Improvement and Strengthening of Institutional Set-up and Legal Framework in the Area of Public Procurement and State Aid, Montenegro, Contract No. CFCU/MNE/056

TRAINING ON PUBLIC PROCUREMENT MATERIALS

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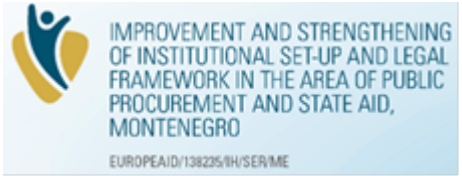

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Module I

Legal framework in the field of public procurement in Montenegro

Public Procurement in Montenegro is regulated by the Public Procurement Law ('PPL')[1] which was awarded on December 17, 2019 was adopted and entered into force on January 7, 2020 and became applicable since 7 July, 2020. The PPL replaced provisions of the previous public procurement law from 2011[2] (old PPL).

The PPL covers procurement above specific financial the thresholds (see → material on financial thresholds). Contracts below those thresholds are referred to as simple procurement and are awarded by contracting authorities in accordance with implementing rules adopted by the Ministry of Finance[3] - see the Rulebook on the way of conducting simple procurement[4].

The PPL provides for:

- new lists of exemptions from its applications,
- new public procurement procedures,
- new solutions and tools for awarding public contracts,
- more flexible rules concerning social and other special services,
- generalized used of electronic tools, establishment of Electronic Public Procurement System (EPPS)
- specific solutions for green and socially responsible procurement.

Brief comparison between the PPL and old PPL is presented in the table below.
The purpose of this material is to provide basic information about major characteristics of the new PPL. More detailed information about specific provisions, procedures and instruments is provided in relevant training materials. Wherever reference is made to specific number of Articles it is understood as reference to the provisions of the new PPL unless it is stated directly otherwise.

Concessions as regulated by the EU Concessions Directive are covered by the Law on Public Private Partnerships (the PPP law)[5] adopted on December 17, 2019. The PPP law will become applicable after six months of entry into force i.e. July 4, 2020. The PPP law defines the concept of PPP as well as regulates the procedures related to approval of PPP projects and selection of private partners. In award of works or service concessions provisions of the PPL are applied along the additional, specific rules of the PPP law.

1 Official Gazette No 074/19 of December 30, 2019.

2 Official Gazette Nos. 042/11, 057/14, 028/15 and 042/17.

3 Article 27 (1) of the PPL.

4 Official Gazette Nos. 061/20 and 065/20.

5 Official Gazette No 073/19 of 27.12.2019.

Procurement in the **field of defence and security** is exempted from the PPL but should be conducted in accordance with separate provisions adopted by the Government.

BRIEF COMPARISON OF 'OLD' AND 'NEW' PPL

OLD PPL	PPL
Scope	
Supplies Services Works	Supplies Services Works Social and other special services
Principles	
• Cost effectiveness and efficient use of public funds • Ensuring competition • Transparency • Equal treatment	• Cost effectiveness and efficient use of public funds • Ensuring competition • Transparency • Equality, freedom and prohibition of discrimination • Environmental protection, social and labour law and ensuring energy efficiency • Proportionality
Exemptions	
- procurement in accordance with special procedures of international organizations, and in accordance with international agreements - confidential procurement in line with law; - acquisition, development, production or co-production of program materials intended for radio/tv emission; - arbitration or conciliation services - notary services; - services in connection with the issue, sale, purchase, or transfer of securities or other financial instruments - services of the central bank of Montenegro; - services related to employment - services related to publication of public procurement announcements in media - procurement of election material; - procurement of goods and services related to the use of Government aircraft - special procurement regulated by the PPL	- Exclusions under concluded international agreements - the acquisition or rental of land, existing buildings or other immovable property or concerning rights thereon; - acquisition, development, production or co-production of program materials intended for audio-visual media services or radio media services concluded by audio-visual and radio media service providers; - services related to broadcasting time for providing radio, television or program services that are concluded with audio-visual or radio media service providers; - services related to arbitration or conciliation; - specific legal services, - procurement of services of the Central Bank of Montenegro; - services in connection with the issue, sale, purchase, or transfer of securities or other financial instruments, financial and legal assistance and all other services related to securities, or other financial instruments, in accordance with a separate law regulating the capital market; - loans, credits and other financial derivatives whether or not in connection with the issue, sale, purchase or transfer of securities or other

	financial instruments; - financial and legal assistance and other activities related to loans, credits and other financial derivatives; - financial, legal or other services in the proceedings related to the privatization of the economy; - services related to employment; - civil security and rescue services provided by non-profit organisations or associations, which are covered - research and development services - public passenger transport services by rail, underground railway or trolley; - political campaign services - procurement of election material; - tasks related to the development and adoption of planning documents as stipulated by the law governing spatial planning - exclusions for procurement of postal services - procurement of services based on an exclusive right - procurement between contracting authorities (in house)
Thresholds (bottom threshold of application of the PPL)	
EUR 15,000 – supplies and services EUR 30,000 – works	EUR 20,000 – supplies and services EUR 40,000 – works
Communication between contracting authority and economic operators	
Written form, electronic, fax etc.	In principle, in electronic form
Procedures of awarding contracts	
1. Open procedure 2. Restricted procedure 3. Negotiated procedure with prior publication of a contract notice 4. Negotiated procedure with prior publication of a contract notice 5. Design contest	1. Open procedure 2. Restricted procedure 3. Competitive procedure with negotiations 4. Competitive dialogue 5. Innovation partnership 6. Negotiated procedure with prior publication of a contract notice 7. Negotiated procedure with prior publication of a contract notice 8. Design contest
Instruments and tools	
Framework agreements Qualification systems	Framework agreements Electronic auctions Dynamic purchasing systems Electronic catalogues Qualification systems
Time periods	
Open procedure: 37 days	**Open procedure**: 30 days

22 days (urgent procurement) **Restricted procedure**: 37 + 22 **Negotiated procedure with and without publication**: 22	25 days: e – bids 15 days – urgent procurement **Restricted procedure:** 30 + 30 15 + 10 (urgent procurement) **Competitive procedure with negotiations**: 30 + 30 15 + 10 urgent procurement **Competitive dialogue**: 30 **Innovation partnership**: 30 days **Negotiated procedure without previous publication of a contract notice**: 8 days
Conditions for participation of economic operators	
Mandatory conditions for participation Optional conditions: Economic and financial standing Technical and professional ability	Mandatory conditions for participation
Contract award criteria	
Price only The most economically advantageous tender	
Subcontracting	
30 % limitation	----------
Modification of contracts	
-	✓

The legal framework is complemented by a set of implementing regulations adopted by the Government or the Minister of Finance. New implementing regulations should be adopted within 6 months since entry into force of the new PPL.

The following implementing regulations should be adopted:

Regulations adopted by the Government

1. The method of conducting procurement of goods and services for diplomatic and consular missions and military – diplomatic representatives, below thresholds (Article 24)
2. The list of military equipment and products (procurement in the field of defence and security) (Article 175 (2)),
3. Procedure concerning implementation, reporting and keeping of records concerning procurement in the field of defence and security (Article 177)

Regulations adopted by the Ministry:

1. Methods of conducting simple procurement below the thresholds from Article 26 (1) points 1 – 3 (Article 27 (1)) – see *the Rulebook on the way of conducting simple procurement*[6].
2. The manner of keeping, the content of records on the conflict of interest or violation on

[6] Official Gazette Nos. 061/20 and 065/20.

anticorruption rule and the methodology for risk analysis in performing control over public procurement procedures (Article 38 (4)), see *the Rulebook record and methodology of analysis of risk in control of public procurement*[7].

3. Operating conditions and instructions for use of EPPS (Article 45 (4),
4. The programme and manner of taking the professional exam, the composition ad method of establishment the commission for taking professional exam etc. (Article 49 (6)) – see *the Rulebook on the programme and the way of passing the professional exam for work in public procurement affairs*[8].
5. The programme and method of professional education in public procurement field (Article 50 (6),
6. Content and form of the tender documentation (Article 53 (3)), see *Rulebook on standard forms for conduct of public procurement procedures*[9].
7. Content and form of invitation to the second stage of the competitive procedure with negotiations (Article 58 (12)) - *Rulebook on standard forms for conduct of public procurement procedures*[10] .
8. The form and content of invitation to the second stage of the competitive dialogue (Article 62 (13) - see *the Rulebook on standard forms for conduct of public procurement procedures*[11].
9. The manner of conducting and concluding an electronic auction (Article 71 (6)),
10. The list of works and tasks which are subject of public procurement of works (Article 77 (2)), see *the Rulebook on the list of works and activities which may be subject of public procurement*[12].
11. A methodology of estimating value of public procurement (Article 82 (4)), see *the Rulebook regulation on methodology of estimating value of public procurement*[13].
12. Form a public procurement plan (Article 84 (8)), see *the Rulebook on the form of a public procurement plan*[14].
13. Form of records on economic operators registered in EPPS (Article 113 (3)), *see the Rulebook on forms of records of economic operators registered in EPPS*[15].
14. The methodology for evaluation and ranking of bids ((Article 117 (9)),
15. The content and instructions for preparation and submission of a bid (Article 120 (16)),
16. The minutes of the opening of bids *(Article 131 (6)) see Rulebook on standard forms for conduct of public procurement procedures*[16].
17. The method of correction of an erroneous calculation in bids (Article 134 (9)) – *see the Rulebook on the method of correction of arithmetical errors in bids in public procurement procedures*[17].
18. The form of the minutes of review, assessment and evaluation of bids (Article 136 (4)) - see *the Rulebook on standard forms for conduct of public procurement procedures*[18].
19. The content and the form of qualification application, the form of the minutes from opening of applications, the form of the minutes of review, assessment and evaluation of bids, the form of notification sent to candidates whose applications have been rejected and of the invitation for the qualified candidates to submit their bids (Article 137 (2)), see *the Rulebook*

7 Official Gazette No 055/20.

8 Official Gazette No. 055/20

9 Official Gazette No. 066/20.

10 Official Gazette No. 066/20.

11 Official Gazette No. 066/20.

12 Official Gazette No. 057/20.

13 Official Gazette No. 057/20.

14 Official Gazette No. 055/20.

15 Official Gazette No. 055/20.

16 Official Gazette No. 066/20.

17 Official Gazette No. 055/20.

18 Official Gazette No. 066/20.

on standard forms for conduct of public procurement procedures[19].

20. The form of notification of exclusion from the restricted procedure, the competitive procedure with negotiations, competitive dialogue and innovation partnership (Article 138 (3)) – see *the Rulebook on standard forms for conduct of public procurement procedures*[20].
21. The form of decision on exclusion from a public procurement procedure (Article 142 (3)), see *Rulebook on standard forms for conduct of public procurement procedures*[21].
22. The form of decision on selection of the most advantageous bid (Article 143 (7), see the *Rulebook on standard forms for conduct of public procurement procedures*[22].
23. The form of decision on annulment of the public procurement procedure (Article 144 (2)), see *Rulebook on standard forms for conduct of public procurement procedures*[23].
24. The form of report from execution of public procurement contracts (Article 152 (2) - *see the Rulebook on form of reports in public procurement procedures*[24].
25. The list of services (social and other special services) (Article 153 (5)), see *the Rulebook on the list of social and other special services*[25].
26. Contest notices, the procedure for opening of bids, the content and method of preparation and supplying of the minutes (Article 156 (4)),
27. The content of the forms of the contest notice, the minutes and the notification on the contest results (Article 157 (10)),
28. The notification form concerning qualification system (Article 173 (1)), see *Rulebook on standard forms for conduct of public procurement procedures*[26].
29. Form of records from public procurement procedures (Article 180 (2)), *see the Rulebook on forms of records in public procurement procedures*[27]
30. The form of the statistical report (Article 182 (8)) - *see the Rulebook on form of reports in public procurement procedures*[28].

Concessions/PPP

Concessions and PPPs are covered by the Law on Public Private Partnerships (the PPP law)[29] adopted on December 17, 2019 (see →material on PPPs and concessions). The PPP law will become applicable after six months of entry into force i.e. July 4, 2020. The PPP law defines the concept of PPP as well as regulates the procedures related to approval of PPP projects and selection of private partners. In award of works or service concessions provisions of the PPL are applied along the additional, specific rules of the PPP law.

PPL and Public Private Partnerships

Provisions of the PPL apply to award procedures for contracts on public – private partnerships, unless otherwise provided by separate laws.

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19 Official Gazette No. 066/20.

20 Official Gazette No. 066/20.

21 Official Gazette No. 066/20.

22 Official Gazette No. 066/20.

23 Official Gazette No. 066/20.

24 Official Gazette No. 060/20.

25 Official Gazette No 056/20.

26 Official Gazette No. 066/20.

27 Official Gazette No. 061/20.

28 Official Gazette No. 060/20.

29 Official Gazette No 073/19 of 27.12.2019.

Institutional framework in the field of public procurement in Montenegro

Relevant provisions Article 44 of the PPL

Public Procurement: Competences in the public procurement field belong to the Ministry of Finance (MoF) which is a line ministry for procurement. The MoF discharges relevant functions through the Directorate for Public Procurement Policies (PPD) which is one of organisational units of the MoF. The MoF is in charge of policy development for public procurement and is also the competent body for drafting legislation, co-ordinating implementation of the public procurement system and co-operating with international and other organisations.

PPP [and Concessions]: The MoF is in charge of policy development for PPP and concessions and is also the competent body for drafting relevant legislation, co-ordinating its implementation and co-operating with international and other organisations in the field of PPP and concessions. The new PPP Law established a new authority – the Montenegrin Investment Agency (MIA). MIA has a status of a legal entity. It is managed by the Council and the Director. The Council consists of the President and four members – all are nominated by the Government for the period of five years. The Director is nominated by the Council following a public competition, for a period of five years also. MIA is financed from the State budget, donations and other sources. The role of MIA is to review and accept proposals of PPP, provide opinions and suggestions concerning implementation of PPP projects, promote and monitor implementation of investments as well as keep the Register of PPP projects. The MIA will mostly deal with the implementation of the investment policy in Montenegro, promotion of investment opportunities in wider sense while PPP related activities will represent only a part of its duties and responsibilities.

Review Body: The independent State Commission for the Review of Public Procurement Procedures (SC)[30] is the institution responsible for reviewing public procurement complaints. The SC is composed of a president and six members appointed by the Government following a public selection process; their term of office is five years, with the possibility of reappointment.

Central Purchasing Body: The Property Administration (PA) undertakes centralised purchasing. On 1 January 2018, the role of the PA was expanded to cover mandatory centralised procurement for central government bodies and state funds in ten categories of products and services. Central government contracting authorities and state funds are obliged to procure these goods and services through the PA.[31] The PA conducts procurement procedures for those goods and services, in accordance with procurement plans submitted by contracting authorities and signs relevant contracts. Contracting authorities are then obliged to transfer to the PA funds to cover price of purchased goods and services[32].

Other Central Public Procurement Bodies: Administration of Inspection Affairs (AIA) through its

30 State Commission website: www.kontrola-nabavki.me.

31 The goods and services subject to this centralised procurement are: office supplies, computer materials and equipment, fuel and engine oils, office furniture, means of transport, electronic communications services (mobile and fixed telephony), electronic communications services (internet), sanitary and other services (disinfection, insect and animal pest control), insurance of civil servants and state employees, and insurance of assets held by the state of Montenegro (movable and immovable property).

32 The Decree on Consolidation of Public Procurement of Goods and Services (Official Gazette no 74/17 of November 8, 2011).

public procurement section carries out inspection controls, verifying the legal compliance of public procurement procedures as well as procedures leading to award of PPP projects and concessions.

Central authority responsible for public procurement

The PPPD (Directorate for Public Procurement Policies), one of organisational units (directorates) of the Ministry of Finance, is responsible specifically for public procurement[33]. The legal basis for the functioning of the PPD is Article 19 of the PPL and Article 44 of the new PPL. The PPD does not have the capacity of a legal entity.

The PPPD carries out a number of functions and activities including preparation of legal drafts, advice and support to contracting authorities, dissemination of information relevant to public procurement, organisation of professional development and training of procurement officers, data collection and monitoring. The PPPD also manages the Public Procurement Portal which supports advertising of public procurement procedures.

More information on the functions and responsibilities of the PPD is set out below.

Internet address of the PPPD:

http://www.ujn.gov.me

The website of the PPD provides for detailed and accurate contact information concerning PPD together with names and contact telephones of relevant staff. The website contains very limited information in English. At the moment of writing, some information in the local language is apparently not updated and provides for a mix of old information about PPA and new one about PPD[34].

Budget and finance: Funding of the PPD is provided from the State Budget, as a part of the MoF.

Management, structure, organisation and staff of the PPPD

The PPPD is managed by a general director. The PPD is based in Podgorica with one employee working in Berane, a town in north-eastern Montenegro.

The PPD is composed of three departments[35]:

1) Department for public procurement regulatory-legal affairs and monitoring (nine employees), divided into two units (divisions):

- Division for regulatory - legal affairs in the field of public procurement
- Division for monitoring in public procurement

2) Department for training, professional development and professional examination for public procurement (six employees),

3) Department for improvement of the public procurement system and management of electronic public procurement (four employees).

Currently, the PPD has 19 full-time employees.

Responsibilities (tasks) of the MoF (PPPD)

Responsibilities (tasks) of the MoF (PPPD) concern legislative activities, monitoring and control, providing opinions, training and support to contracting authorities. In particular, the PPD performs the following functions:

Legislation

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33 MoF: *Pravilnik o unutrašnjoj organizaciji i sistematizaciji,* retrieved from the website of the PPD on December 8, 2019.

34 For example, in the section 'Responsibilities' instead of information about PPD one can still find obsolete information about PPA.

35 http://www.ujn.gov.me/sistematizacija/.

- preparation of legal drafts, initiating and participating in adoption of public procurement regulations

Advice and support
- provision of advisory assistance upon contracting authority's request;
- establishment and maintenance of the Public Procurement Portal for the purpose of ensuring transparency of public procurement;
- dissemination of information specific public procurement procedures
- preparation and publication of a list of contracting authorities on the Public Procurement Portal;
- encouraging the conduct of public procurement in electronic form

Training and education
- organisation and conduct of professional development and training of procurement officers,
- organisation of professional exams for officials performing tasks in the area of public procurement

Data collection, publication, monitoring and control
- monitoring functioning of the public procurement system;
- monitoring compliance of the legislation regulating the public procurement system with EU legislation,
- preparation and submission to the Government annual reports on the public procurement, carried out in the previous year;
- performing inspection control

International cooperation
- cooperation with international organisations, institutions and specialists in the field of public procurement.

Module I

Principles of awarding public contracts

Provisions of the PPL:

- Article 7 – Principle of cost effectiveness and efficient use of public funds

- Article 8 – Principle of ensuring competition

- Article 9 – Principle of transparency of public procurement procedures Amendments to tender documentations

- Article 10 – Clarifying tender documentation

- Article 11 – Principle of environmental protection, social and labour law and ensuring energy efficiency

- Article 12 – Principle of proportionality

Principle of cost effectiveness and efficient use of public funds

Contracting authorities should ensure **cost-effective**, **efficient** and **effective** use of public funds and that the supplies, services and works procured have an appropriate quality, taking into consideration the purpose, use and estimated value of the public procurement.

Public procurement is financed, in part or fully, with public funds. The goal of economic operators as providers of goods and services is to maximise their profit by selling their products and services for

the highest price possible. In difference to suppliers, who usually operate on the open market and are subject to economic risks related to functioning of the market, the responsible persons on the side of the public administration do not spend in the public procurement their own, private funds, but the public funds ('taxpayers' money'). Thus, they do not suffer economic consequences of their decisions. They cannot go bankrupt, in particular. Because of that they may be less motivated than economic operators to achieve the goals of public procurement.

However, due to the fact that public administration's activities are financed from taxpayers' money it is crucial that public funds are spent in responsible and purposeful way. The purpose of public administration, which in the case of public procurement is a buyer of goods or services and will be referred from here as 'the procuring entity', should be minimisation of costs of purchase by obtaining what is needed for the lowest possible price while ensuring that predetermined needs are duly taken care of.

Procuring entities need to buy goods and services of the right quality, at the most cost-effective price, in the most economic quantities, and ensure that they are available when needed. It is because a failure to meet any of these requirements can seriously affect procuring entity's ability to meet its objectives and outputs and ultimately to deliver services to citizens.

All public procurement of goods and services, including works, must be based on the principle of obtaining value for money.

'Value for money' means using resources effectively, economically, and without waste, with due regard for the total costs and benefits of an arrangement, and its contribution to the outcomes the entity is trying to achieve. **It should be underlined, though, that the principle of value for money does not necessarily mean selecting the lowest price but rather the best possible outcome for the total cost of ownership (or whole-of-life cost).** In particular, the value for money is not about merely achieving the lowest initial price. On the contrary, it is defined as the optimum combination of whole life costs and quality.

Value for money is achieved by selecting the most appropriate procurement method considering the risk and value of the procurement.

Better value for money from procurement can be achieved in many ways, for example by:

- getting an increased level or quality of service at the same cost,
- avoiding unnecessary purchases,
- ensuring that user needs are met but not exceeded,
- specifying the purchasing requirement in output terms so that suppliers can recommend cost-effective and innovative solutions to meet that need,
- optimising the total cost of services, works or goods, by including the full life of the contract rather than just the initial price,
- introducing incentives into the contract to ensure continuous cost and quality improvements throughout its duration,
- aggregating transactions to obtain volume discounts, reducing the level of stocks held.

The Public Procurement Law explicitly recognizes the principle of **efficiency, effective use of public funds** and **cost – effectiveness**. Accordingly, contracting authorities should ensure that goods, services or works procured in public procurement are of appropriate quality relevant to the purpose, intended use and value of public procurement

Efficiency is about getting the maximum output of goods and services for a given input of public administration resources (expressed not only in money terms) or minimising the input of such public resources for a given output of goods or services of the procurement process. From the point of view of efficiency, public procurement which is not purposeful is the procurement which leads to additional costs of the contracting authority in the course of the public procurement procedure and

during the implementation of public contract.

Effective use of public funds means paying the lowest price for similar goods and services. From the perspective of effective use of public funds purchase of goods, services or works which does not qualify as purposeful is the procurement which quality and/or quantity is either above or below the actual needs of the contracting authority.

Cost effectiveness: contracting authority should ensure that public procurement procedure is conducted and awarding of contracts is made within time limits and as prescribed by the PPL, with minimum costs spent in conducting public procurement. It basically means that contracting authorities need to control their spending in order to increase efficiency and reduce purchasing costs.

Principle of ensuring competition

Contracting authorities should, in the course of a public procurement procedure, ensure competition among economic operators, in accordance with relevant provisions of PPL (Article 8 (1)).

Contracting authorities may not restrict or prevent competition among economic operators, and in particular they may not disable any economic operator from taking part in a public procurement procedure by way of unjustified application of the negotiated procedure or by using discriminatory conditions and criteria or measures favouring individual economic operators (Article 8 (2)).

Examples of provisions of the PPL related to the principle of competition:

- Article 51 and Article 59 (public procurement procedures): in principle, contracting authorities should choose those public procurement procedures which are launched with publication of a call for competition – the procedure without call for competition – the negotiated procedure without prior publication of a contract notice may be applied exceptionally, in strictly limited circumstances;

- Article 86 (tender documentation): contracting authorities should draw up the tender documentation in a clear, precise and intelligible manner, enabling the submission of adequate and comparable qualification applications or bids;

- Article 87 (technical specifications): contracting authorities should allow economic operators an equal access to the public procurement procedure by technical specifications which may not have the effect of restricting market competition; a contracting authority may not refuse a bid because the offered works, goods or services are not in accordance with the technical specification, provided that the bidder in its bid, by any valid means of proof demonstrates that the offered solutions meet the requirements determined in the technical specification in an equivalent manner; Description and essential characteristics of the procurement subject may not be adapted to a particular economic operator or a particular product; contracting authorities in the tender documentation shall not use or make reference to technical characteristics, trademarks, patents or types, a specific origin or production characterising products, services or works, where by doing so they would favour a certain bidder or eliminate the other bidders without justification;

- Article 110 (grounds for optional exclusion): contracting authority may exclude from participation in the public procurement procedure an economic operator that has concluded a contract or entered into an agreement with another economic operator

with a view to distorting market competition or it is to blame for a grave professional misconduct which brings into question its integrity;

Principle of transparency of public procurement procedures

Contracting authorities should conduct public procurement procedures in a transparent manner: transparency is ensured by publishing all documentation necessary for conducting and implementation of a public procurement procedure at the EPPS, in accordance with the PPL (Article 9).

Examples of provisions related to the principle:

- Article 93 – publication of call for competition and tender documents: contracting authorities are obliged to publish call for competition and tender documentation on EPPS, with the exception of the negotiated procedure without prior publication of a contract notice;

- Article 95 – publication or supply of clarification of the tender documentation: contracting authorities should published modifications with no delay and at the latest five days as of the day of receipt of the request;

- Article 141 – notification and/or publication of decisions taken in the course of public procurement procedures: contracting authorities should:
  1) adopt the decision on exclusion from a public procurement procedure within 15 days as of the day of opening of qualification applications and submit it to the appellant within three days as of its adoption;
  2) adopt the decision on selection of the most advantageous bid, or the decision on annulment of a public procurement procedure within 60 days from the day of opening of bids and publish it on the EPPS within three days as of the day of adoption;

- Article 149 – publication of contracts: contracting authorities shall publish the public procurement contracts on the EPPS within three days from the date of the conclusion;

- Article 151 – publication of contracts' modifications: contracting authorities should publish the decision on contract modifications on the EPPS within three days as of the day of adoption;

- Article 155 – design contest notice: contracting authorities should publish the contest notice on the EPPS ;

- Article 157 – design contest results: contracting authorities should adopt the decision on basis of the opinion of the jury and publish the decision on the contest results on the EPPS, within three days from the day when the jury supplied the decision thereto.

Principle of equality, freedom and prohibition of discrimination

Contracting authorities are obliged to ensure that all economic operators in a public procurement procedure enjoy equal treatment (Article 10 (1)).

There are two aspects of this principle:

Negative: prohibition of discrimination of economic operators

Positive: obligation to ensure equal treatment of all participants of the procurement procedure

What is prohibited:

- setting conditions which would constitute national or territorial, subject-matter or other kind of discrimination against economic operators, or discrimination which would arise from the classification of business activity carried out by an economic operator.
- restricting the freedom of movement of supplies, depending on the place of registration of an economic operator and of provision of services.
- providing, in the course of procurement procedures, of information in a discriminatory manner which could provide benefit to the particular participant in the procedure over the other participants.

Principle of environmental protection, social and labour law and ensuring energy efficiency

see → material on social considerations in public procurement and material on green public procurement

Contracting authorities should take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law including collective agreements, in accordance with the law and internationally ratified conventions on environmental protection and social and labour law (Article 11 (1)).

Contracting authorities should procure supplies, services or works while ensuring the adequate reduction of energy consumption costs, that is, while observing the principles of energy efficiency (Article 11 (2)).

Principle of proportionality

Contracting authority should require the conditions for bidders to participate in a public procurement procedure, related to their economic-financial and professional-technical standing, to be determined in proportion to the complexity of the subject of procurement, the execution of public procurement contracts and the estimated value of the public procurement (Article 12).

Examples of provisions of the PPL related to the principle:

- Article 63 - Innovation Partnership: estimated value of the subject-matter of procurement in innovation partnership must not be disproportionate in relation to the investment required for research and development of the innovative solution of the subject-matter of procurement.

- Article 101 – capability requirements from economic operators: capability requirements for economic operators should be logically connected and proportionate to the procurement subject.

- Article 173 – design contests: contracting authorities should adopt the decision on basis of the opinion of the jury and publish the decision on the contest results on the EPPS, within three days from the day when the jury supplied the decision thereto.

Further reading:

Public Procurement Directive: Article 18
Case law of the Court of Justice:
C – 19/00 'SIAC Construction'
C – 21/03 and C – 34/03 'Fabricom'
C – 18/01 'Korhonen'
C- 513/99 'Concordia Bus'
C- 92/00 'Hospital Ingenieure II'
C- 324/98 'Teleaustria'

Module I

Material scope of the PPL – what is covered by the PPL

Provisions of the PPL:
Article 3 – definition of the public procurement
Articles 13 – 23 – exclusions from the scope of the PPL
Article 26 – thresholds
Article 75 – definition of procurement of supplies
Article 76 – definition of procurement of services
Article 77 – definition of procurement of works
Article 78 – mixed procurement

→ see also the following materials:
- 'Mixed contracts',
- 'Exclusions from the scope of the PPL' and
- 'Financial thresholds of application of the PPL'.

The PPL which was adopted in December 2019 regulates the rules of public procurement procedures for the purpose of concluding contracts of framework agreements for the public procurement of supplies, works or services, the protection of rights in public procurement procedures and other matters relevant to public procurement (Article 1). This provision introduces concepts relevant for the application of the PPL. The purpose of this information fiche is to explain what is the material scope of the PPL, in other words **to what the PPL is applicable**. This information fiche is intended to be read in parallel with the material explaining what is the personal scope of the PPL – which entities are obliged to apply its provisions (see → 'The personal scope of the PPL') as well as with → 'Exclusions from the scope of the PPL' and → 'Financial thresholds of application of the PPL'.

Definition of public procurement

Public procurement is defined in the PPL as a set of actions and activities which are implemented by the contracting authority (see → Personal scope of the PPL) in accordance with the PPL for purpose of procuring supplies, provision of services or execution of works, for which the funds have been allocated, whether or not the works, supplies or services are intended for a public purpose (Article 3

(1)). The PPL defines also such terms as 'the public procurement affairs' (Article 3 (2)) and 'public procurement activities' (Article 3 (4)).

The PPL covers three types of procurement contract:

- works,
- supplies and
- services.

It provides also provisions concerning organization of **design contests**.

Some 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 PPL contains specific rules that are used to classify these 'mixed contracts' (see → the material 'Mixed contracts').

A number of contracts are entirely excluded from the scope of the PPL, either because of their nature so it would be inappropriate to apply the provisions of the PPL or because they are the subject of different systems of regulation or administration. Some contracts, such as 'reserved contracts', receive special treatment as a result of the identity of those supplying the goods, works or services under them (see → details in material 'Special regimes of public procurement').

Even if not excluded, some contracts will only be subject to the provisions of the PPL where their value exceeds the relevant financial value thresholds set out in the PPL (Article 26 points 1 – 3) and are subject to provisions of implementing regulation adopted by the Ministry. To prevent "creative" methods of calculating the value of the contracts to be awarded in order to escape the obligation to apply the PPL there are also provisions concerning rules and methods of calculation as well as prohibition of methods designed to circumvent the PPL by splitting, aggregating or packaging contracts in such a way that the contracts do not properly fall within the appropriate provisions (see → material on estimation of public procurement value).

One more important distinction is to be made between 'contracts' and 'concessions', the latter being treated differently from contracts. Concessions are subject to a separate legislation - the Law on Public Private Partnerships (the PPP law)[36] adopted on December 17, 2019. The PPP law became applicable after six months of entry into force i.e. July 4, 2020 (see → material on 'PPP and concessions').

Common characteristics of procurement contracts

There are some general characteristics that are common to all types of contract covered by the PPL.

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

- **The contract must be 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 in writing.**
- **The contract must be between two parties:** the economic operator and the contracting authority.

In accordance with interpretation of the Court of Justice of the European Union (CJEU) the *pecuniary nature of the contract relates to the consideration due from the public authority concerned in return for the execution of the works which are the object of the contract and which will be at the disposal of the public authority (C- 399/98).*

[36] Official Gazette No 073/19 of 27.12.2019.

Also, according to the CJEU for public procurement characteristic is selectivity understood in the sense that not all economic operators who fulfil certain requirements are entrusted by the contracting authority but only the one who is chosen following procurement procedure.

Ruling in C – 9/17 was adopted in the following circumstances. In Finland farmers can have access to the list of consultants/advisors providing support related to some environment protection issues. Consultants are freely chosen by farmers from the list created for this purpose by the Environment Agency and remunerated for their services from the state budget. Anyone interested in being a consultant could submit application before the expiry of a time period. The only requirements applied were related to the experience and expertise of candidates. Ms Tirkonnen applied for this post but her application was rejected as she did not complete one of the points of application form. The court reviewing the complaint decided to ask the CJEU whether EU public procurement rules are applicable in this case. CJEU noted that the Finnish scheme as presented above is not public procurement, because:

- is open to everybody interested in providing consultancy services and satisfying the minimum requirements
- there is no evaluation and comparison of tenders but only examination of applications in order to check whether they satisfy minimum requirements
- for public procurement it is characteristic: competition, selection and selectiveness - in this specific case, in fact, there was no selection of consultants but only approval of those applicants who satisfied the minimum requirements
- there is no selection so there is no public procurement

the Court concluded that:

Article 1(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that a farm advisory scheme, such as that at issue in the main proceedings, through which a public entity admits all the economic operators who meet the suitability requirements set out in the invitation to tender and who pass the examination referred to in that invitation to tender, even if no new operator can be admitted during the limited validity period of that scheme, does not constitute a public contract within the meaning of that directive.

When does a procurement contract arise?

When a new contract is awarded, there is normally little difficulty in identifying it. Sometimes, however, this is not obvious. For example, an existing contract might 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 PPL. This means that a simple extension, renewal or even amendment might not be permitted if it is made without competition. For more information about modifications of concluded contracts see → material on Modifications of contracts.

What is a supplies contract?
(Article 75)

'Public supply contracts' are defined as contracts having as their object the purchase, hire - purchase or lease, with or without option to buy, of supplies (products.) In addition, the delivery of

such supplies may include siting (set-up) and installation operations as a subsidiary element of the procurement. In other words, if the contract covers not only supply of products but also their sitting and installation (which are services) such a contract is treated as a supply contract for the purposes of the application of the PPL. The value of such services should be included in the total estimated value of the procurement in order to determine whether a respective monetary threshold from the PPL is reached.

The range of products covered by the PPL 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?
(Article 76)

The term 'service contracts' essentially refers to contracts for provision of services other than works. A number of services are specifically excluded, mainly because they are not amenable to purchase through the rules provided by the PPL. Award of other services such as social other special services is regulated by the PPL but to a lesser degree (see → material on special public procurement regimes).

What is a works contract?
(Article 77)

Works contracts are defined as those contracts that have as their object:

- either the **execution** of **works**
- or both the **design and execution of works** or
- the execution of works or tasks on construction of buildings and or civil engineering as a whole which meets all economic and technical requirements of the contracting authority.

The possibility of including design works in a works contract means that 'design and build' contracts may fall within the definition of a works contract. This 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 services would be a service covered by public procurement rules related to services or could, alternatively, be awarded by means of a design contest.

The list of works and tasks referred to in this provision which may be subject to the provisions of the PPL is prescribed by the implementing regulation adopted by the Minister of Finance (see the Rulebook on the list of works and activities which can be subject of public procurement[37].

As regards the last part of this definition – what is covered by the PPL 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 implements the concept of 'a work from the Public Procurement Directives. It 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.

Are there other types of contracts subject to the PPL?

Yes, the PPL applies also to subsidised works and subsidised services contracts (Article 2 (10) and design contests.

37 Official Gazette, no. 057/20.

Subsidised works and services are covered by the PPL only if they are subsidised directly or co – financed by the contracting authority and their value exceeds the thresholds referred to in Article 26 point 6, established by the Ministry of Finance. Additionally, subsidised works are covered only if they concern civil engineering activities as listed in the implementing regulation adopted by the Ministry of Finance (building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes). In the event the contracting authorities providing subsidies or co – financing do not award themselves subsidised contracts they should ensure in the award process of compliance with the PPL.

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

Further reading:

Article 2 (5), (6), (7), (8) and (9) from EU Public Procurement Directive (2014/24)
Rulings of the Court of Justice of the EU:

C- 399/98 'Ordine degli Architetti and Others'
C-410/14 'Falk Pharma'
C- 9/17 'Tirkkonen'

Module I

Exemptions from the scope of the PPL

Provisions of the PPL:

- Article 13 – 23

The PPL is applied with regard to public procurement as defined in Article 3 (1), and covers public supplies, services and works contracts, defined in Article (see → material on the scope of the PPL), awarded by contracting authorities (see → material on personal scope of the PPL)

The PPL applies to public procurement above financial thresholds (see → material on financial thresholds).

There is, however, a number of situations and cases where provisions of the PPL do not apply – those situations are referred to as exclusions (exemptions) from the scope of the PPL and are defined in provisions of Articles 13 – 23 of the PPL.

1. Under the threshold procurement (Article 23 in connection with Article 26 points 1 - 3)

The PPL does not apply to public procurement of very small value which does not exceed thresholds defined in Article 26 (1) points 1 – 3 of the PPL (see → material on financial thresholds).

The PPL does not apply with regard to public procurement value of which (without VAT), calculated at annual basis is lower than:

- EUR 20,000 in the case of supplies and services,

- EUR 40,000 in the case of works.

The fact that those contracts are exempted from the PPL does not, however, mean that they can be awarded fully freely without a need to apply any specific provisions. Quite the contrary, the Ministry of Finance should prescribe the method of awarding such contracts (see the Rulebook on the method of conducting simple procurement)[38]. Accordingly, contracting authorities awarding contracts covered by this exemption can either award them outside of the PPL and in accordance with the requirements of the said regulation or use any of the procurement methods specified in Article 51 of the PPL (see → information fiche on public procurement procedures), in accordance with Article 27 (4). Contracting authorities should also prepare semi-annual reports to the Ministry covering periods: January 1 – June 30, and July 1 – December 31 and submit them to the Ministry within 30 days since the expiry of the respective reporting period (Article 27 (5) – (6)).

2. Procurement of supplies, service and works on the basis of international agreements

The PPL does not apply to procurement which is conducted in accordance with:

a) particular rules determined by an international organization, on basis of a ratified international agreement with that international organization;

b) procedures different from those laid down in the PPL, on basis of legal instruments establishing international legal obligations, such as ratified international agreement between Montenegro and one or several third states, for procurements which will be jointly implemented or used by contractual parties;

c) particular rules determined by an international organization or an international financial institution, provided that such organization or institution funds or secures funding of the project, unless otherwise agreed.

Exemption referred to in point 3 applies to public procurement which is fully (in 100 %) financed by international organization or international financial institution.

In case the procurement is financed in less than 100 % but more than 50 % by such organizations or institutions the contractual parties should agree on the procedure which should be applied.

In the event, the procurement is financed in less than 50 % by international organization or by the international financial institution the PPL is applied.

Legal instruments establishing the international legal obligations and procedures applicable for the award of contracts referred to above should be conducted in accordance with the principles of equal treatment of bidders, non-discrimination and transparency.

The Government of Montenegro should notify the European Commission of conclusion of the agreement referred above.

3. Exemption of specific services

The PPL is not applicable with regard to award of contracts related to a number of specific services which are listed in Article 14 of the PPL.

38 Official Gazette, Nos br. 061/20 and 065/20.

These are:

- the acquisition or rental of land, existing buildings or other immovable property or concerning rights thereon;

The PPL excludes 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 the geographic 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 within this exemption, most commonly because a works contract is awarded a part of the overall arrangement.

- acquisition, development, production or co-production of program materials intended for audio-visual media services or radio media services concluded by audio-visual and radio media service providers;

This exemption may be related only by those contracting authorities which are audio – visual or radio media service providers.

In accordance with the explanation provided in recital 23 of the Public Procurement Directive (2014/24) the exemption covers contracts, awarded by the media service providers for the purchase, development, production or co-production of off-the-shelf programmes and other preparatory services, such as those relating to scripts or artistic performances necessary for the production of the programme.
The exclusion applies equally to broadcast media services and on-demand services (non-linear services).
However, it does not apply to the supply of technical equipment necessary for the production, co-production and broadcasting of such programmes.

The PPL does not define 'programme material' but since the purpose of the new PPL was to implement provisions of the EU the meaning of this term should be understood in accordance with the EU requirements. Accordingly, 'Programme' in the EU procurement directive has the same meaning as in Directive 2010/13/EU *on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.* In the light of this directive 'programme' means *„a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama"*

Definition in 2014/24 covers also radio programmes and radio programme materials.

- services related to broadcasting time for providing radio, television or program services that are concluded with audio-visual or radio media service providers;

This exemption may be relied on by any contracting authority, however, it must be awarded to either audio-visual or radio media service providers.

- services related to arbitration or conciliation;

In accordance with the Public Procurement Directive this exemption is related to the fact that *'arbitration and conciliation services and other similar forms of alternative dispute resolution are usually provided by bodies or individuals which are agreed on, or selected, in a manner which cannot be governed by procurement rules'* (recital 24).
The EU PP Directive does not apply to service contracts for the provision of such services, whatever their denomination under national law.

- the following legal services:
    - services by lawyers in:
        - legal representation of clients in an arbitration or conciliation held in Montenegro, a Member State, a third country or before an international arbitration or conciliation instance; or
        - legal representation of clients in proceedings before courts and other bodies in Montenegro, a Member State of the European Union or a third country, before an international court and other institutions;
    - b) advisory services of lawyers for purpose of preparation for tasks referred to in sub-item a) of this item;
    - c) services provided by notaries or other legal services related to execution of entrusted public powers;

In accordance with the Public Procurement Directive*: "A certain number of legal services are rendered by service providers that are designated by a court or tribunal of a Member State, involve representation of clients in judicial proceedings by lawyers, must be provided by notaries or are connected with the exercise of official authority. Such legal services are usually provided by bodies or individuals designated or selected in a manner which cannot be governed by procurement rules, such as for instance the designation of State Attorneys in certain Member States. Those legal services should therefore be excluded from the scope of this Directive"* (recital 25).

- procurement of services of the Central Bank of Montenegro;

- services in connection with the issue, sale, purchase, or transfer of securities or other financial instruments, financial and legal assistance and all other services related to securities, or other financial instruments, in accordance with a separate law regulating the capital market;

- loans, credits and other financial derivatives whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;

- financial and legal assistance and other activities related to loans, credits and other financial derivatives;

- financial, legal or other services in the proceedings related to the privatization of the economy;
- services related to employment;

- civil security and rescue services provided by non-profit organisations or associations, which are covered by CPV codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3;

The explanation for the need to provide for this exemption is included in recital 28 of the Public Procurement Directive:

"This Directive should not apply to certain emergency services where they are performed by non-profit organisations or associations, since the particular nature of those organisations would be difficult to preserve if the service providers had to be chosen in accordance with the procedures set out in this Directive. However, the exclusion should not be extended beyond that strictly necessary. It should therefore be set out explicitly that patient transport ambulance services should not be excluded. In that context it is furthermore necessary to clarify that CPV Group 601 'Land Transport Services' does not cover ambulance services, to be found in CPV class 8514. It should therefore be clarified that services, which are covered by CPV code 85143000-3, consisting exclusively of patient transport ambulance services should be subject to the special regime set out for social and other specific services (the 'light regime'). Consequently, mixed contracts for the provision of ambulance services in general would also be subject to the light regime if the value of the patient transport ambulance services were greater than the value of other ambulance services."

- research and development services except for services covered by CPV codes: 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 provided that these services are wholly remunerated by the contracting authority and used in the conduct of its own affairs;

In accordance with this exemption research and developments services are generally excluded from the scope of the PPL. Subject to the PPL are only selected R & D services covered by CPV codes mentioned above. Even then, however, award of contracts related to these R & D services should follow provisions of the PPL, if two conditions are cumulatively fulfilled: services are fully paid by the contracting authority and are used in conduct of its own affairs. It is enough then that one of those two conditions is not fulfilled: for example result of the service are shared by the contracting authority with the wide public or the contract is co- financed and the contract is exempted from the scope of the PPL.

- public passenger transport services by rail, underground railway or trolley;

- political campaign services covered by CPV codes: 9341400-0, 92111230-3 and 92111240-6, provided that those services were assigned by the political party within the election campaign;

Again, as explains the EU directive: "…. *this Directive applies only to contracting authorities of Member States. Consequently, political parties in general, not being contracting authorities, are not subject to its provisions. However, political parties in some Member States might fall within the notion of bodies governed by public law.*

However, certain services (such as propaganda film and video-tape production) are so inextricably connected to the political views of the service provider when provided in the context of an election campaign, that the service providers are normally selected in a manner which cannot be governed by procurement rules. Finally, it should be recalled that the statute and funding of European political parties and European political foundations are subject to rules other than those laid down in this Directive."

- procurement of election material;

- tasks related to the development and adoption of planning documents as stipulated by the law governing spatial planning.

4. Exclusion of postal services

A public contracting authority does not apply the PPL to the procurement of the postal services referred to in Article 165 paragraph 2 item b thereof for performance of the following activities:

1) services that are fully provided by electronic means, including the safe transmission of coded documents by electronic means, address management services and transmission of registered electronic mail;
2) financial services which are covered by CPV codes 66100000-1 to 66720000-3 and financial services in connection with securities and other financial instruments referred to in Article 14 paragraph 1 item 7 of this Law, including postal money orders and postal gyro transfers;
3) philatelic services or
4) logistics services (the services which are a combination of physical delivery or warehousing with other non-postal functions).

5. Exclusion of procurement in the field of electronic communication

This Law shall not apply to procurements the purpose of which is to allow a public contracting authority the provision or use of the public communication network or the provision of one or more electronic communication services, in accordance with the law regulating electronic communications (Article 16).

6. Exclusion of services performed on the basis of exclusive rights

This PPL does not apply to the procurement of services that a public contracting authority awards to another public contracting authority or an association of public contracting authorities on the basis **of an exclusive** right enjoyed by them under a law or another regulation (Article 17).

This exemption applies only:

- for services,
- awarded by the contracting authority to another entity which is itself another contracting authority in accordance with the PPL,
- the entity which is awarded the contract performs the service in question on the basis of exclusive right,
- exclusive right it enjoys is based on provisions of law or implementing regulations.

7. Exclusion of public – public cooperation (contracts 'in – house' type)

The PPL provides for exemption related to *in house contracts*; those situations are collectively referred to in the directive as contracts between entities within the public sector (public – public cooperation)

There are two types of situations covered by new rules:

1. A contracting authority awards a contract to an economic operator with majority state ownership where all of the following conditions are fulfilled:

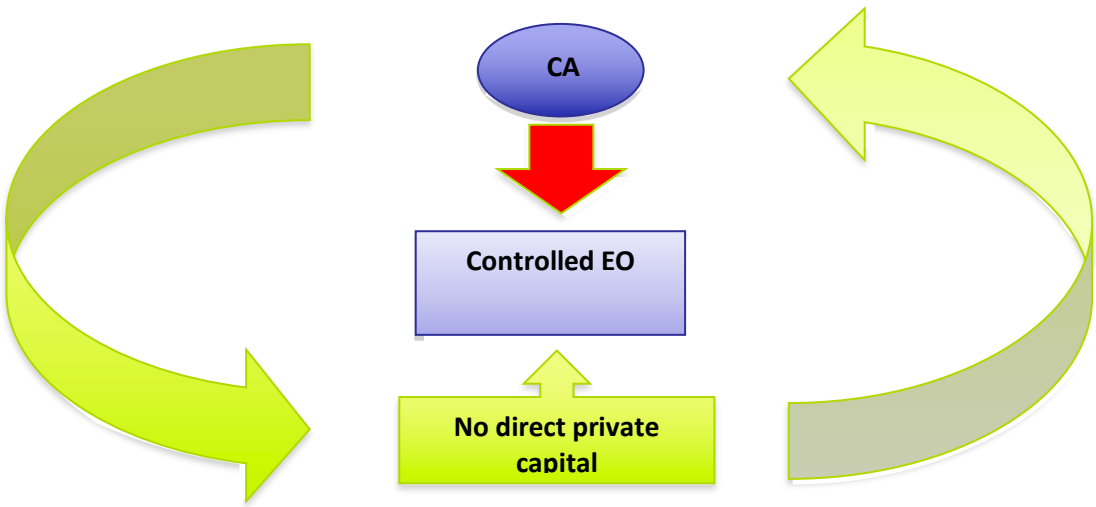
a) the contracting authority, **independently or together** with other public contracting authority, exercises control over such economic operator,
b) such economic operator carries out more than 80% of its activities in the performance of tasks entrusted to it by the public contracting authority or an economic operator controlled by that public contracting authority, and
c) there is no direct participation of the private capital in accordance with the founding agreement, unless otherwise stipulated by the law.

A public contracting authority is deemed to independently exercise control over an economic if it exercises a decisive influence over the management and administration of affairs of the economic operator, or a decisive influence over adoption of significant decisions and strategic objectives of the economic operator.

In house with sole control

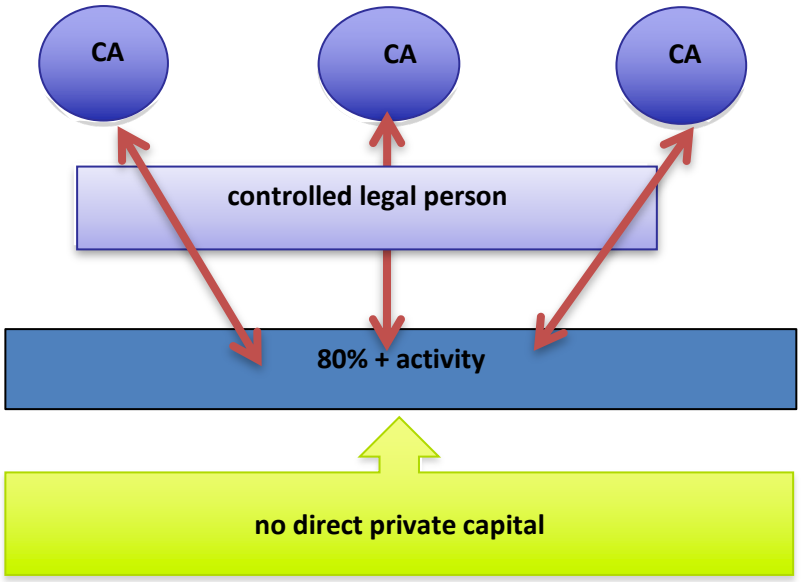
Decisive Control

80%+ Activity



For the control to be exercised **jointly** for the purposes of this exemption it is necessary that:
- the decision-making bodies of that economic operator are composed of representatives of the contracting authorities, while individual representatives may represent several or all of the participating public contracting authorities, or
- those contracting authorities jointly exert decisive influence over the strategic objectives and significant decisions of that economic operator, or
- the economic operator does not pursue any interests which are contrary to those of the controlling contracting authority.

In house with joint control



2. A contract is concluded exclusively between two or more contracting authorities where all of the following conditions are fulfilled:

a) the procurement is conducted as a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common,
b) the procurement is conducted for purpose of achieving and/or protecting the public interest; and
c) the contracting authorities perform on the open market less than 20% of the activities concerned by this cooperation.

How the percentage of the activity is assessed?

For the determination of the percentage of activities referred to in point 1 and 2 above the average total turnover based on the appropriate activity, such as costs incurred by the contracting authority with respect to services, supplies or works for the three years preceding the contract award is to be taken into consideration.

In case that the relevant contracting authorities were created or commenced activities or because of a reorganisation of their activities the information on the turnover for the preceding three years are not available, it should be sufficient for contracting authorities to show by their business projections that they fulfil the required conditions.

8. Exclusions specific for sectoral (utilities contracts)

The PPL provides also a number of exclusions which are applicable only with regard to utilities (sector) contracts (Articles 20 – 21). As such they may be relied only by sectoral contracting authorities awarding utilities contracts (see → training material on the personal scope of the PPL and → on utilities procurement).

8.1 *Exclusions for procurements for the pursuit of sectoral activity for purpose of resale or lease*

The PPL does not apply to procurement contracts awarded by sectoral contracting authorities, for the purpose of resale or lease of the procurement subject where the sectoral contracting authority enjoys no special or exclusive right to sell or lease the subject of such procurement, and where other entities are free to sell or lease it under the same conditions as the sectoral contracting authority
8.2 Exclusion of contracts awarded by the sectoral contracting authority conducting activity which is directly exposed to competition on markets to which entry is not restricted (see Article 170 – 171 and see → training material related to utilities procurement).

8.2 *Exclusion for procurement of water*

Exempted are contracts concerning procurement of water if they are concluded by a sectoral contracting authority performing the activity referred to in Article 162 (1) of the PPL i.e. 1) provision of fixed networks or management of fixed networks intended to provide services to the public in connection with the production, transfer or distribution of drinking water or 2) the supply of drinking water to such networks.

8.3 energy or fuel for the production of energy

Exempted are contracts concerning procurement of energy or fuel for the production of energy conducted by a sectoral contracting authority performing the activity referred to in Article 159, Article 160 (1), Article 161 (1) or Article 166 of the PPL i.e.:

1) generation, transmission or distribution and/or supply of electricity for the purpose of its sale; provision of services related to use of fixed networks or management of fixed networks intended to provide services to the public in connection with the generation, transmission or distribution of electricity; the supply of electricity to such networks
2) provision of services related to use of public infrastructure (hereinafter: fixed networks) or management of fixed networks intended to provide services to the public in connection with the production, transmission or distribution of natural gas or thermal energy; the supply of natural gas or thermal energy to networks referred to in item 1 of this paragraph.
3) research and production of oil, gas, coal or other solid include the exploitation of a geographical area for the purpose of: production of oil or gas, or research or extraction of coal or other solid fuels

8.3 Procurement from the associated persons or on basis of a joint venture referred to in Article 167 of the PPL

9. Exclusions in the field of defence and security procurement

The PPL does not apply to procurements within the field of defence and security which contain the elements laid down by Articles 175, 176 and 177 of the PPL (see → material on defence and security procurement).

10. Exclusion of procurement for diplomatic and consular missions and military – diplomatic representatives

Exempted are contracts for goods and services with the estimated value not exceeding EUR 40,000.00 and contracts for works with the estimated value not exceeding EUR 100,000.00 if they are euros as well as of the reporting on conducted procurements for diplomatic and consular missions of Montenegro abroad, military-diplomatic representatives and units of the Armed Forces of Montenegro in international forces and peacekeeping missions, unless otherwise provided for by

a ratified international agreement or a treaty.

Methods of awarding such contracts should be defined by the Government of Montenegro (see the implementing regulation….)

Reporting obligations envisaged in the PPL do not apply to such contracts.

Further reading:

Provisions of the Public Procurement Directive: Article 8 – 12

Rulings of the CJEU:

C-337/05 European Commission v Italy (Agusta Bell Helicopter)

C-615/10 "Insinööritoimisto InsTiimi"

C-50/14 "CASTA"

C-296/15 "Medisanus"

C-9/17 "Tirkkonen"

C-187/16 European Commission v Austria

CJEU stated in this ruling that "*by having awarded, without an EU-wide call for tenders, service contracts for the production of chip passports, emergency passports, residence permits, identity cards, credit card-sized driving licences and credit card-sized vehicle registration certificates directly to ÖS and, second, by maintaining national provisions which require contracting authorities to award those service contracts directly to that company, the Republic of Austria has failed to fulfil its obligations under* [the EU procurement directive]"

Rulings of the CJEU concerning specifically 'in house'

C-107/98 "Teckal"

C-26/03 "Stadt Halle"

C-29/04 European Commission v Austria

C-410/04 "ANAV"

C-295/05 "Asemfo"

C-480/06 European Commission v Germany

C-324/07 "Coditel Brabant"

C-196/08 "Acoset"

C-215/09 "Mehilainen and Terveystalo Healthcare"

C-182/11 and 183/11 "Econord" C-159/11 "Azienda Sanitaria Locale"

C-386/11 "Pipenbrock"

C-15/13 "Technische Universitat Hamburg"

C-574/12 "Centro Hospital de Setubal"

C- 553/15 "Undis Servizi"

Module I

Special public procurement regimes

Provisions of the PPL:
Article 24 – Procurement for diplomatic and consular missions and military-diplomatic representatives
Article 25 – Reserved public procurement
Article 153 – 154 – Procurement of social and other special services
Articles 174 – 178 – Procurement in the field of defence and security

Public procurement abroad

The method of conducting procurements of goods and services with the estimated value not exceeding EUR 40,000 or procurement of works with the estimated value not exceeding EUR 100,000 as well as of the reporting on conducted procurements for diplomatic and consular missions of Montenegro abroad, military-diplomatic representatives and units of the Armed Forces of Montenegro in international forces and peacekeeping missions are prescribed the Government of Montenegro, unless otherwise provided for by a ratified international agreement or a treaty.

Reserved procurement

Contracting authorities may in tender documentation establish the right to participate in public procurement procedures for economic operators whose aim is:
- the social and professional integration and employment of disabled persons, as well as
- of disadvantaged persons in accordance with the law governing professional rehabilitation and employment of disabled persons,
provided that those persons account **for at least 30% of the employees**, whereupon all participants of the joint bid and all subcontractors belong to the said group.

Economic operators who are covered by provisions on reserved procurement may subcontract up to 20% of the value of a reserved procurement to subcontractors which do not comply with those requirements.

Economic operators who are covered by provisions on reserved procurement should in their qualification application or bids submit the evidence that they meet those requirements.

Defence public procurement

Special rules apply with regard to procurement in the field of defence and security.

The following subject – matter of procurement is covered by those provisions:

1) military equipment, including all its parts, components or subassemblies;
2) security-sensitive equipment, including all its parts, components or subassemblies;
3) goods, services and works that are directly related to the equipment referred to points 1 and 2,
during any period or entire life-cycle of such equipment;
4) services and works exclusively for military purposes;
5) security-sensitive services.

The Government of Montenegro should prescribe the list of military equipment and products

mentioned above.

The exemptions from provisions concerning procurement in the field of defence and security are provided in Article 176:

- to which special public procurement rules apply, in accordance with an international agreement or arrangement concluded between Montenegro and one or more countries;

- to which special public procurement rules apply, in accordance with an international agreement or arrangement relating to the deployment of military units, which relates to the undertakings of Montenegro, an EU Member State or other countries which participate in a public procurement procedure;

- which Montenegro must award in accordance with specific rules of an international organization;

- in which the application of the provisions of this Law would oblige Montenegro to disclose data whose disclosure is contrary to the essential interests of its security;

- for the needs of the security intelligence activities;

- within the framework of a research and development-based cooperation program jointly implemented by Montenegro and at least one EU Member State and, when applicable, for the next stages of the whole or part of the life-cycle of that product;

- concluded in the third state, including for civilian needs, when forces are deployed outside the territory of the European Union if operational requirements require that these contracts be concluded with economic operators located in the area of activity;

- concluded by state authorities of Montenegro with the state bodies of EU Member States or the third country, which relate to:

a) procurement of military equipment or security-sensitive equipment;

a) works and services directly associated with the equipment referred to in indent a) of this item, or
b) works and services for explicitly military purposes or security-sensitive works and security-sensitive services.

- when the protection of essential security interests of Montenegro cannot be ensured by determining the requirements with the aim of protecting the confidentiality of data that the contracting authority makes available in the public procurement procedure as provided by this Law;

- procurements declared to be secret or those which must be accompanied by special security measures in accordance with laws, by-laws or acts of the competent authority, provided that Montenegro has determined that important security measures and interests cannot be protected by the measures referred to in item 9 of this provision.

- procurements of supplies and services the estimated value of which is equal to or less than EUR 20,000.00, or procurements of works the estimated value of which is equal to or less than EUR 40,000.00.

Implementation, reporting and keeping of records on procurement in the field of defence and security should be performed in the manner and according to the procedure established in a regulation adopted by the Government of Montenegro.

Social and other special services

Introduction

The 2014 EU Public Procurement Directives abolished a distinction between priority and non-priority services provided in 2004 directives. As a result, the full application of directives have been extended

to a number of services. However, certain categories of services, namely services known 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 that have limited cross – border dimension. Therefore, a specific light regime was established in 2014 directives for awarding contracts for those services, with the threshold of 750 000 EUR (1 000 000 EUR in the case of utilities) which is much higher than the threshold which applies to fully covered services.

The services regulated this way are listed in Annex XIV of the Public Service Directive and 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.

Those services are listed in Annexes with their respective CPV codes.

The way how the procurement services related to those services should be organized is not regulated in the directives. Member states are given there wide discretion concerning organization of procurement procedures, provided general rules established in Article 74 – 76 of the Public Sector Directive (Article 92 – 93 of the Utilities Procurement Directive) are respected:

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

Regulation of social and other special services in the PPL

The list of services covered by those provisions should be prescribed by the Ministry.

The PPL defines also certain minimum requirements the procedure for award social and other special services should comply with.
Contracting authorities intending to conduct a public procurement of social and other services the value of which equals to or exceeds EUR 20,000 should publish the tender documentation on the EPPS, except for the cases where a negotiated procedure without prior publication of a contract notice have been applied.
Contracting authorities shall act in accordance with provisions concerning principles of public procurement (i.e. Articles 7 – 12 of the PPL).

The minimum time limit for submitting qualification applications and bids shall be 15 days from the day of publishing the call for competition.
In the procedure for procurement of services from paragraph 1 of this Article, contracting authorities shall not be required to use grounds for exclusion, nor to require that the qualification applications and bids are submitted using electronic means of communication.

Reserved procurement of social and other special services

Contracting authorities may reserve the right to participate in public procurement procedures concerning social and other special services that are covered by the following CPV codes: 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4 and 98133110-8 to the organisations meeting the following requirements:

1) their objective is the pursuit of a public service mission;
2) their profits are reinvested with a view to achieving the organisation's objective;
3) their structures of management or ownership are based on employee ownership or participation of employees, users or stakeholders and;
4) they have not been awarded a reserved contract for the services listed in this paragraph within the past three years.

The maximum duration of the reserved contract for services cannot be longer than three years.

Further reading:

Public Procurement Directive: Article 74 - 77
Utilities Procurement Directive: Article 91 - 94

Module I

MIXED CONTRACTS

Provisions of the PPL:

Article 77

See also → Material scope of the PPL: definition on of procurement of supplies, services and works

What is mixed procurement (contract)?

We have mixed contract where subject matter of the public procurement covers 1) two or more types of procurement or 2) procurement which is subject to different procurement rules.

The PPL provides for provisions concerning application of relevant regime (relevant provisions) in the case the subject matter of public procurement covers various items which:

- are subject to the general public procurement types of rules (the same legal regime),
- are subject to different types of rules (different regimes).

Why this issue is relevant?

Public procurement law provides for different provisions depending on whether the subject matter are supplies, services or works:

- there are higher thresholds for works contracts (see → material on thresholds in the PPL),

- there are some exemptions which are applied depending on what is the subject matter of public procurement (see → material on exemptions from the PPL).

Also in case of social and other special services a more flexible public procurement procedure is applied (see → material on social and other special services).

Therefore, in order to decide which provisions have to be or do not have to be applied it is necessary to establish first what is the main subject of procurement.

1. Procurement covering two or more types of procurement

First of all, the PPL (Article 78 (1) – (3)) regulates situation where a given contract has as its subject two or more types of procurement, all of them covered by the PPL.

It is the case where the public procurement covers at the same time procurement of:

- supplies and services (as defined in Article 75 and 76), or
- supplies and works, (as defined in Article 75 and 77), or
- services and works (as defined in Article 76 and 77),

In such a cases the subject of a contract is determined by the main subject of procurement. Accordingly, to the whole public procurement applicable are those public procurement rules which are applicable to the main subject of procurement (Article 78 (1)).

How is the **main subject** defined?

The main subject of procurement is this procurement subject which **has the higher estimated value**.

For example, in the case of supplies and services the main subject of procurement will be services if their value is bigger than the value of supplies. In the opposite case it will be procurement of supplies.

In the case of mixed procurement which is composed of supplies and services and their respective value is EQUAL it is the supplies which are the main subject of procurement.

2. Mixed procurement covering services and social and other special services

Second, the PPL regulates the issue of selection of in case of mixed procurement composed of services and social or other special services (covered by Article 153). In the case when both types of services are of equal value – services are considered to be the main subject of procurement. In such a case more strict rules are applicable. Although it is not explicitly stated in the PPL in the case where one type of service is predominant as regards its value those public procurement rules are applicable which concern services of bigger values.

3. Objectively separate procurement parts

Another issue covered by the PPL is the issue of mixed procurement where the different parts of the subject of procurement **are objectively separable (Article 78 (5) – (7)**. If this is the case the contracting authority may decide to:

- conclude separate contracts for those separate parts of the mixed procurement or to
- conclude a single contract.

If option 1 is applied than the contracting authority should apply provisions of the PPL concerning those separate parts, on the basis of the technical characteristics of those parts (Article 78 96)

If option 2 is applied than the contracting authority should apply provisions which are applicable to the main subject of procurement, established in accordance with the rules presented in points 1 and

2.

4. Mixed procurement covered by general PPL rules and rules o procurement in the field of defence and security

Another issue dealt by the PPL is mixed procurement covering subject matter covered by the PPL and subjects from the field of defence and security (Article 78 (8).

In such a case provisions of the PPL governing procurement in the field of defence and security are applicable (→ see material PROCUREMENT IN THE FIELD OF DEFENCE AND SECURITY), provided, however, that the procurement subject by its content represents the integral whole.

Further reading:

Public Procurement Directive: Article 3
Case law of the Court of Justice:
Case C-331/92 'Gestion Hotelera'

Module I

FINANCIAL THRESHOLDS OF APPLICATION OF THE PPL

Relevant provisions: Article 26 of the PPL

The new PPL provides for the following levels of application (thresholds):

1) contracts up to EUR 5,000,
2) supplies and service contracts from EUR 5,000 to 20,000,
3) works from EUR 5,000 to 40,000,
4) supplies and services from EUR 20,000 to the EU thresholds,
5) works from EUR 40,000 to the EU thresholds
6) supplies, services and works contracts equal or greater than EU thresholds.

Contracts of values not exceeding thresholds referred to in points 1-3 are not covered by the PPL, instead, way of conducting such a procurement will be defined in the implementing regulations to be adopted by the Ministry of Finance (see separate fiche → simple procurement).

Contracts which are referred to in items 4 – 6 are to be awarded in accordance with provisions of the PPL.

Thus:

The lowest threshold for application of the PPL is:

- EUR 20,000 for supplies and services
- EUR 40,000 for works.

The PPL provides thus for gradation of obligations of contracting authorities depending on the annual value of procurement:

1) Procurement up to the low threshold of the PPL – exempted from the PPL
2) Procurement up to the EU thresholds - covered by the PPL

3) Procurement above EU thresholds covered by the PPL and subject to additional obligations (publication of the procurement notice in the OJEU).

Thresholds for procurement abroad

Contracts awarded by:
- diplomatic and consular missions of Montenegro abroad,
- military-diplomatic representatives and
- units of the Armed Forces of Montenegro in international forces and peacekeeping missions (unless otherwise provided for by a ratified international agreement or a treaty)

are exempted from the PPL up to EUR 40,000 for supplies and services and EUR 100,000 for works (Article 24 of the new PPL).

Further reading:

Public Procurement Directive: Article 4
Utilities Procurement Directive: Article 15

Module I

PERSONAL SCOPE OF THE NEW PUBLIC PROCUREMENT LAW

Relevant provisions of the PPL:
Article 2 and Article 4 (definitions)

Provisions of the PPL are to be applied by **contracting authorities**.

Where a given body or entity falls within the definition of a contracting authority then its procurement (see → material on the material scope of the PPL) will be subject to the PPL. If a body does not fall within the definition then its procurement will not be subject to the PPL. If the body does not fall within the definition but it nevertheless tries to follow the rules, this does not mean that any breach of the PPL provisions that it commits would be open to challenge. The PPL either applies or does not apply - there is no 'in-between'.

The concept of 'contracting authority' covers:
- public contracting authorities and
- sectoral contracting authorities

I. There are four categories of **public contracting authorities**:
1) state body;
2) local self-government unit;
3) public service and
4) association founded by two or more contracting authorities,
5) natural or legal persons awarding subsidized contracts

1. **State body** as a contracting authority

In accordance with the EU CJ this term encompasses all of the bodies that exercise *legislative*, *executive* and *judicial* powers. The definition of the state is broad and the Court of Justice of the EU (CJEU) has taken a particularly functional approach in deciding whether or not an organisation falls

within the definition of a public authority. It thus looks more at the actual function of the entity concerned than at the formal categorisation that the entity has been given by domestic law.

In the context of Montenegro the term of the state body covers:

- the Parliament of Montenegro,
- President of Montenegro,
- Government of Montenegro,
- Constitutional Court of Montenegro,
- Judicial Council,
- State Audit Institution,
- Protector of Human Rights and Freedoms,
- State Prosecutor's Office,
- Prosecutorial Council,
- Protector of Property and Legal Interests of Montenegro,
- Central Bank of Montenegro, as well as
- courts, ministries, administration bodies and other bodies and organisations founded by the state.

2. Local **self-government unit body** as a contracting authority covers the following entities:
- a municipality,
- a municipality within the Capital City,
- the Capital City and the old Royal Capital,

3. A special emphasis should be put at the definition of **public service**.

It is defined as an undertaking which fulfils all of the following conditions:
a) it has a capacity of a legal person;
b) it was founded with an aim of meeting the needs of public interest and does not perform an activity of an industrial nor commercial character, and
c) in which the state and/or local self-government unit owns more than 50% of the shares or interest, or which receive more than 50% of their funding from the budget of Montenegro and/or budgets of local self-government units and other public revenues or which are controlled by the contracting authority or which have more than half of their management body or oversight body members appointed by the contracting authority.

Examples of public services are: University of Montenegro, a public institution, the national fund and other bodies and organizations exercising public authority established by the state or local self-government units.

Public service is not a simple definition; application of the PPL by such an entity depends on whether it has certain characteristics. These characteristics are expressed as conditions that need to be met in order for the body in question to be considered as a body governed by public law.

The main question centres around three *cumulative* conditions required by the PPL to indicate the existence of a body governed by public law. An entity must satisfy all three of these conditions to fall within the definition. These conditions are:

- Condition 1: having legal personality
- Condition 2: established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and
- Condition 3: financed, for the most part, by the state, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose

members are appointed by the state, regional or local authorities or by other bodies governed by public law.

What does Condition 2 mean?: This is not defined in the PPL but there are two separate but linked issues here: (1) whether the organisation is established to meet needs in the general interest and (2) whether those general interest needs have an industrial or commercial character (in order to satisfy the definition the general interest needs must not have an industrial or commercial character).

'Needs in the general interest" are *generally* needs that are satisfied otherwise than by the availability of goods and services in the marketplace and that, for reasons associated with the general interest, the state chooses to provide itself or over which it wishes to retain a decisive influence. In accordance with the case law of the CJEU the following issues could indicate the existence of needs in general interests: state requirements with regard to the specific tasks to be achieved; the explicit reservation of certain activities to the public authorities; the obligation of the state to cover the costs associated with the activities in question; the control of prices to be charged for the services; the degree of monitoring or security required; and the 'public interest'.

The additional criterion for the purposes of this definition is that the general interest needs should not have an industrial or commercial character. These are generally activities that are carried out for profit in competitive markets.

Examples of organisations which can be caught by this definition are public housing bodies, an organisation established to produce, on an exclusive basis, official administrative documents, a public limited company set up by two municipalities and entrusted with tasks in the field of waste collection and road cleaning and regional development agencies working to attract inward investment.

4. Entities awarding subsidized contracts:

This concept covers natural or legal persons awarding subsidized contracts which are not contracting authorities referred to in above in cases of conclusion of the following procurement contracts:
- for works that are directly subsidized or co-financed by one or more public contracting authorities with more than 50% and where the estimated value of the procurement equals to or exceeds the value referred to in Article 26 item 6 of the PPL (i.e. EU thresholds – see → material on financial thresholds),
- for services that are related to the works contract within meaning of item 1 of this paragraph, which are directly subsidized or co-financed by one or more public contracting authorities with more than 50% and where the estimated value of the procurement equals to or exceeds the value referred to in Article 26 item 6 of the PPL.

A public contracting authority which subsidizes or co-finances the works or services should control the implementation of procedures and use of funds referred to above.

II. Sectoral contracting authorities

The second category of contracting authorities are sectoral contracting authorities i.e. entities which are obliged to follow provisions of the PPL only with regard to contracts related to performance of so called sectoral 'relevant' activities (see separate fiche on sectoral activities → Sectoral activities).

What are the 'relevant activities'?

Contracting entities falling within the below definitions are covered by the PPL, but only to the extent that they carry out a "sectoral activity" and only in relation to contracts awarded for the purpose of carrying out that activity.

In summary, the relevant activities are the provision of or operation of networks for:

- Water
- Energy - including electricity, gas or heat and the exploitation of a geographical area for the purposes of extracting of oil or gas and exploring for, or extracting coal and other solid fuels
- Transport services - the operation of transport networks and terminal facilities
- Postal services

There are three categories of sectoral contracting authorities are the following:
1) a public contracting authority pursuing one of the sectoral activities established by the PPL,
2) an economic operator in which a public contracting authority has **a dominant influence** and which performs one of the sectoral activities, or
3) other economic operators performing one of the sectoral activities on basis of special or exclusive rights assigned to them by a competent state body or a competent body of a local self-government unit.

A **dominant influence** referred to above in point 2) by a contracting authority over an economic operator is defined as situation where the contracting authority:
- has, directly or indirectly, a major share of registered capital of that economic operator, or
- has a control over majority of votes related to shares issued by the economic operator, or
- may appoint more than half of the members of supervisory, managing or other body in charge of management and conducting business of that economic operator.

If one of those circumstances occur than an economic operator who performs sectoral activity and is under a dominant influence of any pf the contracting authorities becomes itself sectoral contracting authority and has to follow provisions of the PPL when awarding public contracts.

Sectoral contracting authorities are also entities other than those listed above provided two conditions are fulfilled:
1) they perform any of the sectoral activities and
2) perform this sectoral activity on the basis of special or exclusive rights.

Special or exclusive rights are defined in turn as:
rights granted by a competent state body or the competent body of a local self-government unit in accordance with law or other regulation, with the effect to limit the pursuing of a sectoral activity to one or more economic operators and to significantly affect the possibility of other economic operators to pursue such activity.

However, special or exclusive rights are not rights which are granted by means of a publicly conducted procedure involving the definition of objective criteria for the assignment of such tasks.

Procedures which do not lead to granting of special or exclusive rights are any of those:

1) procedures conducted in accordance with the provisions of the PPL Law, regulations governing defence and security public procurements, or regulations governing the award of concessions and public-private partnerships, provided that the tender documentation, or the public invitation or a concession act have been published in accordance with law;
2) procedures ensuring appropriate prior transparency for granting authorisations on the basis of objective criteria, for:
a) granting of authorisation to operate gas installations in accordance with the procedures laid down in separate regulations regulating the field of gas market;
b) authorisation or tender documentation for the construction of new electricity production installations in accordance with separate regulations regulating the field of electricity market;

c) granting of authorisations in relation to a postal service which is not or shall not be reserved, in line with the procedures established by separate regulations regulating the provision of postal services;
d) granting of authorisation to carry on an activity involving the production of hydrocarbons in accordance with separate regulations regulating the field of hydrocarbon production;
e) a procedure for concluding public procurement contracts on public passenger transport services by bus or rail which are awarded on the basis of a competitive procedure with negotiations.

The newly established contracting authority shall, within 30 days of acquiring the capacity of a contracting authority, submit an application to the administrative authority responsible for public procurement (the Ministry) for purpose of its registration on the list of contracting authorities.

IMPORTANT! A contracting authority should apply this law even if it is not registered on the list. In other words, the list is only exemplary and is not exhaustive; what matters is fulfilment of criteria for recognition of the contracting authority rather than formal inscription in the list.

Further reading:

Public Procurement Directive: Article 2 (1) – (4)
Utilities Procurement Directive: Article 3 and 4

Case law of the Court of Justice:
C-323/96 'Commission v Belgium'
C- 353/96 'Commission v Ireland'
C 380/98 'University of Cambridge'
C- 237/99 'Commission v France'
C- 283/00 'Commission v Spain'
C- 44/96 'Mannesmann'

Module II

DIVISION OF PROCUREMENT INTO LOTS

Relevant provisions:
Article 80 of the PPL

Introduction

One of the main choices in public procurement is whether the works, supplies or services which are the subject matter of the procurement should be acquired using one contract or a number of separate contracts or "lots" - which may be awarded and performed by different economic operators. The decision is not an easy one as savings derived from economies of scale may lead to a decision to use a single contract but the diversity resulting from multiple contracts or lots can enhance competition and increase efficiency.

Thera are a number of reasons for the adoption of a procedure of dividing contract into lots, some of which are interrelated. These include:

- Promoting Small and Medium-sized Enterprises (SME) and new entrants to the market,
- Promoting tender participation,

- Fostering competition in the market,
- Avoiding single supplier dependency,
- Spreading risk.

The decision on whether to split a contract into lots and how to split a contract into lots must be made on a case-by-case basis. There is no "one size fits all" solution. This is because decisions on lots depend, to a large extent, on the specific characteristics of the market concerned and on the object of the contract. Specific characteristics of a market which may impact on the decisions on lots include: the number and type of economic operators in that market, technical and quality aspects, speed of technological change and risk of dependency on a sole supplier. An incorrect decision on whether or to divide a contract into lots and how to divide a contract into lots may have a number of negative consequences. These may include: lack of competition with poor value or low quality tender outcomes, failure to encourage SME participation or new entrants, or even collusive behaviour by economic operators.

There are cases where it may not be appropriate to divide a contract into lots -where dividing the contract into lots:

- risks restricting competition; or
- may result in excessive technical difficulties or expense; or
- the resulting need to coordinate different contractors for the lots could seriously risk undermining the proper execution of the contract.

A contracting authority must have a thorough understanding of how the specific market works before it makes a decision on whether and how to split a contract into lots.

A contracting authority also needs to understand the potential practical impact of a decision to split a contract into lots and the way in which lots are structured on:

- economic operators; and
- on the procurement process.

What the PPL says about the division of contracts into lots

The PPL (Article 80) states that the subject of procurement may be divided into lots according to the type, characteristics, purpose, place or time of implementation, provided that the subject-matter and value of individual lots have been determined, taking into account the possibility of participation of small and medium enterprises in a public procurement procedure.
At the same time the PPL also includes rules requiring the aggregation of requirements in many cases and provides that contracts must not be artificially split in order to avoid the application of the public procurement rules. It is therefore important to consider and clearly record the reasons for a decision to split a contract into lots.

The key provisions in Article 80 are as follows:

1. **Freedom to decide whether or not to divide a contract into lots and the nature of lots:** Article 80 (1) makes it clear that contracting authorities are free to decide whether or not to divide a contract into lots. Where contracting authorities decide to divide a contract into lots then they are free to determine the size and contract matter of the lots.

2. **Divide or explain**: Article 80 (2) requires that, where a contracting authority decides not to divide a contract into lots, it must explain the main reasons for its decision. The explanation must be included in the procurement documents.

3. **Transparency about how many lots an economic operator can bid for:** a bidder may submit

the bid for one, several or all lots (Article 80 (3)).

In case that the tender documentation provides for the possibility of awarding several lots to one bidder, a contracting authority may conclude the public procurement contract for each lot separately or by combining several lots or all lots of the procurement subject (Article 80 (4)

Module II

Tender documentation

Provisions of the PPL:

- Article 86 – Manner of preparation of tender documentation

- Article 93 – Publishing and supplying tender documentation

- Article 94 – Amendments to tender documentations

- Article 95 – Clarifying tender documentation

Preparation of tender documentation

Contracting authorities should prepare the tender documentation in:

- a clear,
- precise and
- intelligible manner, enabling the submission of adequate and comparable qualification applications or bids.

The tender documentation must contain all information which would enable the bidder to be aware of all the costs that it may bear in relation to the public procurement subject.

Publication of the tender documentation

The contracting authority is obliged to publish tender documentation on EPPS (Article 93). If a part of the tender documentation contains confidential information, contracting authorities should indicate in the part of the tender documentation they publish the manner in which economic operators may obtain such part of the tender documentation that contains confidential information.

Modifications of tender documentation

The tender documentation which has been published may be later amended by the contracting authorities, however, with respect to certain conditions:

1. tender documentation **may be amended not later than 15 days** before the time limit for submitting bids has expired (see below time periods), without the obligation to extend the time limit for submission of bids. If the contracting authority amends tender documentation less than 15 days before the deadline for receipt of tenders it should extend the time limit for the submission of bids so as to ensure a minimum of 15 days between the day of publication or supply of amendments of

the tender documentation and the expiry of the time limit for the submission of bids. In other words, there should be always minimum 15 days since the modification of tender documents and the deadline for submission of bids.

2. Economic operators have the right to propose to contracting authorities to amend the tender documentation, as well as to propose the amendments to the tender documentation within eight days from the day of its publication or supply.

3. Proposals for modification of tender documentation submitted by economic operators should contain a description of irregularities, shortcomings or unlawful elements of the tender documentation or of amendments to the tender documentation on the basis of which amendments are requested, but it should not contain a proposal for the wording of the amendments concerned.

4. Within 3 days since the day of receipt of the proposal of modification of tender documentation the contracting authority should notify the party having submitted the proposal by electronic means whether it accept the proposed amendments to the tender documentation.

5. The sole extension of the time limit for the submission of bids is not considered an amendment to the tender documentation.

Clarification of the tender documentation

Economic operators are allowed to request the contracting authorities in writing to clarify the tender documentation or amendments thereof. Such a request may be submitted before the expiry of the time period for submission of bids but in any case **not later than 10 days before the deadline for the submission of bids**.

The contracting authority should publish clarification of the tender documentation via EPPS with no delay and **at the latest five days as of the day of receipt of the request**.

IMPORTANT:
Clarification of tender documentation may not be used as a means of amending the tender documentation.

Further reading:

Public Procurement Directive: Article 53

Module II

CENTRALIZED AND JOINT PROCUREMENT

Relevant provisions of the PPL:
Article 4 point 19: definition of centralized procurement
Article 73 – Joint procurement
Article 74 – Centralized public procurement

Joint procurement

Joint procurement is the procurement which is conducted together by tow or more contracting

authorities. In accordance with Article 73 of the PPL two or more contracting authorities may agree to perform joint public procurement. In such a case they should jointly determine their responsibilities and obligations.
There are two options concerning joint procurement provided in the PPL

Option 1

Public procurement is conducted entirely in the name and on behalf of all contracting authorities participating in joint procurement

In the event public procurement procedure is entirely conducted jointly in the name and on behalf of all the contracting authorities involved in such joint procurement all contracting authorities are jointly responsible for fulfilling their obligations pursuant to the PPL.

Also, in the case where one contracting authority conducts on its own a procedure on behalf of all other contracting authorities, all contracting authorities are jointly responsible for fulfilling their obligations pursuant to the PPL.

Option 2
public procurement procedure is not entirely conducted jointly in the name and on behalf of all the contracting authorities

If a public procurement procedure is not entirely conducted jointly in the name and on behalf of all the contracting authorities involved in such joint procurement, they should be jointly responsible only for those parts of the procedure they carry out jointly, and each contracting authority should have sole responsibility for fulfilling its obligations pursuant to the PPL in respect of the parts of the procedure it conducts in its own name and on its own behalf.

Centralized public procurement

Centralized procurement is defined as centralized purchasing activities and means activities conducted on a permanent basis by an authorised contracting authority for procurement of supplies and/or services intended for other public contracting entities, by conclusion of contracts or framework agreements;

Public procurements for the needs of state administration bodies or public services founded by the state can be implemented by a contracting authority appointed by the Government's regulation.

Public procurements for the needs of the local administration bodies and public services founded by the local self-government can be implemented by a contracting authority appointed by the regulation of the competent local self-government body.

The method of planning and implementation of centralized public procurement is to be regulated by the regulation of the Government or a competent body of a local self-government unit.

The Property Administration (PA) undertakes centralised purchasing. On 1 January 2018, the role of the PA was expanded to cover mandatory centralised procurement for central government bodies and state funds in ten purchasing categories for supplies. Central government contracting authorities and state funds are obliged to procure these goods and services through the PA.[39] The PA is responsible for procurement procedures for the designated goods and services, and it receives payment from the relevant contracting authority for the cost of running the procedures. The contracting authority then pays the PA for the goods and services procured.

Module II

Conditions for application of public procurement procedures

Provisions of the PPL:
Article 51 – types of procedures
Article 57 – competitive procedure with negotiations
Article 60 - negotiated procedure without prior publication of a contract notice
Article 61 – competitive dialogue
Article 63 – innovation partnership
Article 64 – negotiated procedure with prior publication of a contract notice
Article 65 – prior approval of the Ministry

See also → training materials on respective public procurement procedures.

In accordance with Article 51 there are seven types of procurement procedures provided under the PPL:

1. Open procedure
2. Restricted procedure
3. Competitive procedure with negotiations
4. Competitive dialogue
5. Innovation partnership
6. Negotiated procedure without prior publication of a contract notice
7. Negotiated procedure with prior publication of a contract notice

Procedures listed in points 1 – 6 may be used by contracting authorities, procedures listed in points 1 – 2 and 4 – 7 may be used by sectoral contracting authorities. The negotiated procedure with prior publication of a contract notice is specific only for sectoral contracting authorities (→ material on sector (utilities) procurement).

There are two groups of procedures under the PPL:

[39] The goods and services subject to this centralised procurement are: office supplies, computer materials and equipment, fuel and engine oils, office furniture, means of transport, electronic communications services (mobile and fixed telephony), electronic communications services (internet), sanitary and other services (disinfection, insect and animal pest control), insurance of civil servants and state employees, and insurance of assets held by the state of Montenegro (movable and immovable property).

- Those which do not require fulfilment of specific conditions and can by applied in any circumstances (**basic procedures**), and
- Procedures which for application require fulfilment of specific conditions and may be applied only in circumstances specified in the PPL (see below).

The **first** group is composed by **open** and **restricted** procedure.

Procedures such as: the competitive procedure with negotiations, the competitive dialogue and the negotiated procedure without previous publication can be applied only in a limited number of circumstances.

The Innovation partnership (→ material on Innovation partnership) does not require fulfilment of specific circumstances – existence of a particular ground - but may be used only for innovative goods, services or works (Article 63 (1)).

Procedures applied by the sectoral contracting authorities

Sectoral contracting authorities may used freely open procedure, restricted procedure, the negotiated procedure with prior publication of a contract notice without a need to fulfil any particular conditions.

They can also apply the innovation partnership if they have need for innovative goods, services or works that cannot be satisfied by the procurement of goods, services or works already available on the market.

They can also apply the negotiated procedure without prior publication of a contract notice but only in conditions specified by the PPL (Article 59))

Conditions for application of specific procedures

The competitive procedure with negotiations (Article 57)

Competitive procedure with negotiations may be applied for the procurement of supplies, works and services if:

- the needs of contracting authority cannot be met without adaptation of existing solutions of the subject-matter of procurement;
- the subject-matter of procurement includes design or innovative solutions;

Definition of innovation is provided in Article 4 point 11 – it is the practical implementation of a new or significantly improved product, property, service, procedure, process, organization and marketing, which contribute to creation of a new value and quality of its implementation

- due to specific circumstances of the subject-matter of procurement which are related to the nature, complexity or the legal and financial requirements of the subject-matter of procurement or due to the risks related to hereto, a procurement procedure cannot be applied without prior negotiations;
- a contracting authority cannot precisely establish the technical specifications of the subject-matter of procurement with regards to valid standards, common technical specification or technical reference,
- all bids received in an open or a restricted public procurement procedure were irregular.

This ground for application of the procedure may be relied on only in the case where the previous competitive and transparent (but only open or restricted procedure) were not successful because all submitted tenders were irregular.

Definition of **irregular tenders** is provided in Article 133.

Irregular tenders are tenders which:

- are not prepared in the manner determined in the tender documentation in accordance with this Law;
- do not contain self-declaration of the bidder referred to in Article 111 of the PPL (→ material on qualification of economic operators);
- do not contain bid guarantee or contain bid guarantee for the value lower than required or bid security is not submitted in the manner established in the tender documentation or is submitted but irregular;
- tenders failing to correspond to the technical specification or where the requirements concerning the subject of procurement are not clear enough, whereupon these shortcomings could not be removed by the clarification of the bid in accordance with Article 134 (3) of the PPL;
- offer the price higher than the estimated value of the procurement;
- offer and unrealistic price, which the bidder failed to justify in accordance with Article 139 of the PPL (→ material on abnormally low tenders);
- contain erroneous calculation, whereupon the bidder does not approve of the proposed correction in accordance with Article 134 (6) of the PPL.

Receipt in the procurement procedure of only irregular tenders is one of the ground for annulation of public procurement procedure (Article 140 (1) point 4)).

Competitive dialogue (Article 61)

Grounds for application of this procedures are the same as for the competitive procedure with negotiations (Article 61)) (→ comparison between those two procedures in the material about the competitive procedure with negotiations).

Innovation partnership (Article 63)

In accordance with Article 63 (1) this procedure may be used only if the contracting authority has the need for innovative goods, services or works that cannot be met by procuring goods, services or works that are available on the market.

For definition of innovation see Article 4 point 11.

Negotiated procedure with prior publication of a contract notice (Article 64)

It is a procedure specific for sectoral contracting authorities only – it does not require any specific circumstances and can be applied always by such entities.

Negotiated procedure without previous publication of a contract notice (Article 59)

This procedure may be applied regardless of the type of the subject matter of public procurement or only with regard to specific types of procurement.

Procurement of supplies, services or works

- no bids or no regular bids have been submitted in response to an open or restricted public procurement procedure, provided that the subject of procurement and the content of the tender documentation are not substantially altered, in which case the contracting authority shall particularly involve in the negotiated procedure all bidders who have submitted their bids in response to the open or the restricted procedure;

- only particular economic operator may implement the procurement for any of the following reasons:

  a) the aim of procurement is the creation or acquisition of a unique work of art or artistic performance of the subject-matter of procurement,
  b) market competition is absent for technical reasons, or
  c) the protection of exclusive rights, including intellectual property rights;

- to the extent necessary, for reasons of extreme urgency brought about in exceptional circumstances by events unforeseeable by the contracting authority and not depending or attributable to that contracting authority, it is not possible to apply open, restricted, or competitive procedure with negotiation within the time limits provided for by this Law;

The negotiated procedure without publication of a contract notice may be used in the case of extreme urgency.

IMPORTANT!
For this to be possible the following conditions must be fulfilled:
1.there are reasons of extreme urgency,
2. brought about by events unforeseen by the contracting authority and
3. the time limits, applicable in public procurement procedures, such as open, restricted procedures or the competitive procedure with negotiations, cannot be kept.

The Court of Justice of the EU explained also that:
- derogations form provisions on mandatory publication of procurement notices must be interpreted
strictly,
- the burden of proof for the actual existence of exceptional circumstances justifying a derogation is on the person seeking to rely on those circumstances,
- circumstances invoked by the contracting authority to justify extreme urgency cannot be in any event attributable to the contracting authority,
- in order to rely on the derogation provided by that provision, all the conditions it lays down must be fulfilled cumulatively and
- a causal link between the unforeseeable event and the extreme urgency resulting therefrom must be established.

The CJEU dealt with this ground for derogation from application of transparent and competitive rules, in particular in the following circumstances used by EU MS in order to justify direct award of contracts:
- faculty and school premises entirely inappropriate for receiving the large number of new students expected in a new academic year (C – 24/91, Commission v Spain): CJEU concluded that Spain did not prove existence of extreme urgency; there was also enough time to apply an accelerated

procedure;
- the 'unforeseen' refusal of an approval by an administrative body (C- 318/94, Commission v Germany): CJEU concluded that Germany did not prove existence of extreme urgency – the possibility that a body which must approve a project might, before expiry of a time period laid down for that purpose, raise objections for reasons which is entitled to put forward, is something which is foreseeable in plan approval procedure;
- the unforeseeable and imminent risk of avalanches in the region (C – 107/92 Commission v Italy) – the CJEU concluded that Italy did not demonstrate the existence of extreme urgency and could have apply, instead of resigning from publication of procurement notice, an accelerated procedure with shorter time limits;
- protection from inundations (C-385/02 Commission v Italy): works consisting in repetition of originally requested works, covered by the contract were to be conducted long after the conclusion of the original contract – the CJEU concluded that those contracts were allowed only within 3 year period since the conclusion of original contract;
- the construction of a system for the transport of ash between the Megalopolis thermal electricity generation plant and the mine of Thoknia (C- 394/02 Commission v Greece): CJEU concluded that Greece did not prove existence of extreme urgency – the need to carry out works within the time limits imposed by the competent authority for the environmental impact assessment cannot be regarded as extreme urgency resulting from the unforeseeable event

In C-19/13 'Fastweb' the CJEU stressed also that recourse to direct awards need to be subjected to a strict assessment of whether the contracting authority "acted diligently and whether it could legitimately hold that the conditions [for recourse to this procedure] were in fact satisfied".

Procurement of supplies

- the subject of procurement are the supplies manufactured purely for the purposes of research, experimentation, study or development, on the condition that it does not include quantity production with an aim of making profit or to recover the costs of research and development;

- it concerns additional deliveries in the course of execution of contractual obligations by the bidder with whom a public procurement contract was concluded under this Law, which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations where a change of bidder or supplies would result in technical difficulties in operation and maintenance, provided that the total value of the additional deliveries does not exceed 20% of the value of the concluded contract, ;and as of the conclusion of original contracts, the duration of such contracts as well as that of recurrent contracts shall not exceed three years;

- supplies are acquired on commodity markets;

- supplies are acquired on particularly advantageous terms from either a bidder which has definitely wound up its business activities or is in the process of liquidation or insolvency, in accordance with the national laws and regulations;

Procurement of services

- the subject of procurement is a service which follows after the continuation of a service provided through a design contest (conducted in accordance with Article 156 of the PPL) and the contract is concluded with:

- the selected economic operator (winner of the contest) or
- one of the selected economic operators (one of winners of the contest), provided that all selected economic operators are involved in the negotiated procedures by the contracting authority.

This ground for application of the negotiated procedure without prior publication of a contract notice is specific only for services and may be organized as a follow up of a design contest. It is applied with regard to award of service contract which is to be concluded with the winner or the winners of the contest.
The conduct of the procedure depend on the results of the design.
If there is only one winner of the contest the contracting authority negotiates the terms of the future contract only with one economic operator – the winner of the contest. If there are more than one winner of the contest the contracting authority should invite to the subsequent negotiated procedure all winners of the contract, negotiate the terms of the contract with all of them and award the contract to the economic operators offering the best offer.

Procurement of services or works

- it concerns procuring services and/or awarding works consisting in the repetition of similar works or services entrusted to the economic operator with whom the contracting authority concluded an original contract, provided that the services and/or works are in accordance with the original contract concluded after the procedure from Article 51 of the PPL was conducted, if the possibility of additional services or works has been foreseen in the tender documents and if the total value of subsequent works or services does not exceed 20% of the value of the contract concluded and the original contract was not concluded more than three years ago.

For this possibility to exist for application of the negotiated procedure without prior publication the following conditions should be fulfilled:

- the subject matter is the repetition of similar works or services,
- the contract is awarded to the economic operator who performs the original contract for the contracting authority,
- services or works which are awarded should be consistent with the original contract,
- the possibility of awarding works or services had been already envisaged in the tender documentation concerning the original contract,
- the total value of subsequent works or services does not exceed 20 % of the original contract,
- the new contract is concluded withing three (3) after the conclusion of original contract.

Further reading:

Public Procurement Directive: Article 26 and 32

Case law of the Court of Justice:
C – 107/92 ‘Commission v Italy’
C-385/02 ‘Commission v Italy’
C- 318/94 ‘Commission v Germany’
C- 394/02 ‘Commission v Greece’
C – 24/91 ‘Commission v Spain’
C-19/13 ‘Fastweb’

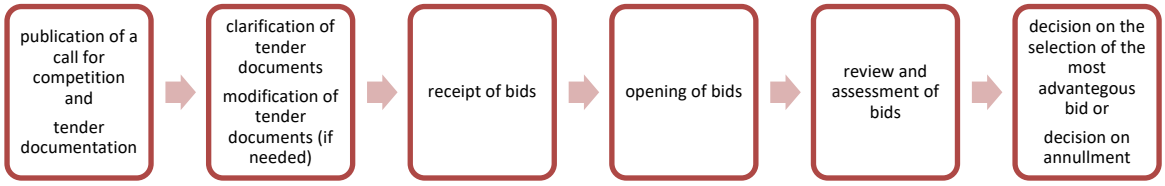
Module II
Public procurement procedures

Open procedure

Some relevant provisions of the PPL:
- Article 53 – Commencing of the procedure
- **Article 54** – Conduct of procedure
- Article 83 – Conditions for launching of a public procurement procedure
- Article 84 – Public procurement plan
- Article 85 – Market analysis
- Article 93 – Publishing and supplying tender documentation
- Article 94 – Amendments to tender documentations
- Article 95 – Clarifying tender documentation
- **Articles 121 – 126** – Submission of bids
- Article 130 – 131 - Opening of bids
- Article 132 – 139 – Evaluation of bids
- Article 141 – 148 – Decisions of the contracting authority

General characteristics of the open procedure – some major treats:

- it is a basic public procurement procedure along the restricted procedure – may be applied for any public procurement subject: does not require fulfillment of any conditions for application;
- it is initiated with the publication of call for competition (tender documentation) on ESPP;
- a participation is open to all interested economic operators;
- it is one stage public procurement procedure – in response to call for competition interested economic operators submit tenders;
- an information concerning economic operators' qualification is included in tenders – evaluation of bidders' qualifications and assessment of tenders is a part of the same stage of the procedure;
- contracting authorities may (but do not have to) evaluate bids as to their compliance with the conditions and requirements relating to the subject of procurement and technical specifications before they verify compliance with conditions and grounds for exclusion from a public procurement procedure;
- a contract is awarded on the basis of submitted tenders in accordance with contract award criteria;
- no negotiations between contracting authorities and bidders are allowed.



Conditions for launching of the procedure

Contracting authorities may initiate the open procedure (as other public procurement procedures too) provided that the **procurement subject is foreseen in their public procurement plan** (see → material on public procurement plan) for the current year and the funds for such procurement are provided by means of a budget allocation or otherwise in accordance with law (Article 83 (1)).

Preparation of the public procurement procedure

Before launching of an open procurement procedure contracting authorities may conduct **a market analysis** (see → Market analysis) with a view to determine precisely the description (see → Description of the subject – matter of public procurement) and the estimated value of the procurement subject (see → Estimation of the public procurement value).

Important:

The contracting authority should prepare tender documentation in a clear, precise and intelligible manner, enabling the submission of adequate and comparable bids. The tender documentation should contain all information which would enable the bidder to be aware of all costs that it may bear in relation to the public procurement subject.

Launching of the procedure

The open procedure is launched by **publication of a call for competition and tender documentation in EPPS** for the purpose of submission of bids.

Publication of the tender documentation

The contracting authority is obliged to publish tender documentation on EPPS (Article 93). If a part of the tender documentation contains confidential information, contracting authorities should indicate in the part of the tender documentation they publish the manner in which economic operators may obtain such part of the tender documentation that contains confidential information.

Modifications of tender documentation

The tender documentation which has been published may be later amended by the contracting authorities, however, with respect to certain conditions:

1. tender documentation **may be amended not later than 15 days** before the time limit for submitting bids has expired (see below time periods), without the obligation to extend the time limit for submission of bids. If the contracting authority amends tender documentation less than 15 days before the deadline for receipt of tenders it should extend the time limit for the submission of bids so as to ensure a minimum of 15 days between the day of publication or supply of amendments of the tender documentation and the expiry of the time limit for the submission of bids. In other words, there should be always minimum 15 days since the modification of tender documents and the deadline for submission of bids.

2. Economic operators have the right to propose to contracting authorities to amend the tender documentation, as well as to propose the amendments to the tender documentation within eight days from the day of its publication or supply.

3. Proposals for modification of tender documentation submitted by economic operators should contain a description of irregularities, shortcomings or unlawful elements of the tender documentation or of amendments to the tender documentation on the basis of which amendments are requested, but it should not contain a proposal for the wording of the amendments concerned.

4. Within 3 days since the day of receipt of the proposal of modification of tender documentation the contracting authority should notify the party having submitted the proposal by electronic means whether it accept the proposed amendments to the tender documentation.

5. The sole extension of the time limit for the submission of bids is not considered an amendment to the tender documentation.

Clarification of the tender documentation

Economic operators are allowed to request the contracting authorities in writing to clarify the tender documentation or amendments thereof. Such a request may be submitted before the expiry of the time period for submission of bids but in any case **not later than 10 days before the deadline for the submission of bids**.

The contracting authority should publish clarification of the tender documentation via EPPS with no delay and **at the latest five days as of the day of receipt of the request**.

IMPORTANT:
Clarification of tender documentation may not be used as a means of amending the tender documentation.

Submission of bids

In response to a call for competition in the open procedure interested economic operators submit bids (those who submit bids are referred to below as bidders – see Article 4 point 17 of the PPL).

See also → Minimum time periods in public procurement procedures

The time period for submission of bids set by the contracting authority in the open procedure, in principle may not be shorter than 30 days counting from the day of publication of the tender documentation.

This time period may be shortened, however, in two situations:

1. if it is so required by the reasons of urgency not caused by the fault of the contracting

authority the contracting authority may reduce the time period for bid submission but to not less than 15 days from the day of publication of the tender documentation.

2. If the bids are submitted electronically through EPPS, the contracting authority may reduce the time period for submission of bids by 5 days: from 30 to 25 days.

Receipt and recording of bids

When receiving bids contracting authorities should make a note of the date and time (hour and minute) of such receipt, and record the bids in order of their receipt. If bids are delivered in person, contracting authorities should issue a confirmation of receipt to the bidder concerned, containing the data on the time of receipt of the bid.

Opening of bids

The procedure which should be followed with regard to opening of bids is defined in Article 130. Accordingly,

- bids should be opened within the time limit and in the manner set out in the tender documentation.
- bids delivered in person or by mail bids should be opened not later than one hour after the time limit for submitting bids has expired.
- bids should be opened in public.
- public opening of bids should be attended by at least two thirds of members of the commission for opening and evaluation of bids. Public opening of bids may be attended by the authorised representatives of the bidders.
- bids should be opened in the order in which they are received;
- late bids and bids which have not been submitted in accordance with requirements specified in the PPL (Article 121) should not be opened but returned to the bidder unopened, upon enforceability of the decision on selection of the most advantageous bid, or the decision on annulment of the procedure;
- contracting authorities are not obliged to open bids publicly where the bids are submitted electronically and where the EPPS enables an automatic opening of bids at the time of expiry of the time limit for bid submission, along with producing the minutes on bid opening and delivery of those minutes to all bidders who submitted their bids.

Minutes of the opening of bids

The **Commission for the opening and evaluation of bids** is obliged to write the minutes of the opening of bids (Article 131). The minutes should be signed by the present members of the commission for the opening and evaluation of bids and the present authorised persons of the bidders. Once the minutes are signed, all of the present authorised representatives of the bidders should be supplied with their copy. Where an authorised representative of a bidder refuses to sign the minutes or leave the bid opening before its closure, such minutes shall state the leaving, the refusal to sign the minutes and the reasons for the refusal to sign the minutes. Contracting authorities should supply bidders who were not present during the opening of bids with the minutes of the opening of bids not later than three days after the opening of bids has ended.

Reviewing and assessing bids

The bids are reviewed and assessed after their opening without bidders being present. The **Commission for opening and evaluation of bids**, in particular, verifies whether there are grounds for exclusion from a public procurement procedure or reasons for irregularity of bids.

The PPL defines types of irregularities which, if noted in received tenders, result in their irregularity.

Thus, **irregular bids** are bids which:

- were not prepared in the manner determined in the tender documentation in accordance with the PPL;
- do not contain self-declaration of the bidder (see → Qualification and selection of economic operators;
- do not contain bid guarantee or the bid guarantee applies to the value lower than required or it is not submitted in the manner established in the tender documentation or it is submitted but irregular;
- fail to correspond to the technical specification or where the requirements concerning the subject of procurement are not clear enough, whereupon these shortcomings could not be removed by the clarification of the bid in accordance with Article 134 (3) of the PPL;
- offer the price higher than the estimated value of the procurement;
- offer an unrealistic price, which the bidder failed to justify in accordance with Article 139 of the PPL;
- contain erroneous calculation, whereupon the bidder does not approve of the proposed correction thereof in accordance with Article 134 (6) of the PPL

Those bids in which irregularities mentioned above were not spotted are classified as **regular bids**.

The PPL provides for the following requirements concerning evaluation of bids.

- contracting authorities may (but do not have to) evaluate bids as to their compliance with the conditions and requirements relating to the subject of procurement and technical specifications before they verify compliance with conditions and grounds for exclusion from a public procurement procedure.
- if a economic operator fails to submit the evidence or the evidence submitted is incomplete or incorrect, contracting authorities should notify the economic operator thereof, respecting the principles of equal treatment and transparency, and allow the economic operators concerned to submit a supplement or clarify the necessary information or documents within five days as of the day of supplying the notification – in the event the bidder does not act accordingly it is deemed to have abandoned the bid.
- evidence relating to the evaluation of the bids may not be subsequently submitted nor amended, unless there is an erroneous calculation.
- where a bid contains erroneous calculation, contracting authorities should notify the bidders thereof and request that bidders provide their written agreement for the correction of such error within five days from receiving such request.
- contracting authorities should reject a bid they establish to be irregular on the basis of the results of review and assessment thereof, or in respect of which there are grounds for exclusion in accordance with the tender documentation.
- the information on the review and assessment of bids must be confidential until the contracting authority has taken the decision.
- once reviewed and assessed, regular bids are evaluated and ranked by the commission for the opening and evaluation of bids.
- each member of the commission should separately (individually) evaluate regular bids on the basis of the criteria established in the tender documentation. On the basis of evaluation results an average number of points awarded to each bid should be established together with a ranking list in descending order.
- commission for the opening and evaluation of bids should write up minutes of the review, assessment, comparison and evaluation of bids.
- a member of the commission disagreeing with the conducted procedure of review and evaluation of bids or with the proposal for the decision on the selection of the most advantageous bid or the decision on the annulment of the public procurement procedure has the right to request that his/her position on the matters concerned be indicated in the minutes.

Selection of the most advantageous tender – award of contract

The contracting authority selects the most advantageous tender in accordance with contract award criteria as stated in the tender documentation (see → Contract award criteria).

Decisions of the contracting authority

Following the evaluation of tenders the contracting authority should take respective decisions concerning the open procedure.
So, the contracting authority should adopt the decision on selection of the most advantageous bid, or the decision on annulment of a public procurement procedure within 60 days from the day of opening of bids and publish it on the EPPS within three days as of the day of adoption.

Those decisions of contracting authority are adopted by the authorized person of a contracting authority, upon proposal of the commission for opening and evaluation of bids.

Decisions published on the EPPS shall be considered properly supplied to all participants in a public procurement procedure on the day following that of their publication. Decision on the selection of the most advantageous tender which is not published shall have no legal effect. In case some of the information included in the decisions is confidential in accordance with the law governing data secrecy, the decisions shall be published in a way that ensures appropriate protection of such information.

Access to public procurement procedure documents

In the period between submission of the decision about exclusion from the public procurement procedure or the publication of decisions on the selection of the most advantageous tender or annulment of the procurement procedure on the EPPS and the expiration of the time limit for lodging appeals, contracting authorities should allow bidders, if they request so in writing, to access all of the public procurement procedure documents within two days as of the day of receipt of such request, with the exception of those documents which are published on the EPPS and the documents designated as confidential.

Content of decisions of the contracting authority

Decision on exclusion from a public procurement procedure should contain:

- data on contracting authority;
- data on type of public procurement procedure, name and description of the procurement subject taken as a whole and by lots and the number of the tender documentation;
- total estimated value of the procurement subject as a whole and by lots;
- name of the qualification applicant that is excluded from the public procurement procedure and the reasons for exclusion thereof;
- instruction on legal remedy;
- date of adoption of the decision and signature of the authorized person of a contracting authority.

The decision on exclusion from a public procurement procedure is enforceable upon expiry of the time limit for filing an appeal in case the appeal was not filed, or on the day following that of publication of the decision on rejection of the appeal.

Decision on the selection of the most advantageous is adopted in order to decide on selection of the most advantageous bid but also to classify a given bid as regular bids and irregular bids, and exclusion of candidates or bidders from a public procurement procedure in accordance with this Law.

If two or more bids are equally ranked against the criterion for the selection of the most advantageous bid, contracting authorities shall invite those equally ranked bidders and perform the selection by drawing lots. The drawing should be performed by the president of the commission for opening and evaluation of bids.

Decisions on the selection of most advantageous bid must contain information about the following:

- the contracting authority;
- the type of the public procurement procedure, name and description of the subject of procurement, taken as a whole and by lots, and the number of the tender documentation;
- the total estimated value of the subject of procurement, taken as a whole and by lots;
- irregular bids and the reasons for such determination;
- regular bids;
- reasons supporting the selection of the most advantageous bid, including the bids in case of conclusion of a framework agreement with one or more bidders;
- instruction on legal remedy;
- the date of adoption of such decision and the signature of the authorised person of the contracting authority.

If the subject of procurement is divided into lots, decisions on the selection of the most advantageous bid should be adopted for each of the lots individually, for more than one lot or for all lots.

It may also happen that for various reasons the contract cannot be awarded and the procedure **must be annulled**.
Reasons for annulment of public procurement procedures are listed in Article 140 of the PPL. Those which are relevant for the open procedure are:

- the contracting authority finds it necessary to **substantially alter the tender documentation** (see above on modification of tender documents) before expiry of the time limit for submitting bids;
- there have been no bids or no regular bids submitted;
- where objective circumstances occurred prior to consideration of bids (organisational change, streamlining, or the subject of procurement is otherwise acquired), due to which the genuine need of the contracting authority for the subject of procurement ceased to exist – if this happens the contracting authority may not conduct the procurement concerned in the current year;
- the subject of procurement has been performed completely or for the most part following a final decision on the selection of the most advantageous bid which is subsequently annulled by the Administrative Court;
- there are other grounds, as prescribed by the PPL.

Depending on the circumstances contracting authorities may annul an entire public procurement procedure or a part of it where the subject of procurement is divided into lots (see → Division into lots).

Decisions on the annulment of public procurement procedures, depending on the reason for the annulment, should contain information about the following:

- the contracting authority;
- the bidders;
- reasons for exclusion from the public procurement procedure;
- reasons supporting the annulment of public procurement procedure, taken as a whole or for specific public procurement lot/s;
- the type of the public procurement procedure, name and description of the subject of procurement, taken as a whole and by lots, and the number of the tender documentation;
- the total estimated value of the subject of procurement, taken as a whole and by lots;

- instruction on legal remedy;
- the date of adoption of such decision and the signature of the authorised person of the contracting authority.

Enforceability of decisions taken by the contracting authority become enforceable upon expiry of certain time period depending on the type of the decision taken.

Decisions **on annulment** of the procedure become enforceable (Article 147):
- on the day following the date of publication on the EPPS, provided that no bids or qualification applications have been submitted;
- upon expiry of the time limit for lodging an appeal, provided that no appeals have been lodged;
- on the day following the date of publishing the decision upon an appeal, by means of which an appeal is rejected or an appeal procedure is discontinued, in accordance with the PPL.

Decisions **on the selection of the most advantageous bid** become enforceable (Article 146):
- upon expiry of the standstill period, provided that no appeals have been lodged,
- on the day following the date of publishing the decision upon an appeal, by means of which an appeal is rejected or an appeal procedure is discontinued, in accordance with the PPL.

Exemptions from the standstill period

Contracting authorities may not conclude a public procurement contract conducted in the open procedure before enforceability of the decision on selection of the most advantageous bid (i.e. before expiry of the standstill) if only one bidder participated in the public procurement procedure.

End of the procurement procedure (Article 148)

The open procedure ends upon adoption by the contracting authority decision on selection of the most advantageous bid, or a decision on annulment of a public procurement procedure.

Module II
Public procurement procedures

Restricted procedure

Relevant provisions of the PPL:

- Article 53 – Commencing of the procedure

- **Article 55** – Conduct of the procedure

- Article 56 – Second stage of the restricted procedure

- Article 66 – Determining qualification of the applicants

- Article 67 – Limitation of number of qualified candidates

- Article 83 – Conditions for launching of a public procurement procedure

- Article 84 – Public procurement plan

- Article 85 – Market analysis

- Article 93 – Publishing and supplying tender documentation

- Article 94 – Amendments to tender documentations

- Article 95 – Clarifying tender documentation

- **Articles 121 – 126** – Submission of bids

- **Articles 130 – 131** - Opening of bids
- **Article 137** – Qualification applications
- **Articles 132 – 139** – Evaluation of bids
- **Articles 141 – 148** – Decisions of the contracting authority

General characteristics of the restricted procedure - some major treats:

- is one of two basic procedures in the PPL (along the open procedure) – may be applied for any public procurement subject – does not require fulfillment of any conditions for application;
- is initiated with the publication of call for competition (tender documentation) on ESPP;
- participation is open to all interested economic operators;
- is a two stage public procurement procedure – in response to call for competition economic operators submit application for qualification;
- the contracting authority invites to the second stage of the procedure and submission of tenders only those candidates which fulfill the requirements concerning qualifications;
- the contracting authority may limit the number of qualified candidates which will be invited to submit bids ('short – listing') – their number may not be lower than 5;
- information concerning economic operators' qualifications is included in applications for qualification – evaluation of candidates' qualifications and their selection is a part of the first stage of the procedure;
- a contract is awarded on the basis of submitted tenders in accordance with contract award criteria;
- no negotiations between contracting authorities and bidders are allowed.

Conditions for launching of the procedure

Contracting authorities may initiate the restricted procedure (as other public procurement procedures too) provided that the **procurement subject is foreseen in their public procurement plan** (see → material on public procurement plan) for the current year and the funds for such procurement are provided by means of a budget allocation or otherwise in accordance with law (Article 83 (1)).

Preparation of the public procurement procedure

Before launching of a restricted procurement procedure contracting authorities may conduct **a market analysis** (see → Market analysis) with a view to determine precisely the description (see → Description of the subject – matter of public procurement) and the estimated value of the procurement subject (see → Estimation of the public procurement value).

IMPORTANT:

The contracting authority should prepare tender documentation in a clear, precise and intelligible manner, enabling the submission of adequate and comparable bids. The tender documentation should contain all information which would enable the bidder to be aware of all costs that it may bear in relation to the public procurement subject.

FIRST STAGE OF THE RESTRICTED PROCEDURE

Launching of the procedure

The restricted procedure is launched by **publication of a call for competition and tender documentation in EPPS** for the purpose of submission of qualification applications.

Publication of the tender documentation

The contracting authority is obliged to publish tender documentation on EPPS (Article 93). If a part of the tender documentation contains confidential information, contracting authorities should indicate in the part of the tender documentation they publish the manner in which economic operators may obtain such part of the tender documentation that contains confidential information.

Modifications of tender documentation

The tender documentation which has been published may be later amended by the contracting authorities, however, with respect to certain conditions:

1. tender documentation **may be amended not later than 15 days** before the time limit for submitting bids has expired (see below time periods), without the obligation to extend the time limit for submission of bids. If the contracting authority amends tender documentation less than 15 days before the deadline for receipt of tenders it should extend the time limit for the submission of bids so as to ensure a minimum of 15 days between the day of publication or supply of amendments of the tender documentation and the expiry of the time limit for the submission of bids. In other words, there should be always minimum 15 days since the modification of tender documents and the deadline for submission of bids.

2. Economic operators have the right to propose to contracting authorities to amend the tender documentation, as well as to propose the amendments to the tender documentation within eight days from the day of its publication or supply.

3. Proposals for modification of tender documentation submitted by economic operators should contain a description of irregularities, shortcomings or unlawful elements of the tender documentation or of amendments to the tender documentation on the basis of which amendments are requested, but it should not contain a proposal for the wording of the amendments concerned.

4. Within 3 days since the day of receipt of the proposal of modification of tender documentation the contracting authority should notify the party having submitted the proposal by electronic means whether it accept the proposed amendments to the tender documentation.

5. The sole extension of the time limit for the submission of bids is not considered an amendment to the tender documentation.

Clarification of the tender documentation

Economic operators are allowed to request the contracting authorities in writing to clarify the tender documentation or amendments thereof. Such a request may be submitted before the expiry of the time period for submission of bids but in any case **not later than 10 days before the deadline for the submission of bids**.

The contracting authority should publish clarification of the tender documentation via EPPS with no delay and **at the latest five days as of the day of receipt of the request**.

IMPORTANT:
Clarification of tender documentation may not be used as a means of amending the tender documentation.

Submission of qualification applications

In response to a call for competition in the restricted procedure interested economic operators submit qualification applications.

See also → Minimum time periods in public procurement procedures

The time period for submission of qualification applications set by the contracting authority in the restricted procedure, in principle, may not be shorter than 30 days counting from the day of publication of the tender documentation.

This time period may be shortened, however, if it is so required by the reasons of urgency not caused by the fault of the contracting but to not less than 15 days from the day of publication of the tender documentation.

Qualification of economic operators

Qualification of the applicants in the restricted procedure should be performed in relation to capability requirements foreseen in the tender documentation.

Together with applications for qualification economic operators should provide declaration that all mandatory requirements have been met, as well as the capability requirements prescribed in the tender documentation.

Opening of qualification applications
Applications for qualification should be opened after the expiry of the period defined in the call for competition, without the attendance of applicants' representatives, about which the minutes shall be produced.

IMPORTANT: the opening of qualification applications is not public unlike the opening of bids.

Assessment of applications for qualifications

After the opening of applications for qualification, contracting authorities should assess the validity of timely submitted applications for qualification and determine which candidates qualify to the second stage of the procedure. Those economic operators who have not fulfilled the qualification requirements should be delivered **a notice of elimination from further public procurement procedure**.

Possibility of limiting the number of qualified candidates

A characteristic solution which differs the restricted procedure from open procedure is the possibility of limiting the number of qualified candidates who will be invited to tender in the second stage of the procedure. Basically, there are two options available to the contracting authority (it should decide which to apply at the moment of launching the procurement procedure). First, the contracting authorities can invite all economic operators who fulfil the qualification criteria to submit bids. Second, they can limit the number of qualified candidates and invite only some of them to submit bids. The second option is referred to as limiting the number of qualified candidates or 'short – listing'. Relevant rules are provided in Article 67 of PPL. Those provisions are applicable not only to restricted procedure but to all other multi - stage procedures such as competitive procedure with negotiations, negotiated procedure with prior publication of a contract notice, competitive dialogue or innovation partnership.

Thus,

- ✓ contracting authority may limit the number of qualified candidates in tender documents, provided that the minimum number of candidates may not be less than 5 (five) (it is minimum three in other multistage procedures);
- ✓ if the contracting authority applies this option, the selection of the foreseen number of candidates should be performed according to the number and/or amount of references for proving the fulfilment of the required capability requirements (see → Qualification and selection of economic operators);
- ✓ if the number of qualified candidates is below the number prescribed by the tender documentation, the contracting authority may proceed with the public procurement procedure if that possibility is envisaged in its tender documentation;
- ✓ after assessing the validity of submitted applications for qualification, contracting authorities shall rank candidates who submitted valid applications;
- ✓ the applicants who were not ranked within the determined number of candidates set by the contracting authority should be delivered a notice of elimination from further public procurement procedure (they are in the same situation as those who have not fulfilled the qualification requirements).

As regards those economic operator who are excluded from the public procurement procedure the contracting authority should inform them within 15 days as of the day of opening of qualification applications and submit it to the economic operator within three days of its adoption (Article 141 (1) point 1).

SECOND STAGE OF THE RESTRICTED PROCEDURE

Second stage of the restricted procedure commences when the contracting authority sends

invitations to qualified candidates to submit bids. Invitations should be send electronically to all invited candidates on the same date.

The invitation to submit bids should contain information about the time limit and the manner of submission of bids, in accordance with tender documents.

Submission of bids

See also → Minimum time periods in public procurement procedures

The time period for submission of bids set by the contracting authority in the second stage of the restricted procedure, in principle may not be shorter than 30 days counting from the day of sending the invitation to submit bids. This time period may be shortened, however, if it is so required by the reasons of urgency not caused by the fault of the contracting authority – in such a case the contracting authority may reduce the time period for submission of bids to not less than 10 days from the day of delivery of the invitation for submission of bids.

Receipt and recording of bids

When receiving bids contracting authorities should make a note of the date and time (hour and minute) of such receipt, and record the bids in order of their receipt. If bids are delivered in person, contracting authorities should issue a confirmation of receipt to the bidder concerned, containing the data on the time of receipt of the bid.

Opening of bids

The procedure which should be followed with regard to opening of bids is defined in Article 130. Accordingly,

- bids should be opened within the time limit and in the manner set out in the tender documentation.
- bids delivered in person or by mail bids should be opened not later than one hour after the time limit for submitting bids has expired.
- bids should be opened in public.
- public opening of bids should be attended by at least two thirds of members of the commission for opening and evaluation of bids. Public opening of bids may be attended by the authorised representatives of the bidders.
- bids should be opened in the order in which they are received;
- late bids and bids which have not been submitted in accordance with requirements specified in the PPL (Article 121) should not be opened but returned to the bidder unopened, upon enforceability of the decision on selection of the most advantageous bid, or the decision on annulment of the procedure;
- contracting authorities are not obliged to open bids publicly where the bids are submitted electronically and where the EPPS enables an automatic opening of bids at the time of expiry of the time limit for bid submission, along with producing the minutes on bid opening and delivery of those minutes to all bidders who submitted their bids.

Minutes of the opening of bids

The **Commission for the opening and evaluation of bids** is obliged to write the minutes of the opening of bids (Article 131). The minutes should be signed by the present members of the commission for the opening and evaluation of bids and the present authorised persons of the bidders. Once the minutes are signed, all of the present authorised representatives of the bidders should be supplied with their copy. Where an authorised representative of a bidder refuses to sign

the minutes or leave the bid opening before its closure, such minutes shall state the leaving, the refusal to sign the minutes and the reasons for the refusal to sign the minutes. Contracting authorities should supply bidders who were not present during the opening of bids with the minutes of the opening of bids not later than three days after the opening of bids has ended.

Reviewing and assessing bids

The bids are reviewed and assessed after their opening without bidders being present. The **Commission for opening and evaluation of bids**, in particular, verifies whether there are grounds for exclusion from a public procurement procedure or reasons for irregularity of bids.

The PPL defines types of irregularities which, if noted in received tenders, result in their irregularity.

Thus, **irregular bids** are bids which:

- were not prepared in the manner determined in the tender documentation in accordance with the PPL;
- do not contain self-declaration of the bidder (see → Qualification and selection of economic operators);
- do not contain bid guarantee or the bid guarantee applies to the value lower than required or it is not submitted in the manner established in the tender documentation or it is submitted but irregular;
- fail to correspond to the technical specification or where the requirements concerning the subject of procurement are not clear enough, whereupon these shortcomings could not be removed by the clarification of the bid in accordance with Article 134 (3) of the PPL;
- offer the price higher than the estimated value of the procurement;
- offer an unrealistic price, which the bidder failed to justify in accordance with Article 139 of the PPL;
- contain erroneous calculation, whereupon the bidder does not approve of the proposed correction thereof in accordance with Article 134 (6) of the PPL

Those bids in which irregularities mentioned above were not spotted are classified as **regular bids**.

The PPL provides for the following requirements concerning evaluation of bids.

- contracting authorities may (but do not have to) evaluate bids as to their compliance with the conditions and requirements relating to the subject of procurement and technical specifications before they verify compliance with conditions and grounds for exclusion from a public procurement procedure.
- if a economic operator fails to submit the evidence or the evidence submitted is incomplete or incorrect, contracting authorities should notify the economic operator thereof, respecting the principles of equal treatment and transparency, and allow the economic operators concerned to submit a supplement or clarify the necessary information or documents within five days as of the day of supplying the notification – in the event the bidder does not act accordingly it is deemed to have abandoned the bid.
- evidence relating to the evaluation of the bids may not be subsequently submitted nor amended, unless there is an erroneous calculation.
- where a bid contains erroneous calculation, contracting authorities should notify the bidders thereof and request that bidders provide their written agreement for the correction of such error within five days from receiving such request.
- contracting authorities should reject a bid they establish to be irregular on the basis of the results of review and assessment thereof, or in respect of which there are grounds for exclusion in accordance with the tender documentation.
- the information on the review and assessment of bids must be confidential until the contracting authority has taken the decision.
- once reviewed and assessed, regular bids are evaluated and ranked by the commission for

the opening and evaluation of bids.

- each member of the commission should separately (individually) evaluate regular bids on the basis of the criteria established in the tender documentation. On the basis of evaluation results an average number of points awarded to each bid should be established together with a ranking list in descending order.
- commission for the opening and evaluation of bids should write up minutes of the review, assessment, comparison and evaluation of bids.
- a member of the commission disagreeing with the conducted procedure of review and evaluation of bids or with the proposal for the decision on the selection of the most advantageous bid or the decision on the annulment of the public procurement procedure has the right to request that his/her position on the matters concerned be indicated in the minutes.

Selection of the most advantageous tender – award of contract

The contracting authority selects the most advantageous tender in accordance with contract award criteria as stated in the tender documentation (see → Contract award criteria).

Decisions of the contracting authority

Following the evaluation of tenders the contracting authority should take respective decisions concerning the restricted procedure.
So, the contracting authority should adopt the decision on selection of the most advantageous bid, or the decision on annulment of a public procurement procedure within 60 days from the day of opening of bids and publish it on the EPPS within three days as of the day of adoption.

Those decisions of contracting authority are adopted by the authorized person of a contracting authority, upon proposal of the commission for opening and evaluation of bids.

Decisions published on the EPPS shall be considered properly supplied to all participants in a public procurement procedure on the day following that of their publication. Decision on the selection of the most advantageous tender which is not published shall have no legal effect. In case some of the information included in the decisions is confidential in accordance with the law governing data secrecy, the decisions shall be published in a way that ensures appropriate protection of such information.

Access to public procurement procedure documents

In the period between submission of the decision about exclusion from the public procurement procedure or the publication of decisions on the selection of the most advantageous tender or annulment of the procurement procedure on the EPPS and the expiration of the time limit for lodging appeals, contracting authorities should allow bidders, if they request so in writing, to access all of the public procurement procedure documents within two days as of the day of receipt of such request, with the exception of those documents which are published on the EPPS and the documents designated as confidential.

Content of decisions of the contracting authority

Decision on exclusion from a public procurement procedure should contain:

- data on contracting authority;
- data on type of public procurement procedure, name and description of the procurement subject taken as a whole and by lots and the number of the tender documentation;
- total estimated value of the procurement subject as a whole and by lots;

- name of the qualification applicant that is excluded from the public procurement procedure and the reasons for exclusion thereof;
- instruction on legal remedy;
- date of adoption of the decision and signature of the authorized person of a contracting authority.

The decision on exclusion from a public procurement procedure is enforceable upon expiry of the time limit for filing an appeal in case the appeal was not filed, or on the day following that of publication of the decision on rejection of the appeal.

Decision on the selection of the most advantageous bid

Decision on the selection of the most advantageous is adopted in order to decide on selection of the most advantageous bid but also to classify a given bid as regular bids and irregular bids, and exclusion of candidates or bidders from a public procurement procedure in accordance with this Law.

If two or more bids are equally ranked against the criterion for the selection of the most advantageous bid, contracting authorities shall invite those equally ranked bidders and perform the selection by drawing lots. The drawing should be performed by the president of the commission for opening and evaluation of bids.

Decisions on the selection of most advantageous bid must contain information about the following:

- the contracting authority;
- the type of the public procurement procedure, name and description of the subject of procurement, taken as a whole and by lots, and the number of the tender documentation;
- the total estimated value of the subject of procurement, taken as a whole and by lots;
- irregular bids and the reasons for such determination;
- regular bids;
- reasons supporting the selection of the most advantageous bid, including the bids in case of conclusion of a framework agreement with one or more bidders;
- instruction on legal remedy;
- the date of adoption of such decision and the signature of the authorised person of the contracting authority.

If the subject of procurement is divided into lots, decisions on the selection of the most advantageous bid should be adopted for each of the lots individually, for more than one lot or for all lots.

It may also happen that for various reasons the contract cannot be awarded and the procedure **must be annulled**.
Reasons for annulment of public procurement procedures are listed in Article 140 of the PPL. Those which are relevant for the restricted procedure are:

- the contracting authority finds it necessary to **substantially alter the tender documentation** (see above on modification of tender documents) before expiry of the time limit for submitting bids;
- there have been no qualification applications submitted;
- the number of qualified candidates prescribed by the tender documentation is insufficient;
- there have been no bids or no regular bids submitted;
- where objective circumstances occurred prior to consideration of bids (organisational change, streamlining, or the subject of procurement is otherwise acquired), due to which the genuine need of the contracting authority for the subject of procurement ceased to exist – if this happens the contracting authority may not conduct the procurement concerned in

the current year;
- the subject of procurement has been performed completely or for the most part following a final decision on the selection of the most advantageous bid which is subsequently annulled by the Administrative Court;
- there are other grounds, as prescribed by the PPL.

Depending on the circumstances contracting authorities may annul an entire public procurement procedure or a part of it where the subject of procurement is divided into lots (see → Division into lots).

Decisions on the annulment of public procurement procedures, depending on the reason for the annulment, should contain information about the following:

- the contracting authority;
- the bidders;
- reasons for exclusion from the public procurement procedure;
- reasons supporting the annulment of public procurement procedure, taken as a whole or for specific public procurement lot/s;
- the type of the public procurement procedure, name and description of the subject of procurement, taken as a whole and by lots, and the number of the tender documentation;
- the total estimated value of the subject of procurement, taken as a whole and by lots;
- instruction on legal remedy;
- the date of adoption of such decision and the signature of the authorised person of the contracting authority.

Enforceability of decisions taken by the contracting authority become enforceable upon expiry of certain time period depending on the type of the decision taken.

Decisions **on annulment** of the procedure become enforceable (Article 147):
- on the day following the date of publication on the EPPS, provided that no bids or qualification applications have been submitted;
- upon expiry of the time limit for lodging an appeal, provided that no appeals have been lodged;
- on the day following the date of publishing the decision upon an appeal, by means of which an appeal is rejected or an appeal procedure is discontinued, in accordance with the PPL.

Decisions **on the selection of the most advantageous bid** become enforceable (Article 146):
- upon expiry of the standstill period, provided that no appeals have been lodged,
- on the day following the date of publishing the decision upon an appeal, by means of which an appeal is rejected or an appeal procedure is discontinued, in accordance with the PPL.

Exemptions from the standstill period

Contracting authorities may not conclude a public procurement contract conducted in the restricted procedure before enforceability of the decision on selection of the most advantageous bid (i.e. before expiry of the standstill) with the exception of situation if only one bidder participated in the public procurement procedure.

End of the procurement procedure

The restricted procedure ends upon adoption by the contracting authority decision on selection of the most advantageous bid, or a decision on annulment of the procedure.

Module II
Public procurement procedures

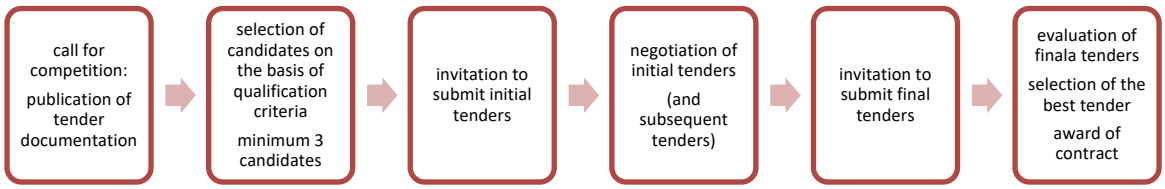
Competitive procedure with negotiations

Relevant provisions of the PPL:
- Article 53 – Commencing of the procedure
- **Article 57** – Conduct of procedure
- **Article 58** – Second stage of the competitive procedure with negotiations
- Article 66 – Determining qualification of the applicants
- Article 67 – Limitation of number of qualified candidates
- Article 83 – Conditions for launching of a public procurement procedure
- Article 84 – Public procurement plan
- Article 85 – Market analysis
- Article 93 – Publishing and supplying tender documentation
- Article 94 – Amendments to tender documentations
- Article 95 – Clarifying tender documentation
- **Articles 121 – 126** – Submission of bids
- Articles 130 – 131 - Opening of bids
- Articles 132 – 136 – Evaluation of bids
- Article 137 – Qualification applications
- Articles 141 – 148 – Decisions of the contracting authority

See also → material on conditions (grounds) for application of various public procurement procedures.

General characteristics of the procedure

- it is two stage public procurement procedure;
- is initiated with the publication of call for competition (tender documentation);
- may be applied only in specific conditions defined by the PPL (the same as for the competitive dialogue) (Article 57 → material on grounds for application of public procurement procedures);
- participation is open in the first stage to all interested economic operators;
- participation in the second stage of the procedure is open only to those economic operators who were qualified and invited by the contracting authority;
- involves negotiations of the initial and other subsequent tenders;
- in the last stage of the procedure the contracting authority evaluates final tenders.



Conditions for launching of the procedure

Contracting authorities may initiate the competitive procedure with negotiations (as other public procurement procedures too) provided that the **procurement subject is foreseen in their public procurement plan** (see → material on public procurement plan) for the current year and the funds for such procurement are provided by means of a budget allocation or otherwise in accordance with law (Article 83 (1)).

Preparation of the public procurement procedure

Before launching of a competitive procedure with negotiations contracting authorities may conduct **a market analysis** (see → Market analysis) with a view to determine precisely the description (see → Description of the subject – matter of public procurement) and the estimated value of the procurement subject (see → Estimation of the public procurement value).

IMPORTANT:

The contracting authority should prepare tender documentation in a clear, precise and intelligible manner, enabling the submission of adequate and comparable bids. The tender documentation should contain all information which would enable the bidder to be aware of all costs that it may bear in relation to the public procurement subject.

FIRST STAGE OF THE COMPETITIVE PROCEDURE WITH NEGOTIATIONS

Launching of the procedure

Launching of the procedure

The competitive procedure with negotiations is launched by publication of the tender documents in EPPS, for the purpose of submission of the application for qualification.

Contracting authority should:

- describe the subject-matter of procurement in tender documents in a manner in which it will define its needs and minimum requirements in terms of elements and characteristics of the subject-matter of procurement which should be met by bidders in their bids so that

economic operators may identify the nature and scope of procurement and decide whether they will submit an application for qualification.

Publication of the tender documentation

The contracting authority is obliged to publish tender documentation on EPPS (Article 93). If a part of the tender documentation contains confidential information, contracting authorities should indicate in the part of the tender documentation they publish the manner in which economic operators may obtain such part of the tender documentation that contains confidential information.

Modifications of tender documentation

The tender documentation which has been published may be later amended by the contracting authorities, however, with respect to certain conditions:

1. tender documentation **may be amended not later than 15 days** before the time limit for submitting bids has expired (see below time periods), without the obligation to extend the time limit for submission of bids. If the contracting authority amends tender documentation less than 15 days before the deadline for receipt of tenders it should extend the time limit for the submission of bids so as to ensure a minimum of 15 days between the day of publication or supply of amendments of the tender documentation and the expiry of the time limit for the submission of bids. In other words, there should be always minimum 15 days since the modification of tender documents and the deadline for submission of bids.

2. Economic operators have the right to propose to contracting authorities to amend the tender documentation, as well as to propose the amendments to the tender documentation within eight days from the day of its publication or supply.

3. Proposals for modification of tender documentation submitted by economic operators should contain a description of irregularities, shortcomings or unlawful elements of the tender documentation or of amendments to the tender documentation on the basis of which amendments are requested, but it should not contain a proposal for the wording of the amendments concerned.

4. Within 3 days since the day of receipt of the proposal of modification of tender documentation the contracting authority should notify the party having submitted the proposal by electronic means whether it accept the proposed amendments to the tender documentation.

5. The sole extension of the time limit for the submission of bids is not considered an amendment to the tender documentation.

Clarification of the tender documentation

Economic operators are allowed to request the contracting authorities in writing to clarify the tender documentation or amendments thereof. Such a request may be submitted before the expiry of the time period for submission of bids but in any case **not later than 10 days before the deadline for the submission of bids**.

The contracting authority should publish clarification of the tender documentation via EPPS with no delay and **at the latest five days as of the day of receipt of the request**.

IMPORTANT:
Clarification of tender documentation may not be used as a means of amending the tender documentation.

Stage first of the procedure

Any economic operator has the right to submit an application for qualification, in accordance with the tender documents.

A time limit for submission of qualification applications may not be shorter than 30 days as of the day of publication of the tender documents (see → material on minimum time periods).

Contracting authority may reduce the time limit for submission of qualification applications, which may not be shorter than 15 days from the day of publication of the tender documents, if required so by the reasons of urgency not caused by the fault of the contracting authority. A contracting authority must provide an explanation in the tender documents on the reasons of urgency due to which the bid submission period was reduced.

Submission of application is followed by evaluation of applications and verification of qualifications of economic operators (see → material on qualification and selection of economic operators).

Qualification of economic operators

Qualification of the applicants in the competitive procedure with negotiations should be performed in relation to capability requirements foreseen in the tender documentation.

Together with applications for qualification economic operators should provide declaration that all mandatory requirements have been met, as well as the capability requirements prescribed in the tender documentation.

Opening of qualification applications

Applications for qualification should be opened after the expiry of the period defined in the call for competition, without the attendance of applicants' representatives, about which the minutes shall be produced.

IMPORTANT: the opening of qualification applications is not public unlike the opening of bids.

Assessment of applications for qualifications

After the opening of applications for qualification, contracting authorities should assess the validity of timely submitted applications for qualification and determine which candidates qualify to the second stage of the procedure. Those economic operators who have not fulfilled the qualification requirements should be delivered **a notice of elimination from further public procurement procedure**.

Possibility of limiting the number of qualified candidates

The contracting authority has possibility of limiting the number of qualified candidates who will be invited to tender in the second stage of the procedure. Basically, there are two options available to the contracting authority (it should decide which to apply at the moment of launching the procurement procedure). First, the contracting authorities can invite all economic operators who fulfil the qualification criteria to submit bids. Second, they can limit the number of qualified candidates and invite only some of them to submit bids. The second option is referred to as limiting the number of qualified candidates or 'short – listing'. Relevant rules are provided in Article 67 of

PPL.

Thus,

- ✓ contracting authority may limit the number of qualified candidates in tender documents, provided that the minimum number of candidates may not be less than 3 (three);
- ✓ if the contracting authority applies this option, the selection of the foreseen number of candidates should be performed according to the number and/or amount of references for proving the fulfilment of the required capability requirements (see → Qualification and selection of economic operators);
- ✓ if the number of qualified candidates is below the number prescribed by the tender documentation, the contracting authority may proceed with the public procurement procedure if that possibility is envisaged in its tender documentation;
- ✓ after assessing the validity of submitted applications for qualification, contracting authorities shall rank candidates who submitted valid applications;
- ✓ the applicants who were not ranked within the determined number of candidates set by the contracting authority should be delivered a a notice of elimination from further public procurement procedure (they are in the same situation as those who have not fulfilled the qualification requirements).

As regards those economic operator who are excluded from the public procurement procedure the contracting authority should inform them within 15 days as of the day of opening of qualification applications and submit it to the economic operator within three days of its adoption (Article 141 (1) point 1).

Second stage of the competitive procedure with negotiations

Invitations to submit initial bids

- Second stage of a competitive procedure with negotiations commences when the invitation to submit initial bid is sent to qualified candidates; initial bid are the basis for further negotiations.

- Contracting authority should send the invitation electronically to the qualified candidates respectively on the same day.

- Invitation should contain the time limit and the manner of submission of initial bids in accordance with the tender documents.

  A time limit for submission of initial bids may not be shorter than 30 days as of the day of sending the invitations for submission of initial bids.

  However, the contracting authority may reduce the time limit for submission of initial bids, which may not be shorter than 10 days from the day of sending the invitations for submission of initial bids, if required so by the reasons of urgency not caused by the fault of the contracting authority. A contracting authority should provide an explanation in the invitation for submission of initial bids on the reasons of urgency due to which the bid submission period was reduced.

Negotiations

Contracting authorities should negotiate with each bidder on the **initial** and **all subsequent** bids submitted by bidders in order to improve the content of bids and to draft the final requirements and specifications needed for submission of the final bid. Contracting authority should produce

particular minutes about the negotiations.

What cannot be the subject of negotiations?

Subject of negotiations cannot be:

- the reduction of the minimum requirements in terms of the elements and characteristics of the procurement subject-matter as well as
- the change of the award criteria for the selection of the most advantageous bid.

Staged negotiations

Contracting authority may apply competitive procedures with negotiation in successive stages in order to reduce the number of bids to be negotiated by applying the award criteria for most advantageous bid established in tender documents. In other words, when applying the award criteria selects not the best tender on which basis to award the contract but tenders which will be admitted to the subsequent stage of the procedure

Obligations of contracting authority in case of staged negotiations

Contracting authority should:

1) inform the bidders whose bids are eliminated from further negotiations by electronic means, not later than 24 hours prior to the commencement of the next round of negotiations;
2) by electronic means, inform at once all the bidders whose bids are not eliminated on all amendments made to technical specifications or other parts of documents and it should set an appropriate time limit for the preparation and submission of amended bids;
3) inform the bidders on the completion of negotiations and provide them with the final technical specifications and other elements related to the subject-matter of the procurement and set a time limit for the submission of final bids.

Submission of final bids

Selection of the most advantageous tender

Having concluded negotiations the contracting authority invites all economic operators remaining still in the procedure to submit final tenders, assesses those tenders and selects the most advantageous tender on the basis of the contract award criteria (→ material on contract award criteria).

The competitive procedure with negotiations and the competitive dialogue may be applied in the same circumstances; there is also a lot of similarities between those two procedures. However, there also differences. Comparison of competitive procedure with negotiations and the competitive dialogue is presented in the following table.

Competitive dialogue

Provisions of the PPL:

- Article 53 – Commencing of the procedure

- **Article 61** – Conduct of procedure

- **Article 62** – Second stage of the competitive dialogue

- Article 66 – Determining qualification of the applicants

- Article 67 – Limitation of number of qualified candidates

- Article 83 – Conditions for launching of a public procurement procedure

- Article 84 – Public procurement plan

- Article 85 – Market analysis

- Article 93 – Publishing and supplying tender documentation

- Article 94 – Amendments to tender documentations

- Article 95 – Clarifying tender documentation

- **Articles 121 – 126** – Submission of bids

- Articles 130 – 131 - Opening of bids

- Articles 132 – 136 – Evaluation of bids

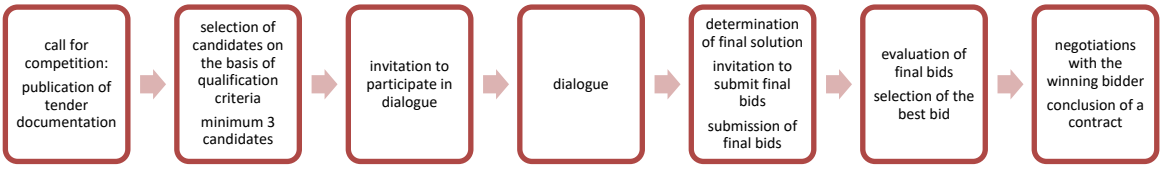
- Article 137 – Qualification applications

- Articles 141 – 148 – Decisions of the contracting authority

See also → material on conditions (grounds) for application of various public procurement procedures.

General characteristics of the competitive dialogue - some major treats:

- it is two stage public procurement procedure;
- is initiated with the publication of a call for competition (tender documentation) on ESPP;
- may be applied only in specific conditions defined by the PPL (the same as for the competitive dialogue) (Article 57 → material on grounds for application of public procurement procedures);
- participation is open in the first stage of the procedure to <u>all</u> interested economic operators;
- participation in the second stage of the procedure is open <u>only</u> to those economic operators who were qualified and invited by the contracting authority;
- involves dialogue between the contracting authority and economic operators;
- contracting authority may provide for rewards for the offered solutions and / or reimbursement of the cost of candidate's participation in the dialogue;
- provides for possible negotiations with the economic operators concerning the tender evaluated as the most advantageous one to confirm the financial conditions of the contract.



Conditions for launching of the procedure

Contracting authorities may initiate the competitive dialogue (as other public procurement procedures too) provided that the **procurement subject is foreseen in their public procurement plan** (see → material on public procurement plan) for the current year and the funds for such procurement are provided by means of a budget allocation or otherwise in accordance with law (Article 83 (1)).

Preparation of the public procurement procedure

Before launching of a competitive dialogue contracting authorities may conduct **a market analysis** (see → Market analysis) with a view to determine precisely the description (see → Description of the subject – matter of public procurement) and the estimated value of the procurement subject (see → Estimation of the public procurement value).

IMPORTANT:

The contracting authority should prepare tender documentation in a clear, precise and intelligible manner, enabling the submission of adequate and comparable bids. The tender documentation should contain all information which would enable the bidder to be aware of all costs that it may bear in relation to the public procurement subject.

FIRST STAGE OF THE COMPETITIVE DIALOGUE

Launching of the procedure

The competitive dialogue is launched by publication of the tender documents in EPPS, for the purpose of submission of applications for qualification.

Contracting authority should specify in the tender documentation:

- the needs and requirements in relation to the subject matter of public procurement,
- a time frame to implement the procedure,
- elements of needs and required characteristics of works, supplies or services which represent the minimum requirements which should be fulfilled by bids and which cannot be amended in the course of the procedure,
- conditions for participation and award criteria for the selection of the most advantageous bid.

IMPORTANT: award criteria – criteria for the selection of the most advantageous bid may be only criteria related to price and quality ratio (see → material on the contract award criteria).

Publication of the tender documentation

The contracting authority is obliged to publish tender documentation on EPPS (Article 93). If a part of the tender documentation contains confidential information, contracting authorities should indicate in the part of the tender documentation they publish the manner in which economic operators may obtain such part of the tender documentation that contains confidential information.

Modifications of tender documentation

The tender documentation which has been published may be later amended by the contracting authorities, however, with respect to certain conditions:

1. tender documentation **may be amended not later than 15 days** before the time limit for submitting bids has expired (see below time periods), without the obligation to extend the time limit for submission of bids. If the contracting authority amends tender documentation less than 15 days before the deadline for receipt of tenders it should extend the time limit for the submission of bids so as to ensure a minimum of 15 days between the day of publication or supply of amendments of the tender documentation and the expiry of the time limit for the submission of bids. In other words, there should be always minimum 15 days since the modification of tender documents and the deadline for submission of bids.

2. Economic operators have the right to propose to contracting authorities to amend the tender documentation, as well as to propose the amendments to the tender documentation within eight days from the day of its publication or supply.

3. Proposals for modification of tender documentation submitted by economic operators should contain a description of irregularities, shortcomings or unlawful elements of the tender documentation or of amendments to the tender documentation on the basis of which amendments are requested, but it should not contain a proposal for the wording of the amendments concerned.

4. Within 3 days since the day of receipt of the proposal of modification of tender documentation the contracting authority should notify the party having submitted the proposal by electronic means whether it accept the proposed amendments to the tender documentation.

5. The sole extension of the time limit for the submission of bids is not considered an amendment to the tender documentation.

Clarification of the tender documentation

Economic operators are allowed to request the contracting authorities in writing to clarify the tender documentation or amendments thereof. Such a request may be submitted before the expiry of the time period for submission of bids but in any case **not later than 10 days before the deadline for the submission of bids**.

The contracting authority should publish clarification of the tender documentation via EPPS with no delay and **at the latest five days as of the day of receipt of the request**.

IMPORTANT:
Clarification of tender documentation may not be used as a means of amending the tender documentation.

Submission of applications for qualification

Any economic operator has the right to submit an application for qualification, in accordance with the tender documents.

A time limit for submission of qualification applications may not be shorter than 30 days as of the day of publication of the tender documents (see → material on minimum time periods).

No reduction of this time period is possible (unlike in other procurement procedures).

Submission of applications is followed by evaluation of applications and verification of qualifications of economic operators (see → material on qualification and selection of economic operators).

Qualification of economic operators

Qualification of the applicants in the competitive dialogue should be performed in relation to capability requirements foreseen in the tender documentation.

Together with applications for qualification economic operators should provide declaration that all mandatory requirements have been met, as well as the capability requirements prescribed in the tender documentation.

Opening of qualification applications

Applications for qualification should be opened after the expiry of the period defined in the call for competition, without the attendance of applicants' representatives, about which the minutes shall be produced.

IMPORTANT: the opening of qualification applications is not public unlike the opening of bids.

Assessment of applications for qualifications

After the opening of applications for qualification, contracting authorities should assess the validity of timely submitted applications for qualification and determine which candidates qualify to the second stage of the procedure. Those economic operators who have not fulfilled the qualification requirements should be delivered **a notice of elimination from further public procurement procedure**.

Possibility of limiting the number of qualified candidates

As in the restricted procedure also in the competitive dialogue the contracting authority has possibility of limiting the number of qualified candidates who will be invited to tender in the second stage of the procedure. Basically, there are two options available to the contracting authority (it should decide which to apply at the moment of launching the procurement procedure). First, the contracting authorities can invite all economic operators who fulfil the qualification criteria to submit bids. Second, they can limit the number of qualified candidates and invite only some of them to submit bids. The second option is referred to as limiting the number of qualified candidates or 'short – listing'. Relevant rules are provided in Article 67 of PPL.

Thus,

- ✓ contracting authority may limit the number of qualified candidates in tender documents, provided that the minimum number of candidates may not be less than 3 (three);
- ✓ if the contracting authority applies this option, the selection of the foreseen number of candidates should be performed according to the number and/or amount of references for proving the fulfilment of the required capability requirements (see → Qualification and

selection of economic operators);

- ✓ if the number of qualified candidates is below the number prescribed by the tender documentation, the contracting authority may proceed with the public procurement procedure if that possibility is envisaged in its tender documentation;
- ✓ after assessing the validity of submitted applications for qualification, contracting authorities should rank candidates who submitted valid applications;
- ✓ the applicants who were not ranked within the determined number of candidates set by the contracting authority should be delivered a notice of elimination from further public procurement procedure (they are in the same situation as those who have not fulfilled the qualification requirements).

As regards those economic operator who are excluded from the public procurement procedure the contracting authority should inform them within 15 days as of the day of opening of qualification applications and submit it to the economic operator within three days of its adoption (Article 141 (1) point 1).

SECOND STAGE OF THE COMPETITIVE DIALOGUE

Invitation to dialogue

- Second stage of a competitive dialogue commences with delivery of an invitation to qualified candidates to a dialogue about the subject matter of the procurement.

- Contracting authority should send the invitation electronically to the qualified candidates on the same day.

- Invitation should contain the time limit and the manner of conducting the dialogue, in accordance with the tender documents.

IMPORTANT: the PPL does not specify a minimum time period for responding to invitation to take part in the dialogue.

Dialogue

Contracting authorities may conduct more than one dialogue with the candidates, individually, until it determines the final solution which meets the established requirements in terms of subject matter of procurement, on the basis of which the candidates will submit their final tenders.

During the dialogue, the contracting authority should consider all the relevant elements of the subject of procurement with bidders.

The contracting authority is obliged to respect the principle of equal treatment of economic operators and may not reveal data and information that would give some candidates an advantage over others.
The Contracting authority should keep minutes from the dialogue.

Staged dialogue

Contracting authority may apply competitive dialogue in successive stages in order to reduce the number of proposed solutions to discuss, by applying the award criteria for most advantageous bid, established in tender documents. In other words, when applying the award criteria selects not the

best tender on which basis the contract is awarded but solutions which will be admitted to the subsequent stage of the procedure.

Obligations of contracting authority in case of staged dialogue

Contracting authority should:

4) Inform, by electronic means the candidates who will not be invited to continue the dialogue, not later than 24 hours prior to the commencement of the next phase of dialogue of negotiations;
5) by electronic means, inform at once all candidates who will be invited to continue the dialogue about all amendments made to technical specifications or other parts of documents and it should set an appropriate time limit for the preparation and submission of amended solution;
6) inform qualified candidates about the conclusion of the dialogue, inviting them to submit their final bids for the solutions accepted during the dialogue, within an appropriate time limit which may not be shorter than 8 days as of the day of supplying the invitation.

IMPORTANT: time limit for submission of final bids should be at least 8 days.

Submission of final bids

Selection of the most advantageous tender

Having concluded dialogue the contracting authority invites all economic operators still remaining in the procedure to submit final tenders on the basis of solutions accepted during the dialogue.

The contracting authority may ask bidders to clarify, specify and adjust their final bids or provide additional information, which do not modify the essential elements of the final bid, provided that such modifications and information do not result in distortion of competition or in discrimination of bidders.

Negotiations with the winning bidder

After evaluating the regularity of the bids, the contracting authority may negotiate with the bidder, whose bid was identified as the most advantageous in terms of the best price / quality ratio, in order to:
- confirm the financial obligations or other conditions contained in the bid by specifying the terms of the contract, provided that this does not result in material changes to the essential elements of the bid or subject of procurement, including the needs and requirements set out in the documentation, and that it does not distort competition.

Module II
Public procurement procedures

Innovation Partnership

Some relevant provisions of the PPL:

- Article 63 – Innovation partnership

- Article 83 – Conditions for launching of a public procurement procedure

- Article 84 – Public procurement plan

- Article 85 – Market analysis

- **Article 93** – Publishing and supplying tender documentation
- **Article 94** – Amendments to tender documentations
- **Article 95** – Clarifying tender documentation
- **Articles 121 – 126** – Submission of bids
- **Article 130 – 131** - Opening of bids
- **Article 132 – 139** – Evaluation of bids
- **Article 141 – 148** – Decisions of the contracting authority

Introduction

The new PPL provides for a completely new procedure: Innovation Partnership (IP).

The purpose of the should be *the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the performance levels and maximum costs agreed between the contracting authorities and the participants.*

Contracting authorities may implement an innovation partnership if it has the need for innovative goods, services or works that it can not meet by procuring goods, services or works that are available on the market.

Definition of innovation is provided in Article 4 (11): ***innovation*** *is the practical implementation of a new or significantly improved product, property, service, procedure, process, organization and marketing, which contribute to creation of a new value and quality of its implementation;*

Purpose of the innovation partnership is to develop innovative goods, services or works and their subsequent procurement, provided that it is in line with the degree of production and the maximum cost agreed between the contracting authority and the participants in the innovation partnership.

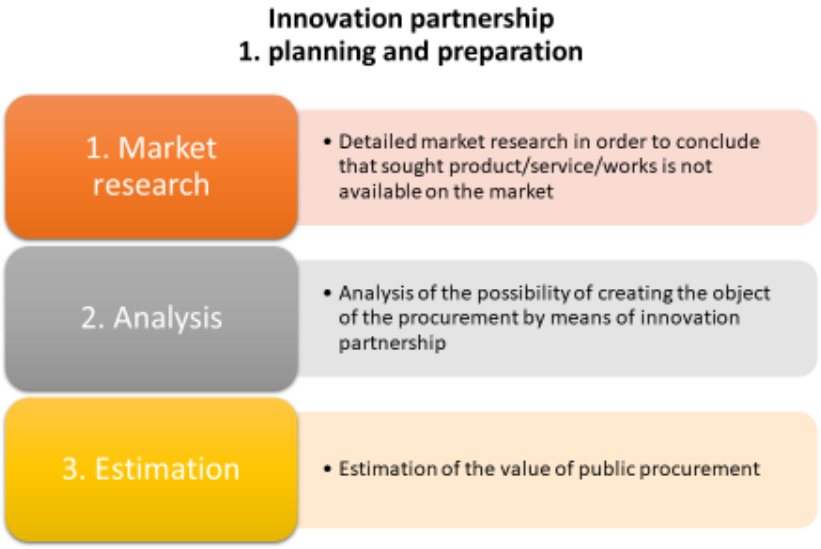
Preparation of the procedure

The contracting authority should determine in the tender documentation the need for innovative goods, services or works, as well as the minimum requirements for the elements of the subject of procurement that the bids should satisfy, the conditions of the competence of the economic operators related to research, development and implementation of the innovative solutions and the manner in which the intellectual property rights shall be regulated.

This information must be sufficiently clear so that economic operator could recognize the nature and scope of the subject-matter of procurement and decide whether to submit a qualification application.
Estimated value of the subject-matter of procurement referred to in paragraph 1 of this

Article must not be disproportionate in relation to the investment required for research and development of the innovative solution of the subject-matter of procurement.

Important: In innovation partnership, bids are evaluated solely on the basis of the offered price and quality.



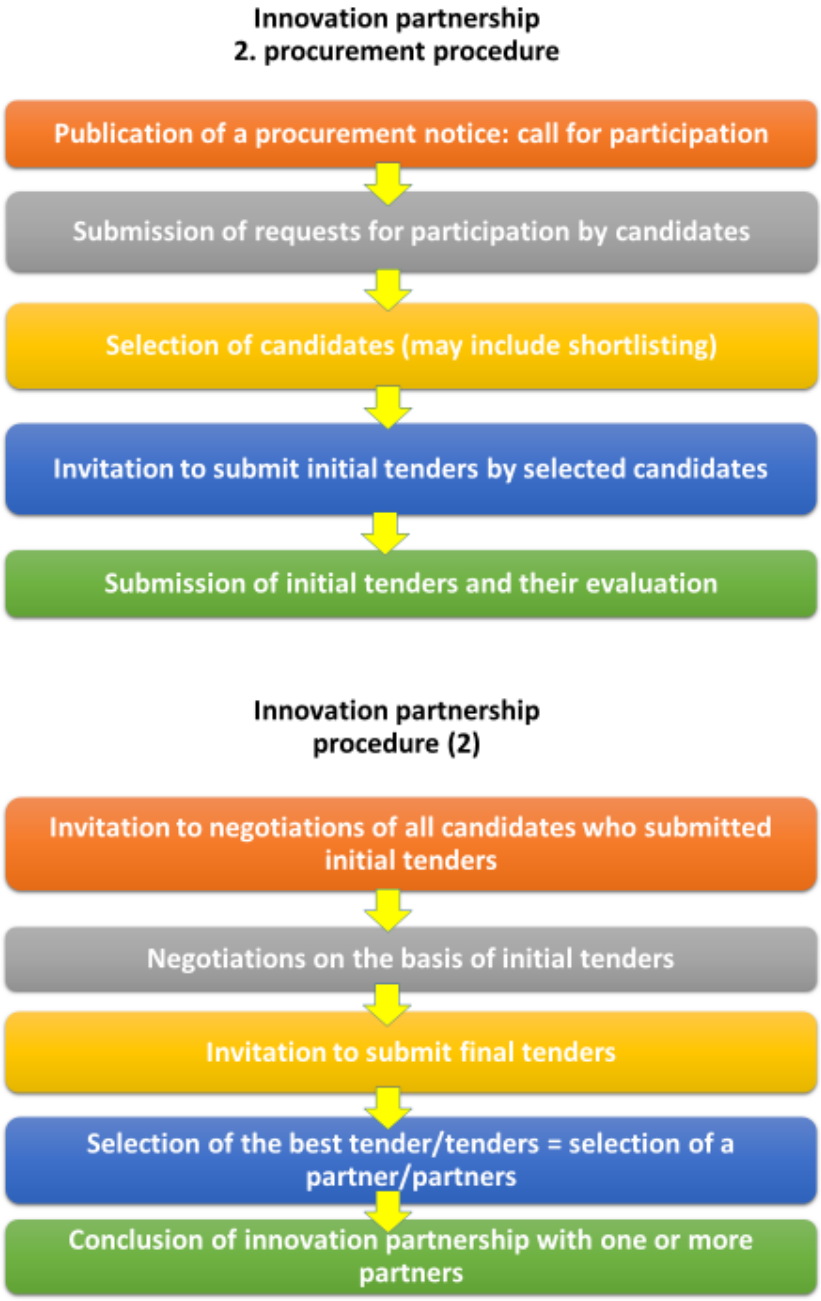
Launching of the procedure

The innovation partnership is initiated by publishing the tender documentation at the electronic system for public procurement (ESPP) for submission of qualification application.

Conduct of the procedure

Innovation partnership basically follows the conduct of the competitive procedure with negotiations
The qualification applications shall be submitted within a time limit which may not be shorter than 30 days as of the day of publication of the tender documentation.

Contracting authority may decide to establish an innovation partnership with one or more candidates who meet the conditions referred to in paragraph 5 of this Article, for the purpose of carrying out separate research and development activities.



Establishment of innovation partnership

The partnership should be established by concluding a contract governing the mutual rights and obligations of the contracting authority and the candidate.

Contracting authority should electronically invite all selected candidates in the innovation partnership on the same day, to submit their initial bids within the specified deadline, without the possibility of insight into the data on other selected candidates.

The innovation partnership takes place in successive stages, respecting the sequence of stages in the research and innovation process that could involve production of goods, provision of services or carrying out of works.

In the innovation partnership process, provisional objectives are set which partners need to achieve in the particular stages of the procedure, as well as payment of fee in appropriate amounts.

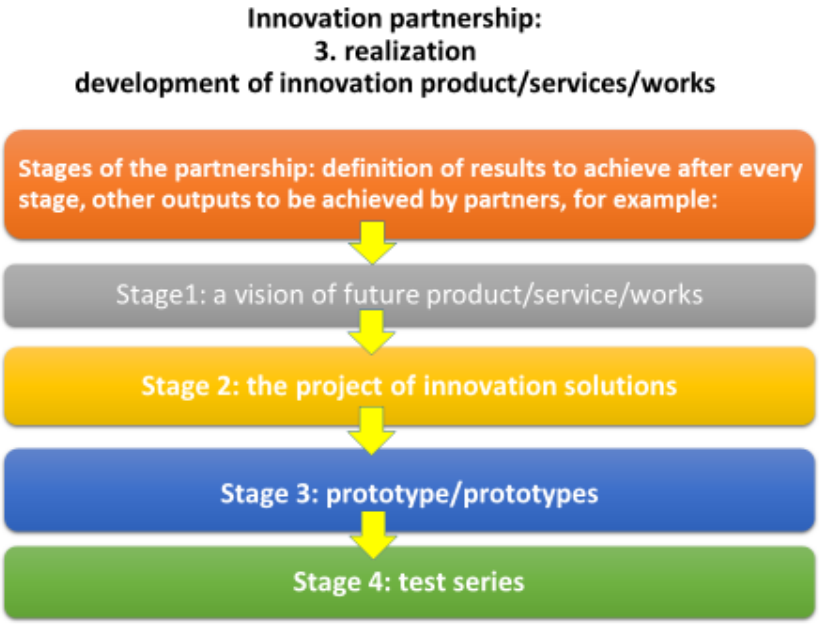
On the basis of the objectives of innovation partnership, the contracting authority may, after each phase, terminate the innovation partnership or, in the case of an innovation partnership with several partners, reduce the number of partners by terminating individual contracts, provided that this possibility has been defined by the tender documentation.

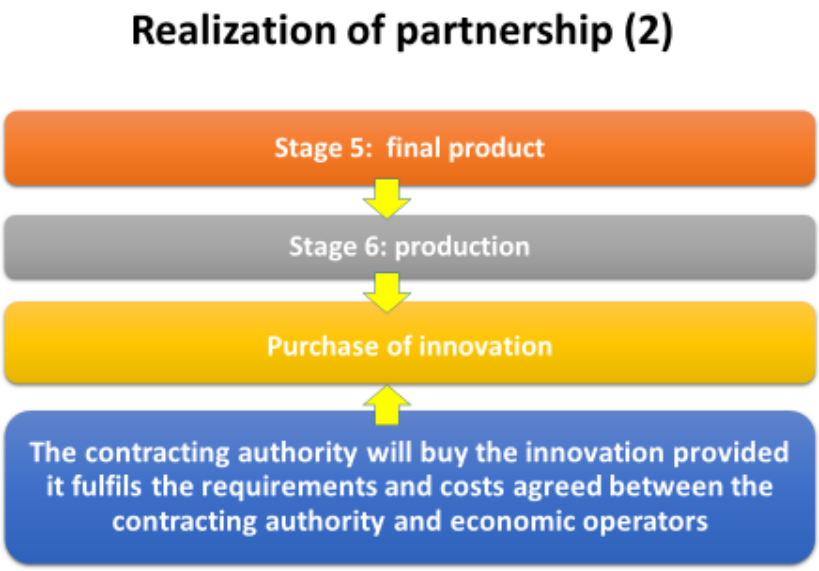
Contracting authority negotiates initial and all subsequent bids with bidder in order to improve their content and reduce the number of bids that are to be negotiated further, except in the case of a final bid and a report is drawn up on that.

There can be no negotiation of reducing the minimum requirements of the subject of procurement and changing the criteria for selecting the most advantageous bid from the tender documentation.

Contracting authority should:

1) terminate the innovation partnership contract with the bidder who will not be invited to the next stage of negotiation;
2) notify the bidders with whom the innovation partnership contract was not terminated of the conclusion of the negotiations and set a deadline for submitting the final bids which may not be shorter than eight days as of the day of supplying the invitation.





Further reading:

Public Procurement directive 2014/24:

Article 31 – Innovation partnership

Module II

Negotiated procedure without publication of a contract notice

Provisions of the PPL:

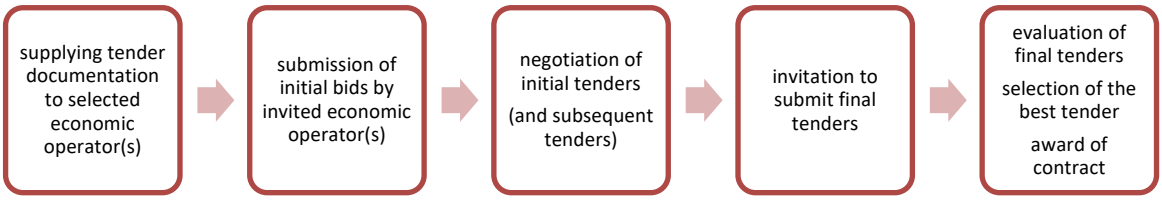
Articles 59 - 60

See also → material on conditions (grounds) for application of various public procurement procedures.

General characteristics of the procedure:

- it is an exceptional procedure, possible only under limited number of circumstances strictly defined in the PPL (Article 59, see → material on grounds for application of public procurement procedures),
- it is the only procedure which is not started by publication of a tender documentation (call for competition) but by direct contacting of economic operator(s),
- it is launched not by the publication of a call for competition but by supplying to one or more economic operators the tender documentation for the purpose of obtaining initial bids,

- it is conducted, depending on circumstances, with one or more economic operators (no minimum number!);
- participation in the procedure is open only to those economic operators who were invited by the contracting authority and received the tender documentation.



Launching of the procedure

The negotiated procedure without prior publication of a contract notice is launched by **the delivery of the tender documentation** to one or more economic operators.

Tender documentation must be delivered directly or by means of electronic means of communication. The contracting authority invites selected economic operator or economic operators to submit **initial tenders.**

Initial tenders may be submitted only by the economic operator or operators invited by the contracting authority. Tender documents should be delivered to all economic operators invited, individually, on the same day.

Contracting authority should:

- specify the subject of the negotiations,
- the method of negotiations and
- appropriate time limit for the submission of initial tenders (see below)

First stage of the procedure

Unlike in the competitive procedure with negotiation in the negotiated procedure without prior publication of a contract there is no separate stage of qualification – the economic operators submit initial tenders and not applications for qualification at the first stage. In that regard, this procedure is similar to the open procedure – assessment of qualifications of economic operators is a part of the same stage of the procedure as assessment of (initial) tenders.

IMPORTANT:

Only the economic operator or operators who were invited to participate in the procedure by the contracting authority are allowed to submit initial tenders.

Time limit for submission of initial tenders

A time limit for submission of initial tenders may not be shorter than 8 days as of the day of supplying the tender documentation, with the exception of the negotiated procedure applied on the basis of the extreme urgency, in accordance with Article 59 point 3 (→ material on grounds for application of public procurement procedures).

Second stage of the procedure

- the contracting authority negotiates initial bids with bidders in order to improve the conditions of bids and submission of final bids;
- the contracting authority should draft minutes of negotiations.

Negotiations

- Contracting authorities should negotiate with each bidder on the **initial** bids in order to improve the conditions of bids and submission of final bids.

What cannot be the subject of negotiations?

- subject of negotiations may not be conditions for participation in the procedure (→ material on qualification of economic operators) as well as the criteria for the selection of the most advantageous bid (→ material on contract award criteria).

Staged negotiations

Contracting authority may apply negotiated procedure without prior publication of a contract notice in successive stages in order to reduce the number of bids to be negotiated by applying the award criteria for the selection of the most advantageous bid established in tender documents. In other words, when applying the award criteria the contracting authority selects not the best tender on which basis to award the contract but tenders which will be admitted to the subsequent stage of the procedure.

Obligations of contracting authority in case of staged negotiations

Contracting authority should:

7) inform electronically the bidders whose bids are eliminated from further negotiations, not later than 24 hours prior to the commencement of the next round of negotiations;
8) by electronic means, inform at once all the bidders whose bids are not eliminated on all amendments made to technical specifications or other parts of the tender documents and it should set an appropriate time limit for the preparation and submission of amended or new bids;
9) inform the bidders on the completion of negotiations and set a time limit for the submission of final bids.

Submission of final bids

Selection of the most advantageous tender

Having concluded negotiations the contracting authority invites all economic operators remaining still in the procedure to submit final tenders, assesses those tenders and selects the most advantageous tender on the basis of the contract award criteria (→ material on contract award criteria). The PPL does not specify the minimum time period for submission of final bids.

Further reading:

Public Procurement Directive: Article 32

Module II

Minimum time periods

Public Procurement Law – relevant provisions:

Article 54 – the open procedure

Article 55 and 56 – the restricted procedure

Article 57 and 58 – the competitive procure with negotiations

Article 62 – the competitive dialogue

Article 63 – the innovation partnership

Article 64 – the negotiated procedure with prior publication of a contract notice

Article 94 – the extension of time limits

Article 115 – general principles concerning setting time limits

Article 116 – the reduction of time limits (general principles)

General information about time periods

The Public Procurement Law defines minimum time periods which must be respected by contracting authorities with regard to relevant stages of various procurement procedures envisaged in the PPL.

When determining the time limits for submission of qualification applications or bids, contracting authorities should particularly take into account the COMPLEXITY OF THE SUBJECT MATTER of public procurement and the time required for DRAWING UP the applications or bids, without prejudice to the minimum time limits set out in the PPL.

In other words, the PPL establishes only minimum time periods – in a given procedure time period may not be shorter than this minimum but may be longer. In any case the contracting authority when setting those deadlines should take into account specificity of a given procurement.

Time periods should be indicated precisely in the tender documentation as regards the date and time in such a way that qualification applications and bids may be timely submitted (Article 115 (2)).

The PPL allows reduction of time periods only in specifically established circumstances (Article 115)

– see below.

Open procedure

Contracting authority has to set the time period for receipt of tenders (it is one stage public procurement procedure).

The restricted procedure

Contracting authority has to set the time period for submission of qualification application qualifications (the first stage) and submission of requests (the second stage).

The competitive dialogue, competitive procedure with negotiations, innovation partnership and the negotiated procedure without prior publication of a contract notice

- The contracting authority establishes the time period for submission of requests for applications (the competitive dialogue, innovation for partnership and the competitive procedure with negotiations).
- The contracting authority sets the time period for receipt of initial, subsequent and final tenders.

Obligation to extend time limits for receipt of tenders

Contracting authority may amend tender documentation not later than 15 days before the time limit for submitting qualification applications or bids has expired, without the obligation to extend the time limit for receipt of applications or bids.

The contracting authority is obliged to extend the time limit for submission of applications or bids,

- if the tender documentation is amended later than 15 days before the expiry of the time limit for receipt of applications or bids: time period must be extended in such a ways that at least 15 days must pass between the day of publication or supply of amendments of the tender documentation and the date of submission of applications or bids
- in the event of interruption of operation of ESPP – contracting authorities should extend the time limit for submission of applications or bids for the duration of interruption.

Extension of an original time period alone, if it is not combined with other changes in the tender documentation is not considered as an amendment of the tender documentation – i.e. does not result in another extension of the time period. In other words, the contracting authority may extend time period for receipt of application or bids any time before the expiry of the time period and it is not treated as amendment of the tender documentation for the purposes of provisions on extension of time limits (Article 94 (7)).

SUMMARY OF MINIMUM TIME PERIODS

OPEN PROCEDURE

STANDARD TIME PERIODS		
		TIME PERIOD (DAYS)
	Bids (Article 54 (3))	30

SHORTENED TIME PERIODS	
CONDITIONS	**TIME PERIOD (DAYS)**
Submission of tenders by electronic means (Article 54 (6))	25
Urgency (Article 54 (4))	15

EXTENDED TIME PERIODS	
CONDITIONS	**TIME PERIOD (DAYS)**
Tender documentation amended later than 15 days before expiry of the time period for receipt of tender	Depends when it is introduced – at least 15 days must be between the day of delivery of modification and the new time period

RESTRICTED PROCEDURE

STANDARD TIME PERIODS	
	TIME PERIODS (DAYS)
Qualification applications (Article 55 (3))	30
Bids (Article 56 (4))	30

SHORTENED TIME PERIODS		
CONDITIONS		**TIME PERIODS**
E – bids		-
Urgency	**Applications** (Article 56 (4))	15
	Bids (Article 56 (5))	10

EXTENDED TIME PERIODS	
CONDITIONS	**TIME PERIOD**
Tender documentation amended later than 15 days before expiry of the time period for receipt of tender	Depends when it is introduced – at least 15 days must be between the day of delivery of modification and the new time period

COMPETITIVE PROCEDURE WITH NEGOTIATION

STANDARD TIME PERIODS	
	TIME PERIODS (DAYS)
Qualification applications (Article 57 (5))	30
Initial bids (Article 58 (4)	30
Subsequent bids	Set by the contracting authority
Final bids	Set by the contracting authority

SHORTENED TIME PERIODS		
CONDITIONS		**TIME PERIODS (DAYS)**
E – bids		-
Urgency	**Qualification applications** (Article 57 (6))	15
	Initial bids (Article 58 (5))	10

EXTENDED TIME PERIODS	
CONDITIONS	**TIME PERIOD**
Tender documentation amended later than 15 days before expiry of the time period for receipt of tender	Depends when it is introduced – at least 15 days must be between the day of delivery of modification and the new time period

NEGOTIATED PROCEDURE WITH PRIOR PUBLICATION
for sectoral contracting authorities only

STANDARD TIME PERIODS	
	TIME PERIODS (DAYS)
Qualification applications (Article 57 (5))	30
Initial bids (Article 58 (4)	30
Subsequent bids	Set by the contracting authority
Final bids	Set by the contracting authority

SHORTENED TIME PERIODS		
CONDITIONS		**TIME PERIODS (DAYS)**
E – bids		-
Urgency	**applications**	15
	Bids	10

COMPETITIVE DIALOGUE

STANDARD TIME PERIODS	
	TIME PERIOD (DAYS)
Qualification applications (Article 61 (4))	30
Dialogue (Article 62 (3))	Set by the contracting authority
Amended solutions	Set by the contracting authority
Final bids	8

INNOVATION PARTNERSHIP

STANDARD TIME PERIODS	
	TIME PERIOD (DAYS)
Qualification applications (Article 63 (4))	30

NEGOTIATED PROCEDURE WITHOUT PREVIOUS CONTRACT PUBLICATION

STANDARD TIME PERIODDS	
	TIME PERIOD (DAYS)
Initial bids (Article 60 (3))	8

Module II

DYNAMIC PURCHASING SYSTEMS

Relevant provisions of the PPL:
Article 70 – Dynamic purchasing system

General characteristics:

- Dynamic Purchasing System (DPS) is a fully electronic instrument which may be applied to purchase goods, services which are generally available on the market,
- free of charge for economic operators,
- it is established following restricted procedure,
- the contracting authority cannot restrict access to it – all qualified economic operators should have access to DPS through its whole duration,
- validity of DPS is not limited in time (unlike in the case of framework agreements),
- shows some similarities with framework agreements and qualification systems but is open through the whole duration to any interested suppliers who are allowed to join any time during the validity period of DPS.

Unlike in the case of electronic auctions provisions of the PPL on DPS do not provide for possibility of regulating further details concerning functioning of DPS in implementing regulations.

Conditions for application of DPS

Dynamic purchasing systems (DPS) may be used to purchase goods, services which are generally available on the market.

DPS must be established and operated using electronic means, free of charge, throughout the entire validity period.

IMPORTANT: there is no limitation concerning duration of validity of DPS but the general principle on ensuring competition is applicable.

DPS are open to all economic operators that meet the requirements set forth in the tender documentation.

Launching the procedure

The contracting authority follows the rules of **the restricted procedure** concerning publication of call

for competition and tender documentation (see → material on restricted procedure). However, there are specific obligations concerning the content of information which should be disclosed by the contracting authority in tender documentation.

The minimum time period for submission of qualification application for economic operators who want to take part in DPS should comply with the requirements applicable in the restricted procedure (see → material on minimum time periods).

It is not clear whether it is possible to reduce the minimum time period for submission of first applications for qualification as in the case of the restricted procedure due to urgency. However, in the light of the EU public procurement provisions it seems that there is no such possibility – the Public Procurement Directive (2014/24) establishes minimum 30 day time period and does not provide for any possible reductions.

Obligations of contracting authorities

For the purpose of awarding a public procurement contract within the framework of a DPS, contracting authority should:

1) indicate in the invitation to tender and in the tender documents that it establishes a dynamic purchasing system and a period of its validity;
2) indicate in the tender documentation the basic information on the nature and estimated quantity of foreseen individual procurement and all necessary information related to the dynamic purchasing system, including information on how the dynamic purchasing system is conducted, the electronic equipment used and the technical connections and specifications;
3) indicate any division into the categories of goods, works or services and relevant characteristics defining them and specify mandatory requirements and conditions for the capabilities of economic operators, for each category of the procurement subject;
4) ensure unlimited, complete and immediate access to tender documentation by electronic means of communication throughout the period of the dynamic purchasing system.

Qualification of economic operators

All economic operators who reply to call for competition and fulfil the qualification criteria should be admitted to the system - all qualified candidates have access to a DPS throughout its entire validity period.

IMPORTANT:
Contracting authority cannot limit the number of qualified candidates in a DPS - unlike in the restricted procedure the contracting authority may not limit in DPS the number of qualified economic operators – 'short – listing' is not allowed (see → material on the restricted procedure and → material on qualification of economic operators).

Contracting authority should evaluate received qualification applications in the system in accordance with the terms set out in the tender documentation within 10 (ten) days from the date of their receipt. Exceptionally, this time period may be extended by 5 (five) days in individual cases where justified, in particular for the purpose of studying additional documents or for verifying whether the mandatory and conditions of the competence of economic operator are fulfilled.

Having evaluated the application for qualification, the contracting authority is obliged to submit to the applicant without delay a notice on access to the dynamic purchasing system or notification of the denial of access to the dynamic purchasing system.

If the contracting authority applies a DPS based on the type of subject, it is obliged to determine, for every procurement subject, the conditions that each economic operator must fulfil.

If the invitation to submit bids for the first specific procurement within the DPS has not been sent, the contracting authority may extend the validity period of the application for qualification, provided that no invitation to tender has been issued during the extended evaluation period, with the contracting authority indicating in the tender documentation the time it intends to extend this period for.

During the duration of the DPS, the contracting authority may require all qualified candidates who have access to the dynamic system to submit innovated and updated statements from the economic operator within five days from the date of submission of the request.

If the DPS is divided into types of procurement subjects for goods, works or services, the contracting authority is obliged to call qualified candidates who have access to the type of subject that corresponds to that procurement to submit the bid.

Qualification of new economic operators

In DPS, each economic operator may submit a qualification application throughout the entire validity period of its system, in accordance with the tender documentation.

IMPORTANT:
DPS are open through their whole validity periods to new economic operators intending to apply and be admitted to DPS. Qualification of new economic operators is conducted in accordance with qualification rules for DPS.

Invitation to submit bids

Submission of bids

Contracting authority should simultaneously and by electronic means of communication, invite all qualified candidates who have access to DPS to submit their bids for each individual procurement within the system.

Article 70 of the PPL does not specify the minimum time period for submission of bids under DPS.
It seems, however, that since DPS are based on the restricted procedure the minimum time period for submission of bids should comply with the requirements concerning the restricted procedure but is not clear. As regards EU provisions on which DPS are based the minimum time period for receipt of bids in DPS is 10 days since the day of sending invitations and provisions on reduction of time periods for example due to submission of e – bids do not apply.

Selection of the most advantageous tender

Contracting authority selects the most advantageous bid within the DPS based on the criteria for selecting the most advantageous bid that are specified in the tender documentation (see → material on contract award criteria).

After completing all individual procurement within the dynamic purchasing system, a contracting authority shall publish the decision on selection of the most advantageous bid.

Evaluation of tenders within DPS is conducted in accordance with provisions of Article 134 of the PPL concerning evaluation of bids.

Changes in the period of validity of DPS

DPS are valid for the duration established by the contracting authority in the tender documentation. If the contracting authority, during the dynamic purchasing system, changes the duration of validity of the system, it should publish a change in the call for competition.

Closing DPS

Upon termination of the dynamic purchasing system, contracting authorities should publish the notification on termination of the dynamic system.

Further reading: Article 34 of the Public Procurement Directive (2014/24)

Module II
Special forms of procurement

ELECTRONIC AUCTIONS

Relevant provisions of the PPL: **Article 71 –** electronic auction Implementing regulation adopted by the Ministry of Finance

Introduction

Electronic auctions are a type of reverse auction, procurement technique in which tenderers receive information about other tenders and can amend their own tenders on an on – going basis to beat those tenders by proposing lower prices/more advantageous terms of future contract. In an electronic reverse auction bidders post and modify their tenders on an electronic site and view the auction's progress through the electronic site.

There a number of advantages electronic auctions bring:

- They can induce tenderers to put forward a better value offer than in a traditional procurement – information about other tenders is available to bidders who can then improve their own offers to win the contract,
- E – auctions can lead to better planning and drafting of both technical specifications and award criteria, which can encourage participation and ensure that bidders are better informed,
- E – auctions may limit opportunities for corruption and discrimination,
- Possibility of learning about competitors' costs in the auctions may limit the risks of submission of abnormally low tenders,
- E- auctions promote the use of electronic means which bring about reduction of face – to – face contacts, lower procedural costs and lead to more rapid procurement procedures.

When electronic auctions may be applied?

Electronic auctions may be applied as an additional stage of the public procurement procedure in the following procedures:

- the open procedure (see → material on the open procedure),
- the restricted procedure (see → material on the restricted procedure),
- the competitive procedure with negotiations (see → material on the competitive procedure with negotiations),
- the negotiated procedure with prior publication of a contract notice (only in the case of utilities procurement) (see → material on the negotiated procedure with prior publication of a contract notice),
- within a framework agreement in the call off stage (see → material on framework agreements),
- in Dynamic Purchasing Systems (see → material on DPS).

Electronic auctions may be conducted after the assessment of bids for the purpose of obtaining new prices, revised downwards and/or new values concerning certain elements of bids, which enables ranking of the bids using automatic evaluation methods.

Important:
Electronic auctions are optional solution which may be but do not have to be applied by contracting authorities. If they want to apply electronic auctions they should envisage this in the tender documentation.

Electronic auction

Electronic auctions are applied after submission of tenders, after their initial evaluation but before award of the contract.

For the conduct of procedures before electronic auctions see → materials on procurement procedures.

Activities of contracting authorities before launching of electronic auctions

Before proceeding with an electronic auction, contracting authorities should make an assessment and evaluation of the bids in accordance with the conditions for participation in a public procurement procedure set forth in the tender documentation and produce minutes thereof (see → material on evaluation of bids).

Electronic auction is not hold, although it was envisaged in the tender documentation when, following assessment of bids, the contracting authority establishes that there is only one **regular** bid (for definition of regular bid see Articles 132 and 133 of the PPL).

If there is only one regular bid the contracting authority may decide to:

- select that one regular tender as the most advantageous bid or
- annul the public procurement procedure.

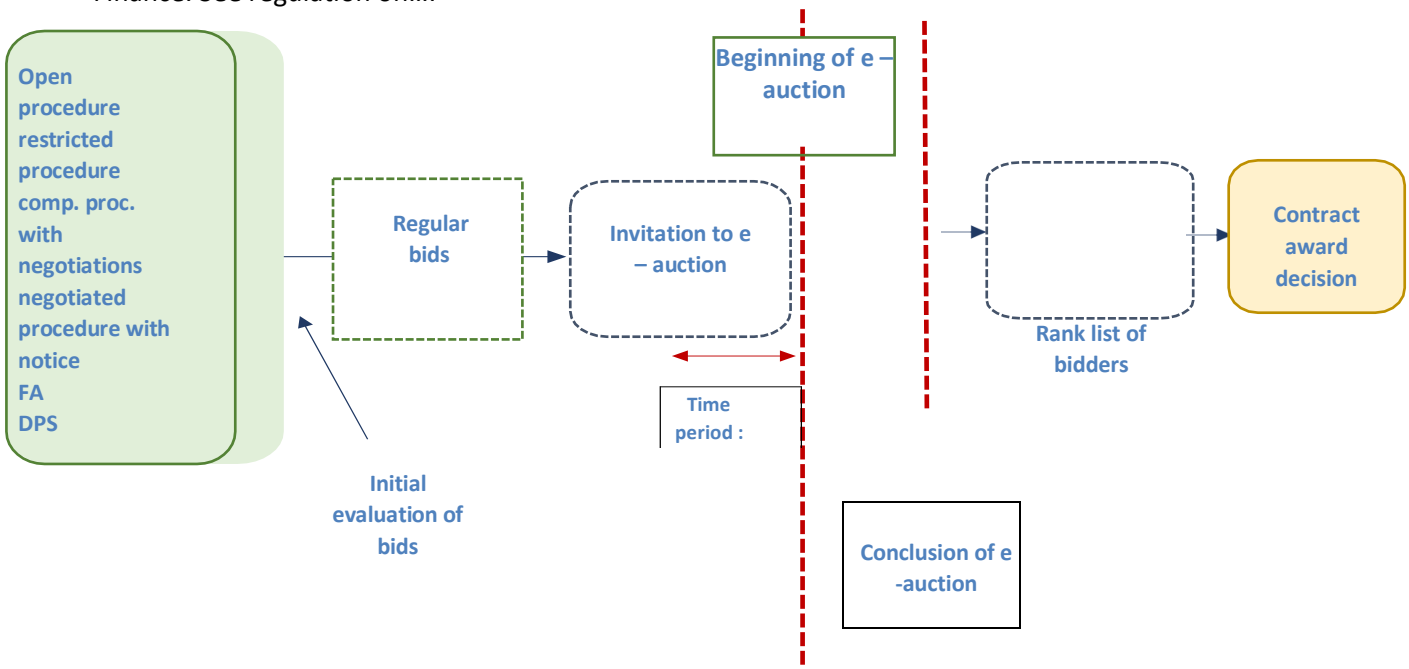
Criteria on basis of which electronic auctions may be applied

Electronic auction may be conducted on basis criteria which can be quantified in numbers or percentages, in other words are suitable for automatic evaluation using electronic means, without intervention of the contracting authority:

- the price, where the selection of bids is conducted on the basis of price only,
- the price and/or a new value specified in the tender documentation, where the selection of bids is conducted on the basis of the price-quality ratio criterion determined by the contracting authority or on the basis of the lowest cost applying the principle of cost-effectiveness.

Implementing regulation

The manner of conducting and concluding an electronic auction is prescribed by the Ministry of Finance. See regulation on….



Further reading
Article 35 of the Public Procurement Directive 2014/24 – Electronic auctions

Module III

Qualification of economic operators

Relevant provisions of the PPL:
Article 67 – Limitation of number of qualified candidates

Article 99 – Mandatory conditions
Article 100 – Means of proof for mandatory conditions
Article 101 – Capability requirements imposed on economic operators
Article 102 – Capability to pursue professional activity
Article 103 – Proving professional suitability
Article 104 – Economic and financial standing
Article 105 – Proving economic and financial standing
Article 106 – Technical and professional ability
Article 107 – Proving technical and professional ability
Article 108 – Grounds for mandatory exclusion
Article 109 – Exception to mandatory exclusion
Article 110 – Special conditions for exclusion from participation in public procurement procedures
Article 111 – Self – declaration submitted by economic operators
Article 112 – Verifying accuracy of the declaration
Article 113 – Records on economic operators registered in the EPPS
Article 114 – Quality assurance and environmental protection
Article 127 – Reliance on the capacities of other entities

Purpose of provisions on qualification

- To assess the ability of prospective contractors to perform the contract in question in accordance with requirements of the contracting authority.

The rules laid down in public procurement provisions consist of three different types of provisions on qualification of economic operators.

1) The first set of rules concerns the grounds that justify an exclusion of a tenderer or candidate from participation in a public procurement procedure. These relate to situations such as conviction for specific criminal offences, non – payment of taxes or social contributions etc. The contracting authority should also exclude economic operators who were found in breach of environmental protection rules.
2) Second group covers provisions related to suitability to pursue the professional activity, economic and financial standing and the technical and professional ability of economic operators to perform the contract in question. As regards the latter, when assessing ability to perform a contract, contracting authorities may take into account specific experience and competence related to environmental aspects which are relevant to the subject matter of the contract. They may ask, for instance, for evidence of the ability of economic operators to apply environmental and supply chain management measures when carrying out the contract.
3) Third group, relevant for staged procurement procedures concerns rules and criteria applied for so called *short listing* of economic operators (see below for details).

Mandatory conditions for participation

Participation in public procurement is open to only those economic operators who fulfil the mandatory conditions provided in Article 99.

There are two groups of conditions provided in that Article:

1. Non – conviction for specific crimes and
2. Fulfilment of due fiscal obligations

First, an economic operator cannot be subject of a conviction by final judgement, and the executive director of which has not been the subject of a conviction by final judgement for a criminal offence with the following elements:

- criminal association;
- creation of a criminal organisation;
- giving a bribe;
- receiving a bribe;
- giving a bribe in business operations;
- receiving a bribe in business operations;
- evasion of taxes and contributions;
- fraud;
- terrorism;
- terrorist financing;
- terrorist association;
- participation in foreign armed formations;
- money laundering;
- trafficking in human beings;
- trafficking minors for adoption;
- slavery and transport of enslaved people.

Second, it is obligatory that economic operator has fulfilled all its due obligations relating to the payment of taxes and healthcare and pension contributions.

Means of proof for mandatory conditions

The following certificates or documents serve as proof of the fulfilment of mandatory conditions for participation:

1) a document that the competent authority issued on the basis of judicial records in accordance with the legislation of the country in which the economic operator concerned is seated, or in the country of residence of its authorised person(s),

2) a document issued by the state administration body in charge of tax affairs, that is, by the competent authority of the country in which the economic operators concerned in seated.

Where the country in which the economic operator is seated or the country of residence of its authorised person does not issue means of proof mentioned above or where these do not cover all the circumstances specified above, the required evidence may be replaced by a declaration made by the economic operator confirming that the listed conditions have been met, accompanied by a proof of authenticity of such declaration issued by the competent authority of the country in which the economic operator is seated or the embassy of that country in Montenegro.

Grounds for exclusion from public procurement procedures

Exclusion criteria deal with circumstances that normally cause contracting authorities not to do any business with a given economic operator. The cases where contracting authorities must or may exclude an economic operator are listed in the public procurement provisions. In some particularly serious cases, exclusion of the economic operator is mandatory, while in other situations exclusion is optional – the contracting authority may exclude a given economic operator provided a specific ground for exclusion was envisaged in the procurement documents.

Mandatory exclusion

Contracting authorities are obliged to exclude an economic operator from participation in a public procurement procedure if they establish that:

1. it is in a conflict of interest situation (see → material on conflict of interest)
2. it has failed to meet the mandatory requirements (such as lack of conviction for specific crimes and due payment of taxes and pension contributions),
3. it has failed to meet the requirements concerning capability to pursue professional activity, economic or financial standing or technical and professional ability indicated in the tender documentation
4. there is some other reason stipulated by the PPL.

Exception to mandatory exclusion

The contracting authority does not have to exclude economic operators even if there are conditions for that fulfilled if:
1. If there are substantial reasons relating to the lives of people and public health or environmental protection, a contracting authority does not have to exclude an economic operator in case where there is a ground for exclusion due to conflict of interest.
2. A contracting authority should not exclude an economic operator due to unsettled liabilities for taxes and contributions, provided that it demonstrates that, in accordance with regulations, it has no obligation of paying taxes or that it has been allowed to defer the payment of taxes and contributions which it performs within the established time limits.

Optional grounds for exclusion

Those grounds for exclusion may be applied, depending on the decision of the contracting authority with regard to specific public procurement procedure or not. However, in order to apply them it is necessary to provide for this in the tender documentation.

Contracting authorities may decide that an economic operator is to be excluded from participation in a public procurement procedure if they establish that it:
1. is the subject of bankruptcy or liquidation procedure; however, a contracting authority does not have to exclude the economic operator if it proves that it will be capable of executing a public procurement contract.
2. it has concluded a contract or entered into an agreement with another economic operator with a view to distorting market competition;
3. it has unsettled contractual liabilities or has shown significant or permanent deficiencies in the performance of contractual obligations under a prior public procurement contract, a public-private partnership or a prior concession contract which led to early termination of that contract, damages or other comparable sanctions;
4. it has misrepresented facts concerning its compliance with the public procurement procedure requirements;
5. it is to blame for a grave professional misconduct which brings into question its integrity.

What is a professional misconduct?

It is an unjustified violation of the obligations stipulated by the public procurement contract by bidders including the refusal to conclude a public contract, as well as breach of regulations in the following fields: environmental protection; social and labour law, including collective agreements; protection of competition or intellectual property rights.

Capability requirements

The purpose of capability requirements is to assess the suitability of an economic operator to carry out a given contract.

They are related to a particular contract. Their common element is that all capability requirements that are applied should be mentioned in the tender documentation.

In an open procedure they may be assessed only on a pass/fail basis, before tenders are evaluated against the contract award criteria (but the contracting authority may reverse the order of the evaluation and assess first tenders against contract award criteria). In staged procedures (such as the restricted procedure, the competitive procedure with negotiations or competitive dialogue), they form a part of the separate qualification stage, and can also be used to shortlist or reduce the number of candidates invited to tender ('short-listing'). The public procurement provisions provide an exhaustive list of the criteria which can be applied to select economic operators, and the types of evidence which may be requested from them.

Important: an overriding requirement in relation to all selection criteria is that they must be *related and proportionate to the subject-matter of the contract*. This means that contracting authorities should adjust their approach to the specific requirements of a given contract, including its value and the level of environmental risk involved. For example, the range of selection criteria applied for a works contract will normally be greater than for a simple, off the shelf, supply contract.

In accordance with the principle of proportionality (Article 11) the contracting authority may require the conditions for bidders to participate in a public procurement procedure, related to their economic-financial and professional-technical standing, to be determined in proportion to the complexity of the subject of procurement, the execution of public procurement contracts and the estimated value of the public procurement

There are three groups of capability requirements:

1) capability to pursue the professional activity,
2) economic and financial standing and/or
3) technical and professional ability.

Capability requirements may be imposed only at a minimum level which ensures the ability of economic operators to successfully perform the public procurement contract in its entirety, or partly, depending on whether the bid is submitted for the procurement subject in its entirety or for a specific lot/s. They should be also logically connected and proportionate to the procurement subject.

Capability to pursue professional activity

Contracting authorities should, as a condition concerning capability to pursue professional activity, require that economic operators prove that they are:
1. registered with the Central Registry of Economic Operators or other appropriate register, in the country in which the economic operators are seated; and/or,
2. possess a valid authorisation (permit, licence, approval or other act) in accordance with law.

Proving professional suitability

The following documents should serve to prove the fulfilment of professional suitability:
1) a document attesting to the registration of economic operators with the Central Registry of Economic Operators or other appropriate register, including information about the authorised persons of the economic operators;

2) a document attesting to the authorisation to carry out the activity which is the subject of procurement (permit, licence, approval or other act issued by the authority in charge of the professional activity which is the subject of procurement).

Economic and financial standing

As a condition concerning economic and financial standing the contracting authority may require the following:
1) a certain minimum yearly turnover in the preceding two years, including a certain minimum turnover in the area covered by the contract; and/or
2) the ratios between assets and due liabilities and/or other financial parameters.

The minimum amount of annual turnover requested by the contracting authority may not exceed two times the estimated contract value, except in duly justified cases such as relating to the special risks attached to the subject matter of the procurement, which the contracting authority shall explain in the tender documentation.

Minimum turnover in specific forms of procurement

Framework agreements

In a public procurement procedure involving the conclusion of a framework agreement under which the procedure is to be re-conducted (mini competition), the minimum annual turnover should be calculated on the basis of the expected maximum value of specific contracts that will be concluded on the basis of the framework agreement or on the basis of the determined value of the framework agreement.

Dynamic purchasing systems

In the case of a public procurement procedure involving a dynamic purchasing system, the maximum annual turnover should be calculated on the basis of the maximum expected value of specific contracts that will be concluded during the period of validity of such system.

Lots

If a contract is divided into lots, the conditions concerning economic and financial standing apply proportionately in relation to each individual lot.

Proving economic and financial standing

The fulfilment of conditions concerning *economic and financial standing should be* proved by financial statements on the turnover within two preceding financial years, depending on the date of establishment or commencement of the activity, accompanied by the reports of a certified auditor in accordance with law governing audit.

Technical and professional ability
In order to check technical and professional ability of economic operators the contracting authority may require that they possess
1. a specific experience with high-quality and successful execution of same or similar activities related to the field of the procurement subject;
2. the necessary expert and personnel resources that will be involved in the contract execution;
3. a mechanical and technical equipment and/or other capacities necessary for timely and high-quality execution of the contract;

4. a quality management system in place which is relevant to the area of the subject of procurement; and/or
5. an environmental protection system in place.

Contracting authorities may render it necessary in the tender documentation for mixed procurement that economic operators comply with professional and technical ability requirements for each part of the subject of procurement.

Proving technical and professional ability

The fulfilment of requirements concerning *technical and professional ability* should demonstrated by supplying one or more of the following proofs:
1. proof of the supplies delivered, services provided or works executed within the preceding years but not more than five, including the year in which the public procurement procedure is launched, giving description and value of the procurement subject, date of contract conclusion and period of contract execution, and the statement that the contract was executed in a timely and effective manner, which is supplied by the investor or the beneficiary;
2. proof (a copy of the employment record, registration of an employee for compulsory insurance, temporary service agreement, etc.) that they employ or engage in some other manner human resources with appropriate references that are required for the implementation of the subject of procurement in accordance with law;
3. official list of capital assets and equipment owned or obtained in a different lawful manner;
4. certificate or other appropriate proof issued by a competent authority or organization of compliance with the quality management requirements relevant to the area of the subject of procurement;
5. certificate or other appropriate document issued by a competent authority or organization attesting an environmental protection system in place.

Limitation of a number of qualified candidates – short – listing

A characteristic solution which may be applied in multi – stage procurement procedures is the possibility of limiting the number of qualified candidates who will be invited to tender in the second stage of:

- the restricted procedure,
- the competitive procedure with negotiations,
- the competitive dialogue,
- the negotiated procedure with prior publication of a contract notice, and
- the innovation partnership.

Basically, there are two options available to the contracting authority (it should decide which to apply at the moment of launching the procurement procedure). First, the contracting authorities can invite all economic operators who fulfil the qualification criteria to submit bids. Second, they can limit the number of qualified candidates and invite only some of them to submit bids. The second option is referred to as limiting the number of qualified candidates or 'short – listing'. Relevant rules are provided in Article 67 of PPL.

Thus,

- ✓ the contracting authority may limit the number of qualified candidates in tender documents, provided that the minimum number of candidates may not be less than 5 (five) (it is minimum 3 (three) in other multistage procedures);
- ✓ if the contracting authority applies this option, the selection of the foreseen number of candidates should be performed according to the number and/or amount of references for proving the fulfilment of the required capability requirements (see → Qualification and

selection of economic operators);

- ✓ if the number of qualified candidates is below the number prescribed by the tender documentation, the contracting authority may proceed with the public procurement procedure if that possibility is envisaged in its tender documentation;
- ✓ after assessing the validity of submitted applications for qualification, contracting authorities shall rank candidates who submitted valid applications;
- ✓ the applicants who were not ranked within the determined number of candidates set by the contracting authority should be delivered a a notice of elimination from further public procurement procedure (they are in the same situation as those who have not fulfilled the qualification requirements).

As regards those economic operator who are excluded from the public procurement procedure the contracting authority should inform them within 15 days as of the day of opening of qualification applications and submit it to the economic operator within three days of its adoption (Article 141 (1) point 1).

Means of proof of fulfilment of conditions

Self-declaration

The PPL, following requirements of EU directives, provide not only a list of issues which may be examined at the selection stage but contain also some limits on the type of evidence which can be requested at the preliminary stages of a procurement procedure. Most importantly, contracting authorities are required to accept, as a preliminary evidence, from economic operators in their tenders (or requests for participation) a declaration of fulfilment of criteria for qualitative selection of economic operator (hereinafter: Declaration). This declaration is the Montenegrin equivalent of the European Single Procurement Directive provided by 2014 Procurement Directive[40]. The Declaration should be submitted on a standard form in an electronic form[41]; until the EPPS is established in written or electronic form and after that only in electronic form[42]. The declaration should serve as a guarantee that the candidate or bidder meets all the mandatory conditions for participation in a public procurement procedure and other requirements established by the tender documentation

The standard form of Declaration will be determined by the Ministry of Finance[43].

Proceeding with the self – declaration

The contracting authority should verify whether the economic operator provided in the declaration accurate information – this verification should be conducted on the basis of records kept by the contracting authority in accordance with the PPL, including also e – Certis and optionally through the EPPS. In the case the information is not available to the contracting authority or the proof cannot be obtained ex officio contracting authorities should require the economic operator to supply originals or certified copies of the necessary evidence indicated in the tender documentation. The period set by contracting authority to provide this information should be minimum 8 days from the receipt of the request[44]. If the information is not complete or unclear the contracting authority should notify the economic operator concerned and allow it to supply clear and complete evidence within 5 days

[40] Article 59 of directive 2014/24.

[41] Article 111 (2) of the PPL.

[42] Article 111 (3) of the PPL.

[43] Article 111 (7) of the PPL.

[44] Article 112 (2) of the PPL.

from receiving such notification[45]. In the case the originals or certified copies of the evidence required from economic operators is not available before the contracting authority takes a decision on the result of the public procurement procedure, the contracting authority should request from the bidder who submitted the most economically advantageous tender to submit original or certified copy of the evidence stipulated in the tender documentation within the period not shorter than 5 days from the date of submission of the request. In the event the winning bidder fails to submit requested documents such a bidder is considered to abandon his bid. Then the contracting authority should 1. invite the bidder whose bid is ranked as the second best to provide originals or the certified copies of the evidence referred to in the tender documentation or 2. to cancel the procedure in accordance with the PPL[46].

Reliance on the capacities of other entities

With a view to proving the fulfilment of requirements related to economic and financial standing and technical and professional ability, a bidder may, in a public procurement procedure, rely on the capacities of other economic operators (third parties) in the following cases[47]:

1. with a view to demonstrate the fulfilment of conditions related to a specific experience with high quality and successful execution of same or similar activities related to the field of the procurement subject and the necessary experts and personnel resources that will be involved in the contract execution, only in case that the economic operator on whose capacities it relies will execute the works or provide the services for which the ability in question is required;
2. if it demonstrates that the economic operator on whose capacities it relies has at its disposal the capacities necessary for performance of the contract.

Contracting authorities should verify whether the economic operators on whose capacities a bidder relies fulfil the relevant capacity requirements.
Where contracting authorities establish that an economic operator does not fulfil the capability requirements on which the bidder relies, or where there are grounds for exclusion, they should notify the bidder thereof and enable the bidder to replace that economic operator with another economic operator who fulfils the necessary conditions, within an appropriate time limit which may not be shorter than 5 days from the day of submission of the request.

Where a bidder relies on the capacities of other economic operators, contracting authorities may require in the tender documentation that those entities be jointly liable for the execution of the contract.

Further reading:

Public Procurement Directive: Article 57 - 66
Case law of the Court of Justice:

Exclusion of economic operators:
C-21/03 and C -34/03 “Fabricom”
C-305/08 “CoNISMa“
C-226/04 and C-228/04 “La Cascina and Zilch”
C-357/06 “Frigerio Luigi”

[45] Article 112 (3) of the PPL.

[46] Article 112 (5) of the PPL.

[47] Article 127 of the PPL.

C-147/06 and C-148/06 “SECAP”
C-199/07 Commission v Greece
C-538/07 “Assitur”
C-376/08 “Serratonini and consortio stabile edili”
C-74/09 “Bâtiments et Ponts Construction”
C-465/11 “Forposta”
C-358/12 – “Consorzio Stabile Libor Lavori Pubblici”
C-470/13 “Generali Providencia”
C-425/14 “Impresa Edilux”
C-27/15 “Pizzo”
C-199/15 “Ciclat ”
C-171/15 “Connexxion Taxi Services”
C-144/17 “Lloyd's of London”

Reliance on resources of third parties
C-389/92 “Ballast Nedam”
C-5/97 “Ballast Nedam II”
C- 176/98 „Holst Italia”
C-314/01 „Siemens ARGE”
C-94/12 „SWM Construzioni”
C-324/14 „Apelski”
C-387/14 „Esaprojekt”
C-406/14 “Wrocław - Miasto na prawach powiatu”
C-234/14 “Ostas celtnieks”
C-227/15 “Pizzo”
C-223/16 “Casertana Costruzioni”

Module III

Criteria for the selection of the best bid

Relevant provisions of the PPL:
Article 117 – Mandatory conditions
Article 118 – Price – quality ratio
Article 119 – The life – cycle cost

Introduction

Criteria for the selectio of the most advantegous bid (contract award criteria) constitute the basis on which a contracting authority chooses the best tender and awards a contract. These criteria must be established in advance by the contracting authority in the call for competition and tender documents and must not be prejudicial to fair competition as well as comply with principles of equal treatment and transparency.

The old 2012 PPL allowed contracting authorities to award a public contract based on either:

- **the lowest-price criterion; or**
- the most economically advantageous-tender criterion, which meant applying

criteria in addition to price.

The choice between those two options was left to the discretion of contracting authorities.

In accordance with the new PPL (Article 117) contracting authorities should select the the most advantageous bid in a public procurement procedure applying the principle of cost-effectiveness, on basis of the following criteria:

1) offered price;
2) best price-quality ratio or
3) life-cycle cost.

The application of criteria for selection of the best bid may include three different approaches:

- price only;
- the best price/quality ratio
- life-cycle costing.

Whichever approach is used, an economic element should always be involved in the evaluation of offers (the principle of cost – effectiveness).

Principles of application of contract award criteria

Criteria applied for the selection of the most advantageous bid should satisfy certain requirements:

- criteria should be disclosed in the tender documentation,
- contracting authority should establish a methodology for evaluation of bids.
- Criteria should be descriptive, determined by points, related to the subject of procurement and non-discriminatory.

Criteria are **related to the subject** of procurement if their parameters relate to the requirements of the procurement subject in any of its aspects and at any stage of its life cycle, including factors related to the specific process of production, execution of works, supply or trading of goods or services or the particular process within some other stage of their life cycle, even when those factors are not part of their substantive content.

Criteria are considered to be non – discriminatory where all their sub-criteria are available to bidders under the same conditions.

Methodology for application of criteria

The bid evaluation methodology should contain the method and the maximum number of points which could be assigned to a bid in accordance with the determined criterion and each envisaged parameter.

The parameters of the criterion for selection of the most advantageous bid and the bid evaluation methodology must be defined in a way which ensures an objective and accurate expression of the number of points assigned to each bid and their ranking.

The methodology for evaluation and ranking of bids should be prescribed by the Ministry of Finance.

(see the Rulebook on the method of evaluation of bids in public procurement procedures)[48].

Types of contract award criteria

1. Offered price

When a contracting authority chooses to apply the most economically advantageous criterion on the basis of price only, the contract is awarded to the tenderer offering the lowest price for a compliant tender. The **price is the only factor** that is taken into consideration when choosing the best compliant tender. Tenders received are evaluated against the set specifications on the basis of a pass or fail system. No cost analysis and no quality considerations can come into play in this choice.

The price-only criterion has the advantage of simplicity and rapidity, but it presents some limitations, including the following:

- It does not allow the contracting authority to take into account qualitative considerations. Apart from the quality factors built into the specifications, which must be met by all tenders, the quality of the requirement being procured is not subject to evaluation.
- It does not allow the contracting authority to take into account innovation and innovative solutions. Tenders that meet the set specifications are compliant.
- For subject matters that have a long operating life, it does not allow the contracting authority to take into account the life-cycle costs of the requirement procured. When the lowest-price criterion is used, only the direct cost of the purchase or the initial purchase price within the set specifications can be taken into consideration.

Limitations concerning application of price criterion

Unlike the old PPL the new PPL provides for limitations concerning application of price as the criterion for selection of the most advantageous tender.

Those limitations concern:
- Application of price as the only one criterion and
- Application of price as one of criteria (where best price – quality ratio is applied).

In most cases the price may not be the only one criterion applied in order to choose the most advantageous tender.

The price may be the sole criterion only in:
- a negotiated procedure without prior publication of a contract notice,
- in a process of concluding the contract on the basis of the framework agreement in an electronic auction or a dynamic purchasing system,
- in a contract award procedure for social and other specific services and
- in the case of public procurement for the needs of defence and security or for the needs of diplomatic missions, consular offices and military and diplomatic representatives abroad, except in case where the price of the procurement subject has been previously determined.

In the case the price – quality criterion is applied (see below) there are also limitations concerning the maximum weighting (points) may be awarded to price.

The ratio between the price and the quality should be determined in such manner that the number

48 Official Gazette, No. 074/20.

of points given on the basis of price may not exceed 90% of the total determined maximum number of points.

2. Price-quality ratio

When the most economically advantageous tender on the basis of the best price/quality ratio is used, a contracting authority can take into account other criteria in addition to – or other than – the price, such as the quality, delivery time, and after-sales services. Each chosen criterion is given a relative weighting by the contracting authority, which reflects the relative importance that it has. The purpose of the best price/quality ratio is to identify the tender that offers the best value for money.

Value for money: The term value for money means the optimum combination between the various cost-related and non-cost-related criteria that together meet the contracting authority's requirements. However, the elements that constitute the optimum combination of these various criteria differ from procurement to procurement and depend on the outputs required by the contracting authority for the procurement exercise concerned.

The concept of value for money recognises that goods, works and services are not homogeneous and that they differ in quality, durability, longevity, availability and other terms of sale. The point of seeking value for money is that contracting authorities should aim to purchase the optimum combination of features that satisfy their needs. Therefore the various qualities, such as intrinsic costs, longevity and durability, of the various products on offer are measured against their cost. It may be preferable to pay more for a product that has low maintenance costs than to pay less for a cheaper product that has a higher maintenance cost.

Advantages of the best price/quality ratio: The best price/quality ratio, as opposed to the price-only criterion, presents a series of advantages, including in particular the following:

- It allows contracting authorities to take into account qualitative considerations. The best price/quality ratio is typically used when quality is important for the contracting authority.
- It allows contracting authorities to take into account innovation or innovative solutions. This is particularly important for small and medium-sized enterprises, which are a source of innovation and important research and development activities.
- For those subject matters with a long operating life, it allows the contracting authority to take into account the life-cycle costs of the requirement purchased and not only the direct cost of the purchase or the initial purchase price within the set specifications.

A contracting authority may take into account various criteria to determine the best price/ quality ratio.

The PPL (Article 118) contains a list of these criteria, which are as follows:

- quality, including technical merit;
- aesthetic and functional characteristics;

- accessibility;
- design for all users;
- social, environmental and innovative characteristics;
- trading and its conditions;
- organisation, qualification and experience of staff assigned to perform the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract;
- after-sales service and technical assistance;
- delivery conditions, such as delivery date, delivery process and delivery period or period of completion.

As the list is only illustrative, it is left to the contracting authority to establish the criteria to be applied in order to determine the most economically advantageous tender from its point of view, taking into account the specific circumstances of each case and within certain specified limitations. Where the price has been previously determined, the bids should be evaluated solely on basis of the quality parameters.

Contract award criteria may be divided into two broad categories: **cost-related** criteria and **non-cost- related** criteria.

Cost-related criteria: cost-related criteria, which are also referred to as economic criteria, allow the contracting authority to determine the financial cost of the acquisition of the object of the procurement as well as the cost of using and operating it.

Non-cost-related criteria: the non-cost-related criteria concern key performance requirements and adherence to specifications. Examples of non-cost related criteria include the following:

- **quality** – the quality characteristics that the object of the procurement must satisfy, such as the number of pages per minute produced by a printer or its durability;
- **technical merit** – if the object of the procurement is fit for its purpose and how well it performs;
- **aesthetic and functional characteristics** – how the object of the procurement looks and feels and how easy it is to use;
- **delivery date** – the guaranteed turnaround time from order to delivery and the ability to meet the set deadline;
- **after-sales services** – the support that is required and available to the contracting authority after the contract has been signed.

3. The life-cycle cost

Life-cycle costs are the costs of the goods, works or services through the duration of their life cycle. In broad terms, the life-cycle costs comprise all costs to the contracting authority relating to the:

- acquisition,
- operational life,
- end of life (such as disposal).

The life-cycle costs can be either "one-off" costs or "recurrent" costs. One-off costs are those that are paid only once with the acquisition of the requirement being procured, such as initial price, purchase and installation costs, initial training or disposal costs. Recurrent costs are those that are paid throughout the life cycle of the requirement being procured. They depend on its longevity and they normally increase with time. Recurrent costs include service and maintenance charges, repairs, consumables, spare parts and energy consumption.

The life-cycle cost, depending on a type of procurement subject, should include all or some of the following costs:

1) the costs borne by the contracting authority or other user, such as:
- acquisition or purchase costs;
- costs of use, such as the consumption of energy and other resources;
- maintenance costs;
- costs related to end of life cycle, such as collection and recycling;

2) costs imputed to environmental impact of the procurement subject during its life cycle, provided their monetary value can be determined and verified, which may include the cost of reducing emissions of greenhouse gases, emissions of other pollutants as well as other climate change mitigation costs.

Where contracting authorities evaluate bids using the life-cycle costing sub-criterion, they should indicate in the tender documentation the data related to costs to be provided by the bidders and the methodology they will use to determine the life-cycle costs on the basis of such data.

Methodology should be based on objectively verifiable and non-discriminatory parameters and that it shall not unduly favour or disadvantage certain economic operators, whereupon any economic operator can provide the required data with reasonable efforts.

Further reading:

Public Procurement Directive: Article 67 - 68

Case law of the Court of Justice:
C- 19/00 'SIAC Construction' – application of general principles to contract award criteria
C-513/99 'Concordia Bus Finland' – application of environmental criteria
C-448/01 'EVN and Wienstrom' – application of environmental criteria
C- 331/04 'ATI EAC'
C -234/03 'Contse'
C-532/06 'Lianakis': "award criteria" do not include criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the tenderers ability to perform the contract in question.

C – 601/13 'Ambisig': Article 53(1)(a) [of Directive 2004/18] *does not preclude the contracting authority from using a criterion enabling evaluation of the teams specifically put forward by the tenderers for the performance of the contract and which takes into consideration the composition of the team and the experience and academic and professional background of the team members.*

C-6/15 'Dimarso' - in the case of a public service contract awarded pursuant to MEAT criterion the contracting authority **is not required to bring to the attention of potential tenderers, in the contract notice or the tender specifications relating to the contract at issue, the method of evaluation used by the contracting authority in order to specifically evaluate and rank the tenders.** However, that method may not have the effect of altering the award criteria and their relative weighting.

C-546/16 'Montte' – contracting may to lay down, in the TD for the open procedure, minimum requirements as regards the technical evaluation, so that the tenders submitted which do not reach a predetermined minimum score threshold at the end of that evaluation are excluded from the subsequent evaluation based on both technical criteria and price.

Module III

ABNORMALLY LOW (UNREALISTIC) TENDERS

Relevant provisions:
- Article 139 PPL and
- Article 132 and 133

Introduction

All decisions and activities of public institutions should be governed by considerations and requirements concerning the pursuit of objectives in the public interest and by the need to spend public funds efficiently. Public procurement decisions and activities are no exception since a significant part of the taxpayers' money is spent in this way. In many cases, procurement decisions are made on the basis of the lowest price, which is a permitted award criterion falling within the concept of the "most economically advantageous tender". Contracting authorities may argue that the cheapest offer ensures the achievement of the important financial goal of budgetary savings. The lowest price is not, however, always the offer which is best value for money in the long term. The PPL acknowledges this by requiring that "*A contracting authority shall select the most advantageous bid in a public procurement procedure applying the principle of cost-effectiveness*" (Article 117). The PPL also provides a framework for the use of life-cycle costing and other cost-effectiveness approaches, encouraging contracting authorities to consider more than just the initial purchase price and to take into account qualitative issues in their evaluation of tenders (Article 119).

The concept of abnormally low tender is generally recognised as referring to the situation where the price offered by an economic operator raises doubts as to whether the offer is economically sustainable and can be performed properly.

Reasons for which abnormally low tenders appear in public procurement

There are various reasons why abnormally low tenders appear in public procurement procedures.

1. Misunderstanding or misinterpreting of requirements of contracting authority:

The submission of an abnormally low tender can be the result of the economic operator misunderstanding or misinterpreting the requirements of the contracting authority.
For example, Company A may not understand the full scope of the procurement and as a consequence submits a tender which does not include all the mandatory requirements. Company A's tender may propose a much lower price than tenders from other economic operators who took into account all of the contracting authority's requirements in their tendered price.
In such a case the price offered seems to be very good but further thorough investigation will show that the tender is not compliant with the requirements of the contracting authority as it does not

provide for all services or works required.

2. Underestimation of risks:

The submission of an abnormally low tender can be a result of underestimation of the risks attached to the execution of the contract. This phenomenon is referred to in economic literature as 'the winner's curse'.
For example, Company B submits a tender which is compliant with all the requirements of the contracting authority but in calculating the tendered price Company B was too confident about the costs of executing the contract. There is a risk that Company B may not be able to perform the contract correctly or it will perform the contract but with delays or lower quality.

3. Non-compliance with social, labour and environmental laws:

The submission of an abnormally low tender can be a result of non-compliance with binding legal requirements concerning social, labour or environmental law.
For example, if Company C does not pay wages in accordance with legal requirements or does not ensure labour conditions compliant with those regulations then it has an unfair competitive advantage.

4. Receipt of a subsidy by the bidder:

The submission of an abnormally low tender may be the consequence of the economic operator receiving a subsidy. For example, Company D is in receipt of a government financial support for start-up companies. Company D may be in a position to offer a price much lower than its competitors who do not have access to this support. Subsidised companies are allowed to participate in public procurement procedures, but as explained below, tenders should be rejected if they are abnormally low because of illegal state aid.

5. Deliberate strategy of the bidder:

The submission of an abnormally low tender may be due to the deliberate actions or strategy of an economic operator. For example, Company E offers an extremely low price in order to provide continued employment for staff. Company F offers a low price in order to drive competitors out of a market. Company G offers a low price on the assumption that it will be able to agree future amendments to the contract and increase remuneration by negotiation during the execution phase of the contract ('low balling' or 'get the foot in the door' strategy).

What are the risks attached to accepting abnormally low tenders:
Awarding a contract to an economic operator which offers an abnormally low tender is risky for the contracting authority (and in general public interest) for a number of reasons, including:

- Default risk:
There is a risk of default particularly in the case of the economic operator who misunderstood the complexity of the procurement or did not take into account all risks related to it. If an economic operator becomes insolvent before the relevant services are finally delivered or works are performed the contract is not implemented and the contracting authority needs to re - tender the remaining parts of services or works, losing time and money.

- Additional charges or price increases:
An economic operator who was chosen on the basis of a very low tender may, in the course of the execution of the contract, seek to charge the contracting authority for extra costs and request increased remuneration. During the execution phase the economic operator's bargaining position is often strong. For example, an economic operator may demand additional payments not included in the contract and threaten to walk away from the contract if the contracting authority does not agree

to those additional payments.

- Quality risk:
There is a risk that goods or services provided will be of lower quality than they should be in accordance with terms of the contract. For example, an economic operator who had proposed a very low tender can try to cheat the contracting authority by replacing materials of high quality with cheaper substitutes or by not performing all required services.

- Avoidance of social, labour and environmental obligations:
There is a risk that binding social, labour and environment regulations will not be correctly applied. For example, the economic operator will try to avoid paying due taxes, minimum wages or social charges. In consequence, the market is distorted and the honest, law abiding companies are discouraged from applying for public contracts. In longer term the competition is lowered as smaller number of firms take part in procurement procedures which, in turn, drives prices up.

What the PPL says about abnormally low tenders?

The PPL contains provisions for dealing with tenders which are suspected of being « unrealistic » (abnormally low Article 139 of the PPL). These rules enable contracting authorities to avoid the negative consequences of accepting a tender which appears extremely advantageous but, in practice, is not viable. In addition to protecting the public interest against the risk of non-performance or poor performance of a contract these provisions are also aimed at supporting genuine competition among economic operators and reducing unfair advantages. For example, the provisions permit a contracting authority to reject a low-priced tender where the low price is a consequence of illegal support from public funds or breaches of specified labour, social or environmental laws.

Definition of unrealistic bids

The PPL defines as "unrealistic bid" as a bid "containing a price which is at least 30% lower than the average price of all regular bids, including such bid". For definition of regular bids – see Article 132 of the PPL. Definition of irregular bids in turn is included in Article 133 of the PPL.

Procedure with unrealistic bids

The PPL requires that a contracting authority should require explanations from bidder(s) having offered an unrealistic price to explain such price (Article 139 (2)).

This means that the contracting authority is not allowed to:
- accept a tender which appears to be unrealistic without conducting first this investigation; or
- reject a tender which appears to be unrealistic without giving a chance to the bidder to explain low level of the price or the costs.

Time period for providing such explanations is five (5) days.

Procedure of investigation of unrealistic bids

Once unrealistic bid or bids is/are detected the contracting authority should request explanation of price by the bidder(s) concerned with regard to the following elements (Article 139 (2)):
- the economics of the manufacturing process, conditions of procurement, technology of the service provision and/or the construction method;
- the technical solutions chosen and favourable conditions for the supply of the products or services or for the execution of the works;
- the originality of the supplies, the licenced services and their products, technical or technological features of the execution of the proposed works;

- compliance with obligations by the subcontractors;
- state aid and other benefits.

Although it is not mentioned here also compliance with environmental protection, social and labour law by the tender is assessed (Article 139 (5)).

Investigation procedure

The bidder concerned should provide explanations within 5 days from receiving the request of the contracting authority. If the bidder does not provide explanations, it is excluded from further participation in the public procurement procedure. As regards explanations provided in due time, the contracting authority should check them with the five elements mentioned above. If the contracting authority establishes that the explanations provided by the bidder are not supported by valid and verifiable evidence it should reject such bid on the grounds it being **irregular**.

Also, the contracting authority **rejects the bid** if it has established that the bid is abnormally low because it does not comply with applicable obligations related to environmental protection, social and labour law, including collective agreements, in accordance with the law and internationally ratified agreements (Article 139 (5)).

Other issues – Q and A

Is a contracting authority permitted to automatically exclude a tender suspected of being abnormally low?

Contracting authorities are prohibited from automatically excluding a tender which appears to be automatically abnormally. Before excluding such a tender, the contracting authority must give the economic operator concerned the opportunity to explain low level of costs or price.
Contracting authorities are not permitted to require contracting authorities to automatically reject abnormally low tenders.
In such limited circumstances, national or local legislation or even the contracting authorities themselves would be entitled to set a reasonable threshold for the automatic exclusion of abnormally low tenders.

Is a contracting authority permitted to automatically reject the lowest tender and the highest tender?

One of the popular myths of public procurement is the existence of a procedure according to which both the lowest price tender and the highest price are automatically rejected, and the best tender is chosen after evaluation of remaining tenders. This is practice is not permitted.
The origin of this myth may be a misconception relating to the use of 'anomaly thresholds' on the basis of the average bidding price. Indeed, there is some national legislation under which tenders containing prices which significantly diverge from the average are not taken into account when the average price of submitted tenders is calculated. It does not mean, however, that these divergent tenders are "rejected". They are evaluated but when the contracting authority calculates the average price of tenders in order to identify tenders which, due to their divergence from the average prices should be further investigated, those tenders are not included in calculation of average price (in order to avoid the impact of divergent tenders on the average price).
Another possible explanation of this myth is probably also the application in Italy and Spain in 80s and 90s of the "average price" criterion where the contract was awarded to the tenderer offering a price closest to average price of all offers. The contract was awarded not to a bidder proposing the lowest or the most advantageous tender but the tender with "average" price. Such a practice was found to be unlawful by the CJEU[49].

[49] Case 274/83 *Commission v. Italy.*

Further reading:

Article 69 of the EU Public Procurement Directive (2014/24)

Selected case law – judgements of the Court of Justice of the European Union:
76/81 *Transporoute v Ministère des travaux publics* (obligation of contracting authorities to request explanations from bidders whose offers appear to be abnormally low before rejecting such offers),
Case 274/83 *Commission v. Italy* (prohibition of criterion of average price),
103/88 *Fratelli Costanzo v Comune di Milano* (prohibition of automatic disqualification of tenders which appear to be abnormally low),
C-285/99 *Impresa Lombardini* (application of a mathematical criterion for identifying abnormally low tenders),
C-147/06 *SECAP and Santorso* (prohibition of automatic rejection of abnormally low tenders under the EU thresholds),
T – 495/04 *Belfass* (application of the concept of abnormally low tender to other than the price criteria of awarding contracts),
C-599/10 *SAG ELV Slovensko and Others* (duty of contracting authority to request explanations from bidders whose offers appear to be abnormally low).

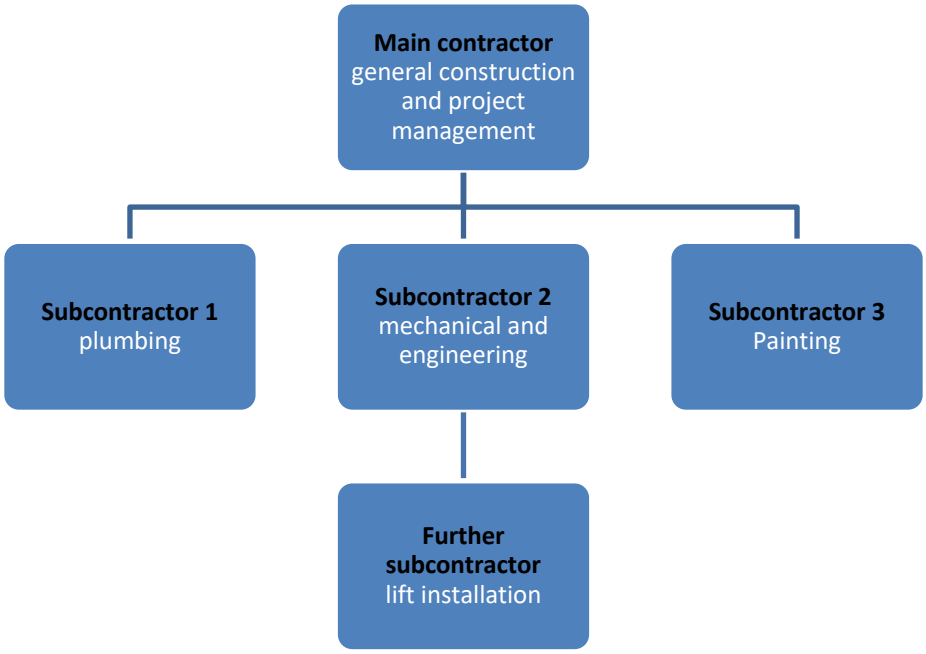
Module III
SUBCONTRACTING

Relevant provisions of the PPL:
- mainly Article 128 and
- Article 126 and 127

Introduction - what is a subcontracting?

Subcontracting occurs where an economic operator which has been awarded a public contract ("contractor") entrusts another entity with the performance of part of the works or services which are the subject matter of that public contract. The entity entrusted with the performance of part of the works or services is a "subcontractor". The contractor may use one or more subcontractors. Subcontractors may also subcontract elements of the works or services which they are required to deliver under the subcontracting arrangements with the contractor ("further subcontracting").
Even though the subcontractor is involved in the execution of part of the contract, it is the contractor who is ultimately responsible and liable to the contracting authority for the proper execution of a contract. There are many cases where subcontracting may be necessary or useful. For example, in the case of construction works the main contractor may decide to entrust other companies with a number of specialised activities such as plumbing, mechanical and electrical works and painting.

Construction works contract for new building - subcontracting arrangements



Similarly with training services the service provider may need to subcontract to other economic operators the catering services, accommodation and transport for participants.

Why subcontracting is applied?

There are various, good reasons for economic operators to use subcontracting. It often makes good financial and business sense to do so. An economic operator (contractor) may, for example, find that it cheaper to use a specialist subcontractor for a specific element of a contract than execute that element of the contract itself. This is because a specialist subcontractor will have the necessary equipment and workforce expertise, which the contractor does not have. In certain cases a contractor may not be authorised to provide all of services or works required by the contracting authority. For example, a contractor executing a works contract may entrust another company, which holds specific authorisations or licenses necessary for the disposal of hazardous waste from a construction site.

An alternative approach to subcontracting could be for the contractor and the specialist waste disposal company to create a group and jointly sign a contract with the contracting authority. However, from the perspective of the waste disposal company this may not be acceptable as the contract may require the waste disposal company to take on liabilities which are unconnected with the tasks which it will carry out. A subcontract arrangement with limited liability is likely to be a far more appealing solution to the waste disposal company.

Subcontracting may also assist an economic operator who does not meet all of the qualification criteria required by a contracting authority. An economic operator is able to rely on subcontractors to supplement missing capacities or resources in order to qualify to participate in the procurement process for the award of a public contract. Subcontracting may also facilitate SME access to public procurement. An SME may not be able to perform a whole contract because of its size, specialisation or limited resources, but it may be perfectly able to perform some of the services or works covered by a bigger project. There may be also cases where subcontracting is used for the wrong reasons, for example as a way to facilitate collusion or bid rigging. Asking advance for details of prospective subcontractors can assist in reducing the risk of collusion or bid rigging.

What the PPL says about subcontracting?

The new PPL does not define what is meant by 'subcontracting' but defines the term 'subcontractor'.

Accordingly, **subcontractor** is "an economic operator to which the bidder assigns the implementation of a specific part of the procurement subject or part of a public procurement contract" (Article 4 (18).

When subcontracting is allowed?

Generally subcontracting is always allowed, in principle. Bidders may assign the performance of a part of a procurement subject or a public procurement contract to a subcontractor/s in accordance with the PPL (Article 128 (1)).

The contracting authority may not in turn:

- require bidders to subcontract a share of the procurement subject or a public procurement contract
- require bidders to involve certain subcontractors,
- restrict bidders in this respect, unless otherwise provided for by a separate piece of legislation or an international treaty.

Are there any limitations concerning subcontracting in the PPL?

Yes, in accordance with Article 126 (8) of the PPL, contracting authorities may require in the tender documentation that, in the event of submission of a joint bid involving setup or installation tasks, certain key tasks are to be performed directly by a holder of a joint bid or by another economic operator who is a member of the joint bid. See the last part of this training material.

What are obligations of subcontractors?

Subcontractors should comply with the mandatory conditions, as well as the capability requirements for conducting the activity and professional-technical capabilities that relate to the subject of procurement which has been assigned thereto.

What are obligations of contracting authorities concerning subcontractors?

At the stage of evaluation of a bid which makes reference to the subcontracting:
1. Contracting authorities should apply all the foreseen grounds of exclusion from a public procurement procedure on subcontractors (→ see material on exclusion of economic operators).
2. Where a contracting authority establishes that there are grounds for exclusion of a subcontractor, it should require the economic operator to substitute such subcontractor within an appropriate time limit which is not shorter than five days.

What are obligations of bidders at the stage of submission of bids?

Bidders intending to subcontract a share of the public procurement contracts should:

- specify in their bid the part of the procurement subject, or the share of the contract they intend to assign, or to subcontract, with the details on the name and description of the part of the subject-matter, precise quantity, and percentage share; and
- specify in their bid the data on the subcontractor (name, address, tax identification number, account number, name of authorized person).

Where an economic operator subcontracts a share of the procurement subject, or a public procurement contract, this information should be indicated in the public procurement contract.

What are rights and obligations of contractors during the execution of a contract?

Bidders may, during the execution of a public procurement contract, request from the contracting authority to approve of the following (Article 128 (8)):

- replacement of a subcontractor for the share of the public procurement contracts which was previously subcontracted to it,
- introduction of one or more new subcontractors the joint share of which shall not exceed 30% of the value of the public procurement contract concerned, net of VAT;
- the taking over of execution of the previously subcontracted share of the public procurement contract.

Contractors who submit such a request should accompany it with the information and documents for proving the compliance with the mandatory conditions, as well as the capability requirements for conducting the activity and professional-technical capabilities for any new subcontractor.

Contracting authorities should not approve the request:

- in the case that the new subcontractor fails to meet the requirements concerning compliance with the mandatory conditions, as well as the capability requirements for conducting the activity and professional-technical capabilities,
- in the case that the bidder fails to meet the capability requirements for conducting the activity and professional-technical capabilities for the part of the procurement subject the execution of which it assumes.

Reliance on subcontractors to satisfy selection stage requirements Information about proposed subcontracting arrangements

Article 127 of the PPL permits an economic operator to rely upon the economic and financial standing and technical and professional ability of a third party in order to satisfy selection stage requirements. This reliance on the capacities of other entities is regardless of the legal nature of the links between the economic operator wishing to participate in a procurement process and the third parties upon which it relies. **Subcontracting is one of the ways in which the economic operator and the third parties may be linked.** An economic operator may prove that he fulfils those requirements by providing information about prospective subcontractors.
During the selection process the economic operator must be able to demonstrate that, at the contract execution stage, it will be able to use the capacities of third parties upon which it relies to satisfy the selection stage criteria. It must prove that its links with the third party are genuine and not merely an artificial means to satisfy the selection requirements. There is a general requirement that the economic operator must prove to the contracting authority that it will have the necessary resources at its disposal. It may do so, for example, “by producing a commitment by those entities to that effect”.
Where an economic operator proposes to rely on the capacities of third parties to satisfy educational and professional qualifications or relevant professional experience it can only do so where those third parties will actually perform the works of service for which those capacities are required.

Limitations concerning reliance on third parties resources, including subcontracting:

Article 126 (8) of the PPL includes a specific limitation on subcontracting. Accordingly, "*contracting authorities may require in the tender documentation that, in the event of submission of a joint bid involving setup or installation tasks, certain key tasks are to be performed directly by a holder of a joint bid or by another economic operator who is a member of the joint bid*". In this case the contractor must perform those tasks directly. It is not allowed to subcontract them or otherwise entrust the tasks to third parties.

Information about proposed subcontracting arrangements and subcontractors

The ability of an economic operator to rely on third parties to satisfy selection stage criteria needs to

be considered by the contracting authority at the planning stage of the procurement process.
This is because, under Article 71(2) of the Directive the contracting authority is permitted to ask an economic operator to indicate in its tender "any share of the contract it may intend to subcontract to third parties and any proposed subcontractors". National provisions may oblige contracting authorities to request this information from economic operators.
This information is useful for a contracting authority to have in advance so that is understands who will execute the contract. The request for this information must be included in the procurement documents and so needs to be thought about at the planning stage.
In addition, as has already been noted above, a contracting authority may ask for proof from an economic operator seeking to rely on the resources of a third party, including a subcontractor, that it will have the necessary resources at its disposal. It is sensible to include a request for relevant information and proof in the procurement documents.

Further reading

Article 71 of the Public Procurement Directive

Rulings of the CJEU:
C-406/14 '*Wroclaw miasto na prawach powiatu*' case the CJEU concluded that Directive 2004/18 '*must be interpreted as meaning that a contracting authority is not authorised to require, by a stipulation in the tender specifications of a public works contract, that the future contractor of that contract perform with its own resources a certain percentage of the works covered by that contract.'*

In C – 63/18 'Vitali' the CJEU stated on the ground of Directive 2014/24:
'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, as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which limits to 30% the share of the contract which the tenderer is permitted to subcontract to third parties.'
Accordingly, a provision which defines in a general way the maximum share of the procurement contract which can be subcontracted by a winning tenderer to third company (companies) is not consistent with the EU provisions as interpreted by the CJEU.

Module IV
Modifications of contracts

Relevant provisions of the PPL:
- Article 150: Termination of public procurement contracts
- Article 151: Modification to public procurement contracts

There are two types of modifications of contracts referred to in the PPL:

1. **Significant** modifications which constitute a new contract and require a new procedure to award such a contract and
2. **Other** modifications which do not require to conduct a new procurement procedure.

Significant modifications

The contracting authority should terminate a contract if circumstances arise which would have as a result the significant modifications of the contract. **Substantial modifications are changes in the contract which make the contract materially different in character from the one initially concluded.**

The PPL defines as significant modifications (Article 150 (2)) such changes in the contract which have as a result the changes in the nature of the contract's nature in material sense to the previously concluded contract, when one or more of the following conditions defined in the PPL are met.

1. Introduction or modification of conditions concerning participation in the procurement procedure

Significant is the modification introduces the conditions which would, provided that they were a part of the original public procurement procedure, enable involvement of other economic operators in relation to those previously selected or the acceptance of other bid in relation to previously accepted, or enable acceptance of other bid in relation to previously accepted one, or enable greater competition in the public procurement procedure which preceded the conclusion of the contract;

2. Change of balance of the contract in favour of economic operator

Significant is the modification which alters the natural balance of the contract in favour of the economic operator with whom the contract was concluded in a manner not envisaged by the original contract.

3. Significant increase of the size of the contract

Significant is the modification which significantly increases the contract size (see → below for non – significant changes in value of contracts).

4. Replacement of economic operator

Significant change of the contract is a replacement of a contractor with whom the contract was originally singed if it took places in circumstances other than those allowed by the PPL in Article 151 (1) point 4 (see → non-significant changes.

5. Failure to performance of the contract by bidder

Significant is the modification of contract in the case the bidder fails to perform the contractual obligations as well as in other cases established in the tender documentation in accordance with law.

Obligations of contracting authorities

A contracting authority which needs to implement significant modifications of a contract should:

1. terminate a public procurement contract;

2. publish the notification on termination of the contract on the EPPS within ten days as of the day the contract was terminated; and

3. launch a new public procurement procedure.

Non - significant modifications (Article 151)

The PPL envisages in Article 151 a number of situations when contracts can be modified during their terms without a need to organize a new procurement procedures.

Those are:

1. Modifications which had been envisaged in the tender documentation and in the procurement contract

- modifications, irrespective of their monetary value, have been provided for in the tender documentation and the public procurement contract in clauses which may include price revision clauses, or options with stated scope and nature of possible modifications or options, as well as the conditions under which they may be used

Such modifications cannot:

- alter the overall nature of the public procurement contract,
- the increase of the contract value may not exceed 20% of the original contract value.

In case of more than one modification, the value of public procurement contract shall be estimated on basis of net cumulative value of all modifications

2. Additional supplies, services or works

for procurement of additional supplies, services or works that have become necessary and that were not included in the original contract where a change of contractor cannot be made for economic or technical reasons such as requirements of compatibility with the existing equipment, services or installations procured under the original contract and would cause significant inconvenience or substantial increase of costs for the contracting authority, whereupon the increase of the contract value may not exceed 20% of the original contract,

In case of more than one modification, the value of public procurement contract shall be estimated on basis of net cumulative value of all modifications

3. Unforeseeable circumstances

Modification is allowed when the need for modification has been brought about by circumstances which a contracting authority could not foresee but

- modification cannot alter the overall nature of the contract, and
- the increase of the contract value may not exceed 20% of the original contract

In case of more than one modification, the value of public procurement contract shall be estimated on basis of net cumulative value of all modifications

4. Replacement of the economic operator

Modification of the contract is allowed on that basis when the economic operator, following corporate restructuring, including takeover, merger, acquisition or insolvency, is universally or partially replaced by an entirely or partly new legal successor, or an economic operator which fulfils the originally established criteria of the public procurement contract, whereby the modifications were foreseen by the tender documentation, provided that no other significant contract modifications from Article 150 (2) are performed.

Obligations of contracting authorities

A contracting authority should publish the decision on contract modifications on the EPPS within

three days as of the day of adoption.

Further reading:
Article 72 of the Public Procurement Directive
Rulings of the CJEU:

C-454/06 “pressetext”
Case C-160/08, *Commission v Germany*, issue of “considerable extension” of a contract for ambulance services

Module IV
GREEN PUBLIC PROCUREMENT

Relevant provisions of the PPL:
Article 11
Article 87
Article 91
Article 106
Article 109
Article 110
Article 114
Article 118 - 119

Green public procurement is defined as “*a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life-cycle when compared to goods, services and works with the same primary function that would otherwise be procured*”.[50]

Green public procurement (for short, ‘GPP’) is an important tool to achieve environmental policy goals relating to climate change, resource use and sustainable consumption and production – especially given the importance of public sector spending on goods and services. GPP policies aim to procure products and services that are more environment friendly. Examples of green procurement concern efficient computers, office furniture from sustainable timber, low energy buildings, recycled paper, cleaning services using ecologically sound products, electric, hybrid or low-emission vehicles as well as electricity from renewable energy sources

Public authorities should assume responsibility to take into account the environmental impacts of their activities. The new Public Procurement Law (PPL) identifies in Article 11 the principle of environmental protection, social and labour law and ensuring energy efficiency. Accordingly, contracting authorities should take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law including collective agreements, in accordance with the law and internationally ratified conventions on environmental protection and social and labour law. Contracting authorities should also procure supplies, services or works while ensuring the adequate reduction of energy consumption costs, that is, while observing the principles of energy efficiency.
The principle of environment protection and energy efficiency as one of the core principles of public procurement. The PPL provides for a possibility of procuring goods, services and works with

50 European Commission: the Communication “Public procurement for a better environment” (COM (2008) 400, published on 16 July 2008.

environmental and energy saving specifications and sets out the elements of contract award criteria which relate to environmental protection, energy efficiency and overall life cycle costs of the supplies. The PPL provides also for the exclusion from public procurement procedures of economic operators if they were convicted of environmental crimes.

Advantages of green procurement

By using their purchasing power to choose goods, services and works with a reduced environmental impact, contracting authorities can make an important contribution towards local, regional, national and international sustainability goals. GPP can be a major driver for innovation, providing industry with real incentives for developing green products and services. This is particularly true in sectors where public purchasers represent a large share of the market (e.g. construction, health services, or transport). GPP may also provide financial savings for public authorities – especially if they consider the full life-cycle costs of a contract and not just the initial, purchase price. Purchasing energy-efficient or water-saving products for example, can help to significantly reduce utility bills. Reducing hazardous substances in products can cut their disposal costs. Authorities who implement GPP will be better equipped to meet evolving environmental challenges, for example to reduce greenhouse gas emissions or move towards a more circular economy[51].

There are numerous benefits of green procurement:

Political benefits

- it is an effective way to demonstrate public authorities' commitments to environmental protection and sustainable consumption and production

Environmental benefits

- it allows public authorities to achieve environmental targets
- it sets an example to private consumers
- it raises awareness of environmental issues in the society

Social/health benefits

- it can improve quality of life both directly and indirectly
- it helps to establish high environmental performance standards for products and services

Economic benefits

- it provides incentives for industry to innovate
- it promotes green products and environmental technologies
- it saves money when the life – cycle costing of products is considered

One of the misconceptions about green procurement is that green services and products are more expensive than traditional ones. Various studies show, however, that it is not necessarily the case. Green products can have a lower purchasing price as they have reduced impacts on the environment with often less energy and raw materials consumed and/or less waste generated.

The legal framework related to green procurement

The PPL envisages possibility of applying environmental considerations in public procurement and provides for a number of solutions related to green procurement (see for details below).

The PPL enable public authorities to take environmental considerations into account. Article 11 of the PPL provides for the principle of environmental protection and ensuring energy efficiency.

Taking account of environmental considerations is possible during preparation of procurement

[51] 'Circular economy' is defined as *economic* system aimed at minimizing waste and making the most of resources.

processes, as part of the procurement process (procedure) itself, and in the performance of the contract. Rules regarding exclusion and selection of economic operators aim to ensure a minimum level of compliance with environmental law by contractors and sub-contractors. Techniques such as life-cycle costing, specification of sustainable production processes, and use of environmental award criteria are available to help contracting authorities identify environmentally preferable tenders.

Choosing proper procurement procedure

The preparatory stage of any procurement procedure is crucial from the perspective of green procurement. When choosing a specific procedure, contracting authorities should consider at what stages they will be able to apply environmental considerations. In accordance with the new PPL contracting authorities have a wide plethora of procedures to choose from.

Open procedures

In an open procedure, any economic operator may submit a tender[52]. All tenderers who meet the pass/fail conditions specified by the contracting authority will be eligible to have their tender assessed. Contracting authorities have access to the maximum choice of potential environmentally friendly solutions – but they are not able to select who to invite to tender based on their environmental technical capacity, for example.

Restricted procedures

In a restricted procedure[53], which is a two-stage procedure, contracting authorities can assess environmental technical capacity in a stage prior to tendering stage. Only those economic operators who meet specific requirements are in such a case invited to submit tenders. Contracting authorities may apply also so called short - listing and limit the number of economic operators to invite to tender. Short – listing consists in selecting, from amongst qualified economic operators, a limited number of those who will be invited to tender. A minimum number of five economic operators must be invited to tender, provided there are sufficient suitable candidates. Due to its staged structure the restricted procedure may help contracting authorities to determine the appropriate level of environmental performance to aim for in their specifications, award criteria and contract performance clauses. By limiting the number of tenderers, however, the contracting authority may also miss out on offers with high environmental performance.

Competitive procedures with negotiation and competitive dialogue

The competitive procedure with negotiations[54] and competitive dialogue[55] can be used by contracting authorities for purchases which require an element of adaptation of existing solutions, design or innovation, or in certain other circumstances.

These procedures may offer advantages in the context of GPP, as they introduce elements of flexibility not available in the open and restricted procedures and may allow for the effect of environmental requirements on cost to be better understood and controlled. However, both procedures require some level of skill and experience in engaging with economic operators if the best results are to be achieved.

Innovation partnership

The new PPL introduces an entirely new procedure – the innovation partnership[56]. Accordingly, where a contracting authority wishes to purchase goods or services, which are not currently available on the market, it may establish an innovation partnership with one or more partners. This allows for the research and development (R&D), piloting and subsequent purchase of a new product, service or work, by establishing a structured partnership. It may be particularly suitable

52 Article 54 (1).

53 Article 55 – 56.

54 Article 57 – 58.

55 Article 61 – 62.

56 Article 63.

where the current state-of-the-art in a sector is not sufficiently advanced to meet environmental challenges identified by a public authority, such as the need for adaptation to climate change or management of natural resources.

Each of the above-mentioned procedures includes a number of steps where environmental considerations can be applied:

- definition of a subject matter and technical specifications
- selection and exclusion criteria (e.g. compliance with environmental laws, technical and professional ability)
- award criteria, and
- contract performance clauses.

Those steps will be discussed below.

Defining the subject – matter of public procurement

The 'subject-matter' of a contract is about what product, service or work the contracting authority wants to procure. This process of determination will generally result in a detailed description of the product, service or work by means of technical specifications, but it can also take the form of a functional or performance-based definition. Choice of a subject-matter is particularly important because it determines the permissible scope of specifications and other criteria contracting authorities may apply. In principle, contracting authorities are free to define the subject of the contract in any way that meets their specific needs. Public procurement legislation is less concerned with what contracting authorities buy, than how they buy it. For that reason, in principle, the PPL does not restrict the subject-matter of a contract as such. Exception could be found in Article 11 of the PPL which in accordance with above – mentioned principle of environmental protection and ensuring energy efficiency requires from contracting authorities to *procure supplies, services or works while ensuring the adequate reduction of energy consumption costs, that is, while observing the principles of energy efficiency*[57].

Note:

The possibilities for taking into account of environmental considerations will differ according to the different types of subject matter of public procurement.

In the case of **works**, the contract covers not only the final product, the work, but also the design and execution of the works. The best opportunity for contracting authorities to take into consideration environmental concerns are to be found in the phase of the design. Contracting authorities could give clear instructions to the architects and/or engineers to design for example, a low – energy consuming administrative building, not only taking account of insulation and the use of specific constructions materials, but also the installation of solar cells for generation of warmth. The contracting authorities could equally require that the building be designed so that the use of lifts is necessary only to a limited extent and the orientation of offices limits the use of artificial light.

As regards **service** contracts, the nature of those contracts allows also for a possibility to prescribe a mode of performing. Contracting authorities could, for example, insist on specific method of building cleaning, using only those materials which are less harmful for the environment. They could also define that, for instance, public transport services are to be carried out by electric buses as well as prescribe the method for the collections of household waste.

Supply contracts relate, generally, to the purchase of final or end products. Therefore, apart from the basis and essential choice of the subject matter of the contract, the possibilities to take into account environmental considerations in addition to this choice are not that extensive as in the case of works or services. The contracting authorities may, however, have certain requirements

57 Article 11 (2).

concerning process of production (see below).

Assessing needs and identifying the main environmental impacts

A crucial step before starting the procurement process is to assess actual needs of contracting authorities in light of the potential environmental impact of the contract. Proper consultation with internal or end users may reveal that lower volumes, or more environmentally friendly options, can readily be applied. In some cases, the best solution may be to refrain from buying. For example, contracting authorities can, instead, share resources or equipment with other authorities, purchase used, recycled or re-manufactured products. Each individual contract will have a different set of potential environmental impacts to be considered.

Supply, service and works contracts will generally entail different considerations, as presented below.

Supply contracts:

- The environmental impact of materials used to make the product (e.g. the raw materials from renewable sources)
- The impact of the production processes used
- The energy and water consumption of the product during use
- Durability/life-span of the product
- Opportunities for recycling/reusing the product at the end of its life
- The packaging and transportation of the product

Service contracts:

- The technical expertise and qualifications of staff to carry out the contract in an environmentally friendly way
- The products/materials used in carrying out the service
- Management procedures put in place to minimise the environmental impact of the service
- The energy and water consumed, and waste generated in carrying out the service

Works contracts:

- In addition to all of the above considerations, works contracts may have significant environmental impacts e.g. in respect of land use or traffic planning
- For some projects a formal Environmental Impact Assessment will need to be carried out – and the results should inform decisions of contracting authorities concerning given public procurement

Environmental technical specifications

After defining the subject – matter of the contract, contracting authorities need to express this in terms of technical specifications which should be included in the procurement documents. Technical specifications play two-fold role.

- First, they present the bidding opportunity (a prospective contract) to the market in such a way that economic operators, on the basis of this information, can decide whether it is of interest to them (and apply for the contract). In this way technical specifications are instrumental in determining the level of future competition.
- Second, they provide measurable benchmarks against which tenders can be evaluated – they constitute thus minimum compliance criteria. Tenders not complying with the technical specifications have to be rejected, unless the contracting authority has specifically

authorized submission of variants (see below). Technical specifications need to relate to characteristics of the particular work, supply or service being purchased – and not to the general capacities or qualities of the economic operator. If they are not clear and correct, they inevitably lead to unsuitable offers being submitted in the procurement procedure.

It is also important that technical specifications are clear, understandable to all economic operators in the same way, and that the contracting authority is able to verify compliance with them when assessing tenders. The obligation of transparency implies that technical specifications are to be clearly indicated in the procurement documents.

Technical specifications may be formulated by reference to *European, international or national standards and/or in terms of performance or functionality*. They may also refer to appropriate criteria that are defined in *labels* (see below for details). Public procurement rules allow contracting authorities to formulate technical specifications in terms of the *environmental and climate performance levels* of a product, service or work. For example, contracting authorities may require that a computer does not consume more than a certain amount of energy per hour; or that a vehicle does not emit more than a certain quantity of pollutants. Contracting authorities may also specify the p*roduction processes or methods for a good, service or work* (see below).

Standards and other technical reference systems

Standards have a major role in influencing the design of products and processes, and many standards include environmental characteristics such as material used, durability or consumption of energy or water. References to technical standards including such environmental characteristics can be made directly in the technical specifications, helping contracting authorities to define the subject - matter in a clear way. The PPL refers to European, international or national standards and various other technical reference systems as one of the means by which specifications can be defined.

When reference to a standard is used, it must be accompanied by the words 'or equivalent.' This means that evidence of compliance with an equivalent standard must be accepted by the contracting authority. Such evidence may be in the form of a test report or certificate from a conformity assessment body. A tenderer may also seek to rely upon a manufacturer's technical dossier if it is not able to obtain third-party evidence within the relevant time limits for reasons which are not attributable to it. The contracting authority must then determine whether this establishes compliance.

Unless justified by the subject-matter of the contract, *technical specifications may not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production which would have the effect of favouring or eliminating certain economic operators or certain products*. Exceptionally, such a reference is permitted where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to above mentioned requirements is not possible. In such a case this reference must be accompanied by the words 'or equivalent'.

Performance-based or functional specifications

The PPL explicitly allow contracting authorities to apply specifications based on performance or functional requirements[58]. A performance-based/functional specification describes the desired result and outputs (for example in terms of quality, quantity, and reliability) expected, including how they will be measured. It does not prescribe the inputs or work method for the tenderer. The tenderer is free to propose the most appropriate solution to achieved desired results and outputs.

A performance-based approach usually allows more scope for innovation and in some cases will challenge the market into developing new technical solutions. When setting performance-based specifications, contracting authorities should think carefully about how they will assess and compare

58 Article 87 (4) point 1.

tenders in a fair and transparent way. They may ask the tenderer to indicate how the desired result will be achieved and meet the level of quality specified in the procurement documents.

Specifying materials and production methods

What a product is made of, how it is produced or how a service or work is performed, can form a significant part of its environmental impact. Under the public procurement rules, materials and methods of production or provision can be taken into account when defining technical specifications – even if these do not form part of the material substance of what is purchased, for example, electricity which is produced from renewable sources or food produced from organic agriculture. However, since all technical specifications should bear a link to the subject matter of the contract, contracting authorities can only include those requirements which are related to the production of the good, service or work being purchased, rather than those which relate to the general practices or policies of the operator. As with all requirements, the contracting authority must ensure that the general principles of non-discrimination, equal treatment, transparency and proportionality are respected when specifying materials or production methods.

Contracting authorities have the right to insist that the product they are purchasing is made from a specific material, or contains a certain percentage of recycled or reused content. Contracting authorities can also set requirements regarding the restriction of hazardous substances in the product.

Typical green procurement approach restricts, for instance hazardous substances in cleaning products and textiles, or requires bidders to demonstrate that timber has been sustainably sourced. To ensure that the general principle of non-discrimination is respected, such restrictions should be based on an objective risk assessment. Labels and GPP criteria which will be presented below are a useful reference point, as they are based on scientific information and life-cycle assessment of the materials and substances found in the covered products and services.

Important:

The procurement provisions allow contracting authorities to include requirements regarding production or provision processes and methods in technical specifications for supply, service and works contracts. It is not allowed, however, to insist upon a production process which is proprietary or otherwise only available to one supplier – or to suppliers in one country or region – unless such a reference is justified by the exceptional circumstances of the contract and is accompanied by the words 'or equivalent.'

Of particular importance is the principle of proportionality. Accordingly, contracting authorities should consider whether the requirements they set regarding production processes are appropriate to achieve the environmental objectives they are trying to promote. A careful analysis of the life-cycle of the goods, services or works they are purchasing will help contracting authorities to arrive at appropriate specifications for production processes and methods. Life-cycle assessment (LCA) which is presented below allows for cradle-to-grave analysis of the environmental impact of products. It thus includes the extraction and refinement of raw materials, manufacturing and other stages of production through to the use and disposal phase.

Use of variants

Variants are a means of introducing greater flexibility in description of the subject – matter of procurement which may result in a more environmentally-friendly solution being proposed by economic operators. Variants allow tenderers to submit an alternative solution which meets certain minimum requirements identified by contracting authorities.

To be able to accept or require variants in a public procurement procedure, contracting authorities should:

- indicate in the contract notice that variants will be accepted or required - without this specification variants are not authorized specify the minimum requirements which the variants

have to meet - only the variants meeting the minimum requirements set by the contracting authority can be considered and

- identify any specific requirements for presenting variants in bids (such as that a variant can only be submitted combined with a non-variant bid)
- determine the award criteria so that they can be applied to variants meeting those minimum requirements, as well as to tenders which are not with variants.

Labels

Labels are defined in the PPL as any documents, certificates or attestations confirming that the supplies, services or works, processes or procedures in question, meet certain requirements[59]. 'Label requirements' are defined, in turn as requirements to be met by the supplies, services or works, processes or procedures in question, in order to obtain the label concerned.

Note:

Labels can be used in different ways in the context of technical specifications:

1) they help contracting authorities to draw their technical specifications in order to define the characteristics of the goods or services they are purchasing
2) they enable checking compliance with these requirements - by accepting the label as one means of proof of compliance with the technical specifications by providing a means of third-party verification, labels can help to save time while ensuring that high environmental standards are be applied in public procurement.

Explanations how to use labels are provided in the PPL. Accordingly, when the contracting authority intends to purchase supplies, services or works with specific environmental, social or other characteristics it may require specific labels as means of proof that the supplies, services or works correspond to the required characteristics. Labels may be used:

1) in the technical specifications,
2) in the award criteria or
3) in the contract performance conditions.

Important:

Labels, should, however, fulfil certain conditions[60]:

- Label requirements may concern only the criteria which are linked to the subject-matter of the public procurement contract and are appropriate to define characteristics of the subject-matter of the public procurement.
- Label requirements should be based on objectively verifiable and non-discriminatory criteria.
- Labels which are used should be established in an open and transparent procedure with participation of all relevant stakeholders, such as government bodies, users of services, social partners, consumers, manufacturers, distributors, non-governmental organisations, and the like.
- Labels should be also accessible to all interested parties.
- The label requirements should be set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

If the contracting authority is satisfied that a label meets all the above conditions, it can include it as part of its technical specifications.

59 Article 91 (1).

60 Article 91 (2).

However, the contracting authority should still accept other labels which have equivalent requirements, i.e. they demonstrate that the same objective criteria are met. If tenderers can show that they were unable to obtain a label within the relevant time limits for reasons which are not attributable to them, the contracting authority must consider alternative evidence submitted by them, such as a technical dossier which demonstrates that the label requirements are met.

It is also possible to require fulfilment of only part of relevant label requirements. If the contracting authority does not require that supplies, services or works should meet all of the label requirements, it should indicate which label requirements are referred to.

Public procurement rules distinguish between labels where all of the criteria are linked to the subject-matter of the contract (discussed above), and those which contain wider criteria, such as for example related to general management practices. The contracting authority may intend to use a label which while fulfilling the above-mentioned conditions relates also to the requirements which are not linked to subject-matter of procurement. In such a case the contracting authority should not refer to the label as such but it should rather define the technical specification by reference to the detailed specifications of that label, or, as necessary, parts thereof, that are linked to the subject-matter of the procurement and are appropriate to define characteristics of subject-matter of procurement.

There are many environmental labels available which aim to help contracting authorities to identify sustainable products or services. The most valuable from green procurement perspective are those which are based on objective and transparent criteria and which are awarded by an independent third party. These labels can play a particular role in developing technical specifications and award criteria, and in verifying compliance.

There are various types of labels:

Multi-criteria labels are the most common type of environmental label and also the most commonly used in green procurement. Multi-criteria labels are based on scientific information about the environmental impact of a product or service throughout its life cycle, from extraction of the raw materials, through production and distribution, the use phase, and final disposal. They apply a number of criteria that set the standard for the label in question. Different sets of criteria are established for each product or service group covered.

Examples of this type of label include:

the EU Ecolabel[61]

the Nordic Swan[62]

the Blue Angel[63]

61 EU Ecolabel or EU Flower is a voluntary ecolabel scheme established in 1992 by the European Commission.

62 The Nordic Ecolabel or Nordic swan is the official sustainability ecolabel for the Nordic countries, introduced by the Nordic Council of Ministers in 1989. This is done by a voluntary license system where the applicant agrees to follow a certain criterion set outlined by the Nordic Ecolabelling in cooperation with stakeholders.

63 The Blue Angel (Der Blaue Engel) is a German certification for products and services that have environmentally friendly aspects. It has been awarded since 1978 by the Jury Umweltzeichen, a group of 13 people from environment and consumer protection groups, industry, unions, trade, media and churches. Blue Angel is the oldest ecolabel in the world, and it covers some 10,000 products in some 80 product categories.

Single issue labels, in turn, are based on one or more pass/fail criteria linked to a specific issue, e.g. energy efficiency. If a product meets those criteria, then it may display the label.

Examples of this type of label are:

the EU Organic label 

the Energy Star label for office equipment 

Sector specific labels – Sector-specific labels include forestry certification schemes operated by organisations such as:

the FSC (Forest Stewardship Council)[64] 

PEFC (Programme for the Endorsement of Forest Certification[65]) 

Graded product labels grade products or services according to their environmental performance on the issue in question, rather than using pass/fail criteria. Examples include the EU Energy Label, which grades energy-related products according to their energy efficiency.

Most labels conforming to the ISO Type I classification will meet these conditions, although they may also contain criteria which are not specific to the product or service being purchased, such as general management requirements. To determine whether this is the case the contracting authorities should review the full criteria underlying the label before referring to it in their documents – most are freely available online.

If a label contains some requirements which are relevant to a given contract but others which are not linked to the subject - matter, such as those relating to general management practices, then the contracting authorities can only refer to the specific label criteria which are linked to the subject-matter and not require the label itself. In fact, it may be considered good practice to always refer to the criteria underlying a label, to ensure that they are all relevant and will be clear to all tenderers.

Verifying compliance with technical specifications

Contracting authorities should pay special attention to the issue of verification of compliance with technical specifications. In particular, contracting authorities should set out in advance in procurement documents the types of evidence of compliance which tenderers can submit. This is often done by providing an indicative list, and stating that other equivalent forms of evidence will also be accepted.

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64 An international non-profit, multi-stakeholder organization established in 1993 to promote responsible management of the world's forests. The FSC does this by setting standards on forest products, along with certifying and labeling them as eco-friendly.

65 An international, non-profit, non-governmental organization which promotes sustainable forest management through independent third-party certification. It is considered the certification system of choice for small forest owners.

Environmental requirements are often complex and assessing compliance may in some cases require technical expertise. However, for many environmental specifications, there are means of verifying compliance which do not require the input of technical experts. For example:

- As a starting point, contracting authorities should refer to relevant legislation with which all economic operators must comply
- Labels can be used to verify compliance with additional environmental requirements in the manner set out above
- A test report or certificate from a conformity assessment body can be required where appropriate, provided the contracting authority accepts certificates from equivalent conformity assessment bodies. This is one way to establish that a product meets a particular specification or performance level. Contracting authorities must consider a technical dossier or other form of proof if a tenderer has no access to a test report or certificate within the relevant time limits for reasons not attributable to the tenderer

Note:

In some cases, a self-declaration on the part of tenderers that they comply with environmental requirements may need to be accepted due to the impossibility of proving compliance by objective third-party evidence during a tender procedure. Where this is permitted, contracting authorities must ensure that they apply the principles of equal treatment, transparency and proportionality, seeking clarification from tenderers where necessary to ensure that they do not unfairly accept or reject a tender.

Selection of economic operators

The rules laid down in public procurement provisions consist of three different types.

4) The first set of rules concerns mandatory conditions for participation[66]. These relate to situations such as conviction for specific criminal offences, non – payment of taxes or social contributions etc.
5) Second group covers provisions related suitability to pursue the professional activity, economic and financial standing and the technical and professional ability of economic operators to perform the contract in question. As regards the latter, when assessing ability to perform a contract, contracting authorities may take into account specific experience and competence related to environmental aspects which are relevant to the subject matter of the contract. They may ask, for instance, for evidence of the ability of economic operators to apply environmental and supply chain management measures when carrying out the contract.

   This group covers also optional grounds for exlusion which may be applied by the contrcting authority. Among
6) Third group, relevant for staged procurement procedures concerns rules and criteria applied for so called *short listing* of economic operators (see below for details).

Mandatory conditions for participation

This group covers conditions which if they are fulfilled normally cause contracting authorities not to do any business with a given economic operator.

Optional grounds for exclusion

A professional misconduct represents an unjustified violation of the obligations stipulated by the public procurement contract by bidders including the refusal to conclude a public contract, as well as breach of regulations in the following fields: environmental protection; social and labour law,

66 Article 99.

including collective agreements; protection of competition or intellectual property rights.

From a green procurement perspective, the most relevant exclusion grounds are:

- breach of regulations in the field of environmental protection; social and labour law, including collective agreements; protection of competition or intellectual property rights[67]
- grave professional misconduct which renders integrity questionable[68]
- significant/persistent deficiencies in performance of substantive requirement under prior contract which led to termination or comparable sanctions[69],
- misrepresentation by the economic operators of facts concerning its compliance with the public procurement procedure requirements[70]

Contracting authorities can exclude an economic operator where they can demonstrate by any appropriate means that it has violated applicable environmental obligations not only under national law but also international one.

Selection criteria

Selection criteria assess the suitability of an economic operator to carry out a contract. In an open procedure they may be assessed only on a pass/fail basis, before tenders are evaluated against the contract award criteria. In staged procedures (such as the restricted procedure, the competitive procedure with negotiations or competitive dialogue), they form a part of the separate qualification stage, and can also be used to shortlist or reduce the number of candidates invited to tender ('short-listing'). The public procurement provisions provide an exhaustive list of the criteria which can be applied to select economic operators, and the types of evidence which may be requested from them.

The most relevant selection criteria which relate to technical and professional ability of economic operators are, from the perspective of green procurement, the following:

- Human and technical resources
- Experience and references
- Educational and professional qualifications of staff (if not evaluated as an award criterion)
- Environmental management systems and schemes (e.g. EMAS, ISO 14001)
- Supply chain management/tracking systems
- Samples of products
- Conformity assessment certificates

Each of these may help to establish whether an economic operator has suitable capacity to carry out the environmental aspects of a contract, as discussed below.

Important:

An overriding requirement in relation to all selection criteria is that they must be *related and proportionate to the subject-matter of the contract*. This means that contracting authorities should adjust their approach to the specific requirements of a given contract, including its value and the level of environmental risk involved. For example, the range of environmental selection criteria applied for a works contract will normally be greater than for a simple, off the shelf, supply contract, unless the supplies present a particular environmental risk, e.g. relate to chemicals or fuels which

67 Article 110 (1) point 3.

68 Article 110 (1) point 5.

69 Article 110 (1) point 3.

70 Article 110 (1) point 3.

must be safely stored.

Environmental technical capacity

Fulfilling green procurement requirements can be complex tasks, for example when they relate to the design and construction of energy efficient buildings or the provision of a printing service which minimises waste. In order to confirm that economic operators have the ability to deliver such requirements, it makes sense to verify their previous experience and human and technical resources available to them. Environmental technical capacity can include technical competence in minimising waste creation, avoiding spillage/leakage of pollutants, reducing fuel consumption or minimising disruption of natural habitats.

In practical terms, it typically concerns questions such as those:

- does the tenderer (candidate) have previous experience with performing contracts in sustainable way?
- does the tenderer (candidate) employ or have access to personnel with the required educational and professional qualifications and experience to deal with the environmental elements of the contract?
- does the tenderer (candidate) own or have access to the necessary technical equipment or facilities related to environmental protection?
- does the tenderer (candidate) have the means to ensure the quality of the environmental aspects of the contract (e.g. access to relevant technical bodies and measures)?

A useful instrument for integration of environmental criteria is the list of contracts carried out in the past. Contracting authorities can use this criterion to check the past experience of companies in carrying out contracts with similar environmental requirements, and (for works contracts only) certificates of satisfactory execution and outcome. In doing so they should ensure that they set out clearly what type of information is considered relevant and how it will be evaluated. Public procurement provisions set a maximum reference period of five years for works contracts and three for supplies or services, unless a longer period is needed to ensure adequate levels of competition.

Educational and professional qualifications of staff and their experience may also be relevant to green procurement.

Supply chain management measures

Any environmental impacts arise not only in the delivery of a final product or service but further back along the supply chain. For example, IT equipment typically has components sourced from many parts of the world, including metals and other substances which pose a high risk of environmental damage in their extraction and processing. A construction contractor may work with many smaller companies each of whom will need to implement sustainable practices on a works project.

For these types of contracts, it makes sense for contracting authorities to look beyond the primary or first-tier contractor, to ensure that environmental requirements will be met. One way to do this is by including specific contract clauses relating to subcontractors.

At the selection stage, contracting authorities may request the following information:

- an indication of the proportion of the contract which the economic operator intends possibly to subcontract and
- an indication of the supply chain management and tracking systems that the economic operator will be able to apply when performing the contract.

Both of these may help to establish how environmental impacts will be managed in the context of a particular contract, and to select operators with strong systems in place.

Product samples, checks and conformity assessment

If a contract includes the supply of products or materials, the contracting authority may request, at selection stage a sample (or description or photograph). Certificates of conformity or quality may also be requested. These can be useful in verifying that products meet any specific environmental requirements for the procurement, for example in terms of durability or energy consumption.

A further option available to contracting authorities is to carry out a check on suppliers' production capacities or service providers' technical capacity, as well as their research facilities and quality control measures. This can be done if the products or services to be supplied are complex or, exceptionally, are required for a special purpose.

The checks may either be carried out by the contracting authority itself or by a competent body in the country where the operator is established.

Means of proof

The PPL, following requirements of EU directives, provide not only a list of issues which may be examined at the selection stage but contain also some limits on the type of evidence which can be requested at the preliminary stages of a procurement procedure. Most importantly, contracting authorities are required to accept, as a preliminary evidence, from economic operators in their tenders (or requests for participation) a self - declaration of fulfilment of criteria for qualitative selection of economic operator (hereinafter: self - declaration)[71]. This self - declaration is the Montenegrin equivalent of the European Single Procurement Directive provided by 2014 Procurement Directive[72]. The Declaration should be submitted on a standard form and should confirm that:

1) there are no grounds for exclusion of the economic operator
2) the economic operator meets the required selection criteria
3) the economic operator fulfils the rules or criteria that have been set for the limitation of the number of qualified candidates (shortlisting criteria – see above), where such are applied in a given procedure.

In the Declaration, economic operators should indicate the issuers of evidence on the fulfilment of criteria for qualitative selection and declare that they will be able to submit such evidence upon request of contracting authority and without delay.

Groups of economic operators and green contracts

Companies applying for public contracts may decide to bring in specialist expertise to address green requirements. For example, a facilities management company may work with an environmental advisor to manage buildings in a more sustainable manner. In this case the technical capacity and experience of both companies should be evaluated at selection stage.

Awarding contracts

Award criteria

At the award stage of the public procurement procedure, contracting authorities evaluate the tenders and compare costs of different tenders. When they assess the tenders, they should stick to predetermined award criteria, published in advance, to decide which tender is the best.

71 Article 111.

72 Article 59 of directive 2014/24.

In accordance with the provisions of the new PPL all contracts must be awarded on the basis of most economically advantageous tender (MEAT). MEAT should be determined on the basis of one of the following criteria:

1) price or
2) costs by applying a cost-effectiveness approach, such as life-cycle costing (see below for more information) or
3) the price-quality ratio i.e. cost-quality ratio which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects.

Cost or price have to form part of the assessment in any procedure, and may be calculated on the basis of lifecycle costs as discussed below. Beyond costs, a wide range of factors may influence the value of a tender from the point of view of the contracting authority, and this includes environmental aspects. It is necessary for award criteria (as well as selection criteria, technical specifications and contract performance clauses) to be linked to the subject-matter of the contract.

The award criteria are considered to be linked to the subject-matter of a contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in:

(a) the specific process of production, provision or trading of those works, supplies or services or

(b) a specific process for another stage of their life cycle.

These factors do not need to form part of the 'material substance' of what is being purchased, i.e. they do not need to be visible or discernible in the final product or service. What this means is that, as with technical specifications, award criteria may relate to sustainability considerations such as renewable or organic production, or to the greenhouse gas emissions associated with a particular product or service.

Note:

The main difference between technical specifications and award criteria is that whereas the former is assessed on a pass/fail basis, award criteria are weighted and scored so that tenders offering better environmental performance can be given more points.

A number of considerations should be taken into account when assessing whether an environmental characteristic should be a minimum requirement (specification) assessed on the basis of pass/fail test or a preference (award criterion) which is used to select, among the suitable tenders, the best one from the perspective of the contracting authority.

Applying environmental award criteria may make sense, for example, if the contracting authority is not sure of the cost and/or market availability of products, works or services which meet certain environmental objectives. By including these factors in its award criteria, the contracting authority is able to weigh them against other factors including cost.

The contracting authority may also wish to set a minimum level of performance in the technical specifications, and then allocate extra points for even better performance at the award stage. This approach is used successfully by a number of contracting authorities to retain flexibility while implementing green public procurement.

The PPL sets out also some basic rules regarding application of award criteria:

Award criteria must never confer an unrestricted freedom of choice on contracting authorities.

This means they must provide an objective basis for distinguishing between tenders, and be adequately specific. Award criteria must be formulated in such a way that allows all easonably well-informed and normally diligent tenderers to interpret them in the same way.

A further element of the objectivity requirement for award criteria concerns verifiability of criteria.

If award criteria relate to factors which cannot be verified by the contracting authority, it will be difficult to demonstrate that they have been applied objectively. This means that contracting

authorities should consider in advance what means of proof tenderers can offer under each award criterion and how this evidence will be evaluated by the contracting authority.

Non – discriminatory character of award criteria

Award criteria should ensure the possibility of effective competition. Environmental award criteria should not be formulated in a way which artificially forecloses the market. As one of the objectives of award criteria is to encourage the market to develop and deliver environmentally preferable solutions, it should always be possible for different operators to obtain marks under such criteria. One good way to ensure this is the case is to discuss environmental award criteria with potential bidders in the context of a pre-procurement market consultations.

The presence of a link with the subject matter of public procurement

The criterion for the selection of the most advantageous bid shall be related to the subject of procurement if its parameters relate to the requirements of the procurement subject in any of its aspects and at any stage of its life cycle, including factors related to the specific process of production, execution of works, supply or trading of goods or services or the particular process within some other stage of their life cycle, even when those factors are not part of their substantive content.

Transparency of award criteria

The procurement provisions require that award criteria must be advertised in advance and their weightings be set out either in the contract notice or in the procurement documents. Accordingly, contracting authorities must indicate in the notice or documents:

- the criteria they will apply to identify the most economically advantageous tender
- the relative weightings they will apply to the criteria, either as precise numbers or a range with an appropriate maximum spread and
- any sub-criteria they will apply and, in most cases, their weightings.

Weighting approaches

The weight given to each award criterion determines the influence it has in the final evaluation of tenders. The weighting of environmental award criteria may reflect the extent to which environmental aspects are already addressed in the technical specifications. If there are strong environmental requirements in the specifications, they may be given a lower weight in award criteria, and vice versa.

There is no set maximum for the weight to be assigned to environmental criteria. To determine an appropriate weighting, contracting authorities should consider:

- how important environmental objectives are for the contract, relative to other considerations such as cost and general quality
- to what extent these considerations are best addressed in award criteria, either in addition to or instead
- how many points the contracting authority can “afford” to allocate – this will vary depending on the product/service and the market conditions. For example, if there is a low degree of price variation for a product, but environmental performance varies greatly, it makes sense to allocate more marks to assess environmental characteristics of product performance (share of products complying with ISO Type I labels or equivalent) and the quality of environmental training programmes.

Using test reports and certificates

In some cases contracting authorities may wish to ask for a test report or certificate from a

conformity assessment body to demonstrate the levels of environmental performance offered by products. For example, in a contract for lighting they may wish to award more marks to lighting solutions which have a longer time-to-replacement (either a standalone criterion or as part of life-cycle costing). In this case the contracting authority could ask tenderers to provide a test report or certificate demonstrating this. If tenderers have no access to such reports or certificates for reasons which are not attributable to them, then the contracting authority must also consider other evidence such as a technical dossier if this offers adequate proof.

Life-cycle costing (LCC) and environmental considerations

When the contracting authority buys a product, service or work, it always pays a price. Purchase price, however, is just one of the cost elements in the whole process of procuring, owning and disposing of a product. Life-cycle costing (LCC) means considering all the costs that will be incurred during the lifetime of the product, work or service:

- Purchase price and all associated costs (delivery, installation, insurance, etc.)
- Operating costs, including energy, fuel and water use, spares, and maintenance
- End-of-life costs, such as decommissioning or disposal.

LCC may also include the cost of externalities (such as greenhouse gas emissions) under the specific conditions outlined below. The PPL requires that where LCC is used, the calculation method and the data to be provided by tenderers should be set out in the procurement documents. Specific rules also apply regarding methods for assigning costs to environmental externalities, which aim to ensure that these methods are fair and transparent.

By applying LCC contracting authorities take into account the costs of resource use, maintenance and disposal which are not reflected in the purchase price. Often this will lead to 'win-win' situations whereby a greener product work or service is also cheaper overall. The main potential, for savings over the life-cycle of a good, work or service are outlined below.

Savings on use of energy, water and fuel

The costs of energy, water and fuel consumption during use often make up a significant proportion of the total cost of owning a product, work or service, and of its life-cycle environmental impact. Reducing this consumption makes clear sense both financially and environmentally. In some cases, the greenest alternative will be one which is designed to maximise the period until replacement and/or minimise the amount of maintenance work which needs to be done. For example, the choice of materials on the exterior of a building or bridge can have a large effect on the frequency of maintenance and cleaning activities. The most sustainable option may be one which helps to avoid such costs, and this can be assessed as part of LCC.

Important:

Disposal costs are easily forgotten when procuring a product or a construction project. Costs of disposal will eventually have to be paid, although sometimes with a longer delay. Not taking these costs into account can turn a bargain into an expensive purchase. Disposal costs range from the cost of physical removal to paying for secure disposal. Frequently, disposal is governed by strict regulations. In certain cases, there may be a positive return to the owner at the end of life, for example where vehicles or equipment can be sold on or recycled profitably.

Assessing external environmental costs

As well as financial costs directly borne by the contracting authority, it may also take into account environmental externalities. Externalities are damages or benefits which are not paid by the polluter or beneficiary under normal conditions. They are defined as 'the costs and benefits which arise when social or economic activities of one group of people have an impact on another, and when the first group fail to fully account for their impact'. Examples of externalities are the costs linked to climate change or acidification of soil or water.

If the contracting authority intends to assign a cost to environmental externalities as part of its award criteria, the public procurement provisions require that the method used by the contracting authority:

- is based on objectively verifiable and non-discriminatory criteria
- is accessible to all interested parties and
- the data required can be provided with reasonable effort by normally diligent economic operators[73].

While it is possible to develop a bespoke method for calculating LCC which is suitable for a particular contract, this must not unduly favour or disadvantage any economic operator.

Applying LCC

An increasing number of public authorities in Europe are using LCC to evaluate tenders, and a variety of tools of different complexity and scope have been developed. An overview and links to some relevant LCC tools can be found at: *http://ec.europa.eu/environment/gpp/lcc.htm*.

In properly assessing LCC, certain issues must be considered:

- **Life-span** – the frequency with which a product needs to be replaced will have a major impact on its cost, especially over a longer period. A cheap product which needs to be replaced frequently may well cost more over the long term than a higher-priced product which lasts for many years. This should be taken into account when determining over how many years the contracting authorities wish to make a life-cycle cost comparison.
- **Discount rate** – since costs in the future are not 'worth' as much as those incurred today, as society places more weight on positive and negative impacts today than in the future. EUR 100 invested today at 5% interest would be worth EUR 105 in one year's time. Therefore EUR 105 spent in one year's time is only "worth" EUR 100 at the present time – its net present value (NPV). NPV can be taken into account when comparing life-cycle costs by applying a social discount rate to future costs. The rate differs between countries but is usually between 3% and 8% (adjusted to eliminate the effects of inflation).
- **Data availability and reliability** – assessing life-cycle costs inevitably includes an element of unpredictability regarding costs to be incurred in the future (for example, maintenance costs, energy consumption, as well as the product's actual lifespan). Requesting detailed supporting information for cost estimates provided by tenderers is therefore important. In some cases, where future costs are within the control of the contractor (e.g. they are responsible for maintenance or disposal), contracting authorities can build maximum future prices into their contract terms, giving greater certainty to their LCC calculations.

LCC tools

This is a non-exhaustive list of tools available for calculating LCC:

- The European Commission's calculator for LCC for vehicle procurement:

  http://ec.europa.eu/transport/themes/urban/vehicles/directive/

- The European Commission's common method for LCC in construction:

  http://ec.europa.eu/growth/sectors/construction/support-tools-studies/index_en.htm

- A tool for assessing both LCC and CO2 emissions in procurement, developed within the SMART-SPP project:

  www.smart-spp.eu

[73] Article 119 (2) of the PPL.

- An LCC tool produced by the Swedish Environmental Management Council (SEMCo): www.upphandlingsmyndigheten.se/omraden/lcc/lcc-kalkyler/
- An LCC tool developed within the BUY SMART project: www.buy-smart.info

Abnormally low tenders

In some cases it may happen that the contracting authority receives a tender which seems unusually low in relation to others or to the cost of the supply, service or work expected by the contracting authority. From a green procurement perspective, the low costs of a tender may raise doubts about compliance of the tenderer with environmental law and/or the viability of the tender in relation to environmental requirements.

In such situations contracting authorities must seek an explanation from the tenderer concerning reasons for its abnormally low price or cost. Legitimate factors such as the particular production method or technical solutions applied by the tenderer, or unusually favourable conditions available to it, may explain the low price (cost) of the tender. The contracting authority may only reject the tender where the explanation and evidence supplied do not satisfactorily account for the abnormally low tender, taking into account the information provided by the tenderer concerned. In some cases it may become clear in the course of enquiries that the abnormally low cost is due to the tender not complying with applicable environmental law – for example because certain components or materials have been sourced illegally. In such cases contracting authorities are obliged to reject an abnormally low tender.

Contract performance clauses

Contract performance clauses are used to specify how a contract must be executed.

Environmental considerations can be included in contract performance clauses, provided they are published in the contract notice or procurement documents and are linked to the subject-matter of the contract. Any special environmental conditions should be indicated in advance, to ensure economic operators are aware of these obligations and are able to reflect them in the price of their tenders.

The contracting authority may provide that economic operators will be excluded from further participation if they do not assent to the contractual clauses. Where such mandatory conditions are indicated, it is important to apply them to all tenderers in the manner set out in the procurement documents.

Modifications of contracts can be important issue from the perspective of green procurement, for example if the contracting authority wishes to switch to a more sustainable product or service model during the execution of an awarded contract, or if there is a provision for additional payments where waste is reduced or energy efficiency improved. PPL sets out specific rules regarding the modification of contracts after their award, so contracting authorities should provide for changes in advance where possible, and draft documents accordingly.

Contract clauses may also include the specific commitments which have been made as part of the procurement process (e.g. enforcing compliance with the environmental performance levels proposed in the tender and evaluated as part of the award criteria.). One way of doing this is to provide a draft set of contract conditions with headings covering the various environmental aspects which are expected to arise in performance of the contract, and allow tenderers to propose specific levels of performance under each heading.

Contract performance clauses for the supply of goods

For supply contracts, environmental clauses may be included in the terms of delivery. Simple ways to improve the environmental impact of a contract include:

- Having the product delivered in the appropriate quantity; this often means a bulk delivery, as this will be more environmentally efficient in terms of transport impact per item than having smaller quantities delivered more often. Specifying a maximum number of deliveries per week or month can be another way of achieving the same result
- Requiring that goods should be delivered outside of peak traffic times to minimize the contribution of deliveries to traffic congestion
- Requiring that the supplier takes back (and recycles or reuses) any packaging that comes with the product – this has the double advantage of centralizing packaging prior to reuse or recycling and encouraging the supplier to cut down on any unnecessary packaging
- Requiring the supplier to report regularly on the greenhouse gas emissions caused in delivering the product, and an indication of measures taken to reduce these emissions over the course of the contract (the latter would not apply to one-off supply contracts).

Where the contracting authority has included specific materials or production processes or methods as part of their technical specifications, these may also form part of the contract clauses for supply contracts.

For example, in a contract for paper products the contract could specify that these will be 'elemental or totally chlorine free'.

Supply contracts often involve some service or works elements (e.g. siting, installation or maintenance), for which the clauses listed below may be appropriate.

Contract performance clauses for the provision of works or services

Examples of possible contract performance clauses for works or service contracts[74] include:

<u>How the service or work is performed:</u>

- Application of specific environmental management measures, where appropriate in accordance with a third-party certified scheme such as EMAS or ISO 14001
- Reporting on any environmental issues arising in the performance of the contract and taking steps to remedy these, e.g. spillages or use of hazardous substances
- Efficient use of resources such as electricity and water on construction sites
- Use of dosage indicators to ensure appropriate quantities of cleaning products etc.

<u>Training of contractor staff:</u>

- Staff trained in the environmental impact of their work and the environmental policy of the contracting authority in whose buildings they will be working
- Drivers trained in eco-driving techniques to save emissions and fuel.

<u>Transport of products and tools to the site:</u>

- Delivery of products to the site in concentrated form and then dilution on site
- Use of reusable containers or packaging to transport products
- Reduction of CO_2 or other greenhouse gas emissions associated with transport.

<u>Disposal of used products or packaging:</u>

- Products or packaging taken away for reuse, recycling or appropriate disposal;
- Targets for the reduction of waste-to-landfill.

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74 Supply contracts often involve some service or works elements (e.g. siting, installation or maintenance), for which the clauses listed may be appropriate.

Monitoring contract compliance

Having environmental contract clauses is only effective if compliance with these clauses is properly monitored by contracting authorities. Different forms of contract compliance monitoring can be applied:

- the supplier may be requested to supply evidence of compliance
- the contracting authority may carry out spot checks or
- a third party may be contracted to monitor compliance.

Appropriate penalties for non-compliance or bonuses for good performance should be included within the contract.

Green public procurement criteria (GPP criteria)

To assist contracting authorities in identifying and procuring greener products, services and works, a number of environmental procurement criteria (GPP criteria) have been developed in the European Union.

At the time of writing this paper GPP criteria are available for 21 product and service groups. Those GPP criteria can be directly inserted into procurement documents. GPP criteria are regularly reviewed and updated to take into account the latest scientific product data, new technologies, market developments and changes in legislation. Most of the criteria are available in all official EU languages. They are available at the website of the European Commission:

http://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm.

The basic concept of GPP relies on having clear, verifiable, justifiable and ambitious environmental criteria for products and services, based on a life-cycle approach and scientific evidence base. In the Communication "Public procurement for a better environment"[75] the Commission recommended the creation of a process for setting common GPP criteria.

The idea behind creating GPP criteria was that criteria used by the European Union Member States should be similar to avoid a distortion of the single market and a reduction of EU-wide competition. Having common criteria reduces considerably the administrative burden for economic operators and for public administrations implementing GPP. Common GPP criteria are of a particular benefit to companies operating in more than one Member State as well as SMEs (whose capacity to master differing procurement procedures is limited).

The priority sectors for implementing GPP were selected through a multi-criteria analysis including:

- scope for environmental improvement
- public expenditure
- potential impact on suppliers
- potential for setting an example to private or corporate consumers
- political sensitivity
- existence of relevant and easy-to-use criteria
- market availability and economic efficiency.

At the moment of writing this paper the GPP criteria are available for:

- road transport
- indoor cleaning services

[75] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Public procurement for a better environment' (COM (2008) 400).

- road lighting and traffic signals
- paints, varnishes and road markings
- textiles products and services
- computer and monitors
- copying and graphic paper
- furniture
- electrical and electronic equipment used in health care sectors
- electricity
- food and catering services
- gardening products and services
- imaging equipment
- office building design, construction and management
- road design construction and maintenance
- sanitary tapware
- toilets and urinals.

All GPP criteria have similar structure. Basically, they follow a procurement process and include issues such as:

- a definition of the subject matter of public procurement
- minimum technical and functional specifications
- selection criteria related to the capacity of tenderers to perform the contract in question
- award criteria used for the comparison of tenders and selection of the best one and
- contract performance clauses.

Note:

GPP criteria are not legally binding - EU Member States are invited, though, to include the GPP criteria into their green public procurement national plans (policies) and individual contracting authorities to use them in their procurement procedures. In practice, a number of EU Member States have either made references to EU GPP criteria in their national action plans, or adopted national criteria which reflect these quite closely. Variations in the criteria adopted in Member States may reflect national differences in the market availability of products or services, approach to procurement and environmental and other priorities. Similarly, respective contracting authorities may choose to adapt the criteria to meet their specific requirements. Individual contracting authorities can choose which criteria to apply, in the absence of specific national laws regulating this issue.

GPP criteria are based on data from an evidence base, on existing ecolabel criteria and on information collected from stakeholders of industry, civil society and Member States. The evidence base uses available scientific information and data, adopts a life-cycle approach and engages stakeholders who meet to discuss issues and develop consensus.

GPP criteria are adopted in line with the following approach - for each sector covered two types of criteria are proposed:

1. core criteria and
2. comprehensive criteria.

The core criteria are those suitable for use by any contracting authority across the Member States

and address the key environmental impacts. They are designed to be used with minimum additional verification effort or cost increases.

Example:

The following core criteria for cleaning services are provided with regard to technical specifications:

'The following types of cleaning products [list of cleaning products to be defined by the contracting authority – for instance all-purposes cleaners, sanitary cleaners] to be used to performed tasks related to the contract must be compliant with criterion 1 and 4 of the EU Ecolabel for hard surface cleaning products on, respectively, toxicity to aquatic organisms and excluded or restricted substances'.

More complex to verify during contract execution option (option B) would be that: *at east A % of all cleaning products, by volume at purchase, to be used to perform tasks related to the contract must be compliant with criterion 1 on toxicity to aquatic organisms and criterion 4 on excluded and restricted substances of the EU Ecolabel for hard surface cleaning products.*

As regards award criteria the core award criterion which could be used is the use of ecolabelled cleaning services: *points will be awarded proportionally to tenders in which more than A % of all cleaning products, by volume at purchase, to be used to perform tasks related to the contract must be compliant with criterion 1 and criterion 4 on the EU Ecolabel for hard surface cleaning products on, respectively to aquatic organisms and excluded or restricted substances* (this criterion can be used only in combination with option B above).

The comprehensive criteria, in turn, are for those contracting authorities who wish to purchase the best environmental products available on the market. These may require additional verification effort or a slight increase in cost compared to other products with the same functionality.

Example:

Again with regard to cleaning services, comprehensive criterion which could be used in technical specification is the requirement that '*all textile cleaning accessories (such as cloths, mop heads) to be used to perform tasks related to the contract must be made of microfiber or meet the requirements set out in in the EU Ecolabel for textile products'.*

GPP criteria provide also methods of verification that they are fulfilled. For example, with regard to indoor cleaning services GPP criteria specify that the tenderer must supply a list of the cleaning products that will be used to perform the contract and provide documentation proving their compliance with the requirements. Products that have been awarded the EU Ecolabel for hard surface cleaning products are deemed to comply with the requirements.

GPP criteria are intended as ready to be used in procurement documents. GPP does not set out to detail each and every aspect of a product's life cycle. Rather, by judicious use of published ecolabel and/or life cycle information, it focuses on key aspects.