



Public Procurement

2014 EU Directives: Public Sector and Utilities Procurement

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Introduction

At the end of March 2014, following extensive negotiations over three years, the *Official Journal of the European Union (OJEU)*¹ published three new procurement Directives². Two of the Directives, relating to procurement by public sector contracting authorities and utilities entities, replace the EU procurement Directives of 2004. The third Directive creates a new, regulated regime for the award of concession contracts. Copies of the new Directives can be downloaded by using the following link:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2014:094:TOC>

The deadline for EU Member States to transpose the new procurement Directives into their national legislation was 18 April 2016. This general deadline was extended in a few cases for the implementation of e-procurement measures.

This Procurement Brief sets out the major changes incorporated into the 2014 Public Sector and Utilities Directives. The Brief is not intended to provide an exhaustive analysis of all of the changes. A separate Procurement Brief (31) focuses on the Concessions Directive 2014/23/EU.

The following terms are used to refer to the Directives:

“2014 Public Sector Directive”	2014/24/EU	}	together referred to as the “2014 Directives”
“2014 Utilities Directive”	2014/25/EU		
“2004 Public Sector Directive”	2004/18/EC	}	together referred to as the “2004 Directives”
“2004 Utilities Directive”	2004/17/EC		

The changes described in this Brief are in the same order as they appear in the 2014 Public Sector Directive. Where relevant, references are also made to the equivalent provisions in the 2014 Utilities Directive.

Reasons for review of the 2004 Directives

Public procurement is one of the market-based instruments to be used to deliver the Europe 2020³ strategy for smart, sustainable and inclusive growth by aiming to:

- improve the conditions for business to innovate;
- encourage the wider use of green procurement;
- ensure the most efficient use of public funds;
- keep procurement markets open EU-wide.

These aims are reflected in the changes incorporated into the 2014 Directives, which focus on ensuring transparency, increasing flexibility, and encouraging the involvement of small and medium-sized enterprises in public procurement. Additional provisions deal specifically with green (environmental) issues. It is clearly recognised that e-procurement is a key factor in

¹ Published in the *OJEU* on 28 March 2014, Volume 57 L94.

² Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, and repealing Directive 2004/18/EC; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

³ See European Commission (3 March 2010), “Communication from the Commission – EUROPE 2020 – A strategy for smart, sustainable and inclusive growth”.

increasing efficiency and ensuring transparency, and greater emphasis is placed on the conduct of procurement processes using electronic means.

The 2014 Directives also incorporate and expand on the procurement principles developed in the case law of the Court of Justice of the European Union (CJEU), which were not covered in the 2004 Directives. Examples are the inclusion of articles concerning in-house transactions⁴ and changes to contracts⁵. In some cases, where a CJEU judgement has led to controversy or uncertainty, the 2014 Directives allow greater flexibility than that permitted by the CJEU. For example, the new provision in Article 68 of the Public Sector Directive permits the use of criteria relating to staff as an award criterion in certain cases. See the comment below on Article 68.

The 2014 Directives are more closely aligned with each other than was the case with the 2004 Directives. Greater flexibility has been introduced in the 2014 Public Sector Directive.

Structure and content of the 2014 Directives

The 2014 Directives are both structured in the same order:

- recitals;
- contents list;
- titles containing the articles – divided into chapters, which are sub-divided into sections;
- annexes.

The recitals are not operative provisions of the Directives. They provide the context and explanations for the operative provisions that are set out in the Articles. The recitals are a useful source of information, assisting in the interpretation of the Articles.

The Annexes contain additional and complementary information and requirements referred to in the Articles, such as the content of Contract Notices.

Mandatory and optional provisions in the 2014 Directives

Most of the Articles are mandatory, and Member States are obliged to implement them.

Some Articles are optional, which means Member States can choose whether to implement them or not. In this procurement Brief, the provisions of these Articles are referred to as “optional provisions”.

⁴ The key cases were C-107/98 Teckal and C-480/06 Commission v Germany. See also SIGMA (2014), *Selected Judgments of the Court of Justice of the European Union on Public Procurement*, chapter 4.

⁵ The key case was C-454/06 presstext Nachrichtenagentur. See also chapter 9 of the SIGMA publication on the CJEU (footnote 4 above).

Scope, definition and general principles

Article 1. Subject matter and scope

Article 1 of the 2014 Public Sector Directive contains new provisions, which were not included in the 2004 Directives, explaining the concept of public procurement. The Article states that the Directive applies to all acquisitions by contracting authorities, whether or not they are intended for a public purpose.

Recital 5 makes it clear that the 2014 Public Sector Directive does not force Member States to contract out or outsource services that they wish to provide themselves. The Directive provides the rules of conduct to be followed when Member States do decide to contract out or outsource services. Article 1(4) confirms that Member States have the freedom to decide how to arrange for the delivery of public tasks and services in the general economic interest and how to organise their social security systems.

Utilities:

Very similar provisions explaining the concept of public procurement are included in Article 1 of the 2014 Utilities Directive.

Oil and gas exploration no longer regulated: The activity of exploration for oil and gas, which was regulated by the 2004 Utilities Directive, is not regulated by the 2014 Utilities Directive. Recital 25 explains that the exclusion of this activity is appropriate, as it is subject to sufficient competitive pressure.

Article 4. Contracting entities and the definition of special and exclusive rights: The 2014 Utilities Directive applies to "contracting entities", which may be (i) contracting authorities, (ii) public undertakings, or (iii) an entity that undertakes certain specified activities and operates on the basis of "special or exclusive rights". The definition of "special or exclusive rights" has been amended and clarified, with a view to resolving some uncertainties in the definition provided in the 2004 Public Sector Directive. A clear link is now made to the impact of granting such a special or exclusive right, which "substantially affects the ability of other entities to carry out such activity".

Article 10. Exclusions

A number of new specific exclusions for service contracts have been included in the 2014 Public Sector Directive. The new categories of excluded contracts are as follows⁶:

- Legal services, including certain forms of legal representation and advice, document certification and authentication services provided by notaries, trustee and guardianship services, and legal services connected with the exercise of official authority.
- Loans – the reference to financial services in the 2004 Public Sector Directive has been amended and split in the 2014 Public Sector Directive to refer separately to financial services and loans.
- Civil defence, civil protection and danger protection services provided by non-profit organisations or associations other than patient transport services.
- Public passenger transport services by rail or metro – the procurement and provision of these services is regulated by a separate EU regime⁷.

⁶ See Article 10 for full details of these excluded contracts.

⁷ Regulation (EC) No. 1370/2007.

- Political campaign services covered by specified common procurement vocabulary (CPV) codes.

The research and development exclusion for specified types of contract is set out in Article 14.

Utilities:

Article 21 of the 2014 Utilities Directive provides for the same new exclusions covering legal services, loans and civil defence, civil protection and danger protection services, and public passenger transport services by rail or metro. However, Article 21 does not include any reference to political campaign services. The research and development exclusion for specified types of contract is set out in Article 32.

Article 12. Public contracts between entities within the public sector

Article 12 codifies and clarifies CJEU case law on “in-house” procurement. It specifies the circumstances under which the award of a contract will be considered as equivalent to an “in-house” arrangement and thus exempt from application of the 2014 Public Sector Directive. Two types of situation are covered by Article 12:

- Contracts awarded by contracting authorities to separate legal entities that they own: this situation is covered by Article 12 paragraphs (2) and (3), which codify and clarify the cases arising from the “Teckal” judgement⁸.
- Agreements between contracting authorities: paragraph (4) of Article 12 covers this situation, codifying and expanding on the cases arising from the “Hamburg” judgement⁹.

This article is quite complex. In each case, in order to fall within the scope of Article 12, the arrangements need to satisfy a number of detailed conditions.

Utilities:

Very similar provisions are included in Article 28 of the 2014 Utilities Directive. Article 28 only applies to contracting entities that fall under the definition of contracting authorities.

In addition to Articles 29 and 30 of the 2014 Utilities Directive, the provisions in Article 28 concern the award of contracts to affiliated undertakings and joint ventures. Articles 29 and 30 apply to all contracting entities, and very similar provisions were already set out in the 2004 Utilities Directive.

Article 22. Communication

A major emphasis in the 2014 Public Sector Directive is placed on communication using electronic means. The initial presumption is that all communication and information exchange is conducted by using electronic means. The minimum time limits in tender processes are calculated, in general, on the assumption that electronic means are used.

Article 22 provides that tools and devices used for electronic communication must be non-discriminatory, generally available and interoperable with technology in general use. In the event that contracting authorities do require the use of tools that are not generally available, they must then offer suitable alternative means of access.

In specified cases where e-communication is not obligatory in the submission process, postal services or other non-electronic means may be used. These cases concern, for example, situations where the specialised nature of the procurement means that the procurement tools,

⁸ C-107/98 Teckal. See also SIGMA (2014), *Selected Judgments of the Court of Justice of the European Union on Public Procurement*, chapter 4.

⁹ C-480/06 Commission v Germany. See also SIGMA (2014), *Selected Judgments of the Court of Justice of the European Union on Public Procurement*, chapter 4.

devices or file formats to be used are not generally available or supported, or where very specialised office equipment would be required. Other provisions regulate the handling of commercially sensitive information.

Contracting authorities are required to ensure that in all communication, exchange and storage of information the integrity of data and the confidentiality of tenders and requests to participate are preserved. Annex IV sets out the minimum requirements relating to the tools and devices used for the electronic receipt of tenders. These requirements primarily concern transparency and data integrity issues.

Optional provisions: Member States have the option of providing for the acceptance of electronic signatures. Article 22(6)(c) contains detailed provisions related to the use of electronic signatures.

Utilities:

Very similar provisions are included in Article 40 of the 2014 Utilities Directive.

Rules on public contracts

Article 26. Choice of procedures

The 2014 Public Sector Directive has five competitive procedures and one non-competitive procedure. The five competitive procedures are:

- open procedure;
- restricted procedure;
- competitive procedure with negotiation;
- competitive dialogue;
- innovation partnership.

The competitive procedure with negotiation has been substantially amended. The innovation partnership procedure is new.

The non-competitive procedure is the negotiated procedure without prior publication.

See below for further comments on these procedures.

Choice of the open or restricted procedure: The open and restricted procedures are still the basic procedures that may be used freely by contracting authorities without a requirement to satisfy conditions.

Conditions for the use of the competitive procedure where negotiation is permitted: Under the 2004 Directives, the conditions that contracting authorities needed to satisfy in order to use the negotiated procedure with prior publication of a Contract Notice or the competitive dialogue procedure differed.

Under the 2014 Directives, the conditions are the same for the competitive procedure with negotiation and the competitive dialogue procedure. These conditions have been amended and new conditions added. The conditions apply to contracts for works, supplies and services.

The conditions are easier to satisfy than was the case under the 2004 Directives. Recital 42 explains that contracting authorities need to have increased flexibility to choose a procurement procedure that provides for negotiation and that this flexibility is likely to increase cross-border trade.

In summary, the conditions for the use of the competitive procedure with negotiation are as follows:

- The needs of the contracting authority cannot be met without adaptation of readily available solutions.
- The works, supplies or services include design or innovative solutions.
- The contract cannot be awarded without prior negotiations due to specific circumstances related to its nature, complexity or legal and financial make-up or because of the risks attached to its execution.
- 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.

Utilities:

The 2014 Utilities Directive also has five competitive procedures. The procedures are the same as those listed in the 2014 Public Sector 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 can be used are more flexible than under the 2014 Public Sector Directive .

Article 44. Contracting entities are free to use either the open, restricted or negotiated procedure with prior call for competition. These options were the same under the 2004 Utilities Directive.

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.

Contracting entities therefore have the freedom to choose any of the five procedures. The innovation partnership procedure may be used only when innovative products, services or works are to be procured.

Articles 27-31. Conduct of the competitive procedures

The 2014 Public Sector Directive takes a slightly different approach to the 2004 Public Sector Directive when setting out the provisions governing the conduct of competitive procedures. In the 2014 Public Sector Directive, the article concerning a particular procedure includes reference to the minimum statutory time limits for that procedure. This provision means that the requirements for a particular procedure are easier to follow than under the 2004 Public Sector Directive, where the provisions on time limits for the different procedures were combined in the same articles.

Utilities:

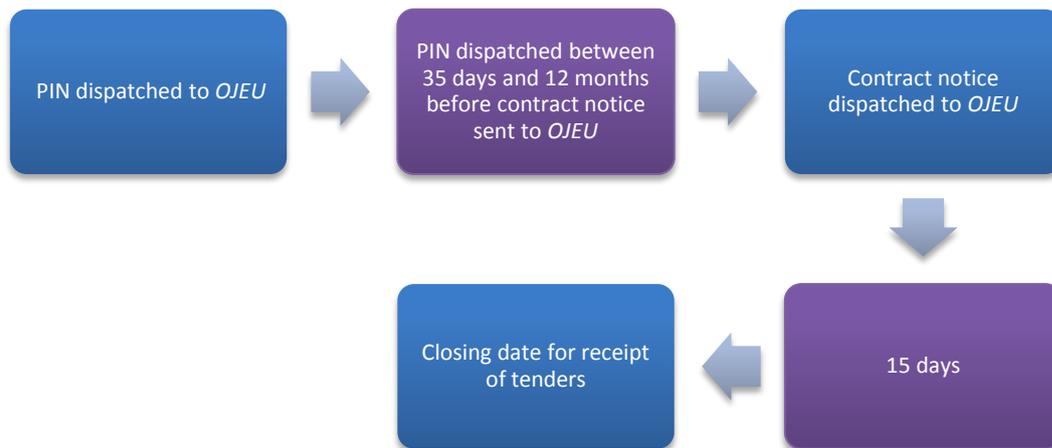
The same approach is used in Articles 45-49 of the 2014 Utilities Directive.

Article 27. Open procedure

The main change with regard to the conduct of the open procedure is the introduction of a shorter minimum statutory time limit for the receipt of tenders, which is now 35 days from the date of dispatch of the Contract Notice to the office of the OJEU. The minimum time limit may be reduced to 30 days where the tenders can be submitted electronically. Under the 2004 Public Sector Directive the minimum time limit was 52 days.

Where contracting authorities publish a Prior Information Notice (PIN), the minimum time limit can be shortened to 15 days, but only 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 prior to the dispatch of the Contract Notice. The minimum time limit under the 2004 Public Sector Directive in such cases was 22 days.

Flow chart 1. Open procedure with publication of a Prior Information Notice (PIN) which contains all of the required information.



Urgency: in the event of urgency, the 35-day period for submission of tenders may be reduced to not less than 15 days from the date of dispatch of the Contract Notice.

Utilities:

Article 45 of the 2014 Utilities Directive includes similar provisions, with the reduction of the minimum time limit for the receipt of tenders to 35 days. The minimum time limit can be further reduced to 15 days if a periodic indicative notice is used. See the comment below on the periodic indicative notice.

The time limit can only be shortened to 15 days if all of the required information has been set out in the periodic indicative notice and if this indicative notice was sent for publication between 35 days and 12 months before dispatch of the Contract Notice.

The same provisions related to urgency as under the 2014 Public Sector Directive apply.

Comment: The periodic indicative notice was included in the 2004 Utilities Directive as an alternative and more flexible form of advertisement than the Contract Notice. Under the 2004 Utilities Directive, contracting entities were permitted to publish a periodic indicative notice in the OJEU at the start of the budget year. The periodic indicative notice could cover all of the procurement planned by the contracting entity in the forthcoming budget year. The periodic indicative notice was the only advertisement required in the OJEU. No further advertisement or Contract Notice (call for competition) was required for procurement covered by the periodic indicative notice. The use of the periodic indicative notice remains under the 2014 Utilities Directive.

The 2014 Public Sector Directive has been amended to include a similar, optional provision permitting the use of a PIN as a call for competition concerning procurement over a period of up to 12 months. This optional provision is only available to specific types of contracting authority. See the comment below on the “PIN as a call for competition” under Article 48.

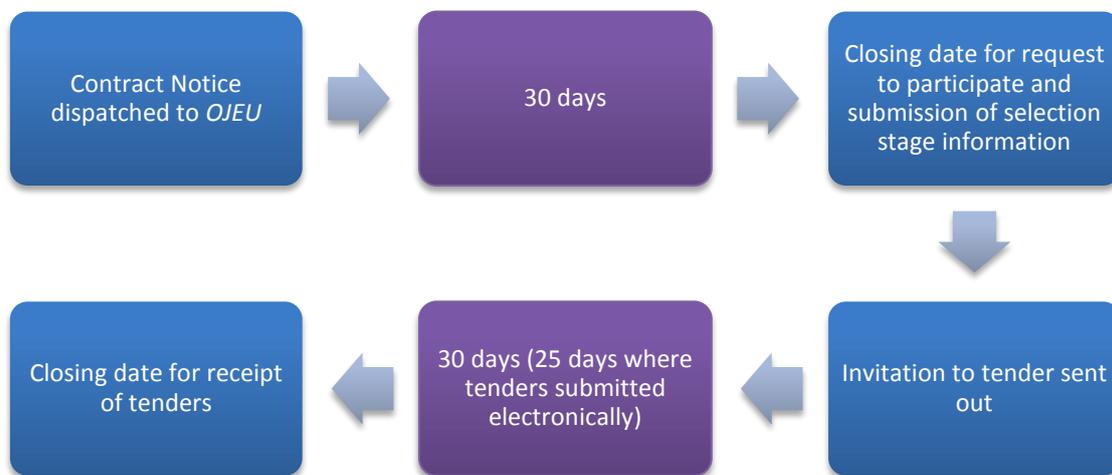
Article 28. Restricted procedure

The main change in the conduct of the restricted procedure is the introduction of shorter minimum statutory time limits.

Restricted procedure without a PIN: The minimum time limit for the receipt of requests to participate, and the provision by tenderers of selection stage information, is now 30 days from the date of dispatch of the Contract Notice to the office of the *OJEU*.

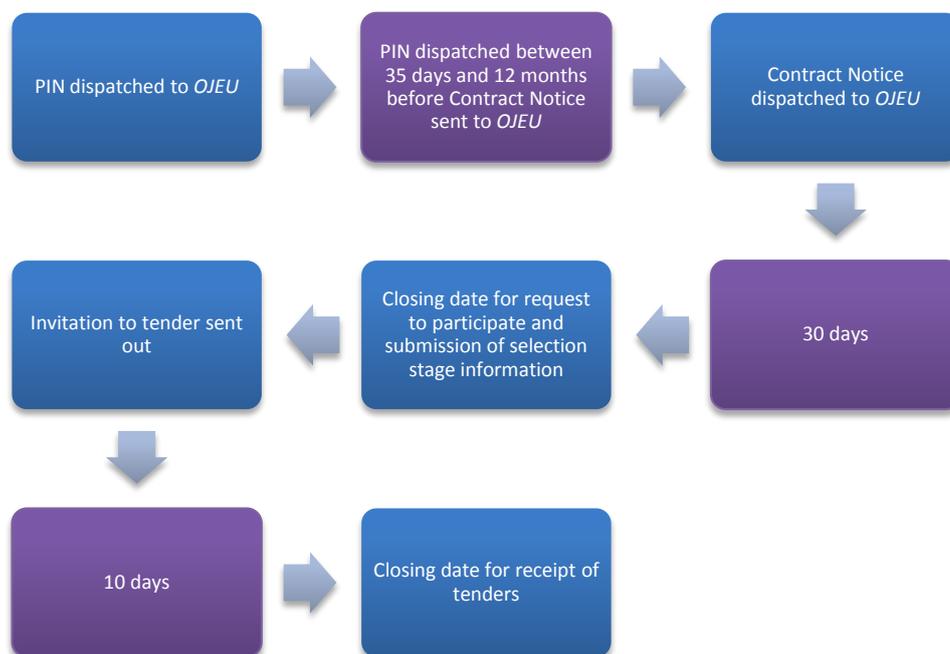
The minimum time limit for the receipt of tenders is now 30 days from the date of dispatch of the invitation to tender. The minimum time limit may be reduced to 25 days where the tenders can be submitted electronically. Under the 2004 Public Sector Directive, the minimum time limit for the receipt of tenders was 40 days.

Flowchart 2. Restricted procedure without a PIN



Restricted procedure with publication of a PIN: Where contracting authorities publish a standard PIN, the minimum time limit for the receipt of tenders can be shortened to 10 days 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.

Flowchart 3. Restricted procedure with publication of a PIN with all of the required information



Optional provisions related to advertising and minimum time limits

Member States may adopt two optional provisions related to calls for competition and minimum time limits.

- **PIN as a call for competition:** For information on this provision, see the comment on Article 48 below.
- **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)]:** Sub-central contracting authorities may set the time limit for the receipt of tenders by mutual agreement with all of the selected candidates. In the absence of an agreement, the minimum time limit for the receipt of tenders is 10 days. Sub-central authorities are contracting authorities that are not central government authorities, as listed in Annex 1. See the comment below on central government authorities.

Comment: **Central government authorities** listed in Annex 1 are contracting authorities covered by the World Trade Organization Agreement on Government Procurement (GPA). Some of the optional provisions in the 2014 Public Sector Directive are not applicable to central government authorities, as those provisions are not aligned with the requirements of the GPA. The distinction between contracting authorities that are subject to the GPA and those that are not is also reflected in the financial thresholds for service and supply contracts. A lower financial threshold applies to service and supply contracts awarded by central government authorities than to contracts awarded by other contracting authorities that are not subject to the GPA.

Utilities:

Time limits under the restricted procedure: Under the 2004 Utilities Directive, contracting entities were able to agree with economic operators on the time limit for requests to participate, subject to a general rule and minimum time limits. They were also able to agree on shorter time limits for the receipt of tenders. Article 46 of the 2014 Utilities Directive retains that approach, with shorter minimum time limits as follows:

- requests to participate: generally 30 days but not less than 15 days;
- receipt of tenders: by mutual agreement or, in the absence of an agreement, 10 days.

The optional provision applying to sub-central authorities in the 2014 Public Sector Directive is not included in the 2014 Utilities Directive.

Article 29. Competitive procedure with negotiation

The “negotiated procedure with prior publication of a Contract Notice” in Article 30 of the 2004 Public Sector Directive has been replaced in the 2014 Public Sector Directive with the “competitive procedure with negotiation”. Like the procedure it replaces, the competitive procedure with negotiation is a two-stage procedure that starts with a call for competition. The competitive procedure with negotiation is more strictly regulated, however. For example, specific provisions concern the following:

- minimum time limit for the receipt of requests to participate: 30 days;
- minimum time limit for the receipt of initial tenders: 30 days or 25 days where tenders may be submitted electronically;
- urgent procedures;
- **optional provisions** on the use of a PIN as a call for competition and on the agreement of time limits for the return of tenders;
- content of procurement documents, including an obligation to define the minimum requirements that must be met by all tenders and the manner of presentation of that information;
- negotiations permitted to improve initial and subsequent tenders, subject to a proviso that minimum requirements cannot be negotiated and an obligation to ensure equal treatment of all tenderers;
- transparency provisions on informing tenderers of any changes in technical specifications or other procurement documents;
- conduct of the process in successive stages and the possibility of reducing the number of tenders during the process by applying published award criteria;
- no negotiation permitted after the receipt of final tenders;
- possibility of an award without negotiation where such an award has been indicated in the call for competition.

Utilities:

Article 47 of the 2014 Utilities Directive sets out the rules applying to "the negotiated procedure with prior call for competition". The rules are more flexible than those in the 2014 Public Sector Directive, which was also the case under the 2004 Directives.

The minimum time limits under the 2014 Utilities Directive are shorter than those under the 2004 Utilities Directive. The time limit for the receipt of requests to participate is generally 30 days, but in any event not less than 15 days. The time limit for the receipt of tenders may be set by mutual agreement; in the absence of an agreement, the time limit is 10 days. Negotiation after the receipt of final tenders is not prohibited.

Article 30. Competitive dialogue

The provisions related to the conduct of competitive dialogue have been amended, in particular concerning: (i) the extent to which it is permitted to clarify final tenders; and (ii) the nature of negotiations that are permitted with the tenderer identified as having submitted the best tender.

Final tenders submitted after the close of dialogue may be "clarified, specified or optimised at the request of the contracting authority". This wording appears to allow for greater changes than under the 2004 Public Sector Directive, which permitted tenders to be "clarified, specified or fine-tuned".

"Post-tender" negotiations are specifically permitted with the tenderer identified as having submitted the best tender. These negotiations "may be carried out to confirm financial commitment or other terms contained in the tender by finalising the terms of the contract". The post-tender negotiations must not materially modify the essential aspects of the tender and must not risk distorting competition or causing discrimination.

Utilities:

Very similar provisions are included in Article 48 of the 2014 Utilities Directive, but with shorter minimum time limits.

Article 31. Innovation partnership

Innovation partnership is a new concept and a new procedure. Innovation partnerships are intended to be long-term partnerships that allow for both the development and subsequent purchase of new and innovative products, services or works. An innovation partnership combines in one process (i) the appointment of one or more innovation partners; (ii) parallel innovative development work where there is more than one innovation partner; (iii) the reduction of the number of partners during the process where there is more than one partner at the outset; and (iv) the option for a contracting authority to purchase the innovative supplies, services or works developed as a result of the innovation partnership. "Innovation" is non-exhaustively defined in the 2014 Public Sector Directive.

An innovation partnership must be advertised in the *OJEU* by means of a Contract Notice. A minimum statutory time limit of 30 days is set for the receipt of requests to participate. A contracting authority procuring an innovation partnership then has a number of different options for running the procurement process and setting up the ongoing innovation partnership arrangements. These options are set out in Article 31.

Utilities:

Very similar provisions are included in Article 49 of the 2014 Utilities Directive, but with a shorter minimum time limit of 15 days.

Article 32. Use of the negotiated procedure without prior publication

The grounds justifying the use of the negotiated procedure without prior publication of a Contract Notice have been amended. The table below compares the grounds in the 2004 Public Sector Directive with those in the 2014 Public Sector Directive.

Utilities: The table also includes references to the relevant provisions of the 2004 and 2014 Utilities Directives.

Grounds for use of the negotiated procedure without prior publication		
2004 Public Sector Directive Article 31 <i>2004 Utilities Directive Article 40</i>		2014 Public Sector Directive Article 32 <i>with key differences noted</i> <i>2014 Utilities Directive Article 50</i>
<p>A.31(1)(a) no tender or no suitable tender or no suitable application</p> <ul style="list-style-type: none"> contracts for works, supplies and services open and restricted procedures <p><i>Utilities A.40(3)(a)</i></p>	➔	<p>A.32(2)(a)</p> <ul style="list-style-type: none"> <i>explanation now provided of concept of when a tender or request to participate is not suitable</i> <p><i>Utilities A.50(a)</i></p>
<p>A.31(1)(b) technical or artistic reasons or reasons connected with the protection of exclusive rights</p> <ul style="list-style-type: none"> contracts for works, supplies and services <p><i>Utilities A.40(3)(c)</i></p>	➔	<p>A.32(2)(b) - restructured</p> <ul style="list-style-type: none"> <i>“artistic” reason expanded</i> <i>new grounds where “competition is absent for technical reasons”</i> <i>new conditions: where competition is absent or there is a need to grounds only apply if there is no reasonable alternative or substitute and no artificial narrowing of the procurement</i> <p><i>Utilities A.50(c)</i></p>
<p>A.31(1)(c) extreme urgency due to unforeseeable events</p> <ul style="list-style-type: none"> contracts for works, supplies and services <p><i>Utilities A.40(3)(d)</i></p>	➔	<p>A.32(2)(c)</p> <p><i>Utilities A.50(d)</i></p>
<p>A.31(2)(a) research, experiment, study or development</p> <ul style="list-style-type: none"> contracts for supplies <p><i>Utilities A.40(3)(b)</i></p>	➔	<p>A.32(3)(a)</p> <p><i>Utilities A.50(b)</i></p>
<p>A.31(2)(b) additional deliveries as partial replacement or extension</p> <ul style="list-style-type: none"> contracts for supplies <p><i>Utilities A.40(3)(e)</i></p>	➔	<p>A.32(3)(b)</p> <p><i>Utilities A.50(e)</i></p>

A.31(2)(c) commodity market <ul style="list-style-type: none"> contracts for supplies <i>Utilities A.40(3)(h)</i>	➔	A.32(3)(c) <i>Utilities A.50(g)</i>
A.31(2)(d) advantageous terms <ul style="list-style-type: none"> contracts for supplies <i>Utilities A.40(3)(k)</i>	➔	A.32(3)(d) <i>Utilities A.50(i)</i>
A.31(3) design contest <ul style="list-style-type: none"> contracts for services <i>Utilities A.40(3)(l)</i>	➔	A.32(4) <i>Utilities A.50(j)</i>
A.31(4)(a) additional, unforeseen requirements where there is technical inconvenience <ul style="list-style-type: none"> contracts for works and services <i>Utilities A.40(3)(f)</i>	➔	<ul style="list-style-type: none"> <i>amended and moved to A.72(1)(b) modification of contracts during their term</i> <i>see comment below on Article 72.</i> <i>moved to A.89(1)(b)</i>
A.31(4)(b) repetition of similar requirements <ul style="list-style-type: none"> contracts for works and services <i>Utilities A.40(3)(g)</i>	➔	A.32(5) <i>amended to clarify requirement for basic project to include indication of possible additional requirements</i> <i>Utilities A.50(f)</i>
<i>Utilities A.40(3)(j) bargain purchases</i> Note: <i>These grounds were not available under the 2004 Public Sector Directive.</i>	➔	<i>Utilities A.50(h)</i> Note: <i>These grounds are not available under the 2014 Public Sector Directive.</i>

Article 33. Framework agreements

The provisions on framework agreements have been strengthened to require increased transparency, particularly in relation to (i) the identification of the contracting authorities party to the framework agreement; and (ii) the basis on which decisions are made concerning the way in which contracts are awarded under framework agreements.

Utilities:

Article 51 also includes transparency requirements and provides that framework agreements are generally not to exceed eight years. Under the 2004 Utilities Directive, no maximum time period was specified.

Article 37. Centralised purchasing activities and central purchasing bodies

More extensive provisions on central purchasing are included in the 2014 Public Sector Directive than in the 2004 Public Sector Directive. The 2014 Public Sector Directive defines two new terms: “central purchasing activities” and “ancillary purchasing activities”. The definition of central purchasing activities in the 2014 Public Sector Directive is based on the definition of a central purchasing body provided in the 2004 Public Sector Directive. The definition of ancillary purchasing activities is entirely new.

Optional provisions: Member States have the option of allowing contracting authorities to acquire the following:

- supplies and/or services from a central purchasing body thus enabling central purchasing bodies to conduct a warehousing type of activity, selling directly to contracting authorities;
- works, supplies and services by using contracts, dynamic purchasing systems or frameworks awarded or established by a central purchasing body.

Member States also have the option of requiring certain kinds of procurement to be carried out by using a central purchasing body or bodies.

Article 37(2) of the 2014 Public Sector Directive confirms that a contracting authority fulfils its obligations when it:

- purchases supplies or services from a central purchasing body;
- uses dynamic purchasing systems and framework agreements established by a central purchasing body.

Under the 2014 Public Sector Directive, a contracting authority is responsible, however, for fulfilling its own obligations with regard to the parts of those procedures that it conducts itself. The contracting authority is responsible when it:

- awards a contract under a dynamic purchasing system;
- re-opens a competition under a framework agreement;
- determines which economic operator is to be awarded a contract under a framework agreement when competition is not re-opened.

Emphasis is placed on the importance of e-procurement. A new requirement establishes that all procurement conducted by central purchasing bodies is to be performed using electronic means [Article 37(3)].

New provisions relate to “ancillary purchasing activities”. Ancillary purchasing activities are activities that support purchasing activities, such as the provision of technical infrastructure, advice on the conduct or design of public procurement activities, and preparation and management of procurement processes. Contracting authorities may award contracts for carrying out these activities to a central purchasing body without having to apply the procedures provided in the 2014 Public Sector Directive.

Utilities:

Similar provisions are included in [Article 55 of the 2014 Utilities Directive](#).

Article 38. Occasional joint procurement

Article 38 permits two or more contracting authorities to agree to perform certain specific kinds of procurement jointly. They may do so by allocating either joint responsibility between the participating contracting authorities or individual responsibility to different contracting authorities.

Utilities:

Similar provisions are included in [Article 56 of the 2014 Utilities Directive](#).

Article 40. Preliminary market consultations

Article 40 of the 2014 Public Sector Directive introduces new provisions that specifically permit the use of preliminary market consultations. Contracting authorities may conduct preliminary market consultations “with a view to preparing the procurement and informing economic

operators of their procurement plans”. This new provision expands considerably on the technical dialogue referred to in Recital 8 of the 2004 Public Sector Directive. Article 40 includes an example of the search for, or acceptance of, advice from independent experts, authorities or market participants. This process must not distort competition or violate principles of non-discrimination and transparency.

Utilities:

Very similar provisions are included in Article 58 of the 2014 Utilities Directive.

Article 41. Prior involvement of candidates or tenderers

Article 41 introduces new provisions that reflect the case law of the CJEU¹⁰. Contracting authorities must take appropriate measures to ensure that competition is not distorted by the participation of a candidate or tenderer having had prior involvement in advising the contracting authority or preparing the procedure. Article 41 includes examples of the sorts of measures that a contracting authority may take in this regard.

Contracting authorities may only exclude candidates or tenderers on the grounds of prior involvement where there are no other means of ensuring equal treatment. If a contracting authority does decide to exclude on this basis, it must give the candidate or tenderer concerned the opportunity to prove that this prior involvement would not distort competition.

Utilities:

Very similar provisions are included in Article 59 of the 2014 Utilities Directive.

Article 42. Technical specifications

The key changes in the provisions related to technical specifications reflect the increasing emphasis on social and environmental considerations and on the development of CJEU case law on this issue¹¹.

Article 42 starts by confirming that the technical specifications lay down the characteristics required of works, services or supplies. It further provides that those characteristics may also refer to:

- the specific process or method of production or provision of the work, supply or service;
- a specific process for another stage in the lifecycle of the work, supply or service.

This provision applies even where such factors do not form a part of the material substance of the works, supplies or services, provided that the factors are proportionate and are linked to the subject matter of the contract.

This provision may permit, for example, the specification of environmentally friendly means of production or disposal of a product or the requirement for the production process to be in accordance with fair trade principles. As the principle of equivalence applies, contracting authorities must accept products that satisfy the requirement by any appropriate means.

Where the subject of the procurement is intended for use by persons, the technical specifications must take into account accessibility criteria. This principle applies to usage by both the general public and the staff of the contracting authority. Only in duly justified circumstances does this principle not apply.

Technical specifications may also refer to specific labels. See the comment on Article 43 below.

¹⁰ In particular, the CJEU judgement in the joint cases C-21/03 and C-34/03 *Fabricom*.

¹¹ In particular, the CJEU judgement in C-368/10 *Commission v Netherlands* concerning the use of fair trade and environmental requirements and labels.

Utilities:

Very similar provisions are included in Article 60 of the 2014 Utilities Directive.

Article 43. Labels

The new provisions on the use of labels are incorporated into the changes concerning technical specifications discussed above in Article 42. A contracting authority may require a specific label, or part of a label, as proof that the works, supplies or services correspond to specific environmental, social or other characteristics. The requirement for a specific label may be included in the technical specifications, award criteria or contract performance conditions.

Where a contracting authority does specify a particular label, it may only do so when a number of conditions are met. These conditions are set out in Article 43(1)(a) to (e).

The principle of equivalence applies, and contracting authorities must therefore accept equivalent labels and other appropriate means of proof.

Utilities:

Very similar provisions are included in Article 61 of the 2014 Utilities Directive.

Article 46. Lots

The provisions on lots have been expanded, with the aim of encouraging contracting authorities to divide contracts into lots and thus increase the participation of small and medium-sized enterprises. It is presumed that contracts will be divided into lots, and an **optional provision** allows Member States to make the use of lots obligatory. Contracting authorities must set out in the procurement documents or in a contract report the main reasons for any decision to not divide a contract into lots. Other provisions permit contracting authorities to limit the number of lots for which a tenderer may bid and to combine the award of more than one lot. Another **optional provision** allows a contracting authority to limit the number of lots that a tenderer can win.

Utilities:

Very similar provisions are included in Article 65 of the 2014 Utilities Directive. The key difference is that there is no requirement to set out, in either the procurement documents or the contract report, the main reasons for a decision to not divide a contract into lots.

Article 48. Prior Information Notices

Optional provisions– PIN as a call for competition: Article 48 of the 2014 Public Sector Directive contains an optional provision that introduces a new form of PIN: a “PIN as a call for competition”.

A PIN as a call for competition can be used by:

- "sub-central" contracting authorities for fully regulated contracts, i.e. contracts that are subject to the 2014 Public Sector Directive and are not “light regime” contracts;
- all contracting authorities for “light regime” contracts. See the comment below on Articles 74 to 76 for an explanation of the “light regime”.

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

A contracting authority may use a PIN as a call for competition to advertise a number of contracts that it will procure over a period of up to 12 months (and longer in the case of light regime contracts). Economic operators interested in tendering for the contracts described in the PIN as a call for competition must express an interest by responding to that PIN. There is no requirement to publish another Contract Notice prior to commencing the tendering

process. The contracting authority invites those economic operators that have expressed an interest in response to the PIN as a call for competition to confirm whether they are interested in participating in the procurement process.

The new provisions on the PIN as a call for competition are similar to the provisions included in the 2004 Utilities Directive that permitted contracting entities to advertise, at least once a year, the use of **periodic indicative notices** as a means of calling for competition.

Utilities:

Article 67 of the 2014 Utilities Directive permits the use of periodic indicative notices, according to provisions that are similar to those in Article 48 of the 2014 Public Sector Directive. See the comment above on periodic indicative notices (Article 27).

Article 50. Contract Award Notices

In keeping with the aim of speeding up the procurement process, the time limit for filing Contract Award Notices has been reduced to 30 days after the conclusion of a contract or a framework agreement. Under the 2004 Public Sector Directive the time limit was 48 days.

There is no obligation to publish Contract Award Notices for contracts awarded under framework agreements. **Optional provision:** Member States may require contracting authorities to publish, on a quarterly basis, Contract Award Notices relating to the award of contracts under framework agreements.

Utilities:

Very similar general provisions and time limits are included in Article 70 of the 2014 Utilities Directive. The same **optional provision** is available.

Article 53. Electronic availability of procurement documents

Under the 2014 Public Sector Directive, a new requirement 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 as a call for competition is used, as from the date when the invitation to confirm interest was sent).

Procurement documents are defined in Article 2(13) as “any document produced or referred to by the contracting authority to describe or determine elements of the procurement or the procedure, including the Contract Notice, the prior information notice where it is used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents”.

Comment: This requirement appears to cover the documents that are usually included in the invitation to tender. This means that in two-stage procedures, such as the restricted procedure, the contracting authority must make the content of the invitation to tender available as from the date of the publication of a Contract Notice or call for competition rather than at the later date, i.e. after conclusion of the selection stage, as provided in the 2004 Public Sector Directive.

It does not make sense to make all of the tender documents available at this early date for procedures involving a number of stages, namely competitive dialogue, competitive procedure with negotiation, and innovation partnerships. For those procedures, the obligation perhaps applies to the selection stage and the initial invitation to tender or participate in the procedure and not to subsequent stages in the negotiation process.

Utilities:

Very similar provisions are included in Article 73(1) of the 2014 Utilities Directive.

Article 57. Exclusion grounds

Significant changes have been made to both the grounds for exclusion and the approach that contracting authorities must adopt when excluding candidates or tenderers.

It is important to note that mitigation or “self-cleaning” provisions now oblige contracting authorities to consider, on a case-by-case basis, evidence from tenderers that may justify a decision to not exclude them, despite the existence of grounds for exclusion. Such provisions are in line with the case law of the CJEU, which requires certain grounds for exclusion to be considered on a case-by-case basis and casts doubt on the legality of using automatic exclusion lists. See SIGMA Public Procurement Brief 24, *Use of automatic exclusion lists in public procurement*, for further information and comment on this subject.

As was the case under the 2004 Public Sector Directive, the grounds for exclusion are divided into mandatory grounds and optional grounds. **Optional provision:** Member States may decide to make one or more of the optional grounds mandatory.

Mandatory grounds for exclusion: The mandatory grounds for exclusion listed in Article 57(1) of the 2014 Public Sector Directive are serious offences for which economic operators have been convicted by final judgment. The offences listed in the 2004 Public Sector Directive relating to participation in criminal organisations, corruption, fraud and money-laundering are included in the 2014 Public Sector Directive. Additional offences have been included, linked to terrorism, terrorist financing, child labour and other forms of human trafficking. The offences listed as mandatory grounds for exclusion in Article 57(1) are defined by updated references to specific EU legislation.

Article 57(1) clarifies that the obligation to exclude an economic operator also applies when the person convicted by a final judgment (i) is a member of the administrative, management or supervisory body of the economic operator or (ii) has powers of representation, decision making or control.

Optional provision: Member States may provide for a derogation from the mandatory grounds for exclusion on an exceptional basis "for overriding reasons relating to the public interest such as public health or the protection of the environment".

Optional grounds for exclusion: Some of the optional grounds for exclusion under the 2004 Public Sector Directive have been amended and expanded in the 2014 Public Sector Directive, which also includes additional grounds for exclusion that were not included in the 2004 Public Sector Directive. These additional grounds are, in summary:

- non-compliance with environmental, social and labour law, in accordance with Article 18(2);
- plausible indications of an agreement between economic operators aimed at distorting competition;
- conflict of interest arising in the conduct of the procurement process, which cannot be remedied by measures that are less intrusive than exclusion;
- distortion of competition due to prior involvement of economic operators in the preparation of the procurement procedure, which cannot be remedied by measures that are less intrusive than exclusion;
- significant or persistent deficiencies in the performance by the economic operator of a substantive requirement under a prior public contract or concession contract, which led to early termination of the prior contract, damages or other comparable sanctions;

- where the economic operator has sought to unduly influence the decision-making process, to obtain confidential information, or to negligently provide misleading information.

Mitigation or "self-cleaning": The 2014 Public Sector Directive incorporates a new principle of mitigation or "self-cleaning", which should benefit economic operators facing the prospect of exclusion from the tender process.

Article 57(6) provides that an economic operator has the right to provide evidence demonstrating its reliability despite the existence of mandatory or optional grounds for exclusion. If such evidence is considered by the contracting authority to be sufficient, then the economic operator shall not be excluded. Article 57(6) lists the types of evidence that may be sufficient to demonstrate the reliability required. Contracting authorities are obliged to take into account the gravity and particular circumstances of a criminal offence or misconduct. If the contracting authority decides that the evidence is insufficient, it must then provide the economic operator with a statement indicating the reasons for its decision.

Comment: It is not entirely clear from the wording of Article 57(6) whether the list of evidence that the economic operator must provide is an exhaustive list or an illustrative list of the types of evidence that may be appropriate. In practice, it makes more sense for this list to be an illustrative list, as the evidence listed in Article 57(6) is not relevant to all of the grounds for exclusion.

Breach of obligations related to the payment of taxes or social security obligations

Optional ground: Under the 2004 Public Sector Directive, the exclusion of an economic operator on the grounds of a breach of its obligations related to the payment of taxes or social security obligations was an optional ground. Under the 2014 Public Sector Directive, this exclusion continues to constitute an optional ground where a contracting authority can demonstrate a breach of those obligations "by any appropriate means".

The 2014 Public Sector Directive nevertheless provides that this optional ground for exclusion no longer applies where the economic operator has fulfilled its obligations by either paying or entering into a binding arrangement to pay the taxes or social security contributions due.

Mandatory ground: Under the 2014 Public Sector Directive, a breach of obligations related to the payment of taxes or social security contributions now constitutes a mandatory ground for exclusion where "the breach has been established by a judicial or administrative decision having final and binding effect in accordance with the country in which it is established or with those of the Member State of the contracting authority". **Optional provision:** Member States may opt to use two derogations from the mandatory ground for exclusion:

- on an exceptional basis, "for overriding reasons relating to the public interest such as public health or the protection of the environment";
- where an exclusion would be clearly disproportionate; the 2014 Public Sector Directive provides examples of such circumstances.

Maximum periods for exclusion: Member States are required to determine the maximum periods of exclusion to be incorporated into their national measures implementing the 2014 Public Sector Directive, subject to specified maximum periods.

Utilities:

Article 80 of the 2014 Utilities Directive permits, but does not oblige, Member States to apply to contracting entities in general the mandatory and optional grounds for exclusion set out in Article 57 of the 2014 Public Sector Directive. However, Member States are obliged to apply Articles 57(1) and 57(2) of the 2014 Public Sector Directive to contracting entities that are contracting authorities. In either case, the grounds must be applied in accordance with the relevant terms and conditions set out in Article 57 of the 2014 Public Sector Directive.

Article 67. Contract award criteria

The 2004 Public Sector Directive provided that contracts were to be awarded by using one of two criteria, either (i) the most economically advantageous tender or (ii) the lowest priced tender.

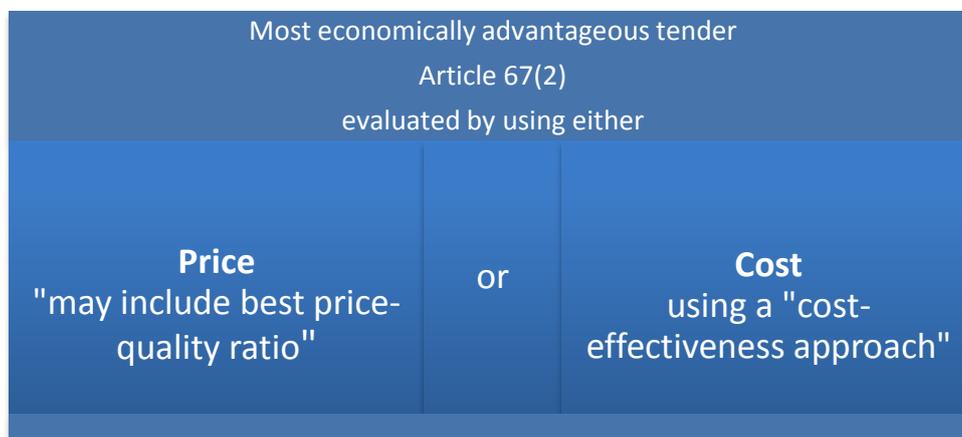
The 2014 Public Sector Directive changes the approach and places much greater emphasis on the evaluation of criteria other than the price alone.

Article 67(2) states that "contracting authorities shall base the award of public contracts on the most economically advantageous tender". The concept of the most economically advantageous tender is explained further as follows:

"The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of price or cost, using a cost-effectiveness approach, such as life-cycle costing...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...." The article then goes on to provide examples of criteria that may be used to assess the "best price-quality ratio".

Comment: The wording of Article 67(2) is not clear and is open to different interpretations. This lack of clarity is the result of an imperfect compromise reached between the European Parliament, which wanted to eliminate the use of the lowest price criterion, and the European Commission, which wished to retain the lowest price criterion or introduce the lowest cost as a criterion. Recital 89 of the 2014 Public Sector Directive does provide some assistance by explaining that the term "most economically advantageous tender" used in the 2004 Public Sector Directive is now referred to as the "best price-quality ratio" under the 2014 Public Sector Directive.

One interpretation of the provisions is illustrated below.



It is possible to use only the price or the cost as the sole award criterion unless a Member State chooses to adopt the final paragraph of Article 67(2). Under that **optional provision**, Member States have the option of stipulating that contracting authorities may *not* use only the price or the cost as the sole award criterion.

Comment: It is open to debate whether much change has occurred in practice. Contracting authorities may still award contracts on the basis of price alone or cost alone. They may also use a "price-quality ratio" approach that is the equivalent of the "most economically advantageous tender" under the 2004 Public Sector Directive. Perhaps the major changes are the requirement to use a "cost-effectiveness approach" in the evaluation of cost and the new requirements in Article 68 concerning life-cycle costing.

Further provisions in the Public Sector Directive tie in with changes reflecting both CJEU case law and the Europe 2020 focus on environmental issues in procurement. Article 67(3) confirms that award criteria are to be considered as linked to the subject matter of the contract where they relate to any stage in the life cycle of the works, supplies or services to be procured. That life cycle may include specific processes of production, provision or trading.

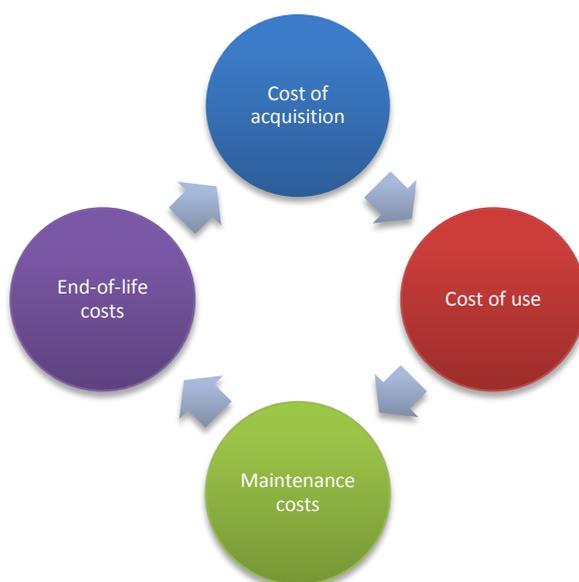
A new provision also permits the use of award criteria related to the organisation, qualification and experience of the staff assigned to performing the contract. These criteria may be used "where the quality of staff assigned to the contract can have a significant impact on the level of performance of the contract". This provision clarifies uncertainties arising from a CJEU judgement that some commentators interpreted as meaning that this type of criterion could only be used as a selection-stage criterion and could never be used as an award criterion¹².

Utilities:

Very similar provisions are included in Article 82 of the 2014 Utilities Directive.

Article 68. Life-cycle costing

As has been mentioned above, Article 67(2) appears to mean that when a contracting authority decides to award a contract on the basis of cost, it must use a cost-effectiveness approach. Life-cycle costing is an example of the cost-effectiveness approach. Article 68 sets out the concept of life-cycle costing from an EU perspective, as costs borne by the contracting authority or other users, as illustrated below:



¹² C-532/06 Lianakis.

Where contracting authorities use a life-cycle costing approach, they must include in the procurement documents information on the data to be provided by economic operators and on the method that the contracting authority will use to assess that data. The method used must fulfil a number of conditions listed in Article 68(2)(a) to (c) relating to transparency and accessibility.

Where there is EU legislation mandating a method for the calculation of life-cycle costing, then that method must be used. Only one mandated method is listed in Annex XIII of the 2014 Public Sector Directive, related to the specification of clean and energy efficient road transport vehicles¹³ under Directive 2009/33/EC. The introduction at EU level of additional mandatory life-cycle costing methods is a possibility.

Utilities:

Very similar provisions are included in Article 83 of the 2014 Utilities Directive.

Article 69. Abnormally low tenders

The main change in the provisions with regard to abnormally low tenders concerns the issue of whether a contracting authority is obliged to investigate an abnormally low tender. Under the 2004 Public Sector Directive, a contracting authority was under the obligation to investigate a tender that seemed to be abnormally low only if it had the intention of rejecting that tender. The 2014 Public Sector Directive requires a contracting authority to investigate all abnormally low tenders, irrespective of its intention to accept or reject such a tender.

Utilities:

Very similar provisions are included in Article 84 of the 2014 Utilities Directive.

Article 71. Subcontracting

The provisions on subcontracting under the 2014 Public Sector Directive are much more extensive. Article 25 of the 2004 Public Sector Directive allowed or required contracting authorities to request that a tenderer indicate any share of the contract that it intended to subcontract and any proposed subcontractors. This principle has been incorporated into Article 71(2) of the 2014 Public Sector Directive. Article 71 goes on to include other provisions related to subcontracting.

Information about subcontractors: The main contractor is required to provide details of subcontractors, and changes in subcontractors, working at a facility under the direct oversight of the contracting authority. This requirement applies after the award of the contract and at the latest by the time the performance of the contract commences. Contracting authorities have discretion to extend these requirements, for example to subcontractors further down the subcontracting chain.

Compliance with obligations under environmental, social and labour law, in accordance with Article 18(2) and **other grounds for exclusion:** This compliance includes, where applicable, mechanisms of joint liability and verification that the relevant grounds for exclusion do not apply to subcontractors. It also concerns obligations for the main contractor to replace a subcontractor that is subject to other grounds for exclusion.

Optional provisions: Direct payment to subcontractors: Member States may put into place measures permitting direct payment by the contracting authority to a subcontractor, with or without a request from the subcontractor.

¹³ Road transport vehicles in this context are cars, buses, light commercial vehicles and heavy goods vehicles.

Comment: It is still unclear whether it is permissible under the 2014 Public Sector Directive for contracting authorities to require the subcontracting of a specific minimum or maximum share of a contract.

Utilities:

Very similar provisions are included in Article 88 of the 2014 Utilities Directive.

Article 72. Modification of contracts or framework agreements during their term

The 2004 Public Sector Directive had very limited provisions concerning the modification of contracts or framework agreements during their term. Those provisions related to circumstances where the use of the negotiated procedure without prior publication of a Contract Notice was permitted. Far more extensive provisions are included in Article 72 of the 2014 Public Sector Directive. Some of these provisions are linked to and expand upon CJEU case law¹⁴.

Under the 2014 Public Sector Directive, there are six circumstances in which contracts or framework agreements may be modified during their term without triggering the requirement for a new competitive award procedure. These circumstances, in summary, are as follows:

1) Modifications that are clearly provided for in the initial procurement documents

[Article 72(1)(a)]: Where the initial procurement documents provide for modifications to be made in "clear, precise and unequivocal review clauses", then these modifications are permitted. The scope and nature of the possible modifications must be clear, as must be the conditions under which the review clauses can be used.

2) Necessary modifications when a change of contractor cannot be made [Article 72(1)(b)]:

Additional requirements can be delivered by the original contractor as a "necessary modification" when a change of contractor (i) cannot be made for economic or technical reasons, and (ii) would cause significant inconvenience or a substantial increase in cost for the contracting authority.

This modification is only permitted if the cost increase does not exceed 50% of the value of the original contract. It is possible to make several modifications, and the 50% increase in cost applies to each separate modification. Where a contracting authority relies on this provision, it must publish a notice in the *OJEU*, using a special standard format notice.

3) Modifications to deal with unforeseen circumstances [Article 72(1)(c)]:

Where circumstances occur that a contracting authority could not have foreseen, it is possible to modify the contract without a further procurement procedure. This modification is permitted where (i) it does not alter the overall nature of the contract, and (ii) the increase in cost does not exceed 50% of the value of the original contract. It is possible to make several modifications, and the 50% cost increase limit applies to each separate modification. Where a contracting authority relies on this provision, it must publish a notice in the *OJEU*, using a special standard format notice.

4) Modifications to deal with a new contractor replacing the original contractor [Article 72(1)(d)]:

A new contractor may replace the original contractor in three cases. These cases are where:

- an unequivocal review clause or option is in conformity with Article 72(1)(a);
- a "universal or partial succession into the position of the initial contractor following corporate restructuring, including takeover, merger, acquisition or insolvency..." has occurred; the replacement may be made provided that (i) the new contractor meets

¹⁴ See footnote 3.

the pre-qualification criteria initially established; and (ii) the change in contractor does not result in other substantial modifications to the contract;

- the contracting authority takes over the role of the main contractor in order to assume the obligations towards its subcontractors.

5) Modifications that are "not substantial" [Article 72(1)(e) and 72(4)]

Substantial modifications are changes that make the contract "materially different in character" from the original contract. Modifications that are "not substantial" can be made to a contract without a requirement to undertake a new procurement procedure. Article 72(4) includes a non-exhaustive list of modifications that will always be considered as substantial and will therefore require a new procurement procedure.

6) Low-value modifications [Article 72(2)]

If the value attributable to the modification is low, the modification is permitted. A modification is considered to be of low value when it does not alter the overall nature of the contract and when the value of the modification falls below the relevant procurement threshold *and* is less than 10% of the initial contract value for supplies and services contracts or 15% of the initial contract value for a works contract. The values of the modifications are calculated cumulatively. The total value of all low-value modifications must not exceed the relevant procurement threshold.

Comment: Any breach of these provisions can be subject to legal proceedings. Each Member State determines the appropriate forum for legal action.

Utilities:

Very similar provisions are included in Article 89 of the 2014 Utilities Directive.

Article 73. Termination of contracts

The 2014 Public Sector Directive includes new provisions, which were not in the 2004 Public Sector Directive, covering circumstances where contracting authorities are to have the possibility of terminating a contract. These circumstances are as follows:

- **Substantial modification of the contract:** where the contract has been subject to a substantial modification that would have required a new procurement procedure, pursuant to Article 72;
- **Mandatory grounds for exclusion:** where one of the mandatory grounds for exclusion listed in Article 57(1) applied to the contractor at the time of the contract award;
- **Infringement declared by the CJEU:** where the contract "should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and [the 2014 Public Sector Directive] that has been declared by the Court of Justice of the European Union in a procedure pursuant to Article 258 TFEU¹⁵."

Comment: Member States are free to decide how best to implement these provisions so as to reflect their national legal systems. It is possible, for example, that a Member State may include in its implementing legislation a requirement on the part of contracting authorities to include a specified contract clause in all contracts. Other Member States may set down a general obligation on contracting authorities to comply with Article 73, while leaving the details to the discretion of the contracting authorities.

¹⁵ A procedure brought under Article 258 TFEU is a case brought by the European Commission against a Member State.

Utilities:

Very similar provisions are included in Article 90 of the 2014 Utilities Directive.

Particular Procurement Regimes

Articles 74-76. "Light regime"

Under the 2004 Public Sector Directive, two types of rules were applied for the award of service contracts. The services listed in Annex II A of the 2004 Public Sector Directive were subject to the full application of that Directive. All other services, listed in Annex II B, were subject to only limited regulation.

The distinction between Annex II A and Annex II B services has now been abolished. Instead, the 2014 Public Sector Directive introduces a particular regime for the award of contracts for social and other specific services listed in Annex XIV of the Directive.

Services not listed in Annex XIV are subject to the full application of the 2014 Public Sector Directive. Services listed in Annex XIV are subject to a "light regime", where the value of the contract exceeds a threshold of EUR 750 000. The list of services in Annex XIV is quite similar but not identical to the list of Annex II B services under the 2004 Public Sector Directive. The Annex XIV services include mainly health, social and cultural services.

Member States are required to put into place national rules for the award of contracts for "light regime" services, subject to compliance with a limited number of provisions set out in Articles 75-76 of the 2014 Public Sector Directive. The provisions in the 2014 Public Sector Directive relate to the following:

- **Advertising:** "Light regime" services must be advertised in the *OJEU*, using either a standard form contract notice or a Prior Information Notice (PIN) as a call for competition. Contracting authorities must also publish a Contract Award Notice in the *OJEU*.
- **Principles for awarding contracts:** The national rules 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.

Optional provisions: Member States may also specify that the choice of service provider is to be made on the basis of the "best price-quality ratio".

Utilities:

Very similar provisions are included in Articles 91-93 and Annex XVII of the 2014 Utilities Directive. The financial threshold is higher, set at EUR 1 000 000 (EUR 1 million).

Article 77. Reserved contracts for certain "light regime" services

Optional provisions: An optional provision is linked to the "light regime". This provision permits Member States to limit participation in tender processes for certain "light regime" services to a particular type of organisation. The list of services to which this optional provision applies is much narrower than the Annex XIV list and focuses on health and social services. Participation in the tender process can be limited to organisations that satisfy conditions relating to their objectives, ownership, management structure and contracts that they have previously been awarded. The intention of this optional provision is to limit participation in the competitive process to employee-owned organisations and similar bodies.

Utilities:

Very similar provisions are included in Article 94 of the 2014 Utilities Directive.

Further Information

Other sources

The European Commission's website on public procurement :

https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en