



## Brief 6

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### Public Procurement

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# Advertising

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## Why is advertising important?

Advertising is one of the foundation stones of public procurement. Full and open advertising:

- **facilitates appropriate competition** – by informing as many potential economic operators as possible about contract opportunities and thereby enabling them to compete, which leads to the best value-for-money outcomes for contracting authorities;
- **develops markets** – by showing potential economic operators that business opportunities are available, which encourages the development of the marketplace with new and more diverse economic operators and widens the source of economic operators at local, regional, national and international levels;
- **helps in the battle against corruption** – by increasing transparency and ensuring that economic operators, the public, the press and other stakeholders are aware of available contract opportunities and are able to find out more about these opportunities and about the economic operators that have been awarded contracts.

## Where do you advertise?

Notices for contracts of a certain type and value that are subject to the Directive must be advertised in the Supplement to the *Official Journal of the European Union (OJEU)*. Notices are published by the Publications Office of the European Union free of charge. A free online version of the Supplement to the *OJEU*, called Tenders Electronic Daily (TED), is available<sup>1</sup>.

Many EU Member States also require the advertisement, at national level, of notices for contracts that are not subject to the requirement to advertise in the *OJEU*.

**Other publications:** Contract opportunities may also be advertised in other international, national or local publications. Where additional advertising is used, the Directive stipulates that this advertising must not be published before the contract notice has been published in the *OJEU*. However, the additional advertising may be published at national level in the event that the contracting authorities have not been notified by the Publications Office of the European Union of the publication in the *OJEU* within 48 hours of the confirmation of receipt of the notice. The additional advertising must not contain any information that is not included in the *OJEU* contract notice.

## When do you need to advertise?

You need to advertise on three main occasions:

- before the start of the formal procurement process – an optional advertisement, to pre-warn the marketplace of potential future opportunities, using a Prior Information Notice (PIN);
- at the start of a contract-specific procurement process – to invite economic operators to participate in the procurement process, using a Contract Notice;
- at the end of a contract-specific procurement process – to notify economic operators and others that the procurement process has been concluded, using a Contract Award Notice or a Voluntary *ex ante* Transparency Notice.

**Advertising before the start of the formal procurement process by using a PIN:** The Directive permits, but does not oblige, a contracting authority to pre-warn the marketplace of potential

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<sup>1</sup> <http://ted.europa.eu>

future contract opportunities by advertising, using a PIN. The PIN is published by the EU Publications Office in the *OJEU* or by contracting authorities on their buyers' profiles (see below for more information about 'buyers' profiles').

Advertising in advance in this manner provides benefits to both the contracting authority and potential economic operators, as follows:

- Before advertising, the contracting authority needs to have thought carefully about its requirements, and thus the preparation of the PIN can assist in ensuring that advance planning and budgeting are taken seriously.
- Economic operators that have been given advance warning of potential opportunities can also plan accordingly. This planning assists in ensuring good levels of competition and better outcomes in terms of value for money for the contracting authority.
- If a PIN is used, in certain circumstances statutory tender time scales can then be reduced.
- Contracting authorities other than central contracting authorities may use a PIN as a call for competition, but only in restricted procedures or competitive procedures with negotiations. In that case, if the PIN is sufficiently detailed, the contracting authorities are not obliged to publish later a separate Contract Notice.

A standard format PIN is published by the European Commission on its website<sup>2</sup> (form number 1). The format is the same for all types of contracts.

### Keeping the market informed

As an alternative to advertising a PIN in the *OJEU*, a contracting authority can keep the market informed of future potential opportunities by setting up its own internet-based "buyer profile". The buyer profile includes general information about the contracting authority together with information about ongoing invitations to tender, scheduled purchases, contracts concluded, and procedures cancelled.

A contracting authority can also use its buyer profile to publish a PIN. Where a contracting authority uses its own buyer profile to publish a PIN, it does not need to dispatch a PIN to the *OJEU*, but it should send to the *OJEU* a notice about the publication on the buyer profile.

### Advertising at the start of a contract-specific procurement process by using a Contract Notice

The Contract Notice is an extremely important part of the procurement process. It marks the commencement of the formal procurement process for a specific contract and notifies potential economic operators of the opportunity to participate in the process.

The standard format notices must be used. These notices are published by the European Commission on its website. The standard format Contract Notice is used for the majority of procurement processes, but different formats are used for different types of procurement. For example, special forms of contract notice are to be used for design contests, public works concessions, service concessions, social and other special services.

To ensure as much competition as possible and to comply with the basic requirements for transparency, the Contract Notice must be drafted in a way that clearly describes the nature, scope and estimated value of the contract and explains how economic operators can apply to participate in the process. The Contract Notice must also be completed fully and correctly. Failure to draft a clear, complete and compliant Contract Notice could result in a disappointing

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<sup>2</sup> [www.simap.europa.eu](http://www.simap.europa.eu)

level of competition, poor quality or inappropriate tenders, or a flawed procurement process that might have to be started again.

### **What are the consequences of awarding a public contract covered by the Directive without previous publication of a Contract Notice?**

The Directive allows, in a limited number of cases, the awarding of a public contract covered by the Directive without previous publication of a contract notice, for example where the works, supplies or services can be supplied only by a particular economic operator or where it is strictly necessary for reasons of extreme urgency brought about by events that were unforeseeable to the contracting authority. In the event that the contracting authority has awarded a contract without prior publication in the *OJEU* without legal basis for the lack of publication, such a contract should be considered ineffective by a review body, in accordance with the provisions of the “Remedies Directive” (Directives 89/665/EEC and 92/13/EEC). For more information on the ineffectiveness of a contract, see SIGMA Public Procurement Brief 12, *Remedies*. To avoid ineffective contracts, the Remedies Directive provides for a mechanism of publication of a Voluntary *ex ante* Transparency Notice (form number 15) in the *OJEU*.

### **What can be done if the Contract Notice is incorrect or if information has to be changed in the Contract Notice?**

There is a standard form for making changes to a contract notice, the Notice of Corrigendum. This standard form notice is available on the European Commission’s website (form number 14) and can be used for publishing changes in the previously published notices or for providing additional information. However, if corrections or modifications of notices lead to a substantial change of the competition conditions, it is necessary to extend the original time limits or launch a new procedure.

### **Advertising at the end of a contract-specific procurement process by using a Contract Award Notice**

The contracting authority must advertise the conclusion of a contract-specific procurement process by using a Contract Award Notice within 30 days of the award of the contract.

This final notice is important because it ensures the transparency of the process, as economic operators and others are made aware of the conclusion of the procurement process and the basis for the award. The European Commission also uses this information to prepare statistical data on the level and nature of procurement activity and to monitor procurement processes.

The obligation to advertise a Contract Award Notice applies to all contracts where a Contract Notice has been advertised and also to some other contracts where such a notice has not been advertised.

### **Advertising the modification of a contract during its term**

Contracting authorities must also publish information on the modification of a contract during its term. The standard form for this notice is available on the European Commission’s website (form number 20). This notice must be published if the modification:

- concerns additional works, services or supplies that have become necessary and were not included in the original contract;
- has been brought about by circumstances that a diligent contracting authority could not have foreseen and where the modification does not alter the overall nature of the contract and any increase in price is not higher than 50% of the original contract or framework agreement.

There are also other situations where the modification of the contract during its term is allowed in the Directive, but the contracting authority that has modified the contract is obliged to publish a modification notice in the *OJEU* only in the two cases mentioned above.

### **Are there rules about how the notices must be sent and how quickly they must be published?**

All notices must be transmitted by electronic means to the EU Publications Office, in accordance with the standard forms provided by the European Commission. A free online system is directly available on the European Commission's website. Notices must be published within five days of dispatch.

The format and procedure for sending notices electronically are accessible on the European Commission's website.

### **Utilities**

Contracting entities are required to advertise contracts of a specific type and value, but more flexibility is provided in terms of the choice of advertising method.

**Choice of advertising:** Contracting entities have a free choice between five forms of competitive procedures: open procedure, restricted procedure, competitive dialogue, negotiated procedure with a prior call for competition, and innovation partnership.

Contracting entities also have flexibility in terms of how they advertise – referred to in the legislation as a “call for competition”. When conducting a restricted procedure or a negotiated procedure with a prior call for competition, contracting entities may choose to use any of the following three methods:

- contract notice
- annual “periodic indicative notice”
- notice on the existence of a qualification system.

When conducting an open procedure, contracting entities can choose to use a periodic indicative notice or a contract notice.

**Local notices:** Notices may also be published nationally, in which case they must not contain any information other than that contained in the notice sent to the European Commission, and they must not be published locally prior to the date of publication in the *OJEU*. However, publication at national level may take place in the event that, within 48 hours of the confirmation of receipt of the notice by the EU Publications Office, the contracting entities have not been notified of the publication of the notice in the *OJEU*.

**Qualification systems:** Contracting entities are permitted to set up and run qualification systems. A qualification system is a system in which economic operators that are interested in contracting with the contracting entity apply to be registered as potential providers. The contracting entity then registers some or all of those economic operators in its qualification system. The registered economic operators then form a pool from which the contracting entity may draw those that are to be invited or to negotiate contracts.

When setting up a qualification system, the contracting entity uses a notice announcing the existence of a qualification system (form number 7 on the European Commission's website), in which it indicates the purpose of the system, how to access to the rules for its operation, and the period of validity. If the system is terminated, the contracting authority should publish a Contract Award Notice.

**Framework agreements:** Contracting entities can set up framework agreements by using the

standard form of Contract Notice.

**Dynamic purchasing systems:** Contracting entities are also permitted to set up dynamic purchasing systems for commonly used purchases. In order to set up a dynamic purchasing system, the contract authority should publish a Contract Notice. Invitations to submit tenders for contracts covered by the dynamic purchasing systems do not have to be published, but they are sent directly to all participants admitted to the system.

**Contract award notices:** Contracting entities are required to send a Contract Award Notice in a standard format to the Office of the *OJEU* within 30 days of the conclusion of a contract or framework agreement. Contract Award Notices for contracts awarded within the framework agreement and contracts based on dynamic purchasing systems can be grouped and sent on a quarterly basis within 30 days of the end of the relevant quarter.

## Further information

### Publications

SIGMA (2015), *Public Procurement Training Manual* – Module E2, 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

SIGMA (2016), *E-Procurement*, Brief 17, OECD Publishing, Paris

SIGMA (2016), *Procurement by Utilities*, Brief 16, OECD Publishing, Paris

SIGMA (2016), *Procurement Tools*, Brief 11, OECD Publishing, Paris

SIGMA (2016), *Remedies*, Brief 12, OECD Publishing, Paris

SIGMA (2016), *Understanding the EU Financial Thresholds*, Brief 5, OECD Publishing, Paris

### Other sources

Selected case law of the Court of Justice of the European Union: C-199/85 *Commission v Italy*, C-24/91 *Commission v Spain*, C-107/92 *Commission v Italy*, C-328/92 *Commission v Spain*, C-318/94 *Commission v Germany*, C-225/98 *Commission v France*, C-385/02 *Commission v Italy*, C-394/02 *Commission v Greece*, C-126/03 *Commission v Germany*, C-21/01 and C-28/01 *Commission v Germany*, C-362/03 and C-463/03 *Strabag and Kostman*, C-299/08 *Commission v France*, C-561/12 *Nordecon and Ramboll Eesti*, C-19/13 *Fastweb*, [http://curia.europa.eu/jcms/jcms/j\\_6/](http://curia.europa.eu/jcms/jcms/j_6/)