have reduced or discouraged cross-border participation in paper-based procedures.

An increasing volume of procurement can now be provided from another country, for example the provision of services involving software, design competitions and helpdesks, and e-procurement is well suited to facilitate such opportunities, in particular for SMEs. In addition, e-invoicing can reduce the cost and complexity of sending invoices. It can also limit errors via automation, which simplifies auditing and tax collection. The latter in turn reduces the administrative burden on enterprises, which weighs more heavily on SMEs.

A majority of SMEs are equipped for end-to-end e-procurement, allowing them to benefit from its use. However, it is extremely important that the design of an e-procurement system does not in any way hinder full SME participation in the procurement market. A particular objective should be to ensure that the e-submission phase is as accessible as possible. The barriers that often discourage newcomers from undertaking the onerous registration or authentication procedures required by some platforms – in some cases involving the use of tools and assets that are only available in the country concerned – must be removed. For this purpose, the Directive requires that the tools and devices to be used for e-communication, as well as their technical characteristics, must be non-discriminatory, readily available and interoperable with the information and communication technology products in general use. They must not restrict economic operators' access to the procurement procedure.

For more information, see SIGMA Public Procurement Brief 17, *e-Procurement*.

## Utilities

The Utilities Directive<sup>13</sup> contains provisions that are practically identical to those in the Directive concerning the participation of SMEs in procurement procedures. Refer to the following articles:

- Article 37 – Groups of economic operators
- Article 79 – Reliance on capacities of other entities
- Article 60 – Technical specifications
- Article 88 – Subcontracting
- Article 40 – e-procurement

Article 65 of the Utilities Directive covers the division of contracts into lots. Unlike the Directive, there is no obligation on a contracting entity to either consider whether or not to divide the contract into lots and or to record the reasons for its decision.

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<sup>13</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.

Articles 78 and 80 provide more flexibility than under the Directive in terms of the choice of the selection criteria that may be applied and the evidence that may be requested from economic operators. As a general rule, contracting entities must apply objective rules and criteria when selecting and excluding economic operators. When contracting entities opt to use the rules and criteria defined in the Directive, they should then apply those criteria in accordance with the requirements of the Directive, such as the criteria for minimum turnover requirements, use of the ESPD, and e-Certis.

## Further information

### Public Procurement Briefs

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

SIGMA (2016), *Economic Issues in Public Procurement*, Brief 2, OECD Publishing, Paris

SIGMA (2016), *Selecting Economic Operators*, Brief 7, OECD Publishing, Paris

SIGMA (2016), *Division of Contracts into Lots*, Brief 36, OECD Publishing, Paris

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