



## Brief 4

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### Public Procurement

# Contracts Covered by the Public Procurement Directives

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## General context: Types of contract, common characteristics

**Types of contract:** The Public Sector Directive<sup>1</sup> defines procurement as “the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not works, supplies or services are intended for public purpose”. The definition in the Utilities Directive<sup>2</sup> is essentially the same.

The Directives<sup>3</sup> cover three main types of contract: works, supplies and services, including design contests.

Contracts will often contain elements of one or more of the above types of contract. Thus a contract to construct a building might include design services and certain necessary supplies. Similarly, a supply contract may include siting and installation services. The Directives contain specific rules that are used to classify these “mixed contracts.”

A number of contracts are entirely excluded from the scope of the Directives (but not necessarily of the Treaty<sup>4</sup>), either because of their nature, which means it would be inappropriate to apply the provisions of the Directives, or because they are the subject of different systems of regulation or administration. Some contracts, the new “reserved contracts”, receive special treatment as a result of the identity of those supplying the goods, works or services.

Even if contracts are not excluded, they will only be subject to the provisions of the Directives if their value exceeds the relevant monetary value set out in the Directives – the EU financial threshold. These thresholds reflect the level at which the EU Legislator assumed that cross-border trade was likely (although it is possible that, depending on the circumstances, tenderers may be interested in below-threshold contracts in other EU Member States – it is to be recalled that the general principles apply to the award of these contracts in any event). In order to prevent creative methods of calculating the value of the contracts to be awarded, the Directives also apply rules and methods of calculation and prohibit methods designed to circumvent the Directives by splitting, aggregating or packaging contracts in such a way that the contracts do not properly fall under the appropriate provisions. For more discussion on this issue, see SIGMA Public Procurement Brief 5, *Understanding the EU Financial Thresholds*.

One important distinction made by the Directives is between “contracts” and “concessions”, the latter being treated differently from contracts. A separate directive, the Concessions Directive, covers works and services concessions of a certain value<sup>5</sup>. For more discussion on the issue of concessions, see SIGMA Public Procurement Brief 18, *Concessions and PPPs*, and SIGMA Public Procurement Brief 31, *2014 EU Directives: Concessions*.

**Common characteristics:** There are some general characteristics that are common to all types of contract covered by the Directives.

The Directives apply to contracts for pecuniary interest concluded in writing between an economic operator and a contracting entity, as follows:

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

<sup>2</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 (the Utilities Directive)

<sup>3</sup> In this SIGMA Public Procurement Brief, the term “Directives” is used to refer to the Public Sector Directive and the Utilities Directive.

<sup>4</sup> Treaty on the Functioning of the European Union – consolidated version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union* C 326, 26 October 2012. Referred to in the Public Procurement Brief as “TFEU” or “Treaty”.

<sup>5</sup> Directive 2014/23/EU on the award of concession contracts, 26 February 2014.

- The contract must be established for pecuniary interest, i.e. for money or money's worth. There must be a financial consideration, no matter how it is paid.
- The contract must be set down in writing. In the very unlikely event that a contract falling under the Directives is not in writing, it will be subject to the general application of the rules contained in the Treaty.
- The contract must be established between two parties: the economic operator and the contracting authority.

### When does a contract arise?

When a new contract is awarded, there is normally little difficulty in identifying it. Sometimes, however, its identification is not obvious. For example, an existing contract may be amended or renewed. A contract may also be amended during its execution. All of these situations give rise to new obligations between the parties and may change the terms of the original contract.

If the result of the changes is so extensive that the renewed or amended contract is fundamentally different from the original contract, then it may be the case that a new contract will be established. If there is a new contract and all of the elements of a contract are present, then the contract should be subject to the procurement rules, i.e. it must be awarded according to the provisions of the Directives. This requirement means that a simple extension, renewal or even amendment might not be permitted if it is made without competition. For more discussion on the issue of contract modifications, see SIGMA Public Procurement Brief 38, *Contract modifications*.

### Works vs. supplies vs. services contract

**What is a works contract?** Works contracts are defined as those contracts that have as their object:

- either the execution only or both the design and execution of works related to one of the activities referred to in Annex II of the Directive (Annex I of the Utilities Directive);
- the execution, or both the design and execution, of a work;
- the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting entity exercising a decisive influence on the type or design of the work.

The possibility of including design works in a works contract means that “design and build” contracts may fall under the definition of a works contract. This definition could include, for example, contracts covering the planning and financing of a project as well as its execution. Where design and construction are awarded separately, the design service would be a service covered by public procurement rules related to services or, alternatively, could be awarded by means of a design contest.

For the second part of the definition, a “work” is the outcome of building or civil engineering works taken as a whole that is sufficient in itself to fulfil an economic and technical function. This definition is relevant for a number of reasons, notably in the context of the realisation of works by any means and for the purposes of assessing the threshold values and, consequently, when deciding whether a single requirement for works has been split up with a view to bringing contracts below the relevant threshold value.

**What is a supplies contract?** The definition of supplies is more straightforward than that of works or services. “Public supply contracts” are defined as contracts having as their object the

purchase, lease, rental or hire-purchase, with or without option to buy, of products. In addition, the delivery of such products may include siting and installation operations.

The range of products covered by the Directives can be seen in the various nomenclatures used to describe products for the purposes of advertising. See, for example, the Common Procurement Vocabulary (CPV).

**What is a services contract?** The term “service contract” essentially refers to a contract for the provision of services other than works. A number of services are specifically excluded, mainly because they are not amenable to purchase according to the rules provided by the Directives. The award of other services is regulated by the Directives, but to a lesser degree (“light regime”).

**Services contracts – light regime:** The Directives abolished a distinction between priority and non-priority services, as provided in the 2004 procurement directives<sup>6</sup>. As a result, the full application of the Directives has been extended to a number of services. However, certain categories of services, namely services referred to as “services to the person”, such as specific social, health and educational services, are provided within a particular context, which varies among Member States due to their different cultural traditions, and by their very nature have a limited cross-border dimension. Therefore, a specific light regime was established in the Directives for awarding contracts for such services, with the threshold of EUR 750 000 (EUR 1 000 000 in the case of utilities), which is much higher than the threshold that applies to fully covered services.

The services regulated in this way are listed in Annex XIV of the Directive and in Annex XVII of the Utilities Directives.

The list of those services includes, for example:

- health, social and related services;
- administrative, social, educational, health care, and cultural services;
- compulsory social security services;
- hotel and restaurant services;
- legal services, to the extent that they are not excluded altogether from the Directives;
- investigation and security services;
- international services;
- postal services.

These services are listed in annexes with their respective CPV (Common Procurement Vocabulary) codes.

The way in which the light regime services should be procured is not regulated in the Directives. Member States are given wide discretion in the organisation of procurement procedures, provided that the general rules established in Articles 74 to 76 of the Directive (Articles 92 and 93 of the Utilities Directive) are respected. These general rules are as follows:

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<sup>6</sup> Directive 2004/18/EC on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts, 31 March 2004, and Directive 2004/17/EC on co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal service sectors, 31 March 2004.

- Contracts of value equal to or above the above-mentioned thresholds must be advertised in the *Official Journal of the European Union (OJEU)*, either in the form of a contract notice or an enhanced Prior Information Notice.
- The rules must allow contracting authorities to take into account the specificity of the service in question.
- The contract award notice should be published in the *OJEU*; however, contracting authorities may group the notices related to those services together and publish them quarterly.
- The rules should ensure that contracting authorities take into account the need to ensure the quality, continuity, accessibility, affordability, availability and comprehensiveness of the service as well as the specific needs of various categories of service users.

## Contract classification

**How is a contract classified when it includes a mix of different elements?** Contracts do need to be classified as works, services or supplies contracts because different provisions of the Directives apply to different types of contract. Problems may arise in deciding how a contract is to be correctly classified where the contract is a combination of works and/or supplies and/or services. The Directives contain provisions on how this problem is dealt with, for example:

**Fully-regulated services and services covered by light regime services contracts – value test:** The Directives apply an explicit value test to services contracts that contain both types of services. Contracts are to be for fully-regulated services if the value of those services is greater than the value of the services covered by the light regime. Contracts are to be covered by the light regime if the value of the partly-regulated services is greater than the value of the fully-covered services.

**Supplies/services – value test:** Essentially, contracts containing elements of both supplies and services are to be treated as one or the other type of contract depending on the value represented by each element.

The contract is to be considered to be a services contract where the value of the services performed is greater than the value of the products supplied. Where the value is equal, the contract is to be awarded in accordance with the provisions applicable to the type of procurement characterising the main subject of the contract in question. The definition makes no distinction between fully-regulated services and light regime services, with the effect that, where the value of non-priority services in a mixed contract is greater than the value of supplies, the whole contract is to be treated as a contract for light regime services.

**Works/services – principal object test:** In the case of works and services, the Directives do not provide for a value test but include a test based on the principal object of the contract.

**Works/supplies:** Under the Directives, supplies contracts that also cover, as an incidental matter, siting and installation operations are defined as supplies contracts. For example, in the case of the purchase of a crane to be installed on a dockside, the object of the contract is the supply of the crane and not the works required to site it, even if those works are considerable.

This “principal object” test, which mirrors the way in which works and services contracts are to be distinguished, would appear to apply even if the value of the siting or installation services is greater than the value of the supplies themselves, since it is a test based on the object of the contract and not on the value-based test that is applied to distinguish between supplies and services.

The Directives also have provisions dealing with mixed contracts, including where the contracts potentially fall under more than one regime (public sector and concessions or public sector and utilities). In the case of a mixed contract containing elements of supplies, works and services contracts, and concessions, the mixed contract is to be awarded in accordance with the provisions of the Directive if the part of the mixed contract that constitutes a contract covered by the Directive is equal to or greater than the relevant threshold of application of the Directive.

With regard to contracts that have as their main subject procurement covered by the Directive as well as procurement concerning an activity that is subject to the Utilities Directive, the following rules apply, and if different parts of a given contract are *objectively separable*, contracting entities may choose one of two options:

- to award separate contracts for the separate parts, or
- to award a single contract.

For the first option, the decision as to which legal regime applies to either one of the separate contracts should be taken on the basis of the characteristics of the separate part concerned. For the other option, if the contracting entity chooses to award a single contract, it is the Utilities Directive that applies to the ensuing mixed contract, irrespective of the value of the parts that would otherwise fall under a different legal regime and irrespective of which legal regime those parts would otherwise have been subject to.

In the case where the different parts of a given contract are *objectively not separable*, the applicable legal regime is determined on the basis of the main subject matter of that contract.

### Are there other types of contracts subject to the Directives?

**Subsidised contracts:** The Directive also applies to subsidised works and subsidised services contracts. The Directive covers these contracts only if they are subsidised directly by the contracting authority and if their value exceeds the thresholds of the Directive that are applicable to works and services respectively. Additionally, subsidised works are covered only if they concern civil engineering activities as listed in Annex II to the Directive: building work for hospitals; facilities intended for sports, recreation and leisure; school and university buildings; and buildings used for administrative purposes. In the event that the contracting authorities providing the subsidies do not themselves award subsidised contracts or where they award that contract for and on behalf of other entities, they should ensure compliance with the Directive in the award process.

**Design contests:** The Directive also contains separate, general rules applicable to design contests. Design contests refer to procedures that enable the contracting authority to acquire a plan or design, which should be selected by an independent jury after having been put out to competition, with or without the award of prizes. Design contests are mostly, but not only, organised in the fields of town and country planning, architecture, engineering or data processing.

### Frequently Asked Question 1:

**What is a PPP contract?** The acronym PPP refers to “public-private partnership”. There is no single or simple definition of a PPP contract, as the term covers a range of different types of contracts and other delivery models. A PPP generally involves an arrangement according to which the contracting authority (the public sector) enters into an agreement with a private sector organisation to deliver infrastructure or public services. The structure may be contractual or institutional, the latter involving the setting up of a joint venture company or other joint venture organisation in which both the contracting authority and the private

sector party participate to deliver the infrastructure or services.

A key feature of PPPs tends to be the sharing or transfer of risk to the private sector party, and PPPs are often, but not always, of long duration. Payment and funding methods vary under PPPs. Payments may be made by the contracting authority or derived from third parties, such as users of the facilities, or they may come from a combination of sources. Funding may come from the contracting authority, the private sector party, or external funders, such as banks or a combination of sources.

Many PPP contracts will be subject to the full application of the Directive, but some may be subject to the Concessions Directive. See FAQ 2 for comments on concession contracts.

### Frequently Asked Question 2:

**What is a concession? Is it covered by the Directives?** A concession is a contract of the same type as the contracts defined in the Directives, except that consideration for the works or services to be carried out, for example, consists either solely of the right to exploit the work or service or of this right together with payment.

For an arrangement to be classified as a concession, a concessionaire must accept an operating risk in exploiting those works or services, in return for the opportunity to make a profit through the exploitation of the “services”. Concessions may sometimes be classified as a form of PPP.

Concessions are used, for example, to carry out and finance major infrastructure projects, notably in respect of the construction of a road network, bridges or tunnels, where the concessionaire is remunerated by way of tolls charged to users. They are also used, however, simply to provide for the operation and maintenance (rather than the construction) of facilities by concessionaires, such as where an operator is given the concession to operate an existing railway or underground railway infrastructure. The former types of concession are examples of works concessions; the latter is an example of a services concession.

Public works concessions and service concessions are comprehensively dealt with in the Concessions Directive.

For further information, see:

SIGMA Public Procurement Brief 18, *Concessions and PPPs*

SIGMA Public Procurement Brief 31, *2014 EU Directives: Concessions*

## Exemptions

Even where contracts fall under the general definition of a public contract, some of these contracts will be excluded from the scope of the Directives for a number of reasons. Some contracts are excluded because they are not, by their nature, amenable to competition. Some of the exclusions apply only to contracts of a specific type. Some contracts are excluded because governments wish to exclude them from competition for specific reasons. There is also a category of “reserved” contracts that, although not excluded, do benefit from preferential treatment.

### Exemptions due to the nature of the contract

**Contracts for the acquisition of land:** The Directives exclude contracts for the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property, or for the acquisition of rights thereon. These contracts are excluded because they relate to immovable property, which is naturally dependent on geographical location. Such contracts

take place essentially in local markets, and their objects generally rule out any real prospect for cross-border competition.

It is important to note that development agreements and other types of property deals may not necessarily fall under this exemption, most commonly because a works contract is awarded a part of the overall arrangement.

**Exclusions relating specifically to services:** These exclusions apply to specific circumstances, based either on the award of exclusive rights to certain authorities to carry out certain services or on the nature of a number of specified services, as follows:

- services contracts provided on the basis of exclusive rights;
- broadcasting material and time;
- arbitration and conciliation services;
- certain legal services;
- certain financial services;
- loans;
- research and development services other than those wholly remunerated by the contracting authority, where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs;
- employment contracts;
- civil defence, civil protection and danger prevention services;
- some research and development contracts;
- political campaign services awarded by political parties in the context of election campaigns;
- electronic communication services;
- public passenger transport services by rail or metro.

#### **Exemptions by reason of choice**

These exemptions relate to procurement of a military nature, procurement requiring secrecy, and procurement that, by agreement, is subject to different procurement rules. All three types of exemption concern the Directive.

**Defence procurement:** Certain contracts awarded in the field of defence and security are either covered by the Defence Directive<sup>7</sup> or exempted from the Defence Directive on the basis of a specific provision in the Defence Directive.

**Contracts requiring secrecy measures:** The Directives do not apply to public contracts 1) that are declared secret; or 2) the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned; or 3) when the protection of the essential interests of the state's security cannot be guaranteed by less intrusive measures, for instance by imposing requirements aimed at protecting the confidential nature of information that is made available by the contracting authority.

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Directive 2009/81/EC on the co-ordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security and amending Directives 2004/17/EC and 2004/18/EC, 13 July 2009.

**Contracts governed by other rules:** The Directives do not apply to contracts that are governed by different procedural rules and are awarded:

- pursuant to a legal instrument creating international obligations, such as an international agreement, concluded in conformity with the Treaty, between a Member State and one or more third countries or their subdivisions and covering works, supplies or services intended for the joint implementation or exploitation of a project by their signatories;
- pursuant to the particular procedure of an international organisation, such as the United Nations, the European Bank for Reconstruction and Development, or the World Bank.

Equally, the Directive does not apply to public contracts and design contests that the contracting authority awards or organises according to procurement rules provided by an international organisation or an international financial institution if those contracts and design contests are fully financed by that organisation or institution. In the case of co-financing, where funds are derived mostly from an international organisation or instrument, the parties to the agreement should agree on the applicable procurement procedures.

### **In-house procurement**

The Court of Justice of the European Union (CJEU) has developed over the years case law related to conditions under which contracting authorities may award contracts to other legal persons directly without following public procurement processes. Conditions under which it would be possible to do so were explained in the extensive case law of the CJEU and consolidated in the form of provisions in the 2004 Directives, entitled “public contracts between entities within the public sector”.

For more discussion on this exemption, see SIGMA Public Procurement Brief 39, *In-house procurement*.

### **Reserved contracts**

The Directives provide for a category of “reserved” contracts, which are not excluded from the scope of the Directive but are subject to the imposition of specific conditions of eligibility on the participants. EU Member States may reserve the right to participate in public contract award procedures concerning sheltered workshops to economic operators whose main aim is the social and professional integration of disabled and disadvantaged persons or they may provide for such contracts to be performed in the context of sheltered employment programmes, where at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

The Directives introduce a new category of reserved contracts for certain services.

Member States may provide that contracting authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for the health, social and cultural services that are listed by reference to CPV codes in Article 77 of the Directive.

The duration of the reserved contracts cannot be longer than three years.

Organisations eligible to participate in the reserved contract procedure must fulfil all of the following conditions:

- Their objective must be the pursuit of a public service mission linked to the delivery of the services mentioned above.

- The profits are to be re-invested with a view to achieving the organisation’s objective; any distribution or re-distribution of the profits should be based on participatory considerations.
- The structures of management or ownership of the organisations performing the contract are to be based on employee ownership or participatory principles, or must require the active participation of employees, users or stakeholders.
- The organisation must not have been awarded a contract for the relevant services by the contracting authority concerned pursuant to this procedure within the past three years.

For more discussions on reserved contracts, see SIGMA Procurement Brief 14, *Incorporating Social Considerations into Public Procurement*.

## Utilities

### Exemptions specific to the utilities sector

The Utilities Directive provides for sector-specific exemptions in a number of utility sectors, based essentially on the degree of competition in these markets. Examples of these exemptions include contracts for the purchase of fuel for the production of energy and contracts for the purchase of water.

The Utilities Directive also contains a general exemption mechanism for activities exposed to competition in markets to which access is not restricted.

The Utilities Directive also contains a series of other exemptions specific to the utilities sector, including:

- **Activities outside the European Union:** The Utilities Directive does not apply to contracts awarded by contracting entities for purposes other than the pursuit of their relevant activities, or the pursuit of such activities in a third country, under conditions that do not involve the physical use of a network or geographical area within the European Union.
- **Affiliated undertakings exemption:** Where “undertakings” consist of a number of mutually owned or mutually dependent companies, the Utilities Directive provides for a specific exemption for purchases made between such companies, subject to certain conditions. These purchases are treated as “in-house” contracts, known as intra-group transactions. The excluded contracts, subject to meeting certain conditions, are those that have been awarded to affiliates whose essential purpose is to act as central service providers to the group to which they belong rather than to sell their services commercially on the open market.

**Purchases for re-sale or hire:** The Utilities Directive excludes from its scope of application any contracts that have been awarded for purposes of re-sale or hire to third parties. This exclusion is intended to include contracts for goods where the contracting entity intends to sell or hire the equipment purchased in a competitive market. These contracts will only be excluded if the contracting entity enjoys no special or exclusive right to sell or hire the subject of such contracts and if other entities are free to sell or hire the same goods under the same conditions as the contracting entity.

## Further information

### Publications

SIGMA (2015), *Public Procurement Training Manual* – Modules D3 and D4, OECD Publishing, Paris, <http://www.sigmaweb.org/publications/public-procurement-training-manual.htm>

SIGMA (2014), *Selected Judgements of the Court of Justice of the European Union on Public Procurement (2006-2014)*, OECD Publishing, Paris, <http://www.sigmaweb.org/publications/Judgements-CourtJustice-31July2014-Eng.pdf>

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### Other sources

European Union's selected case law of the CJEU: C-107/98 *Teckal*, C-399/98 *Ordine degli Architetti and Others*, C-26/03 *Stadt Halle and RPL Lochau*, C-220/05 *Auroux and Others*, C-451/08 *Helmut Müller*, C-337/05 *Commission v Italy*, C-157/06 *Commission v Italy*, C-382/05 *Commission v Italy*, C-226/09 *Commission v Ireland*, C-197/11 *Libert and Others*, [http://curia.europa.eu/jcms/jcms/j\\_6/](http://curia.europa.eu/jcms/jcms/j_6/)