



# **Procedures for the award of engineering contracts concerning services**

**Guidelines for transposition of Directive 2004/18 to national legislation**

**May 2006**

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## 1. General

The award of consulting contracts above a certain threshold<sup>1</sup> which are either awarded by contracting authorities [Art. 1 par. 9]<sup>2</sup> (or a central purchasing body on their behalf [Art. 11]) or, for engineering services related to certain works, directly subsidized by more than 50% by contracting authorities [Art. 7 and 8] is governed by the provisions of Directives 2004/18 for the award of public works, supply and service contracts<sup>3</sup>, with the exception of procurement procedures in the water, energy, transport and postal services sectors which are covered by Directive 2004/17. Contracting Authorities may not break down a project into smaller ones below the threshold for publication to avoid application of the Directive [Art. 9 par. 3].

These directives are consistent with the Treaty of the European Community, which calls for freedom of establishment, freedom to provide services and freedom of movement of goods within the E.U. Specifically, the provisions of these Directives are driven by the principles of [whereas 2, Art. 2]<sup>4</sup>:

- transparency
- non-discrimination
- mutual recognition, i.e. that services supplied in each European country must be accepted in others if they meet the objectives
- proportionality, i.e. that specified measures shall be necessary and proportionate to the objectives
- equality of treatment, i.e. that similar situations shall be treated in a similar manner and with the objective of opening up public procurement to Europe-wide competition.

The above Directives must be transposed into national legislation in all European countries, in the sense that:

- national legislation must be consistent with the Directives
- however, not all of the options set forth in the Directives need be included in the national legislation [e.g. whereas 16].

## 2. The nature of consulting contracts

Consulting contracts may be classified into the following types:

- a) Design contracts, where the consultant is responsible for delivering the design of the project within a specified time frame. In this case the consultant is responsible for allocating adequate and appropriately qualified human resources for the fulfilment of his obligations. The remuneration of the consultant is usually lump sum, possibly with a justification of required man-months of input.
- b) Service contracts, where the consultant undertakes the responsibility to provide certain services within a specified time frame, e.g. construction supervision. In this case the

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<sup>1</sup> Currently at 137.000 € net of VAT for central government authorities and 211.000 € net of VAT for all other authorities [Art. 7 & 8]; these values include any form of option and any possible renewals envisioned for the contract. [Art. 9]

<sup>2</sup> References in brackets refer to Directive 2004/18.

<sup>3</sup> with some exceptions [Art. 10, 14, 18], including service concessions [Art. 17] and technical assistance to third countries [Art. 15].

<sup>4</sup> numbers preceded by "whereas" refer to the preamble Directive 2004/18

consultant is responsible for allocating adequate and appropriately qualified human resources for the fulfillment of his obligations – although the contracting authority may set minimum qualifications for staff in the invitation to tender. Such contracts are normally remunerated on a unit-cost basis, per man-month of staff.

- c) Technical assistance contracts where the consultant provides qualified staff to the contracting authority for assistance in the provision of certain services within a specified time frame, e.g. project management assistance, assistance to construction supervision. In this case the required staff is determined by the contracting authority in the invitation to tender. Such contracts are normally remunerated on a unit-cost basis, per man-month of staff.

Contracts can be mixed, in the sense that they may comprise of more than one of the above types; in such cases, the duties and responsibilities of the consultant for each type should be consistent with the above.

### **3. Procedures of award of consulting services**

#### **3.1. Open and restricted procedures**

The main award procedures are the "open" and "restricted" procedures [Art. 28]. In the open procedure any interested economic operator may submit a tender [Art. 1 par. 11.a], but only the technical proposals of selected candidates are evaluated [Art. 44 par. 1]. In the restricted procedure any economic operator may request to participate but only the selected ones are invited to submit a tender [Art. 1 par. 11.b].

#### **3.2. Negotiated procedures**

In specific cases, the directives allow for the award of contracts with negotiated procedures, whereby the contracting authority confers with the consultants of its choice and negotiates the terms of contract with one or more of these [Art. 1 par. 11.d]. Specifically, such negotiations can take place:

- (a) After publication of an announcement for the project, in which the content of the tenders submitted by the selected candidates is negotiated and the contract is awarded to the best one [Art. 30]. The main cases for which this procedure can be used are:
- following submission of irregular or unacceptable tenders submitted in response to an open or restricted procedure
  - for intellectual services such as the design of works, where sufficient contract specifications for their award with the open or restricted procedures cannot be established.
- (b) Without prior publication of an announcement for the project [Art. 31], in which the contract scope and remuneration is negotiated with one or more consultants. The main cases for which this procedure can be used are:
- when no tenders or no suitable tenders have been submitted in response to an open or restricted procedure
  - in extreme urgency brought about by unforeseeable events and not attributable to the contracting authority,

- for award of a design contract after a design contest<sup>5</sup>
- for supplementary work that could not have been foreseen but is deemed necessary for an existing contract<sup>6</sup>
- for repetition of similar services<sup>7</sup>.

### 3.3. Design contests

Design contests enable the contracting authority to acquire a plan or design chosen anonymously by a independent jury after being put out to competition, mainly in the fields of town and country planning, architecture and engineering or data processing, with or without the award of prizes [Art. 1 par. 11.e, 73, 74]. An announcement of the project is made, following which a selection stage may or may not be specified [Art. 72]. If the design contest is used a first step for the award of a design contract, the negotiated procedure without prior publication is applied for negotiation with the winner or with the successful candidates, depending on the provisions of the announcement.

### 3.4. Competitive dialogue

In cases of particularly complex contracts, where the contracting authorities are not able to define:

- the technical, performance or functional requirements of a project, or
- the legal and/or financial setup of a project

the project award can be made through "competitive dialogue" after publication of an announcement for the project [Art. 1, par. 11 (c)].

With this procedure, any economic operator may request to participate and the contracting authority enters into discussions with the selected candidates with the objective of identifying the key technical, legal and/or financial aspects of the project; discussions of technical aspects could concern the definition of the performance specifications and/or alternative technical solutions.

Following the discussions, the contracting authority decides on the technical, legal and financial aspects of the project and the candidates submit final tenders [Art. 28, 29]; these tenders may be revised, clarified, specified and fine-tuned until the contracting authority sees fit.

Contracting authorities may specify a remuneration to candidates participating in this procedure [Art. 29, par. 8].

Member States have the discretion whether to introduce competitive dialogue in their legislation or not [whereas 16].

### 3.5. Other procurement systems

Dynamic purchasing systems [Art. 1 par. 6 and Art. 33] and electronic auctions [Art. 1 par. 7 and Art. 54] are systems for commonly used procurement where the emphasis of the award

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<sup>5</sup> provided that this is stipulated in the announcement of the project.

<sup>6</sup> the total value of such contracts cannot exceed the amount of the original contract by more than 50%.

<sup>7</sup> with the provision that such options are included in the original contract notice and is exercised within three years from the conclusion of the original contract.

procedure is on price. However, electronic auctions may not be used for the award of intellectual services such as the design of works [Art 1 par. 7].

*For the transposition of E.U. legislation into the law of the European countries, EFCA recommends that:*

- 1. The open procedure should be avoided for the award of consulting contracts - with the exception of small and simple ones - because it entails excessive preparation costs by the consulting sector on the one hand and excessive evaluation costs by the public sector on the other.*
- 2. The restricted procedure is the most appropriate procedure for the award of consulting services.*
- 3. Negotiated procedures after publication could be used for the award of design contracts for which sufficient contract specifications cannot be established in advance by the contracting authorities e.g. the award of preliminary or concept design. The negotiations should primarily regard the technical merit of the tenders.*
- 4. Negotiated procedures without publication should be used for the award of supplementary work that could not have been foreseen but is deemed necessary for an existing contract, provided that the total value of such contracts cannot exceed the amount of the original contract by more than 50% and for the award of design contracts following design contests, provided that this is stipulated in the invitation.*
- 5. Competitive dialogue should be transposed in national legislation only for the adjustment of legal and/or financial conditions of complex projects or complex project delivery structures such as Public-Private Participation schemes.*
- 6. For all other cases for which difficulties may be encountered with the conventional project award system stipulated in Directive 2004/18, EFCA recommends that the contracting authorities hire qualified consultants through:*
  - o negotiated procedures with prior publication, in accordance with Art. 30, par. 1 (c) of the Directive*
  - o technical assistance contracts, for the project preparation of Design-Build and Public Private Partnership (PPP) contracts, or*
  - o design contests and subsequent negotiated procedures without prior publication.*
- 7. Where competitive dialogue is used:*
  - o the discussion the identification of alternative solutions should not be permitted, because (a) participants will be burdened with excessive costs<sup>8</sup> and (b) such a process is characterised by reduced transparency and offers no guarantee for the equal treatment of candidates<sup>9</sup>.*

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<sup>8</sup> For the discussion of technical solutions, the candidates should prepare preliminary or concept designs of one (or more) technical solutions and adjust them according to the progress of such discussions; such an elaboration requires significant input of highly experienced staff.

<sup>9</sup> Indeed, during discussions with the selected candidates, contracting authorities may adopt the best ideas from the technical solutions proposed by each candidate and transfer them to the others in order to achieve the best final result (a process known as "cherry-picking"). The Directive stipulates [Art. 29 par.3] that "Contracting authorities may not reveal to other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement".

- *the final tenders should not be subject to revision, clarification, specification, fine-tuning or any other intervention by the candidates*
  - *national legislation should provide for the remuneration of candidates for their participation in the competitive dialogue process; this remuneration should cover the full cost of consulting work undertaken for the benefit of the contracting authorities, e.g. the preparation of concept or preliminary studies.*
8. *In view of the higher costs and increased duration of the award process through design contests, such procedures are used only for projects with aesthetic significance and with a provision for the award of prizes. If design contests are procured as a first step for the award of a design contract, they should be restricted to consultants that have the capability to undertake the ensuing design contracts.*
9. *Dynamic purchasing is not used for the award of any engineering consulting services, which by their nature are intellectual services.*

#### **4. Award process**

For all of the above procedures, except for the negotiated without prior publication of an announcement for the project, the contracting authority obligatorily announces the project with a contract notice in Supplement "S" of the Official Journal of the European Union, the content and form of which is specified in the Directive [Art. 36]. This information is included in the Tenders Electronic Daily (TED) database, which is accessible through the internet. The award of consulting services is generally performed in two stages:

- selection of the candidate consultants, after evaluation of their suitability<sup>10</sup>, and
- award of the contract to one of the selected candidates.

##### 4.1. Selection of consultants

The selection process of consultants is performed in two steps, namely [Art. 44 par.1]:

- screening of consultants for compliance with compliance with the law, and
- evaluation of suitability of consultants

##### 4.1.1. Screening of consultants

The consultants expressing their interest are first screened insofar as their legal status is concerned – referred to in the Directive as “personal situation” of the candidates [Art. 45]; for design contests, such screening is not stipulated [Art. 72]. The screening necessarily excludes candidates that have been convicted of certain significant violations [Art. 45, par. 1] and optionally excludes candidates that are in a bankruptcy process or may have committed lesser violations.

For this screening, evidence should be provided by the consulting firm that it has not been involved in criminal activities, is not bankrupt, is not guilty of professional misconduct, has paid

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However, the incentive of the contracting authority to disseminate successful ideas in order to improve the tenders that will be submitted is a strong one; thus the enforcement of this clause in practice is questionable. Moreover, candidates who have invested time and effort in their participation in the competitive dialogue process may be pressured to cooperate with the contracting authority and agree to the use of their ideas.

<sup>10</sup> Design contests may or may not have a selection stage

the requisite social security contributions and taxes etc., as specified in the national law of each Member State<sup>11</sup>. In every case, the contracting authority may invite candidates to supplement or clarify the certificates and documents submitted for screening [Art. 51].

Member States may introduce official lists of approved consultants or certification by designated public or private bodies complying with European certification standards. Certified registration of a consultant on official lists constitutes a presumption of compliance with the law<sup>12</sup> - and is valid for all Member States [Art. 52].

*EFCA recommends:*

1. *In view of the significant documentation necessary for the provision of evidence for the screening of the personal situation of candidates and the variations of stipulations from country to country, that the screening process be streamlined by one of the following means or any other means deemed appropriate:*
  - *establishment of official lists of approved consultants by the Member States*
  - *provision in national legislation for consultants include a declaration in the tender covering all the aspects of the Directive<sup>13</sup>- with the obligation of the consultants to whom the services are awarded to duly submit all requisite documents<sup>14</sup>.*
  - *set-up of a database containing all related documents of all consultants for their period of validity, with provision for access to this database to the contracting authorities.*
2. *Insofar as official lists do not exist, however, that Member States authorise contracting authorities to invite consultants to supplement or clarify any of the screening documents where necessary - in order to avoid undue disqualification of candidates and the subsequent restriction of competition.*
3. *For design contests that are procured as a first step for the award of a design contract, that candidates should be screened – so that subsequent award of the design contract to them will be possible.*

#### 4.1.2. Evaluation of suitability of consultants

The suitability of consultants is evaluated in respect of:

- economic & financial standing, and
- technical and/or professional ability.

The information that can be requested for the assessment of the candidates' economic and financial standing is bank statements, balance sheets<sup>15</sup> and/or statements of turnover of the candidates.

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<sup>11</sup> National law shall specify (i) the implementing conditions for the exclusion from participation in public procurement of consultants that may have the attributes of par. 1 of Art. 45 and (ii) which of the attributes of par. 2 of Art. 45 are considered in the Member State as conditions for exclusion.

<sup>12</sup> with the exception of obligations for social security and taxes, for which separate certificates should be provided [Art. 52 par. 3].

<sup>13</sup> with the possible exception of documents attesting the fulfilment of obligations for payment of social contributions and taxes

<sup>14</sup> Such a provision would enhance the spirit of the Directive, since candidates would not be disqualified for insignificant errors or omissions in the information submitted about their personal situation.

<sup>15</sup> The Balance Sheet reports the financial position of a company at a certain point in time in one page.

The information that may be requested for the assessment of the technical and/or professional ability may include one or more of the following [Art. 48 par. 2] depending on the nature, quality or importance of the project:

- experience of the consultant in similar projects, over a reasonable number of years, e.g. at least 10<sup>16</sup>
- educational and professional qualifications of the consultant and/or those of his managerial staff and, in particular, those of the person or persons responsible for providing the services
- the technical facilities and measures used by the consultant for ensuring quality and the consultant's study and research facilities
- the technicians or technical bodies involved in the consulting firm, especially those responsible for quality control
- the environmental management measures that the consultants will apply when performing the contract
- a statement of the average annual manpower of the consultant and the number of managerial staff for the last three years
- a statement of the tools, plant or technical equipment available to the consultant for carrying out the contract
- an indication of the proportion of the contract which the consultant intends possibly to subcontract.

Notes:

1. The contracting authorities must include in the contract notice the selection criteria they intend to apply [whereas 39].
2. The European Commission presently interprets the Directive and the relevant decisions of the European Court as requiring the assessment of the qualifications of the proposed project team in the selection stage. EFCA has proposed that the assessment of the project team should be made in the award stage since:
  - a) The suitability of the candidate is affected by the qualifications of the project team. This is inappropriate, since the project team is in effect the subject of the offer of the candidate, not an attribute of his suitability.
  - b) Candidates proposing highly qualified staff cannot be differentiated in the award process from selected candidates proposing acceptable but less qualified staff. Since, for consulting projects, the qualification of staff is one of the main constituents of the expected quality of the service<sup>17</sup>, it is clear that the most advantageous proposal cannot be determined if this factor is not taken into account.

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<sup>16</sup> The "three years" stated in the Directive [Art. 48 par. 2(a)(ii)] should be regarded as a lower limit of the period over which experience can be requested. For, if this provision is interpreted as allowing the contracting authorities to request experience only in the last three years (or not at all), then fully qualified consultants who have executed significant projects of similar nature (e.g. large bridges, dams, Olympic sports facilities) before four or more years can never be selected; this would clearly violate the principles of proportionality, non-discrimination and equality of treatment of the candidates, unnecessarily restrict competition and result in the same firms securing successive contracts in each field.

<sup>17</sup> Indeed for consulting services, where only *the factors that will define* the quality of the deliverable can be assessed during the award process (as opposed to supplies, where the deliverable is available for assessment), the qualifications of the project team represent constitute one of those factors.

- c) The qualifications of the project team are interrelated with the contents of technical proposal, such as:
- o the organisational structure of the candidate for the project
  - o the methodology for the provision of the services<sup>18</sup>, and
  - o the proposed time schedule for the provision of the services<sup>19</sup>

The assessment of part of this interrelated entity in the selection stage and part in the award stage induces a needless complication to the submission and assessment process.

- d) The candidates are required to commit themselves to the project team from the selection stage, which is normally several months in advance of the award of the contract. The commitment of staff for a possible project so much in advance and for an undefined range of time (since the duration of the award process cannot be known) is not practically feasible.
3. The contracting authorities may specify in the contract notice that candidates should meet minimum levels of economic & financial standing and/or technical/ professional ability [Art. 44 par. 2].
  4. Where contracting authorities require certificates of compliance of the candidates with quality assurance standards, the relevant European standards are to be referred to; however, the contracting authorities should also accept evidence of other equivalent quality assurance measures.
  5. Where contracting authorities require certificates of compliance of the candidates with environmental management standards, the Community Eco-Management and Audit Scheme (EMAS) or relevant European or international standards are to be referred to; however, the contracting authorities should also accept evidence of other equivalent environmental management measures.
  6. The contracting authority may invite candidates to supplement or clarify the certificates and documents submitted for selection [Art. 51].
  7. In the competitive dialogue and negotiated procedures with publication, the selection may take place in successive steps in order to reduce the number of tenders to be submitted and evaluated [Art. 29 par. 4 and Art. 30 par. 4].

The official lists of approved consultants mentioned in the previous section may cover the economic & financial standing, and technical and/or professional ability of candidates [Art. 52 par. 3]. However, in the restricted procedure or the negotiation procedure with prior publication or the competitive dialogue where a limited number of candidates must be selected, the registration on a list cannot by itself provide enough information for such selection; in those cases, the announcement for the project should specify the information to be submitted by candidates included in official lists of approved consultants.

#### 4.1.3. Consultant Selection

In open award procedures, all suitable consultants are selected and the tenders they have submitted are evaluated, ref. next section.

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<sup>18</sup> in terms of required staff for each activity of the project

<sup>19</sup> taking into account pending obligations of each member of the team.

In restricted procedures, negotiated procedures with publication as well as in the competitive dialogue, the announcement for the project may limit the number of suitable candidates they will invite to tender [Art. 44 par. 3]; in that case, the contracting authority:

- should indicate the rules they intend to apply for the selection of the candidates that will be invited to tender
- should indicate the minimum number of candidates that will be selected, and
- could specify the maximum number of candidates that will be selected<sup>20</sup>.

The minimum number of candidates is five in the restricted procedure and three in negotiated procedures with publication and competitive dialogue [Art. 44 par. 3]; if the number of suitable candidates is less, the contracting authority must select the suitable candidates only. In any event, the number of candidates should be sufficient to ensure genuine competition. If a maximum number of candidates is specified, only the most suitable ones are selected; if a maximum number is not specified, all suitable consultants are selected.

*Regarding the selection of consultants, EFCA recommends that:*

1. *Contracting authorities request from legal entities the submission of 1 page summaries of the balance sheets of the last three years, in order to verify their financial health. Requirements on the economic and financial standing should be set only for projects where the financing required for the consulting services is significant and, in those cases, it should be commensurate with the actual project requirements. e.g. the average annual turnover of the last 3 years (as available) should be larger than the estimated project value per year.*
2. *In restricted procedures, negotiated procedures with publication as well as in competitive dialogue:*
  - *the announcement for the project should specify a limited number of consultants to be selected, and*
  - *that the upper limit of candidates to be selected be eight for the restricted procedure and five for the negotiated and competitive dialogue procedures.**If the number of candidates is larger, their incentive for the compilation of proposals of high quality will be reduced.*
3. *The technical and/or professional suitability of consultants is assessed on the basis of their experience in similar projects - even for contracts where a specific composition of the project team may be specified in the invitation. For the assessment of the experience of consulting firms, the projects on which senior permanent staff of the firm may have worked during previous employment in other firms should be taken into account.*
4. *If the educational and professional qualifications of the consultant are to be assessed in the selection stage, the requested information should only concern key staff, which determines the quality of the service to be provided.*
5. *Where contracting authorities require candidates to meet minimum levels of technical and/or professional ability, such levels should be commensurate with the actual project requirements. Moreover, in such cases all candidates fulfilling these minimum levels should be considered suitable.*

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<sup>20</sup> If a maximum number is not specified in the invitation, then all suitable candidates should be selected and invited to submit tenders.

*If on the other hand the contracting authority does not specify in the contract notice that candidates should meet minimum levels of economic & financial standing and/or technical/professional ability, then all candidates should be considered as suitable and selected - unless the restricted procedure is being applied and a maximum number of candidates that will be selected has been specified in the invitation, which is less than the number of suitable candidates.*

- 6. Contracting authorities should invite consultants to clarify the submitted documents if necessary, provided that such clarifications do not alter the content of these documents; in any event the exclusion of candidates for non-substantial reasons should be avoided since it reduces competition.*
- 7. In both the open and restricted procedures, the information submitted from candidates for the selection procedure according to the sections above are submitted in separate envelopes from those including the technical and financial proposals. The technical and financial proposals of candidates that are not selected should be returned unopened.*
- 8. For design contests that are procured as a first step for the award of a design contract, the suitability of candidates should be evaluated – so that subsequent award of the design contract to them will be possible.*

#### 4.2. Award of the contract

The award of the contract is made to the most "economically advantageous" tender or, alternatively, to the tender with the lowest price [Art. 53 par. 1]. The most economically advantageous tender is the one deemed to offer the best value for money spent [whereas 46]. To this<sup>21</sup> effect, various criteria such as quality, price and technical merit may be used; the Member States and contracting authorities have relative freedom in the definition of the award criteria - with the restriction that the award criteria should not overlap with the selection criteria. In competitive dialogue, the award of the contract is necessarily made to the most economically advantageous tender [Art. 29 par. 1]; in design contests, the same essentially applies.

For all procedures involving publication, the award criteria and their relative weighting (or, at least, their descending order of importance<sup>22</sup>) should be specified in the invitation to tender [Art. 40 par. 5.e. and Art. 53 par. 2].

Regarding prices, it should be noted that:

- the award criteria must not affect the application of national provisions on the remuneration of consulting services (i.e. fee scales designated by law) where applicable [whereas 47, Art. 53 par. 1]<sup>23</sup>
- the relative weight of the financial component of the tenders, where applicable, is not specified in the Directives

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<sup>21</sup> includes the key staff

<sup>22</sup> in cases where contracting authorities justify that weighting cannot be established [whereas 46]

<sup>23</sup> fee scales in Member States may define the remuneration of the consultant for the services to be provided or, alternatively, lower acceptable limits for proposed prices; where fee scales define the remuneration of the consultant, financial proposals are not required.

- the use of separate envelopes for the technical and financial proposals, although widely used in the E.U. where financial tenders are submitted, is not stipulated in the Directive
- if a financial tender appears to be abnormally low, the contracting authority may reject the tender after requesting justification of the tender [Art. 55]<sup>24</sup>; abnormally low tenders may result from gross underestimations of the required amount of work and/or dumping practices in unit prices.

The above criteria are used to evaluate the technical proposals of all submitted tenders. Normally, for each proposal grades (usually on a scale of 100) are allocated to each criterion and, subsequently, these grades are weighted with the weightings specified in the invitation, in order to obtain the weighted average grade of the technical proposal. Proposals may be rejected if:

- the grade in one or more of the award criteria and/or
- the weighted average grade

are below acceptable lower limits specified accordingly in the invitation to tender [Art. 53 par. 2].

Subsequently, the integrated weight of the proposal is evaluated by weighting the grades of the technical and financial proposals. The grade of a financial proposal can be defined as the ratio of the lowest price of all proposals to the price of the particular proposal<sup>25</sup>.

*EFCA recommends that:*

*1. The technical proposals consist of:*

- *a description of the characteristic aspects of the particular project*
- *the methodology for provision of the services, including breakdown of the project into activities or phases and description of the input, method of execution and output for each one, and*
- *the time-schedule for execution of the contract in which the sequencing of the proposed activities and the relevant milestones are presented*
- *information on the key members of the proposed project team for the execution of the project*<sup>26</sup>
- *the organisational structure of the project team, i.e. the distribution of responsibility within team, and*
- *the material resources that will be made available for the execution of the project.*

*2. The award criteria for evaluating the technical proposals are:*

- *the degree to which the characteristic aspects of the particular project have been identified*
- *the adequacy of the proposed methodology for the execution of the contract to a high standard of quality*
- *the effectiveness of the proposed time-schedule for execution of the contract*<sup>27</sup>

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<sup>24</sup> The rejection of tenders as abnormally low has to date been difficult in practice.

<sup>25</sup> or by any other suitable means e.g. as a (linear or non-linear) function of the ratio of the price of the particular proposal to the project budget.

<sup>26</sup> such a provision in national legislation is subject to the Commission's consent; otherwise, such information should be requested in the selection stage, ref. section 4.1.2.

<sup>27</sup> the time for the execution of the contract should not be used as a criterion in itself, since it may lead to unrealistic underbidding.

- *the effectiveness of the proposed project-team<sup>28</sup>, taking into account any specific requirements regarding the project team specified in the invitation to tender*
- *the effectiveness of the organisational structure of the project team for the execution of the contract.*

*For design contests, the award criteria should include the aesthetics and functionality of the proposed design.*

*3. The principal parameters of quality for an engineering project are:*

- *value engineering with respect to the project objectives*
- *state-of-the-art constructability (clear, unhindered & safe)*
- *environmental & social sustainability*
- *economic sustainability, taking life-cycle costing into account.*

*4. The effectiveness of the project team mainly depends upon:*

- *the adequacy of its expertise in relation to the project requirements, and*
- *the proportionality of the human and material resources to the size of the project.*

*For design contracts, where the consulting firm is responsible for the suitability and adequacy of the allocated resources during the execution of the contract, the project manager principally determines the quality of the service. Thus, the effectiveness of the project team for a design contract could be assessed on the basis of the CV of the project manager, and profiles of its key members<sup>29</sup>*

*For service contracts that require home office support, the effectiveness of the home office team could be assessed on the basis of the CV of the home office manager, and profiles of its key members.*

*5. The invitation to tender includes acceptable lower limits for the grades in one or more of the award criteria as well as the weighted average grade; any proposals that are graded below these lower limits are rejected.*

*6. The technical and financial proposals are submitted by the tenderers in separate sealed envelopes - and only the financial proposals of the candidates whose technical proposals are acceptable are opened, the others being returned unopened.*

*7. In order to ensure the quality of the services to be provided, which are by their nature intellectual services:*

- *the award of consulting services should always be made to the most advantageous tender, and*
- *the weight of the financial component should be no more than 20%.*

*In addition, for proposals to be meaningful for the actual execution of the project, EFCA recommends that the proposals and particularly the proposed CVs be appended to the contract of the successful tenderer and considered as binding for up to 90 days after submission of the proposal. Apart from real 'force majeure' cases or when contract award has taken more than 90 days, replacement of the team leader or key experts by the consultant should be prohibited. In*

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<sup>28</sup> If the expertise of the project team has been assessed in the selection stage, it should not be re-assessed in the award stage.

<sup>29</sup> i.e. their academic qualifications (e.g. civil engineer), fields of expertise (e.g. hydrologist), and years of experience.

*any event, replacements of staff of the project-team by the consultant should only be possible by staff of equal or higher standing and subject to approval by the contracting authority.*

## **5. Framework agreements**

Contracting authorities may award "framework agreements" with one of the procedures discussed above in cases where the scope of services to be provided cannot be fully defined in advance [Art. 32], e.g. for geotechnical investigations.

These are agreements between the contracting authority<sup>30</sup> and one or more consultants (or joint ventures) establishing contract terms (e.g. unit prices and/or quantities) for contracts to be awarded during a given period, which may not exceed four years. The framework agreements may define all contract terms or not; in the latter case, the subsequent contract(s) will have to define the terms which have not been defined in the framework agreement, in a manner that is consistent with it.

Where the framework agreement is established with one consultant and does not define all terms of the contract (e.g. the time within which the services of the specific contract will be provided), then such terms will be mutually agreed in writing for the award of any subsequent contract.

Where the framework agreement is established with multiple consultants [Art. 32 par. 4]:

- *there should normally be at least three in number*
- *contracts may be awarded either by direct application of the terms of the framework agreement (if all contract terms have been defined in the agreement) or through a tendering procedure among them (if some terms have not been defined in the agreement).*

Member States may choose:

- *whether to introduce framework agreements in their national law or not [whereas 16]*
- *whether to stipulate single and/or multiple framework agreements*
- *whether to require that all contract terms are defined or not.*

*EFCA recommends that national legislations foresee framework agreements with one consultant (or one joint-venture of consultants), to be awarded through one of the applicable award procedures, whereby all or almost all of the contract terms are defined in the agreement; this expedites the award of subsequent contracts and restricts the possibility of price competition for the award of individual contracts, which is inappropriate for intellectual services.*

## **6. Alliances**

Following a decision of the European court, the Directives specify that a consultant may, where appropriate and for a particular contract, rely on the capacities of other entities - provided that he proves that he will have at his disposal the resources of these entities that are necessary for the execution of the contract [Art. 47 par. 2, Art 48 par. 3].

*EFCA recommends that a declaration on oath from the person(s) responsible for the management of the entities furnishing these resources clearly stating the type and number of resources that will be made available is considered as adequate proof of such commitment.*

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<sup>30</sup> or a specified group of contracting authorities (as in the case of a central awarding authority acting as an intermediary on behalf of the contracting authorities).

## **7. Subcontracting**

Subcontracting is permitted in order to encourage the involvement of small & medium-sized consulting firms [whereas 32]. The member states may specify in their legislation that the tenderers should indicate in their tenders any share of the contract that they intend to subcontract and the proposed subcontractors or, alternatively, that the contracting authorities themselves may decide whether to request such information or not [Art. 25].

*EFCA recommends that:*

- 2. Member States specify in their legislation that the tenderers should indicate in their tenders any share of the contract that they intend to subcontract and the proposed subcontractors.*
- 3. The contracting authority specifies in the invitation to tender whether the subcontractors should be bound by exclusivity to each candidate or not.*
- 4. The contribution of these subcontractors is taken into account in the evaluation of the level of expertise of the proposed project-team and its leader, the sufficiency of the human and other resources allocated to each activity and the proposed organogram for the provision of the services.*

## **8. Groups**

Permanent groups of co-operating consultants or groups established specifically for each project (joint ventures) may participate in the award processes described above.

These groups may not be required by the contracting authorities to assume a specific legal form in order to submit a tender, but may be required to do so when it has been awarded the contract - to the extent that it is considered necessary for the satisfactory performance of the contract [Art. 4 par. 2]. If such groups will be requested to assume a specific legal form for signature of the contract, this should be specified in the publication of the contract notice.

The group should be considered as acceptable if all of its members are acceptable, as evaluated through the screening process. In the evaluation for selection (and contract award), however, the qualifications of the group as a whole should be taken into account [Art. 47 par. 3, Art. 48 par. 4].

*EFCA proposes that all members of the groups enter into contract with the contracting authority and that:*

- the consulting firms in the groups are jointly and severally responsible for all the contractual aspects, i.e. execution of the project in time and according to the contract provisions, and*
- individually responsible for their intellectual input .*

## **9. Variants**

For contracts which are to be awarded to the most economically advantageous tender, tenderers may submit variants only if the contracting authorities indicate so in the invitation to tender [Art. 24]. In that case, the contracting authorities shall state in the contract documents the minimum requirements to be met by the variants.

## **10. Conflict of interest**

Conflict of interest is not treated in the Directive.

*However, for the contracting authorities' interests to be duly protected in the procurement process, EFCA recommends that:*

- 1. Consultants are deemed suitable for undertaking service contracts from the public sector only if independent from suppliers or contractors, in order to ensure their objectivity on behalf of the contracting authority.*
- 2. Consultants preparing tender documents for the procurement of a service contract are expressly excluded from participating in the procurement process for that service, since the consultant that prepares the tender documents may unduly influence the content of such documents if he has a personal interest in the undertaking of the service. This restriction should apply to all firms that are dependent from the firm that provided the technical assistance services, but need not apply to firms that had a minor role in the preparation of the tender documents*
- 3. Consultants that supervise or oversee a service contract are independent from those executing that contract, since the opinion of the supervising consultant could be affected by his personal interest from the execution of the project.*

*Candidates selected in restricted or negotiated procedures or in competitive dialogue should be independent from each other; to this end, the invited candidates should be required to submit information about their ownership structure<sup>31</sup>.*

*In the above context, two firms are deemed as dependent if the one exercises a dominant influence over the other or if a third legal entity exercises a dominant influence over both of them. Dominant influence shall be presumed between two legal entities, without prejudice to proof of the contrary, when one of them [Directive 94/45]:*

- o holds a majority of the other's subscribed capital, or*
- o controls a majority of the votes attached to the other's issued share capital, or*
- o can appoint more than half the members of the other's administrative, management or supervisory body.*

*With the exception of the preparation of the tender documents referred to above, EFCA does not believe that a conflict of interest arises or the equality of candidates is jeopardised if consultants that undertook one phase of a contract participate in the award process of a subsequent stage - provided that all relevant documents are duly made available to all other candidates.*

## **11. Unfair competition**

The entities that may participate in the procedures for award of contracts include natural and legal persons belonging to the private sector and public entities [Art. 1 par. 8]. However, Member States should ensure that the participation of a public entity in an award procedure does not cause any distortion of competition in relation to private tenderers [whereas 4].

*In view of the fact that public entities are usually (directly or indirectly) subsidized and their participation in the procedures for award of public contracts results in the distortion of*

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<sup>31</sup> In case such information is withheld by any candidate or if the information submitted by any candidate is found to be inaccurate or incomplete, the candidate should be disqualified.

*competition, EFCA recommends that such entities<sup>32</sup> be excluded from the award of public contracts - unless they can prove beyond doubt that they are economically independent units, i.e. receive no direct or indirect subsidy<sup>33</sup>.*

## **12. Abnormally low financial proposals**

Abnormally low tenders in open or restricted procedures can be rejected after due consultation with the respective candidates [Art. 55].

In cases where abnormally low tenders are submitted and the contracting authority establishes that the reason for such a submission is that the tenderer has obtained illegal<sup>34</sup> State aid, the tender can be rejected on that ground alone after due consultation [Art. 55 par. 3]. However, the identification of abnormally low tenders and the existence of (direct or indirect) State aid to the tenderer is difficult in practice.

Very low financial proposals may be due to one or more of the following:

- (a) Unreasonably low number of man-months allocated to the project, due to a lack of understanding of the contract on behalf of the candidate and/or unclear or insufficient description of the project by the contracting authority.
- (b) Low unit rates due to:
  - lower fees in the country of origin of the professional staff proposed for the project
  - excessive discounts by the candidate for the particular project, or
  - subsidised unit rates of the candidate, ref. the previous section.

Of the above cases, only the one where an abnormally low tender is due to the lower fees in the country of origin of the professional staff proposed for the project is acceptable - while all other cases should be considered as "abnormally low".

*In order to clearly identify such tenders, EFCA proposes that:*

- *a limit below which tenders will be considered as abnormally low is specified either in national legislation or by the contracting authorities in the tender invitation<sup>35</sup>, and*
- *candidates who have submitted abnormally low tenders be required to justify them in terms of both the work input<sup>36</sup> and the applicable prices by means of their breakdown into fees paid to the employees times company overhead ratios plus profit.<sup>37</sup>*
- *if the contracting authority deems that the work input in such a tender is insufficient for the procured service or that the applicable prices are unreasonably low, the tender is rejected.*

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<sup>32</sup> These should be defined as entities that fall within the definition of "Contracting Authorities" of Article 1 par. 9 of the Directive

<sup>33</sup> in this context, it is noted that the increase of capital constitutes an indirect subsidy.

<sup>34</sup> the term "illegal" for State Aid is not defined in the Directive.

<sup>35</sup> This limit should preferably have the form of a percentage of the project budget; a limit that would be statistically related to the financial proposals submitted lacks transparency since it is not known to candidates in advance.

<sup>36</sup> for lump sum projects, the man-months of various levels of expertise envisioned per task

<sup>37</sup> Overhead ratio is defined as the ratio of total company expenditures over the cost of billable man-months of professional staff of the company, i.e. man-months charged to projects; values should normally range from 2.0 to 4.0, depending on the size of the company.

### **13. Accountability of contracting authorities**

The contracting authorities shall as soon as possible inform the candidates of any award procedure of any related decisions [Art. 41]. On request from any consultant, the contracting authority shall as soon as possible inform him on:

- the grounds for any decision not to conclude a tendered contract
- the reasons for rejection of his application or tender, if applicable
- the name of the successful tenderer and its relative advantages.

### **14. Transparency**

In addition, contracting authorities shall send within 48 days a notice of the results of any award procedure valued above the applicable thresholds to Supplement "S" of the Official Journal of the European Union [Art.35 par. 4].

Finally, contracting authorities shall, upon conclusion of any award process, draw up a written report documenting the progress of the award procedure [Art. 43].

However, contracting authorities shall not disclose information that tenderers have designated as confidential [Art. 6, Art. 35 par. 4, Art. 41 par. 3]. The directive does not indicate what kind of information may be designated as confidential by the tenderers, but it can be assumed that it can only apply to specific aspects of his tender.

*EFCA recommends that, in order to enhance transparency, contracting authorities communicate to all tenderers the written report documenting the progress of the award procedure specified in Art. 43 - with the possible exception of specific aspects of the successful tender that may have been designated as confidential by the tenderer.*

### **15. Appeals**

The directive itself does not foresee any appeals mechanisms for public procurement. The "remedial" directives 89/665 and 92/13 include provisions for review procedures to the award of public supply and public works contracts and contracts in the water, energy, transport and telecommunications sectors respectively; a new directive amending them with the objective of improving the effectiveness of review procedures in the award of public contracts is presently under preparation.

Appeals may contribute to the restriction of discrimination, equality of treatment for candidates, mutual recognition and proportionality and enhance the accountability of contracting authorities - albeit with an increased duration of the contract award process.

*In view of the above, EFCA considers that the stipulation of appeal mechanisms for service contracts should be included in national legislation, with the following provisions:*

- *an administrative appeal mechanism should be foreseen at first instance, where the authority evaluating the appeals should preferably be one administrative level above the contracting authority, and*

the final judgement is made by appeal tribunals; for appeals to be meaningful, the award process should be suspended until the tribunal concludes its deliberations.

## 16. The issue of corruption

Corruption and political instability remain serious obstacles not only for efficient project delivery but also for the planning and implementation of sustainable projects that address the needs of all stakeholders.

Corruption, definable as the “abuse of public or private office for personal gain”, is morally and economically damaging; thus it is more than stealing funds, it is stealing trust.

EFCA believes that:

- the best project results are achieved when there is a true professional relationship of absolute trust between the client and the consultant
- selecting a consulting engineering firm is therefore a most important task, as it forms the basis for the essential and mutual trust between the client and the consultant; thus the various selection criteria set down for the purpose of judging a firm’s suitability to carry out a project, are completely undermined if the selection process is tainted by corruption, and
- more importantly, a tendering and evaluation process conducted with transparency and expedition will more likely result in a contract award predicated upon proper factors, ultimately leading to a successful project and value for money for the client.

*In view of the above, EFCA recommends that, for the reduction of corruption:*

1. *The procurement procedures be based on well-defined and objective selection and award criteria.*
2. *Contracting authority evaluations in the context of award procedures are detailed, justified and copied to all candidates upon conclusion of each stage of the evaluation process [Art.41].*
3. *Appeal mechanisms are implemented for the assessment by independent bodies of justified complaints by candidates on the award process, ref. previous section.*

*EFCA Committee on Public Procurement  
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