IBR Publicaties

Proportionality Guide

1st revision, April 2016

ibr
instituut voor bouwrecht

Proportionality **Guide**

1st revision, April 2016

ISBN 978-94-6315-044-6
NUR 822

© 2019, Stichting Instituut voor Bouwrecht

No part of this book may be reproduced in any form, by print, photo print, microfilm or any other means without written permission from the Dutch Institute for Construction Law (IBR) in The Hague, The Netherlands.

Introduction to the translation of the Dutch Proportionality Guide[1]

The translation

The European Procurement Directive of 2014 pays specific attention to the principle of proportionality. Point 1 of the Preamble states the following:

> 'The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.'

The provisions on proportionality are continued in Points 15, 66 and 83 of the Preamble.

The Directive does not specifically indicate how to deal with this principle. The Dutch experience shows that contracting authorities have great difficulty in applying this principle. In order to help the contracting authorities, the Proportionality Guide was published following the introduction of the Dutch Public Procurement Act (Aanbestedingswet) in 2012. The Guide contains a detailed explanation of what the principle of proportionality means, or should mean, in all stages of the procurement procedure and in the terms and conditions of the contract.

The Guide has received attention outside of the Netherlands on various occasions and has always been well-received. It is clear that the problems that the Guide seeks to solve are problems all European countries are confronted with. That is why the Instituut voor Bouwrecht (Netherlands Institute for Construction Law), whose director is currently the chair of the European Society of Construction Law, has taken the initiative to translate the Guide into English.

The Institute is of the opinion that the Proportionality Guide truly helps contracting authorities and can also do so at European level. If its guidelines are followed, requirements and criteria will be more predictable, more understandable and more proportional, so that tenderers will have a better idea of what they are dealing with and in addition the requirements will better comply with the European regulations. Consequently the translation will also contribute to promoting a clear interpretation of the European Directive, which will stimulate cross-border transactions.

1 This 'Introduction to the translation of the Dutch Proportionality Guide' is not a part of the Dutch Proportionality Guide'.

This translation has been made possible thanks to the financial support of the following organisations:

- Vereniging voor Bouwrecht-Advocaten (Netherlands Society of Construction Lawyers)
- Nederlandse Vereniging voor Aanbestedingsrecht (Netherlands Society for Procurement Law)
- Bouwend Nederland
- Belgian Society of Construction Law
- BNA, Branchevereniging Nederlandse Architectenbureaus (Royal Institute of Dutch Architects)
- Ministerie van Infrastructuur en Waterstaat, Rijkswaterstaat, (Ministry of Infrastructure and Water Management, Rijkswaterstaat)
- ProRail
- NEVI (Dutch Association for Purchasing Management)
- Benthem Gratama Advocaten
- Loyens & Loeff
- Witteveen+Bos
- EFCA, European Federation of Engineering Consultancy Associations

I would like to thank these organisations for making this translation initiative possible.

Explanations of some terms

Tender for Works Regulations:
The Dutch Works Procurement Regulations 2016 (Aanbestedingsreglement Werken 2016; ARW 2016) describe the procedures for putting works contracts out to tender. On the basis of the Dutch Public Procurement Act 2012 and the Dutch Public Procurement Decree (Aanbestedingsbesluit) a contracting authority is obliged to apply the ARW 2016 to public contracts for works below the European threshold values according to the 'comply or explain' principle. This only applies to contracting authorities within the meaning of the Dutch Public Procurement Act and not to other parties putting contracts out to tender (see also paragraph 4.3 of the general explanation). Contracting authorities are free to use the ARW 2016 for contracts for supplies and services. In addition, contracting authorities are free to use the ARW 2016 for contracts above the European threshold values.
Every procurement procedure is set out in full in the ARW 2016.

SME:
Small and Medium-sized Enterprises

UAV 2012:
Uniform Administrative Conditions for the Execution of Works and Technical Services 2012; these general terms and conditions are intended for use with the model contract whereby the principal assigns a contractor the realisation of construction works in accordance with a design made available to him by the principal.

UAV-GC 2005:
Uniform Administrative Conditions for Integrated Contracts 2005; these general terms and conditions have been established for the model contract whereby the principal charges a contractor with the design and execution of construction works.

Status of this translation

This translation was made by a professional translation agency, JMS Textservice BV (Volendam), and was subsequently carefully reviewed by Laurence Gormley (Professor of European Law & Jean Monnet Professor, Groningen University). It is important, however, to be aware that the translation is not an official translation issued by the Dutch authority which publishes the Proportionality Guide.

Lastly

It is my firm belief that this translation is of great use and importance for anyone involved in public procurement: contracting authorities, tenderers or academics, all over Europe and beyond.

Prof. dr. Monika Chao-Duivis

Director of the Netherlands Institute for Construction Law; Professor of Construction Law, Delft Technical University; President of the European Society of Construction Law, 2019.

Structure of the Guide

You have before you the *Proportionality Guide*. This Guide is the result of the work of the Proportionality Guide Editing Board. The Guide was established in the framework of the flanking policy relating to the Dutch Public Procurement Act 2012 (*Aanbestedingswet 2012*) (parliamentary documents II number 32440).

The law deems the principle of proportionality to be one of the fundamental principles of public procurement law. The principle of proportionality entails that the choices which a contracting authority makes and the requirements and conditions it sets for a tender, must be reasonably proportional to the nature and scope of the contract to be awarded.

For example, it can be disproportional to follow a public procurement procedure for a complicated design contract, because an unlimited number of market parties have to incur costs to meet the criteria; in such a case it would be more logical to apply a restricted procedure (with pre-selection), so that only parties with a reasonable chance of being awarded the contract will incur the costs of submitting a tender. A selection criterion can also be disproportional when it sets requirements for reference contracts which are many times greater than the actual contract to be awarded.

The Editing Board consisted of four members and an independent chairman, with administrative support from the Ministry of Economic Affairs (EA). Two members work with market parties and two members with contracting authorities. The Editing Board carried out its activities in the period from April 2010 to January 2013 and in that period met – only in its full composition – 19 times at the Ministry of EA in The Hague.

Previous versions of the *Proportionality Guide* were discussed at the meetings. This Guide is the result of intensive consultation with the Editing Board and represents the collective vision of the Editing Board members with regard to the topic of proportionality. Interim versions of the Guide have been discussed in the Sounding board Group, consisting of representatives of contracting authorities and the business community and a number of independent members.

The *Proportionality Guide* presents the vision of the members of the Editing Board regarding the way in which the term 'proportionality' must be dealt with in public procurement procedures. Toward this end the Guide goes through the entire procurement procedure. The Editing Board acknowledges that 'purchase' is a broader concept than 'procurement'. However, it did try as much as possible – in the light of its role in flanking policy relating to the Public Procurement Act – to restrict itself in the Guide to the topics which are relevant for the procurement procedure.

With regard to 'proportionality', in the Editing Board's opinion, the preliminary stage in the procurement procedure is the decisive stage. In this stage the contracting authority makes its most important decisions with regard to the nature and scope of the contract. In that stage the decisions must also be made about application of the rules relating to dividing contracts into 'lots', the use of framework agreements, the need for suitability requirements or the terms and conditions of the contract. The chapters covering the pre-tender stage and the drawing up of the tender documents therefore take up most of the Guide.

The Editing Board hopes to make it clear with the Proportionality Guide that the concept of 'proportionality' can play a role in many ways and in many places in the procurement procedure, both above and below the European 'threshold'. Awareness of the ways in which proportionality can play a role and a reasonable application by contracting authorities are essential for fair competition between the market parties in obtaining the contract.

In its original form the *Proportionality Guide* intended to provide guidance for a reasonable application of the principle of proportionality. During the legislative process the *Proportionality Guide* gained a somewhat different status than it was given in the original bill. For this reason the definite version includes 'rules'. The Editing Board wished to emphasise that these 'rules' must be read in the context of the full text of the Guide. The principle of proportionality and the application thereof also apply to the parts of the Guide for which no rules have been formulated.

The rules are numbered according to the paragraph in which they appear. Where in this Guide several rules are included in a paragraph, they are given an alphabetical reference. In the rules the word 'or' has been included a number of times, this can be read as 'and/or'.

Blue boxes in the Guide contain text from the Public Procurement Act. These are placed with the relevant parts of the Guide. Because Articles 1.10, 1.13 and 1.16 are to a great extent the same, inclusion at certain points of only Article 1.10, which is the most comprehensive, has been deemed sufficient. The text also includes yellow boxes which provide a description of an example or a concrete case.

The Proportionality Guide Editing Board strongly recommends reading and using the *Proportionality Guide* when engaging in a procurement procedure.

Proportionality Guide Editing Board:

- A. (Annechien) Sloots, Editing Board member
- H.J.I.M. (Hub) Keulen, Editing Board member
- M.A.Th. (Meriam) de Koning- van Rutte, Editing Board member
- M.A.J. (Marcel) Stuijts MSc, Editing Board member
- J.M. (Jan) Hebly, chairman

The Hague, 15 January 2013

Explanatory note with the 1st revision

In March 2014 revised European procurement directives were introduced for the classical sectors (2014/24/EU) and the special sectors (2014/25/EU) and a new European procurement directive on the award of concession contracts (2014/23/EU) saw the light of day. The revised European legislation has been implemented in the Dutch Statute amending the Procurement Act 2012 (*Wet tot wijziging van de Aanbestedingswet 2012*) pursuant to the implementation of the procurement directives 2014/23/EU, 2014/24/EU and 2014/25/EU (Parliamentary Documents II, 2015-2016, 34 329).

The changes in the law necessitate a revision of the *Proportionality Guide*. In a slightly altered composition (one of the original members no longer works in public procurement practice) the Editing Board assessed the changes as to relevance for the application of the principle of proportionality. Where necessary in the opinion of the Editing Board, this led to adjustment of the text of the Guide. Changes other than those connected with the revised legislation have not been implemented.[1]

In the Editing Board's opinion, at this time the Guide's scope merits special attention. When drafting the Guide, the Editing Board took the regulation of the classical sectors as the starting point. It did not seek to limit the application of the Guide to those sectors. At the time it was the opinion of the Editing Board that separate handling of proportionality aspects for the special sectors would, if it had been necessary, have unnecessarily complicated the structure of the Guide, with possible exception clauses and separate examples and article references. In the light of the positioning of the articles relating to the principle of proportionality in Part 1 of the Public Procurement Act 2012, the Editing Board believes (both then and now) that the contents of the Guide apply *mutatis mutandis* to procurement contracts to which the provisions of Part 3, and now also Part 2a, apply.

The references to statute articles relate to articles from the Public Procurement Act 2012, which was revised in 2016. The text of the 1st revision of the *Proportionality Guide* takes electronic procurement (e-procurement) as its starting point; however, the related statutory obligation only becomes effective on 1 July 2017.

The text for the 1st revision of the *Proportionality Guide* was discussed in the Sounding Board Group, consisting of representatives of contracting authorities and the business community and a number of independent members.

Proportionality Guide Editing Board (1st revision):

- J.A. (Joost) Heurkens, Editing Board member
- H.J.I.M. (Hub) Keulen, Editing Board member
- M.A.Th. (Meriam) de Koning-van Rutte, Editing Board member
- M.A.J. (Marcel) Stuijts MSc, Editing Board member
- J.M. (Jan) Hebly, chairman

The Hague, 22 April 2016

1 With the exception of a few obvious typing errors and logical updates.

Table of contents

1.	**Introduction**	**7**
1.1	Explanation of the principle of proportionality	7
1.2	Effectiveness and legitimacy	8
1.3	Relationship between purchasing and procurement	8
2.	**Pre-tender stage**	**9**
2.1	Introduction	9
2.2	Needs	10
2.3	Goal	11
2.4	Purchasing strategy	11
2.5	Market consultation	12
2.6	Schedule of Requirements	13
2.7	Tender, evaluation and award	13
3.	**Drafting tender documents**	**14**
3.1	Introduction	14
3.2	Defining the subject-matter	15
3.3	Scope of the contract	15
3.3.1	Proportionality in combining contracts	16
3.3.2	Lots	19
3.3.3	Framework agreements	21
3.3.4	Central purchasing body/purchasing cooperation	24
3.3.4.1	Forms of purchasing cooperation	25
3.3.4.2	Shrinking of the market and proportionality	26
3.4	Choice of procurement procedure	26
3.4.1	Character of the market	27
3.4.2	Common procedures	27
3.4.3	Less common procedures	30
3.4.4	Procedure rules	30
3.5	Requirements & criteria	31
3.5.1	Exclusion grounds	31
3.5.1.1	Mandatory exclusion grounds	32
3.5.1.2	Optional exclusion grounds	33
3.5.1.3	Self-Declaration/proof	37
3.5.2	The elaboration of suitability requirements	37
3.5.2.1	Requirements relating to financial and economic strength	38
3.5.2.2	Requirements relating to technical and professional skill	43
3.5.3	Selection criteria	46
3.5.4	Requirements for consortiums	47
3.5.5	Award criteria	48
3.5.6	Sustainability/social conditions	50
3.5.7	Relationship with other legislation	53
3.6	Time limits	54
3.7	Variants	57
3.8	Tendering costs	58
3.9	Contract terms and conditions	59
3.9.1	Individual contract clauses	61
3.9.1.1	Liability clause	61

3.9.1.2 Intellectual property 62
3.9.1.3 Most-favoured customer clause 62

4. Tender stage 63

4.1 Questions for and notices of contracting authority 63
4.2 Formal requirements 63
4.3 Standstill period 64
4.4 Complaints procedure (proportionality aspect of complaints procedure) 64

1. Introduction

1.1 Explanation of the principle of proportionality

The principles of procurement law are laid down in the Dutch Public Procurement Act 2012 (*Aanbestedingswet 2012*) (hereafter: the Act) The principle of proportionality is one of the main principles, along with the principle of non-discrimination, the principle of equality and the principle of transparency. On the basis of this principle, contracting authorities[2] are bound in the framework of the procurement procedure to set proportional requirements and conditions. The term 'proportional' means 'in reasonable proportion to'. More concretely, this means in the event a public contract is put out to tender, being reasonably proportional to the subject-matter of the public contract in terms of the nature and scope of the public contract. The principle of proportionality relates to all stages of the procurement procedure, thus from the choice of tender procedure, the number and the contents of the requirements to be set, up to and including the contract terms and conditions. The scope of the principle of proportionality will be explained in further detail in §3.1. Per public contract a contracting authority must therefore make a careful consideration of the relevant choices at every stage of the procurement procedure. This relates to, for example, the procurement procedure which is chosen, whether or not to combine contracts or divide them into lots, and the requirements to be set and whether these are in the correct proportion to the nature and scope of the contract. This Guide provides guidance for these considerations.

The Proportionality Guide in its entirety sets out the guidelines referred to in the Dutch Public Procurement Decree (*Aanbestedingsbesluit*) and provides guidance for a reasonable application of the principle of proportionality. In addition, rules are laid down in chapters 3 and 4 of this Guide. Pursuant to the Act, contracting authorities must comply with these regulations, or, deviation from (parts of) these rules must be explained in the tender documents. Every contracting authority must be able to present reasons for its choice to deviate from these rules, for example when selecting more stringent requirements. It is obviously not possible to completely decide against application of the rules in the Proportionality Guide nor can a general deviating ground be chosen. Where relevant it will have to be stated, with reasons, why and to what extent a deviating position is justified in that specific situation. Deviation from the rules is therefore not possible without good grounds. These rules do not stand alone, but must always be assessed in the context of the full text of the Guide. The principle of proportionality and the application thereof also apply to the parts of the Guide for which no rules have been formulated.

In any event, other obligations regarding presenting reasons also apply. This includes such things as, inter alia, the reasons on which a decision not to award is based. Such a decision must be made in time, in an accessible manner with sufficient substantive arguments. These obligations to present reasons will not be discussed in further detail in this Guide, as they do not specifically touch upon the principle of proportionality.

2 Where this Guide speaks of contracting authority this also means special sector company. The special sector company will apply this Guide *mutatis mutandis* within the framework applicable to it.

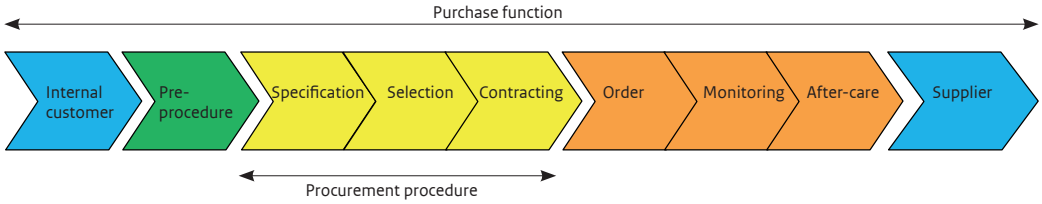
1.2 Effectiveness and legitimacy

In the desire to apply the principle of proportionality, both the effectiveness and the legitimacy of the procurement procedure must be taken into account. In principle, effectiveness relates to the way in which public resources are spent.

This can be geared to, inter alia, a good price/performance ratio of the purchased goods or services (*Best value for taxpayer's money*) and/or the stimulating of the local economy. In addition, in a procurement procedure in the framework of the legitimacy, equal opportunities of participating parties must be safeguarded and integrity risks must be combatted. Legitimacy relates to compliance with legislation and regulations. With regard to the principle of proportionality, this Guide provides guidance for contracting authorities on how to deal with this.

1.3 Relationship between purchasing and procurement

Purchasing and procurement are closely related. The purchasing of products, services and works is the greater whole of which procurement is a specific part. Procurement is one method of purchasing. The procurement method of purchasing is characterised by putting the contract out to tender to competing parties at the same time, on the same conditions, terms and procedure rules. This Guide relates in particular to the stage in which the specification, selecting and contracting takes place, as that is where the choices which are relevant in terms of proportionality are made.



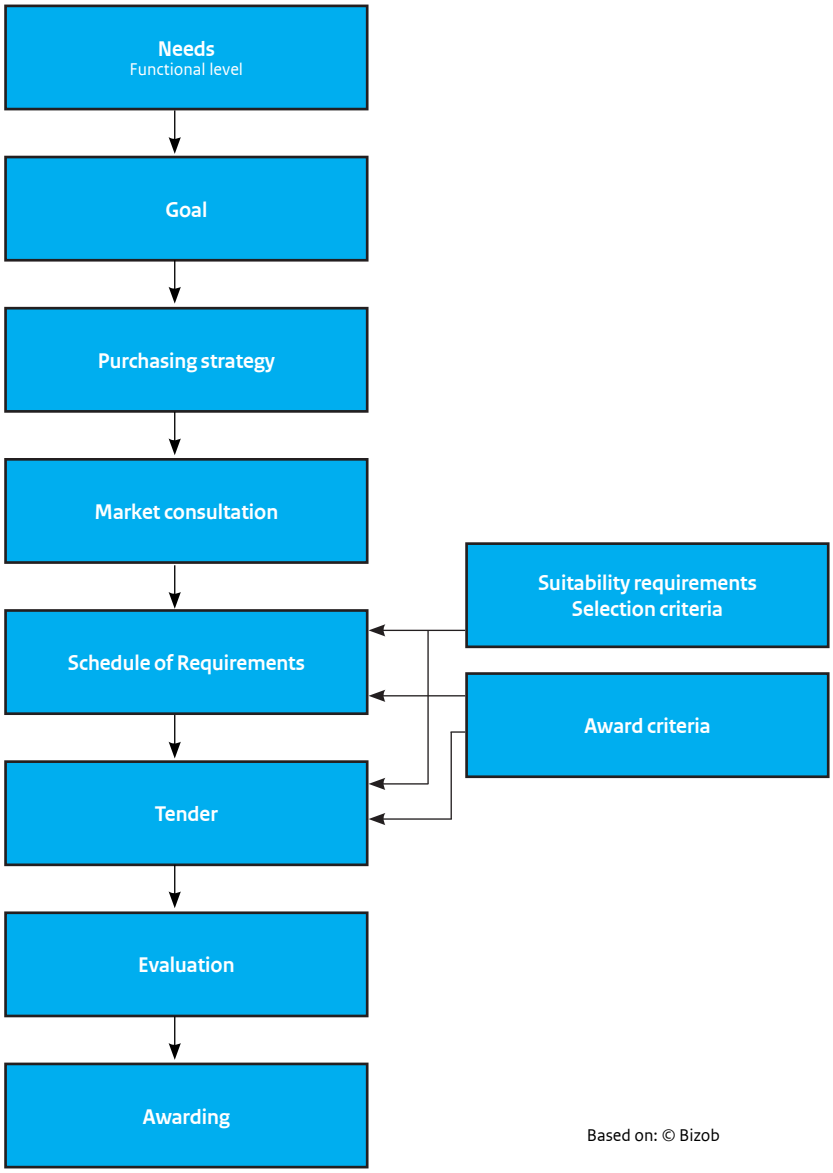
Based on: (Lysons & Farington, 2006)

2. Pre-tender stage

2.1 Introduction

Procurement is a sub-process of the much more extensive purchasing process. A strategy has to be formulated before a purchasing process is started. A good purchasing strategy is derived from the organisation's goals. A few examples: is price important, what are social goals, does quality have priority, does the organisation wish to anticipate new developments or would it prefer to be more reserved and be a 'follower'? This also means that one organisation's purchasing strategy for a product can differ substantially from another organisation's purchasing strategy. It is important to consider the organisation's goals in terms of the situation on the market. Is it a market with many or only a few suppliers, is there a strategic service whereby you enter into a long-term relationship with a supplier, or does the contract concern incidental supplying of a simple product? Are you coming to the market with a detailed contract description (technical specification), or are you coming to the market with a global functional description of the contract, and are you tasking the supplier with coming up with a technical solution for your functional problem?

In addition, the organisation's strategy, and the purchasing strategy derived therefrom, will undergo change over time. This is an important reason to first carry out thorough research at the start of a purchasing process and not to show 'copy & paste' behaviour, not with regard to other organisations (which may have completely different organisational goals) nor with regard to documents of the own organisation from some years ago. Every purchasing process is unique, whether it concerns, works, supplies or services. This requires the making of careful considerations with regard to the concrete situation which is to lead to tailored work. Simply taking over, for example, requirements, conditions and criteria without further consideration as to whether they are suitable for this contract may not only give rise to ambiguities, but can also lead to disproportionality. In all stages of the purchasing process, and thus not only during the procurement stage, it is important to safeguard the proportionality of what is requested. The purchasing process with the purchasing strategy is set out in the overview below and is explained in further detail in the subsequent paragraphs.



Based on: © Bizob

There is no general, uniform purchasing strategy which is suitable for all supplies, services and works to be purchased. The best purchasing strategy to be applied depends on the product, service or works to be purchased and the specific market situation.

The purchasing strategy to be applied is determined, inter alia, by the combining of 2 factors:

- the estimated value of the contract;
- the purchasing risk (are there alternatives or is the contracting authority, for whatever reason, strictly bound by one or a very limited number of suppliers, service providers or contractors).

Every purchasing segment (from routine to strategic purchases) has its own purchasing strategy to be applied.

2.2 Needs

In this first exploratory stage the organisation's needs are charted. The current situ-

ation is analysed in that framework. For example, when existing service provision is concerned, the following questions are relevant: what contracts do we already have, what is going well and what is not going well and to what extent have the needs of the organisation changed? At this stage it is wise to ask fellow contracting authorities how they dealt with such procedures, in order to look at new possibilities, separate from your own experience. This is a stage purely intended to make an inventory, proportionality aspects are not yet relevant here.

A municipal primary school needs a new sports facility for gym classes. The school board asked the ministry and neighboring municipalities about possible current and relevant developments.

2.3 Goal

This sports facility must be:
- sustainably built;
- at least 500 m²;
- completed at the latest with two years latest

The purchasing process must make a contribution to achieving the general goals of the organisation. The purchasing goals are therefore directly derived from the general goals. It is important to make those goals as concrete as possible. Only then can they explicitly be taken into account in the purchasing process For example they could include goals relating to functionality, sustainability, delivery time and costs. This stage does not have immediate proportionality aspects. There may be indirect proportionality aspects, for example with a goal for the lead time of a contract. At the time that the organisation asks the purchaser for an extremely short lead time for a contract, this can entail that this requirement is translated into extremely high (perhaps disproportional) requirements for the tenderers, resulting in competition being unnecessarily and wrongly restricted.

2.4 Purchasing strategy

When putting the sports facility on the market the following internal wishes apply:
- local and regional contractors must be considered;
- the project will be put out to tender in 3 lots;
- the installer should have at least 1 comparable reference

The basic principle of the purchasing strategy is that the product, services or works will be acquired for the right price/performance ratio. One of the fundamental principles of the EU treaty is that the procuring service will treat contractors equally, regardless of size and place of business. The basic principle applies to all goals of the purchasing procedure.

Partly on the basis of a market analysis you can determine whether it is wise to combine contracts or divide them into lots, or perhaps put out a joint tender with other contracting authorities, which may or may not on the basis of a specific division into lots (see also §3.3.1 and §3.3.2).

The purchasing strategy may not, however, be designed with the intention of avoiding application of the law or artificially restricting competition (see Article 1.10a). This means that the purchasing strategy may not have as its goal to advantage or disadvantage specific economic operators. Nor may less favourable terms be set for economic operators from countries which do not belong to the EU (see Article 1.23).

As has been indicated above, all in all there is no general uniform purchasing stra-

tegy which is suitable and right for all products, services and works to be purchased. The best purchasing strategy to be applied, in addition to the organisational goals, depends on the product, services or works to be purchased and the specific market situation.

The purchasing strategy to be applied will, in addition, be determined by the combination of 2 factors:

- the estimated value of the contract;
- the purchasing risk (are there alternatives or is the contracting authority, for whatever reason, strictly bound to one or a very limited number of suppliers, service providers or contractors?).

Every purchasing segment from routine purchasing (low value, low risk) to strategic purchasing (high value, high risk) has its own purchasing strategy to be applied.

Determining the purchasing strategy forces the purchasing team to thoroughly think through the choices to be made in advance. As soon as these choices have been recorded and confirmed by the persons responsible within the organisation (if necessary at several levels) they are fixed for the rest of the purchasing process, including the procurement procedure. A number of these choices has a clear proportionality impact. These choices will be discussed in further detail in chapter 3.

2.5 Market consultation

Knowledge of the market is necessary. Market consultation is an important instrument for reviewing the findings on, inter alia, the goal, the need and any purchasing strategy, but also to look whether the formulated question aligns with what the relevant market has to offer and whether or not there are better solutions, etc. A consultation can also paint a picture of the structure and composition of the relevant market. It can be reviewed what cooperation/business relationship would be most suitable in the market for that contract. On the part of contracting authorities there is sometimes reticence to talk to potential tenderers prior to putting a tender out. This ensues from, inter alia, fear of possible litigation, discussions on insider knowledge and the like. However, this is not necessary. Naturally care must be taken to ensure that the general principles, such as transparency, are properly safeguarded. This is possible, for example, by making an accurate report of the contents and the process of the market consultation, which will be added as a document with the tender documents. If a choice is made for any form of market consultation, this may lead to there being a covert selection or procurement procedure.
A market consultation is a very comprehensive concept and one market consultation can be very different from the other. In various contracting authorities, but also in various industries, usable forms of market consultation are available.

A contracting authority wants to put a tender for telecom services and equipment on the market and wants to hear from the market parties whether the choices which have been made in the strategy document are realistic and feasible. To this end the contracting authority has an ICT Feasibility review carried out especially geared to these questions. This allows the contracting authority to get a good picture of the structure and what is and is not possible in the market, while market parties can indicate before the tender how the contracting authority can improve the request. In order to satisfy the principles of procurement law, a detailed report of the session is published, so that market parties which are not present receive the same information.

2.6 Schedule of Requirements

Functional specifications are defined relating to the inside climate goals of the sports facility (such as temperature, air humidity). The tenderer states in his offer how it intends to achieve these.
Technical specifications will precisely describe what technical requirements the installations must satisfy.

In this stage the need, the goals, the purchasing strategy and the information which is obtained from the market consultation are translated into a concrete document on the basis of which the procurement is to be implemented. This is roughly possible in two ways: functional or technical specifications. Functional specifications describe the function which products, services or works are to perform. Technical specifications, on the other hand, contain the precise characteristics which products, works or services must satisfy. Functional specifications offer tenderers the freedom to present specific solutions for a problem, instead of prescribing in detail what solutions must be provided. The choice for functional or technical specifications has direct consequences for the requirements which are set for the tenderer. In one case you want to know whether the tenderer can produce something that is described in detail, in the other case you are asking the tenderer to come up with a solution for your problem. When drawing up the schedule of requirements choices are thus made which can have a clear proportionality aspect.

2.7 Tender, evaluation and award

These topics will be discussed later on in this Guide; the discussion will only focus on the proportionality aspects connected with these topics.

3. Drafting tender documents

3.1 Introduction

It is necessary to formulate requirements and conditions when actually putting a contract out to tender. When elaborating on the requirements and conditions, the principle of proportionality plays an important role. The general rule can be found in the Act itself, in Article 1.10 for European tenders and Article 1.13 for national tenders, with the exception of multiple private tenders, which are regulated in 1.16.

Article 1.10

1. When preparing and concluding a public contract, a special sector contract or a concession contract or organising a design contest, a contracting authority or a special sector company shall only set requirements, conditions and criteria for the tenderers and the tenders which are reasonably proportional to the subject-matter of the contract.
2. When applying the first paragraph the contracting authority or the special sector company, in so far as applicable, shall in any event take the following into account:
   a. whether or not to combine contracts;
   b. the exclusion grounds;
   c. the contents of the suitability requirements;
   d. the number of suitability requirements to be set;
   e. the time limits to be set;
   f. the award criteria;
   g. compensation for high costs of a tender;
   h. the terms and conditions of the contract.
3. By General Administrative Measure, guidelines shall be established which encompass regulations relating to the way in which contracting authorities or special sector companies designated by said General Administrative Measure are to implement the first paragraph.
4. The contracting authority or the special sector company shall apply the regulations referred to in the third paragraph or it shall present reasons for a deviation from one or more of those regulations in the tender documents.

Article 1.13

1. When preparing and concluding a contract, a contracting authority or a special sector company shall only set requirements, conditions and criteria for the tenderers and the tenders which are reasonably proportional to the subject-matter of the contract.
2. When applying the first paragraph, the contracting authority or the special sector company, in so far as applicable, shall in any event take account of:
   a. whether or not to combine contracts;
   b. the exclusion grounds;
   c. the contents of the suitability requirements;
   d. the number of suitability requirements to be set;
   e. the time limits to be set;
   f. the award criteria;
   g. compensation for high costs of a tender;
   h. the terms and conditions of the contract.

3. By General Administrative Measure, guidelines shall be established which encompass regulations relating to the way in which contracting authorities or special sector companies designated by said General Administrative Measure are to implement the first paragraph.
4. The contracting authority or the special sector company shall apply the regulations referred to in the third paragraph or it shall present reasons for a deviation from one or more of those regulations in the tender documents.

Article 1.16

1. When preparing and concluding a contract, a contracting authority or a special sector company shall only set requirements, conditions and criteria for the tenderers and the tenders which are reasonably proportional to the subject-matter of the contract.
2. When applying the first paragraph, the contracting authority or the special sector company, in so far as applicable, shall in any event take account of:
   a. whether or not to combine contracts;
   b. the time limits to be set;
   c. the costs connected with the tender;
   d. the terms and conditions of the contract.
3. By General Administrative Measure, guidelines shall be established which encompass regulations relating to the way in which contracting authorities or special sector companies designated by said General Administrative Measure are to implement the first paragraph.
4. The contracting authority or the special sector company shall apply the regulations referred to in the third paragraph or it shall present reasons for a deviation from one or more of those regulations in the tender documents.

Note: Hereafter in this Guide, when citing the above articles, where possible the text of Article 1.10 will be cited and the other articles will simply be referenced.

The second paragraph is always concerned with a limited specification of topics which in any event, as indicated in the Act, fall under the principle of proportionality; the scope of the principle of proportionality is, however, broader. Proportionality relates to all stages of the procurement process, from the choice of tender procedure up to and including the awarding of the contract. In addition to the requirements and criteria, contract terms and conditions, inter alia, also play a role in this respect.

In order to come to an optimal proportional elaboration of the above-mentioned aspects, the contracting authority must have clearly formulated the purchasing needs. Freely translated, as described in chapter 2:

- What do I want?
- Who do I need to achieve this?
- Whatare potential specific risks which I wish to cover in the procurement procedure?

3.2 Defining the subject-matter

It is of vital importance for the contracting authority to first have a clear picture of what the contract to be put out to tender precisely encompasses. In other words: the characteristics of the contract, in terms of a schedule of requirements, must be charted. The way in which this can take place, is explained in §2.6.

3.3 Scope of the contract

A realistic estimate will then have to be made per contract. On the basis of this estimate the various requirements set for the contract or the tenderer can be further elaborated.
The defining of the contract in a financial sense is not the only thing to influence

the requirements. The scope of the contract, in terms of whether or not to combine contracts or to split them up into lots also plays a role. Combining contracts and dividing contracts into lots are two sides of the same coin. The following paragraphs will go into the phenomenon of 'combining' on the one part and 'dividing into lots' on the other.

Article 2.13
The contracting authority shall estimate the value of the intended public contract or design contest or the intended dynamic purchasing system or innovation partnership in accordance with Articles 2.14 through 2.22.

3.3.1 Proportionality in combining contracts

Article 1.10 (1.13 and 1.16 contain corresponding provisions for national procurement procedures and multiple private tenders)

1. When preparing and concluding a public contract, a special sector contract or a concession contract or organising a design contest, a contracting authority or a special sector company shall only set requirements, conditions and criteria for the tenderers and the tenders which are reasonably proportional to the subject-matter of the contract .
2. When applying the first paragraph the contracting authority or the special sector company, in so far as applicable, shall in any event take account of:
   a. **whether or not to combine contracts;**

...

Article 1.5

1. A contracting authority or special sector company shall not unnecessarily combine contracts. Before contracts are combined, account shall in any event be taken of:
   a. the composition of the relevant market and the influence of the combining on the access to the contract for enough economic operators from the SME sector;
   b. the organisational consequences and risks of the combining of the contracts for the contracting authority, the special sector company and the economic operator;
   c. the degree in which the contracts are related.
2. If contracts are combined, the contracting authority or the special sector company shall state the reason therefor in the tender documents.
3. A contracting authority or a special sector company shall divide a contract into several lots, unless it does not deem such appropriate, in which case the contracting authority or the special sector company shall state the reason therefor in the tender documents.

There are various forms of combining: combining similar contracts within one contracting authority, combining similar contracts from different contracting authorities and combining dissimilar contracts.
The latter can relate to dissimilar contracts which must be performed simultaneously or successively.

Similar contracts within one contracting authority:
A contracting authority with several independent establishments combines all contracts for security services for all locations into one contract.

Similar contracts of various contracting authorities:
Three Water Boards combine their printing contracts for the coming two years into one contract.

Successive dissimilar contracts:
A contracting authority makes one contract for the design, execution and long-term, multi-year maintenance of a national motorway. These contracts, which follow each other in time, are combined into one contract.

Simultaneous dissimilar contracts:
A contracting authority combines the contracts for catering services, cleaning and technical maintenance of its buildings into one contract.

The similarity of contracts requires critical review, whereby market knowledge plays a big role. This appears from the following examples:

A contracting authority has put out a tender, combining different interpreting and translation services. The contract has been divided into 2 large lots for interpreting and translation services for various independent establishments. The 2 lots each cover all language combinations and all areas of specialisation. In view of the size of the lots, a minimum turnover is required of

€ 1,900,000 for lot 1 and € 1,600,000 for lot 2. This procurement will have a direct effect on the interpreting and translation market, partly because the specialisation areas are combined. It matters a great deal whether someone is a certified legal translator or a medical translator, or if someone translates Swedish or Iraqi. Currently the right translator is often not at the right place.

Another contracting authority has decided that it will no longer cluster all personal interpreting services (i.e., not including interpreting over the phone) and is putting them out to tender directly on the market one by one. Its arguments for this decision are: the risk of reputation damage is smaller and there is a need for confidential and personal contact with the people who provide the service. This contracting authority indicates that these personal services cannot be combined into one homogenous service. Naturally this does not necessarily mean that the value of all those individual contracts should not be added up in order to determine whether the contract exceeds the tender threshold and actually has to follow a tender procedure.

Article 2.15a

1. If a contracting authority consists of individual operating units, the total estimated value of these units shall be taken into account when determining the estimated value of the public contract.
2. If an individual operating unit is independently responsible for its tenders or certain categories of tenders, in deviation from the first paragraph, the value of a public contract can be determined at the level of the relevant operating unit.

A common misconception is that independent units of one contracting authority are obliged to combine similar contracts. If the matter truly concerns an independently functioning unit, this is not necessary from the perspective of procurement law and could even be contrary to Article 1.5 or the principle of proportionality.

To review whether there is an “operating unit” the following cumulative requirements apply:

- independent purchasing/own responsibility;
- possesses a separate purchasing budget;
- provides for own needs through purchasing;
- independent contracting.

Unnecessary combining of contracts is not permitted under the Act.
If contracts are combined, the reason therefor must be stated in the tender documents.

Combining contracts can be a means to achieving certain goals. The combining of contracts must be justified and reasons must be presented therefor with an eye on the criteria laid down in the law. Every form of combining has advantages and disadvantages. These are dependent on the specific circumstances of the contract and they must be clearly presented.

When a choice has been made to combine contracts in one tender, with reasons based on a correct weighing up of the various interests, pursuant to the Act the basic principle is that the contract will be divided into several lots. See also §3.3.2.

The size of a contract is not a static fact. A balance must be sought between the advantages and disadvantages of a large contract (the '*economy of scale*' versus the '*economy of scope*'). On the one part, an increase in scale can lead to limiting transaction costs (tender costs and administrative costs) and a lower price. On the other hand, an increase in scale can lead to an increase in the complexity of the contract which can be of influence on the manageability and lead time (with related costs) and an increase in risks and costs of failure.
When evaluating whether combining contracts (or dividing into lots, see §3.3.2) is effective in this case, the total costs (costs of preparation, tendering, realisation, exploitation and maintenance) and possible other relevant aspects of the contract must be taken into account.

One of those other relevant aspects is the composition of the relevant market. The number of potential tenderers must be such, that competition is safeguarded and is not noticeably restricted.[3]

Taking account of the above, two or more (similar or otherwise) contracts can thus be combined:
- when they concern logically coherent units which are inseparably connected with each other[4];
- whereby – in the framework of the market relationships – the position of SMEs is carefully analysed and weighed up; and
- the contracting authority can present good reasons for the need tocombine.

A nationally operating contracting authority combines the technical maintenance for the installations for its buildings for all its locations in the Netherlands in one contract for 4 years. This seriously restricts the options for SMEs. In addition, this makes the contracting authority highly dependent on one market party, which can entail supply risks.

3 For more information, see § 3.5.4.
4 'Inseparably connected with each other' means those units which do not have an independent function separately from each other, for example due to a technical and/or organisational need for combining; artificial combining or grouping together of smaller similar projects must be combatted.

Another contracting authority combines the stand-alone disciplines of security, interior cleaning, catering, window washing and groundskeeping. The market is particularly characterised by companies which offer one of these disciplines, with the odd exception offering two. By demanding that one party execute this contract in its entirety, only a very limited part of the market will be eligible for this contract. This is disproportional.

3.3.2 Lots

Article 2.14

1. The contracting authority shall not split the intended public contract, or design contest or the intended dynamic purchasing system or innovation partnership with the intention of avoiding application of this statute.
2. The contracting authority shall not make the choice for the method of calculating the estimated value with the intention of avoiding application of this statute.

A contracting authority with several establishments makes a conscious choice when procuring its facilities services (cleaning, security or catering) to divide the contract into (geographical and/or functionally determined) lots, so that one tenderer cannot be awarded all lots.

When a number of smaller municipalities combine the volume for the exploitation of waste recycling centres, 3 to 5 potential economic operators remain who can execute this entire contract, while many more economic operators are operating in the relevant market segments. Combining restricts the market working, with as a possible result a shrinking market. This can be resolved by dividing this contract (for example) into 5 lots:

1. Recycling paper collection, transport and processing;
2. Recycling glass collection, transport and processing;
3. Household hazardous waste acceptance, transport and processing;
4. Management of the waste recycling centres (operational exploitation);
5. Transport of the collected waste recycling flows to processors.

The public contract is divided into 5 sub-contracts (lots) which align with the market segments.

Article 2.10

1. A contracting authority shall state in the notice of the public contract whether tenders can be submitted for one or more lots.
2. If several lots can be awarded to the same tenderer, a contracting authority can award a public contract for a combination of lots or for all lots, provided in the notice of the public contract it:
   a. has reserved the option of doing so, and
   b. it has indicated what lots or groups of lots can be combined.
3. Without prejudice to the first paragraph a contracting authority can limit the number of lots to be awarded to a tenderer, provided the maximum number of lots per tenderer is stated in the notice of the public contract.
4. In a case as referred to in the third paragraph a contracting authority shall state in the tender documents the objective and non-discriminatory rules which it will apply to determine what lots shall be awarded if the application of the award criteria were to lead to the awarding of more lots than the maximum number to the same tenderer.

A contracting authority is not permitted to intentionally split a contract into parts, in order to avoid the obligation to follow the European tender procedure. This prohibition on division can be found in Article 2.14 of the Act. In this case the term 'lots' is sometimes wrongly used.

In the framework of public procurement, the term 'lots' refers to splitting a contract into several sections within the rule of procurement law. The basic principle of the law is that in principle combined contracts must be divided into lots. For example, a choice may be made for division into lots because when determining the purchasing strategy it turned out that the contract demands various types of expertise which often cannot be provided by one economic operator. Another reason to choose for division into lots can be that the contracting authority also wants to give the somewhat smaller economic operators the opportunity to compete for a part of the contract. Lastly, the division into lots can also be an intentional strategy of a contracting authority, in order not to become dependent on one economic operator in a specific market segment.

The law gives the possibility of restricting the number of lots which can be awarded to one tenderer. With a contract which is divided into lots, on the basis of this possibility it can be indicated that one tenderer can, for example, be awarded one or two lots, but not all. This power must be used consciously, whereby, for example, the market, geographic spread and disciplines play a role.

It can be proportional to include a restriction of the number of lots to be awarded per tenderer. The protection of the interests of the SMEs can play a role in this respect, but so can the reducing of risk for a contracting authority. Think of such things as ensuring the individual economic operator can handle the quantity of work and increasing the opportunities of acquiring a contract.

Combining a number of lots can also have advantages for the market and/or the contracting authority. It is proportional not to set a restriction in advance on the number of potential lots to be awarded.

If use is made of the option to restrict, it must be made clear in the tender documents how the allocation is to take place (§ 2.4). When making this choice the contracting authority must provide substantiation for the reasons underlying this choice.

A geographically-spread out contracting authority opts, when putting security services out to tender, that a tenderer can only be awarded in the Eindhoven or Tilburg or Limburg region.

In addition to a number of national economic operators, this industry also has a large number of local / regional SME economic operators. By making this choice the SME operators have more opportunities, and the contracting authority is less dependent on one contracting party.

There are economic operators working in the landscaping industry who only take care of grounds maintenance, other economic operators only work on paving, and there are economic operators that do both. For a contract which encompasses both (both grounds maintenance and paving) it can be useful both on the part of economic operators and on the part of the principal to divide the contract into lots. In this industry is would not be proportional to indicate in advance that a party can only be awarded one of the two lots (grounds maintenance or paving).

The risk of disproportionality is particularly found in putting a very sizeable contract on the market which is either not divided into lots, or which is divided into very large lots, so that a significant part of the market is excluded. This is neither in the interests of the business community, nor in the interests of the contracting authority (limiting the market). There must be a good balance.

Article 2.18

1. If intended works or an intended purchase of services can lead to public contract which are placed in individual lots, the contracting authority shall take the estimated total value of these lots as the basis.
2. If the composite value of the lots referred to in the first paragraph is equal to or greater than the amount referred to in Articles 2.1, 2.2, 2.3 or 2.6a, the provisions established by or pursuant to part 2 of this Act apply to the placing of each lot.
3. The second paragraph does not apply to:
   a. public contracts for works for which the estimated value is no more than € 1 000 000, exclusive of VAT,
   b. public contracts for services for which the estimated value is no more than € 80 000, exclusive of VAT, provided the total estimated value of the lots referred to under a or b together come to no more than 20% of the total value of all lots.

Article 2.19

1. If an intended acquisition of homogenous supplies can lead to public contracts which are placed in individual lots, the contracting authority shall take the estimated total value of these lots as the basis for the estimate.
2. If the composite value of the lots referred to in the first paragraph is equal to or greater than the amount referred to in Articles 2.2 or 2.3, the provisions established by or pursuant to part 2 of this Act apply to the placing of each lot.
3. The second paragraph does not apply to lots for which the estimated value is no more than € 80 000, exclusive of VAT, provided the total estimated value of those lots jointly come to no more than 20% of the total value of all lots.

In procurement procedures, the term 'lot' is also used in a different manner, i.e. in the framework of Articles 2.18 and 2.19 of the Act: the rules relating to division into lots. On the basis of these rules, when procuring works, services or supplies a part of the contract (a lot) can be kept outside of the procurement procedure, provided this part does not exceed fixed values in euros or percentages. This creates an opportunity for SMEs.

The division into lots increases the market working as more economic operators have the opportunity to participate. The contracting authority can still limit its transaction costs (in the preparation) because there is one tender procedure, but purchasing at competitive prices is possible due to better market working. In addition, the opportunities for SMEs are increased.

3.3.3 Framework agreements

Framework agreements occur in many sectors. Framework agreements increases the speed and efficiency with which the ultimate transaction can be handled for all parties involved. In a framework agreement the contract terms and conditions are known and they are periodically reviewed for market conformity by

Article 1.1

In this Act and the provisions based thereon, the following terms have the following meaning:

...

framework agreement: a written agreement between one or more contracting authorities or special sector companies

and one or more economic operators with the goal of recording the terms and conditions on which public contracts or special sector contracts are to be concluded during a specific period;
...

means of a tender procedure. Framework agreements are particularly used for routine (repeat) purchases whereby the total quantity is still uncertain. In practice a part of these agreements turn out to only be open to larger economic operators and from the perspective of market working this raises the necessary questions. Consortium forming of (smaller) economic operators (aside from the competition law restrictions relating to forming a consortium) is often difficult in practice. This is because, for example, direct competitors have to work with each other, meaning they can gain insight into how the other operates. In addition, finding a more suitable partner is also not always that easy; you have to just happen to know and trust someone. Consortium forming thus demands a lot from economic operators. In addition, the alignment of activities requires the necessary extra effort and the bigger the consortium, the more difficult this becomes. When choosing to put a contract out to tender in the form of a framework agreement, substantiation should be presented in the tender documents as to the way in which account has been taken of the parties on the relevant market and instead of a framework agreement, putting a concrete contract out to tender is also possible. Lastly, it is a basic principle that framework agreements may not have the effect of restricting access for SMEs.

In certain sectors such as civil and hydraulic engineering it can be desirable to agree prices per unit, without recordig the related quantities in advance. These are 'open item' specifications (in the RAW Standaard 2015 (industry-wide general terms and conditions applied to civil and hydraulic engineering works) referred to as a RAW Framework Agreement) lead to fictitious contracting sums in tenders. The work to be carried out is awarded on the basis of sub-contracts on the pre-agreed terms and conditions.

This system lends itself for maintenance and repair work for which the scope is not yet known in advance. In addition to these framework specifications, service specifications can also be used for the execution of work on demand depending on circumstances which cannot yet be foreseen, e.g. towing away of vehicles, de-icing activities, etc. Not only is the scope not known in advance, but it is even unclear whether use will in fact be made thereof. The use is influenced by whether or not disasters occur. In the latter specifications prices can be determined, whereby a distinction can be made according to working days/ Sundays and public holidays; inside/outside of normal working hours.

A municipality puts out minor repair contracts (per contract < € 25,000 euros) and maintenance work on roads, bicycle paths, pavements, sewage systems and access driveways inside a municipality to tender for a number of years in the form of a framework agreement. The agreement encompasses a contract for the period from 2011 to 2014 for carrying out on demand:

- repair work on roads and bicycle paths;
- small street works;
- removing tree roots;
- laying access driveways;
- lowering pavements;
- sewage works;
- etc.

Above, to form a picture, a number of specific examples relating to framework agreements have been set out. Naturally there are many more examples. In this

Guide it was decided to present a detailed elaboration of these examples. However, with regard to the latter example an outline is given of an approach which might be chosen in practice:

The repair work is to take place in a municipality consisting of 5 town centres, including the related outer areas. The town centres are at a distance of between 2.5 and 7 km from each other. The market for the work consists primarily of economic operators with 2-5 employees who are regionally oriented. The latter is in view of the low value per individual contract. In addition, many of the works have an urgent character (for example a hole in the road) and rapid action is required. In order to minimise the risk relating to supplies, a choice has been made to divide the contract into 5 lots, 1 lot per town centre. This aligns with the municipality's wishes and with the market situation.

What this paragraph is particularly concerned with, is to indicate briefly what proportionality aspects deserve attention:

Rule 3.3 A:

The contracting authority shall not stipulate in a framework agreement that tenderers keep personnel, material or equipment available without such being offset by a turnover guarantee or remuneration.

- Framework agreements can lead to disproportionality if economic operators are under an obligation to keep personnel, material, equipment and/or other goods available for the principal without this being offset by any turnover guarantee or remuneration for the economic operators in question. This can relate to a direct obligation when this is explicitly included in the contract terms and conditions, but it can also concern an indirect obligation because, e.g., an obligation to supply is laid down in the framework agreement which is so close to the awarding of the additional contract(s), that the economic operator must de facto keep the relevant personnel, material, equipment and/or other goods available.

Rule 3.3 B:

If a contract to be awarded under the framework agreement is to be divided over several tenderers, the contracting authority shall state in a transparent manner in the notice:
1. for which activities prices must be stated in the tender;
2. within what timeframe the specified activities are to be executed;and
3. in what manner these activities shall be divided among the economic operators.

- If the contracts are to be divided among several economic operators within a framework agreement, it must be made clear in advance in the notice of the framework agreement for which activities/parts prices are required when tendering and which activities will be instructed after awarding, as well as within what timeframe these matters are to be executed. In other words, it may not be the case, that 1 or more of the economic operators only first find out upon the awarding of the contract that they are being allocated an unknown, unfavourable part. For example, this can relate to activities which are not connected, but are geographically spread out so that many extra mobilisation costs must be made which have not been included in the calculations in advance.
  The (method of) dividing work among several economic operators must be transparent.
- When using 'open items' specifications, or ' RAW' framework agreements (as outlined in an earlier box in this paragraph) it is necessary that a realistic estimate is made of the scope of the contract for which a price is requested. The

prices to be issued can vary emphatically, depending on the quantity required under an obligations to provide a result. If the scope of a specific activity is difficult to estimate in advance, it can be proportional for the relevant works not to include one single specification item, but to demand prices by means of a sliding scale price for various quantities, e.g. from 0 to 100 m^2, from 100 to 500 m^2 etc.

3.3.4 Central purchasing body/purchasing cooperation

Article 1.1
In this Act and the provisions based thereon the following terms have the following meaning:
...
purchasing body: a contracting authority or a special sector company that carries out a centralised purchasing activity and an additional purchasing activity;
...
additional purchasing activity: an activity which consists of the providing of support for a purchasing activity, in particular in the following ways:
a. by making technical infrastructure available which enables the contracting authority or special sector company to place public contracts or special sector contracts;
b. by advising on the course or the set-up of the procurement procedures;
c. by preparation and management of procurement procedures on behalf of and at the expense of the relevant contracting authority or the relevant special sector company;
...

Article 2.11a
1. Two or more contracting authorities can agree to jointly carry out specific procurement procedures.
2. If a complete procurement procedure is carried out jointly on behalf of and at the expense of all contracting authorities involved, they are jointly responsible for the performance of their obligations on the basis of part 2 of this Act.
3. The second paragraph applies mutatis mutandis if a contracting authority manages the procedure and acts on behalf of itself and the other contracting authorities involved.
4. If a procurement procedure is not carried out fully jointly on behalf of and at the expense of the contracting authorities involved, they are only jointly responsible for the jointly executed parts.
5. In the case referred to in the fourth paragraph, each contracting authority has sole responsibility for the performance of its obligations by or pursuant to part 2 of this Act with regard to the parts which it executes in its own name and at its own expense.

Article 2.11b
1. Contracting authorities in various member states of the European Union can jointly place a public contract, exploit a dynamic purchasing system or, in accordance with Article 2.140, first paragraph, place a contract in the context of the framework agreement or the dynamic purchasing system.
2. In a case as referred to in the first paragraph, the participating contracting services shall make an agreement which stipulates the following:
   a. the division of responsibilities of the parties and the relevant applicable national provisions, and
   b. the internal organisation of the procurement procedure, including the management of the procedure, the division of the works, supplies or services to be tendered, and the concluding of contracts, unless these elements have already been arranged by an international agreement made between the relevant member states of the European Union.
3. The division of responsibilities and the applicable national provisions referred to in the

second paragraph, sub-paragraph a, shall be stated in the tender documents.

4. In a case as referred to in the first paragraph a participating contracting authority shall perform its obligations by or pursuant to part 2 of this Act if it acquires works, supplies or services from a contracting authority in another member state of the European Union which is responsible for the procurement procedure.
5. National provisions of the member state of the European Union where a central purchasing body is based, apply to said purchasing body:
   a. providing a centralised purchasing activity;
   b. placing a public contract in the framework of a dynamic purchasing system;
   c. giving a new notice in the context of a framework agreement;
   d. determining which of the economic operators who are a party to a framework agreement, shall execute a specific task.
6. If contracting authorities from different member states of the European Union have founded a joint entity, including an entity founded pursuant to the law of the European Union, the participating contracting authorities shall agree by decision of the competent body of the joint organisation which national procurement rules apply:
   a. the national provisions of the member state where the joint entity has its registered office; or
   b. the national provisions of the member state where the joint entity carries out its activities.
7. An agreement as referred to in the sixth paragraph can:
   a. apply for an indefinite period of time if the memorandum of association of the joint entity provides for such; or
   b. be limited to a specific term, kind of contract or to one or more individual placements of contracts.
8. Contracting autorities shall not make use of a possibility as referred to in this article with the intention of avoiding mandatory public law provisions pursuant to the law of the European Union.

Smaller organisations often cannot make sufficient qualitative and quantitative capacity free to be able to professionally steer and implement purchasing and procurement processes. Often it is department staff who have been charged with purchasing as a small part of their task package, without having the necessary background or education. Due to this lack of professional capacity the advantages of the procurement procedures are not sufficiently utilised, consequently jeopardising the legitimacy and thus the proportionality. This lack of purchasing and materials expertise can be resolved in several ways. Certainly with some more specialised or more complex procurements this can be done by means of knowledge sharing, provided the quality of the knowledge to be shared and the knowledge sharing takes place properly.

3.3.4.1 Forms of purchasing cooperation

A number of smaller contracting authorities have already sought out cooperation in the area of purchasing. This concerns joint procurement with various levels of integration of the purchasing policy and process. Every organisational group chooses the form which suits the specific circumstances of said cooperation. This varies from sharing knowledge on an ad hoc basis to the forming of an independent purchasing entity, like an association or foundation. The forms of cooperation should preferably go no further than what the weakest link in the group wants.

The advantages of cooperation are direct and evident. The more professional the procurement procedure, the more that can be saved. Procurement processes should be set up more professionally not only because of the financial advantages, but because quality aspects of procurement play an important role. Naturally the quality

of the purchasing department translates into the quality of the products, services and works themselves, but also into the quality of the management of lead times and delivery times, the preventing of unexcepted budget overruns, the integrity of the municipal organisation and the verifiable legitimacy of the expenditure. Lastly, the image of properly set-up municipal purchasing processes as an example for the own organisation, the business community and citizens is important. This plays an essential role in the developing and maintaining of confidence in the way in which public funds are spent. When contracting authorities jointly put a contract out to tender, they are jointly responsible for the correct application of the law and the principle of proportionality. Cooperation with foreign contracting authorities is also a possibility which can be used. In that case, in principle all contracting authorities must make a contract which records how the responsibilities will be divided, what national provisions apply and how the procedure is organised internally. When choosing the applicable national provisions, it is not proportional to opt for the law of another member state with the intention of evading application of this Guide.

3.3.4.2 *Shrinking of the market and proportionality*

When entering into a purchasing cooperation venture, it is important to take account of consequences which this cooperation can have on the market. Despite the fact that clear savings can be booked with tenders when being part of a cooperation venture, it is necessary to always be on guard that this does not lead to a shrinking of the market and the competitive and innovative products and services available in the long term. Purchasing and procurement is a trade and it involves an adequate analysis of the market, particularly with purchasing cooperation ventures. Purchasing cooperation ventures may explicitly not be confused with combining of contracts. This entails that purchasing cooperation may not by definition lead to the combining of contracts. On the basis of §3.3.1 a proportional weighing up has to be made for combining.

3.4 Choice of procurement procedure

Rule 3.4 A:

The contracting authority shall review per contract which procurement procedure is suitable and proportional, whereby it shall in any event take account of the following aspects:

- *size of the contract;*
- *transaction costs for the contracting authority and the tenderers;*
- *number of potential tenderers;*
- *desired end result;*
- *complexity of the contract;*
- *type of contract and the character of the market.*

A procurement procedure is a procedure with the help of which a contracting authority tries to come to awarding of a contract to a market party by calling for competition in the market. Contracting authorities are obliged to put contracts with a value above the European threshold amounts[5] out to tender at a European level. Below the European threshold amounts, contracting authorities often apply procurement procedures. The transaction costs which these procedures entail, are not always proportional to the goal to be achieved with the application of such a procedure. It is important to review per contract, which procedure is the most suitable and proportional.

5 These European threshold values for public contracts are laid down in the European directives. The European Commission establishes new threshold values very two years, these are published in the Official Journal of the European Union.

The following matters, among others, play a role when making that consideration:
- size of the contract;
- transaction costs of the contracting authority and tenderers;
- number of potential tenderers;
- desired end result;
- complexity of the contract;
- type of contract/sector.

3.4.1 Character of the market

Knowledge of the character of the market, in terms of the number of potential providers and the degree of competition, is decisive for the strategy to be followed and tactics to be applied, including the procurement procedure to be chosen. In the framework of proportionality it is important to choose that procurement procedure which best suits the relevant type of market. A different procedure is required for a market with many (equal) competitors, than with a market with only a few providers. Other differences, such as geographic differences, can play a role. For example, the same type of market can require a different procedure in one region than in another region.

In all cases there must thus be a customised procedure.

3.4.2 Common procedures

Above the threshold for European tenders a number of procedures are possible, for which the open and restricted procedures are the most well-known and the most commonly used. Below the threshold for European tenders no procedure is, in principle, prescribed. Both above and below the threshold it is important that a procedure is chosen which aligns with the subject-matter of the relevant tender, taking account of the character of the market in which potential tenderers operate (see §3.4.1). This cannot be quantified in a fixed amount: amounts can be useful, however, to determine the direction to take.

When choosing a procedure, it is good to take the (administrative) burdens which this choice entails for both the contracting authority and the tenderers into consideration.[6]
In view of these (administrative) burdens, one-on-on contracting or the negotiated procedure without prior notification seems the most suitable for 'small contracts' . With repetitive small contracts a framework agreement (see also §3.3.3) can be an effective and efficient tool. The threshold amounts of supplies and services on the one part and works on the other differ significantly from each other. When choosing the procedure it is therefore desirable to also take this difference in threshold amounts into consideration. What constitutes a 'small contract' , must in the first instance be evaluated on the basis of the considerations stated in the introductory text with §3.4. In a general sense, with regard to the value of a 'small contract' for supplies and services one could think of contracts up to € 40,000 - € 50,000, for works a minor contract (being an amount below which the one-on-one contracting procedure may in any event be applied) up to € 150,000 is deemed realistic. The value of a 'small contract' for supplies and services is, because of the difference in the thresholds, lower than those for works. A multiple private tender procedure is deemed proportional up to the European threshold for supplies and services and up to an amount of € 1,500,000 for works.

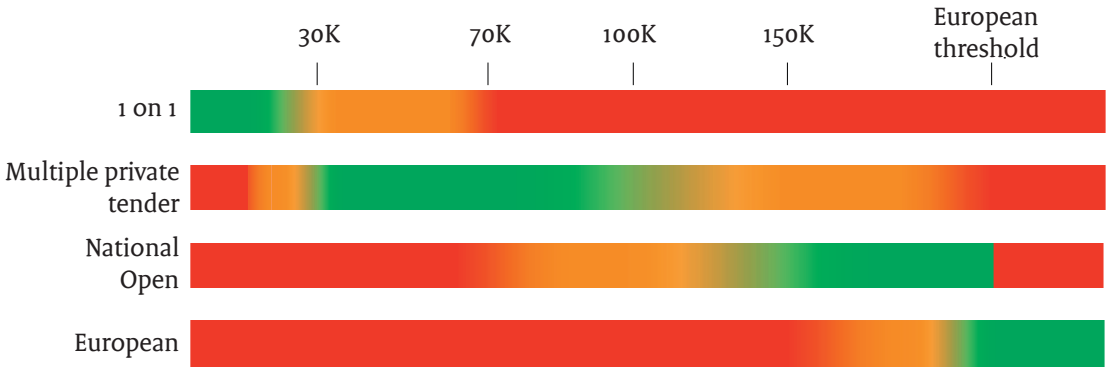
As previously indicated, amounts can be useful to determine what direction to take. The bar charts below provide guidance in this respect. These charts do not take ac-

6 See also Article 1.6. It also applies to paragraphs 3.5.2 and 3.5.4.

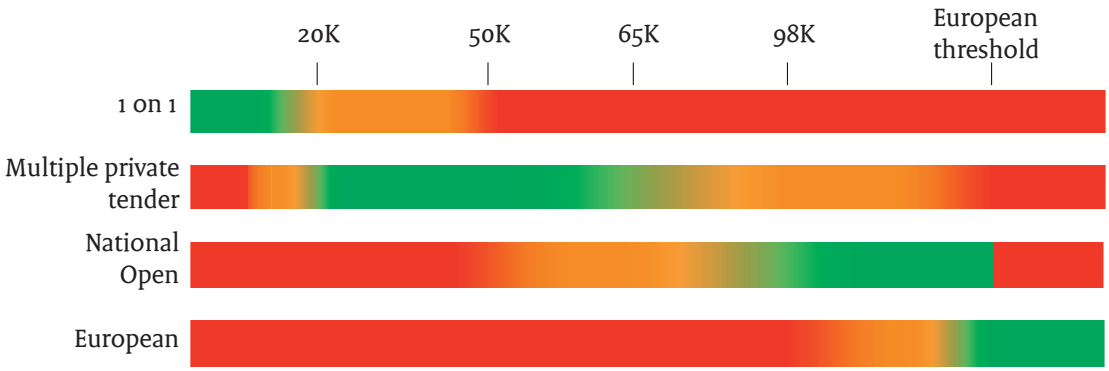
count of contracts with a cross-border interest. In such contracts it can be necessary to put a contract with lower values out to tender nationally. Aside from the general frameworks which are set out in these bars, it naturally remains important to always look at the concrete situation.

The bar charts below indicate in what manner Rule 3.4A must in principle be implemented.[7]

Supplies/services for Sub-central contracting authority

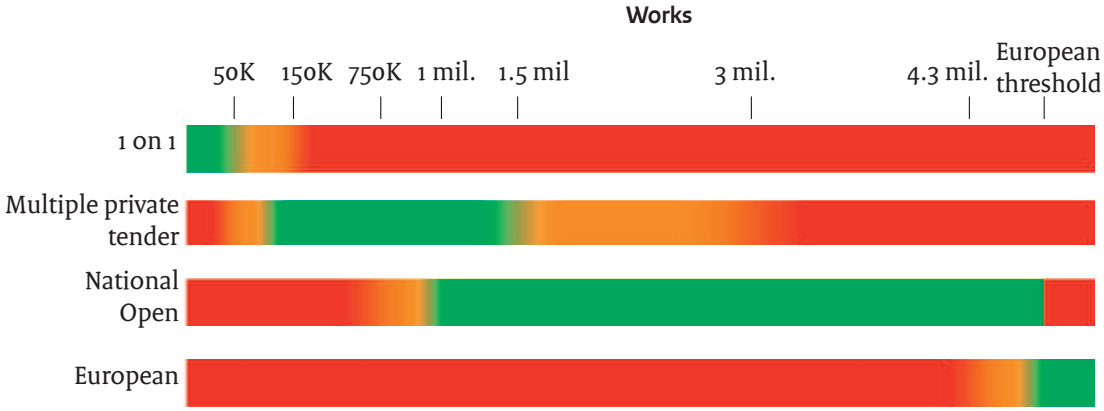


Supplies/services Central contracting authority



Contracts of an architectural or civil engineering nature, which fall under the term 'works', are very diverse in nature, varying from the installing of electrical systems, painting or insulation works in buildings up to the execution of complex infrastructure works. Examples of main categories can be activities such as installation technology, residential and non-residential construction and civil and hydraulic engineering activities. It is necessary to add some nuance in this respect, if only according to new construction, reconstruction and maintenance. In addition to the other aspects stated in § 3.4 the scope and type of activities per underlying industry are also of influence on the proportional choice for a procedure.

7 For contracts in the category "social and other specific services", in deviation from the regular threshold amounts, a threshold amount of € 750,000 applies for European tenders. For concession contracts alignment can be sought with the Works bars, just as for special sector companies alignment could be sought mutatis mutandis with the bars Supplies/services Sub-central government and Works.



Rule 3.4 B:

With a multiple private tender procedure below the European tender threshold, the contracting authority shall invite at least three and at most five tenderers to submit a tender.

If there is a multiple private procedure below the threshold, it is generally common and also sufficient, to invite between 3 and 5 economic operators to submit a tender. Inviting more economic operators means that more work will be put into making an offer, which increases the transaction costs. Aside from these general frameworks it naturally remains important to always look at the concrete situation. For the choice of, for example, a supplier of a very easily defined product, for which there are many providers, it can be good that you invite three economic operators (multiple private tender) and award to the lowest bidder without requirements. When calling for tenders for, for example, a complex or a very sensitive product or service (for example, company health care services), perhaps more economic operators can be invited or an open procurement procedure can be held, and in addition to the price other, perhaps even more important, criteria can be applied. When opting for an open procedure it must be realised that in general the transaction costs are considerably higher, inter alia because several tenderers are making the same (tender) costs. When a choice is made for an open or restricted procedure, it is important to estimate how many tenderers/candidates there more or less are on the relevant market who might be interested in this contract.

The procurement of regular asphalting work on the basis of (traditional) Standard 'RAW' specifications whereby awarding is based on the lowest price tends to lend itself for an open procedure. Even if there are a relatively large number of providers in this market: due to the highly standardised method of requesting offers, the effort asked of potential tenderers is limited. In the case of a tender specification whereby a reconstruction of a road by means of a 'design and construct contract' puts innovation in the market, it would be more logical to opt for a restricted procedure.

The architect branch is a branch with a relatively large number of providers. It is common in this branch to use a restricted procedure, whereby in the first stage the efforts of candidates are limited, and only in the second stage of the tender procedure are a limited number (usually 5) parties asked to provide a further elaboration on the basis of which the contract is ultimately awarded.

If the number is fewer than about 10, it can be defensible to put the contract out for public tender, but other procedures naturally also remain an option.
If there are (far) more than 10 and/or if there is a special effort for the potential tenderers (for example the elaboration of a design), the effort which a tenderer has to put in to present an offer, versus the chance that he will be awarded the contract may run the risk of being unbalanced. This can entail that many potential tenderers/candidates bail out and that is also not in the interests of the contracting authority. In such a case a restricted procedure is more logical. It is permitted to have more than 5 candidates go through to the second stage of the restricted tender procedure, but here too the pros and cons must be weighed up against each other. What is proportional in this respect can differ per industry. With regard to the selection: see also §3.5.3.

3.4.3 Less common procedures

In addition to the commonly known procedures, the regulations provide for specific situations, on conditions described in further detail, the application of other procedures, such as competitive dialogue, the competitive procedure with negotiation, the innovation partnership procedure, the procedure for social and other specific services[8], the dynamic purchasing system and the design contest. The choice for such a procedure is particularly based on the wish of the contracting authority to generate input on possible solutions from the market and is only put in motion after thorough consideration. The procedure of competitive dialogue, the competitive procedure with negotiation or the innovation partnership procedure can be applied if it is no longer possible to provide for the needs of the contracting authority without a considerable adjustment of easily available solutions, or because the matter concerns an innovative solution which is not yet available on the market.

Objectively and transparently going through these procedures requires a more serious effort of both the contracting authority and market parties than the more common procedures. The preparatory work for a tender (writing the basic principles and the goals to be realised) remains the same, but the procedure in itself has a longer lead time and requires in addition to (sometimes time-consuming) consultation with market parties, detailed and thorough reporting. This leads to higher transaction costs which can be disproportional. In many cases a market analysis or consultation will suffice to acquire certain information.

The electronic auction is not a process which can be used lightly. The system of final price forming explicitly deviates from tendering on the basis of a regular procurement procedure. In an auction the focus is often explicitly on the price. This entails a risk. In practice, in electronic auctions all kinds of hidden costs are unfortunately not taken into consideration, which can make the ultimate price outcome of an auction for both the contracting authority and for the tenderers very disadvantageous. For example, possible substantial savings due to the presenting of smart solutions may not be included. In most cases the choice for using a procedure other than the open or restricted procedure is not obvious.

3.4.4 Procedure rules

Partly from the perspective of proportionality it is deemed desirable, once a procedure has been chosen, to follow the procedure rules established for that procedure. In this framework reference is made, inter alia, to the Tender for Works Regulations (*Aanbestedingsreglement Werken*), which have been designated by a General Administrative Measure as the guideline for procuring works. These procurement regulations

8 Only those services which are included in Annex XIV of Directive 2014/24/EU.

explicitly relate to a time schedule for going through a procedure, starting with the notice and ending with a general dispute resolution clause. The various procedures, such as the open procedure and the multiple private tender procedure have each been separately described in full for the sake of clarity. All choices which must be made within these procedures, such as the concrete elaboration of the requirements, still have to be made by the contracting authority. This Guide provides the necessary frameworks for the desired proportional elements.

3.5 Requirements & criteria

In the following paragraphs there will be further discussion of exclusion grounds, suitable requirements, selection criteria and award criteria. In practice there is some confusion about these terms. The following therefore applies in anticipation of the discussion of the proportional elaboration or application of these requirements and criteria.

1. Exclusion grounds, suitability requirements and selection criteria relate to the qualitative evaluation of tenderers (in an open procedure) or candidates (in a restricted procedure).
   a. exclusion grounds: relate to circumstances relating to the tenderer/candidate himself and which in general can justify exclusion from participation in a tender procedure (§ 3.5.1);
   b. suitability requirements: relate to minimum requirements which a tenderer/candidate must satisfy with a concrete tender in order to be eligible for awarding of the contract (§ 3.5.2).
   c. selection criteria: relate to requirements which a contracting authority can set in order to restrict the number of candidates eligible for an invitation to tender (in a restricted procedure) (§ 3.5.3).

2. Award criteria related to the evaluation of the tenders. The award criteria are explained in further detail in § 3.5.5

3.5.1 Exclusion grounds

Exclusion grounds relate to circumstances relating to the (person of the) tenderer or candidate which can justify his exclusion from participation in a procurement procedure.

The law has two kinds of exclusion grounds above the European tender thresholds, i.e. mandatory and optional exclusion grounds. Below the European tender thresholds, setting exclusion grounds is optional.

Article 1.10 (1.13 contains a corresponding provision for national procurement procedures)

1. When preparing and concluding a public contract, a special sector contract or a concession contract or organising a design contest, a contracting authority or a special sector company shall only set requirements, conditions and criteria for the tenderers and the tenders which are reasonably proportional to the subject-matter of the contract.
2. When applying the first paragraph the contracting authority or the special sector company, in so far as applicable, shall in any event take the following into account:
   ...

b. the exclusion grounds;

...

3.5.1.1 *Mandatory exclusion grounds*

The mandatory exclusion grounds are stated in Article 2.86 of the Act:

Article 2.86

1. A contracting authority shall exclude a candidate or tenderer in respect of whom a conviction has been pronounced as referred to in the second paragraph by irrevocable and final judgment which is known to the contracting authority as a result of verification in accordance with Articles 2.101, 2.102 and 2.102a or under another heading, from participation in a procurement procedure.
2. For the application of the first paragraph reference is made to convictions relating to:
   a. participation in a criminal organisation within the meaning of Article 2 of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (Official Journal of the EU 2008, L 300);
   b. bribery within the meaning of Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (Official Journal of the EU 1997, C 195) and of Article 2(1) of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (Official Journal of the EU 2003, L 192);
   c. fraud within the meaning of Article 1 of the Convention on the protection of the Communities' financial interests (Official Journal of the EC 1995, C 316);
   d. money laundering within the meaning of Article 1 of Directive no. 91/308/EEC of the Council of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (Official Journal of the EC L 1991,L 166) as amended by Directive no. 2001/97/EC of the European Parliament and the Council (Official Journal of the EC L 2001, 344);
   e. terrorist acts or criminal offences connected with terrorist activities within the meaning of Articles 1, 3 and 4 of Council Framework Decision 2002/475/JHA of 13 June 2003 on combating terrorism (Official Journal of the EU 2002, L 1640);
   f. child labour and other forms of human trafficking within the meaning of Article 2 of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking of human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (Official Journal of the EU 2011, L 101).
3. A contracting authority shall also exclude a candidate or tenderer from participation in a procurement procedure if an irrevocable conviction as referred to in the second paragraph is made in respect of a person who is a member of the board of directors, managerial or supervisory body or has powers of representation, decision making or control in respect of such bodies, of which the contracting authority has knowledge.
4. A contracting authority shall furthermore exclude a candidate or tenderer from participation in a procurement procedure if the contracting authority has knowledge that by irrevocable and binding judicial administrative decision in accordance with the statutory provisions of the country where the candidate or the tenderer is based or in accordance with national statutory provisions, it has been established that the economic operator is not performing his obligations to pay taxes or social security premiums.
5. The fourth paragraph does not apply if the candidate or tenderer has performed his obligations by paying the taxes or social security premiums owing, including accrued interest or fines if applicable, or makes a binding arrangement to pay such.
6. Convictions as referred to in the second paragraph are in any event convictions pursuant to Articles 134a, 140, 140a, 177, 178, 225, 226, 227, 227a, 227b, 273f, 285, third paragraph, 323a, 328ter, second paragraph, 420bis, 420ter or 420quater of the Dutch Criminal Code or convictions relating to commission of the offences referred to in Article 83 of the Criminal Code, if the provisions in said article have been satisfied.

7. When applying the first paragraph, the contracting authority shall only include judgments which have become irrevocable in the five years prior to the date of submission of the request to participate or the tender.

In order to prevent exclusion from occurring too easily, a 'hardship clause' has been laid down in Article 2.86a in relation to payment conduct of taxes and premiums. It is not proportional in this respect, for example, to exclude a tenderer due to a payment arrears of only small amounts.

Article 2.86a

1. The contracting authority can decide not to apply Article 2.86(4), if exclusion would be apparently unreasonable.
2. There is an apparently unreasonable exclusion as referred to in the first paragraph, inter alia:
   a. if the candidate or tenderer has failed to only pay small amounts in taxes or social security premiums;
   b. if the candidate or tenderer became familiar with the precise amount owing in taxes or social security premiums at a time when it was not possible for him to perform the obligations referred to in Article 2.86(5) or to enter into a binding arrangement for payment thereof before the deadline for submitting a request to participate or submitting a tender.

In addition to the above exception, when applying the mandatory exclusion grounds, Articles 2.87a and 2.88 which are included under the optional exclusion grounds, also apply.

3.5.1.2 *Optional exclusion grounds*

The optional exclusion grounds are stated in Article 2.87 of the Act:

Article 2.87

1. The contracting authority can exclude a tenderer or candidate from participation in a procurement procedure on the following grounds:
   a. the contracting authority demonstrates by any appropriate means that the candidate or tenderer has breached one or more of the obligations referred to in Article 2.81(2);
   b. the tenderer or candidate is bankrupt or in liquidation, has ceased his activities, is subject to a moratorium on payment or a creditors' agreement (in bankruptcy), or the candidate or tenderer is in another comparable situation pursuant to a similar procedure under the heading of the legislation and regulations applicable to him;
   c. the contracting authority can make a plausible case that the tenderer or candidate has made a serious error in the performance of his profession, whereby his integrity is in doubt;
   d. the contracting authority possesses sufficient plausible indications to conclude that the tenderer or candidate has made agreements with other economic operators which are geared to distorting competition;
   e. a conflict of interests within the meaning of Article 1.10b cannot be effectively rectified with other less far-reaching measures;
   f. f. due to the earlier involvement of the tenderer or candidate in the preparation of the procurement procedure there has been a distortion of competition as referred to in Article 2.51 which cannot be rectified with less far-reaching measures;
   g. the tenderer or candidate has demonstrated considerable or continuing shortcomings in the compliance with an essential regulation of another public authority, an earlier contract of a special sector company or an earlier concession contract and this led to

premature termination of such earlier contract, to compensation or to other comparable sanctions;

h. the tenderer or candidate has been culpable to a serious degree of false statements in the provision of information which is necessary for the monitoring of the lack of grounds for exclusion or the satisfying of the suitability requirements, or has withheld such information, or was not able to present the supporting documents referred to in Articles 2.101 and 2.102;

i. the tenderer or candidate has tried to wrongfully influence the decision making process of the contracting authority, to obtain confidential information which can provide him with wrongful advantages in the procurement procedure, or due to negligence has provided misleading information which can have an important influence on decisions relating to exclusion, selection and awarding;

j. the contracting authority can demonstrate by any appropriate means that the tenderer or candidate has not performed his obligations to pay taxes or social security premiums.

2. The contracting authority shall include in the application of:
   a. the first paragraph, sub-paragraph a, only a breach of the obligations referred to in that part which occurred in the three years prior to the date of the submission of the request to participate or the tender;
   b. the first paragraph, sub-paragraph c, only serious errors which have occurred in the three years prior to the date of submission of the request to participate or the tender;
   c. the first paragraph, sub-paragraph d, only decisions as referred to in Article 4.7, first paragraph, sub-paragraphs c and d, which in the three years prior to the application have become irrevocable;
   d. the first paragraph, sub-paragraph g, only shortcomings which have occurred in the three years prior to the date of submission of the request to participate or the tender;
   e. the first paragraph, sub-paragraph j, only the failure to perform the payment obligations referred to in that part which have been determined in the three years prior to the date of submission of the request to participate or the tender.
3. Article 2.86(5) applies mutatis mutandis to the case referred to in the first paragraph, sub-paragraph j.

The application of the (optional) exclusion grounds can be dispensed in the cases mentioned in Article 2.87a and 2.88.

Article 2.87a

1. The contracting authority shall give a candidate or tenderer to whom an exclusion ground as referred to in Article 2.86, first or third paragraph, or Article 2.87applies, the opportunity to prove that he has taken sufficient measures to demonstrate his reliability. If the contracting authority deems that evidence sufficient, the relevant candidate or tenderer shall not be excluded.
2. For the application of the first paragraph the candidate or tenderer shall demonstrate that he, in so far as applicable, has compensated or made a commitment to compensate loss ensuing from convictions for criminal offences as referred to in Article 2.86 or from errors as referred to in Article 2.87, that he has contributed to clarifying facts and circumstances by actively cooperating with the investigating authorities and that he has taken concrete technical, organisational and personnel measures which are suitable to prevent further criminal offences or errors.
3. The contracting authority shall assess the measures taken by the candidate or tenderer, taking account of the seriousness and the special circumstances of the criminal offences or errors. If the contracting authority does not deem the measures which have been taken to be sufficient, it shall inform the relevant candidate or tenderer thereof, with the reasons therefor.

Article 2.88
The contracting authority can decide against application of Article 2.86 or Article 2.87:
a. for mandatory reasons of public interest;
b. if in the opinion of the contracting authority exclusion is not proportional with an eye on the time which has passed since the convictions and in view of the subject-matter of the contract.

The legislation shall then itself provide guidance for the evidence to be submitted, in Article 2.89:
1. A candidate or tenderer can demonstrate by means of an excerpt from the commercial register, which at the time of submission of the request to participate or the tender is no more than six months old, that the exclusion ground of Article 2.87, first paragraph, sub-paragraph b, does not apply to him.
2. A candidate or tenderer can by means of a Declaration of Conduct for Tenderers, which at the time of submission of the request to participate or the tender is no more than two years old, demonstrate that the exclusion grounds referred to in Articles 2.86 and 2.87, first paragraph, sub-paragraphs c and d, in so far as the matter concerns an irrevocable conviction or an irrevocable decision due to breach of competition rules, do not relate to him.
3. A candidate or tenderer can by means of a statement from the revenue service, which at the time of submission of the request to participate or the tender, is no more than six months old, demonstrate that the exclusion grounds, referred to in Article 2.86, fourth paragraph, or Article 2.87, first paragraph, sub-paragraph j, do not apply to him.
4. A contracting authority to which a candidate or tenderer presents details as proof that the exclusion grounds referred to in Article 2.86 or Article 2.87, do not apply to him, shall also accepts details and documents from another member state, from the country of origin of the candidate or tenderer or the country where the candidate or tenderer is based which serve an equivalent purpose or which show that the exclusion grounds do not apply to him.

Rule 3.5 A:

The contracting authority shall only apply those (optional) exclusion grounds which are relevant for the relevant contract.

It is not always necessary with every contract to immediately stipulate (all) exclusion grounds. With every contract it must be reviewed in advance what (optional) exclusion grounds are relevant.

The optional exclusion ground of commission of a serious error in the exercising of the profession (Article 2.87, first paragraph, under c) is an open standard which is open for various interpretations and is consequently difficult to apply. This includes cases in which the economic operator's integrity must be doubted. Taking this into account, this exclusion ground must be applied very restrictively. In any event, many matters which fall under this ground, are already covered in the Declaration of Conduct for Tenderers (*Gedragsverklaring Aanbesteden*), for which provision is made in the law.

The possibility of exclusion on the basis of past performance (Article 2.87, first paragraph under g) must similarly be dealt with in a reticent manner. This certainly does not concern minor shortcomings, but considerable or repeated shortcomings of essential provisions in earlier contracts, for which the economic operator can be held responsible. Such as the consistent failure to comply with essential delivery times or the essential deviation from the contracted quality which causes serious doubt to rise with regard to the reliability of the economic operator.

It is also relevant in this respect that the shortcomings have led to premature termi-

nation of the contract, compensation or other comparable (non-standard and substantial) sanctions. The provision thus explicitly relates to exceptional situations, for example non-delivery or non-performance of a contract. The shortcoming must have been objectively and consistently determined (professional contract management is of vital importance in this respect).

Exclusion on the basis of a one-off poor assessment of a project leader is thus not proportional.

Should a contracting authority decide to keep a register of poor performance from the past, the establishing and use thereof (by these or other contracting authorities) in any case against the background of the above should take place very carefully. Black lists could arise quickly with all concomitant negative consequences for companies (reputation damage). This means, inter alia, that a register must contain sufficient details about the relevant shortcomings and the economic operator must have the opportunity to make a possible notation in the register a matter for discussion.

With all optional exclusions, including an exclusion on the basis of past performance, any improvement actions of the tenderer must also be reviewed. The review period is three years. He must demonstrate that he has taken improvement measures (self-cleansing capacity) so that he is again a reliable partner. If this has been sufficiently demonstrated, the contracting authority may no longer exclude this economic operator. Should the contracting authority nevertheless wish to exclude after having heard the explanation, it must present reasons as to why in its opinion the economic operator's reliability has not been sufficiently demonstrated and this economic operator is nevertheless excluded.

If it is decided to set exclusion grounds, it is of great importance to align with legislation when it comes to evidentiary requirements. For example, if a term of validity for a specific statement is set out in the law (for example an excerpt from the Chamber of Commerce which is no more than 6 months old) there should be no deviation therefrom. Deviation causes confusion in the market, leads to an extra administrative burden and gives rise to errors.

With regard to sub-contractors the following two points, inter alia, should be taken into consideration:

- a more stringent application of the exclusion grounds to sub-contractors than to the tenderer will not be deemed proportional, for example a main contractor who can suffice with a statement that is 6 months old, while the sub-contractor has to submit a statement which is no more than 3 months old;
- nor is the application of exclusion grounds to sub-contractors which a tenderer is not claiming in relation to satisfying requirements which have been set with regard to financial/economic strength, or technical skill and professional skill, deemed proportional.

It is important that the minimum requirements which are set for a (sub-)contractor, can be directly traced back to the relevant contract, and relate to competencies which are concretely necessary to be able to properly carry out the relevant contract. Naturally the contracting authority, prior to the procurement procedure, must first evaluate whether review of sub-contractors against exclusion grounds is proportional in the light of the relevant contract. With smaller contracts/lower interest, from the perspective of costs an individual review of (sub-)contractors is not an obvious step.

The proportional application of exclusion grounds will be explained in further detail below. As the legislator has opted for a uniform method of reviewing these exclusion

grounds, these points will be discussed in the light of the Self-Declaration model.

3.5.1.3 *Self-Declaration/proof*

With regard to the specification relating to both the exclusion grounds and the suitability grounds, according to the law use of the Self-Declaration model which was introduced as a measure to lighten the burdens is mandatory. Use of a self-designed Self-Declaration model is thus no longer allowed. In the Self-Declaration a tenderer states that he is compliant with the exclusion grounds and suitability requirements which have been set. De facto review of the proof should take place afterwards with regard to the economic operator expected to be eligible for the contract. Proportionality particularly expresses itself here in only requesting proof which actually relates to the related exclusion grounds and suitability requirements of the intended contractor.

Article 1.19

1. Contracting authorities and special sector companies which set exclusion grounds and suitability requirements, shall require of an economic operator that with his request to participate or his tender, he make use of the specified Self-Declaration model, and shall specify what details and information must be provided in the Self-Declaration.

3.5.2 The elaboration of suitability requirements

Article 1.10 (1.13 contains a similar provision for national procurement procedures)

1. When preparing and concluding a public contract, a special sector contract or a concession contract or organising a design contest, a contracting authority or a special sector company shall only set requirements, conditions and criteria for the tenderers and the tenders which are reasonably proportional to the subject-matter of the contract.
2. When applying the first paragraph the contracting authority or the special sector company, in so far as applicable, shall in any event take the following into account:

...

   c. the contents of the suitability requirements;
   d. the number of suitability requirements to be set;

...

Article 2.90

1. A contracting authority can, after use of the online certificates database e-Certis, set suitability requirements for candidates and tenderers.

...

Rule 3.5 B:

If the contracting authority sets suitability requirements, it shall only set suitability requirements which are connected with de facto risks which the contract entails, or can be traced back to the desired competencies.

Suitability requirements are minimum requirements, which means that the requirements must be satisfied. The degree in which the requirements are set, i.e. that an economic operator scores better for a requirement than the relevant minimum, is not a criterion. Contracting authorities must beware to not set more requirements than is strictly necessary. Suitability requirements are set to cover certain risks. The contracting authority must always determine what de facto risks there are and whether those risks are covered by the requirements which are set.

Finally, the question whether the requirement is reasonably proportional to the risk

to be covered and the nature and scope of the contract is relevant. It is relevant that the suitability requirements which are set for an economic operator and a possible sub-contractor, can be directly traced back to the relevant contract, and relate to competencies which are concretely necessary to be able to properly perform the contract in question.

Rule 3.5 C:

When applying a multiple private tender procedure the contracting authority shall only set suitability requirements if the contracting authority was not yet familiar with the suitability of one or more of the potential tenderers.

The basic principle of a multiple private tender procedure is a presumed suitability of the economic operators to be invited. A choice will usually be made for economic operators known to the contracting authority. That is why the setting of suitability requirements with such a procedure must be handled with great reserve. If the suitability of the economic operators, due to lack of expertise regarding the subject-matter which cannot be resolved in any other way, is not known to the contracting authority at the time of choosing the economic operators to be invited, it may be proportional to set suitability requirements.

This can occur, for example, if a contracting authority has never yet done business in that market and has selected a number of economic operators on the basis of an internet search or by looking in the Yellow Pages. In view of the administrative burdens it is advisable to be very reserved in this approach. When this happens the invitation letter can clearly state in advance what concrete proof of the qualifications claimed by the economic operator (standards, certificates and the like) will have to be presented at a given point in time.

The various kinds of suitability requirements will be fleshed out hereafter in the following paragraphs.

3.5.2.1 Requirements relating to financial and economic strength

Article 2.90

1. A contracting authority can, after use of the online certificates database e-Certis, set suitability requirements for candidates and tenderers.
2. The suitability requirements referred to in the first paragraph can relate to:
   a. financial and economic strength;
   b. technical skill and professional skill;
   c. professional qualifications.
3. If the contracting authority sets suitability requirements as referred to in the second paragraph, under a, such requirements shall not relate to the amount of the total turnover and the turnover of the business activity which is the subject-matter of the public contract, unless the contracting authority substantiates this with significant arguments in the tender documents.
4. The contracting authority shall only set suitability requirements which can guarantee that a candidate or tenderer possesses the legal capacities and financial means and the technical skill to perform the public contract.
5. If the suitability requirements as referred to in the second paragraph, under a, relate to the amount of the total turnover and the turnover of the business activity which is the subject-matter of the public contract, that requirement shall be no higher than:
   a. three times the estimated value of the contract;
   b. if the contract is divided into lots, three times the value of a lot or a cluster of lots which must be executed simultaneously;
   c. if the matter concerns a contract on the basis of a framework agreement, three times

the value of the specific contracts, which must be performed simultaneously;
   d. if the matter concerns a contract on the basis of a framework agreement, whereby the value of the specific contracts is not known, three times the value of the framework agreement;
   e. if the matter concerns a dynamic purchasing system, three times the expected maximum size of the specific contracts which are awarded under that system.
6. When setting suitability requirements as referred to in the second paragraph, sub-paragraph a, the contracting authority can demand that the candidate or tenderer:
   a. a.provide information relating to his financial statements;
   b. has a suitable level of insurance against professional risks.
7. If the contracting authority desires information on details from the financial statements, it shall state in the tender documents the transparent, objective and non-discriminatory methods and criteria according to which the requested details must have been determined.
8. When preparing and concluding a contract, a contracting authority shall only set requirements for the tenderer and the tender which are related to and which are reasonably proportional to the subject-matter of the contract.

Article 2.91

1. An economic operator shall in any event be able to demonstrate his financial and economic strength by one or more of the following means:
   a. suitable bank statements or proof of insurance against professional risks,
   b. presentation of financial statements or excerpts from the financial statements, if the legislation of the country where the economic operator is based prescribes publication of financial statements, or
   c. a statement concerning the total turnover and the turnover of the business activity which is the subject-matter of the public contract, over no more than the last three available financial years, depending on the date the economic operator was established or the date when the economic operator started his business activities, in so far as the relevant turnover figures are available.
2. A contracting authority shall state in the notice of the public contract or in the invitation to tender which of the details referred to in the first paragraph and what other proof must be presented.
3. If the economic operator is not able, for valid reasons, to present the evidentiary documents requested by the contracting authority, he can demonstrate his economic and financial strength by means of other documents which the contracting authority deems suitable.

It is important that the requirements which are set with regard to financial and economic strength are chosen in such way that anyone who is able to perform the contract properly can in fact compete for the contract. This is beneficial for a competitive market. When determining what requirements to set, the position of SMEs deserves attention, certainly when market analysis shows that this group has a potential tenderer for the relevant public contract. By setting excessively high requirements, the market is unnecessarily restricted, which is in neither the interests of the contracting authority nor in the interests of the economic operators. The requirements which are set must be reasonably proportional to the nature and size of the contract. It is therefore important with every requirement to think about why that requirement has been set: with more and/or stricter requirements, fewer and fewer economic operators are left, so that the choice becomes more limited. In the end one wants to reach the group of economic contractors who are suitable for the contract.

Desiring a certain financial and/or economic strength for the specific contract says something about the continuity of the economic operator, but this requirement

explicitly says nothing about, for example, the technical skill and professional skill or having followed training with regard to relevant activities.

If after careful consideration there appears to be a need for some capacity requirement in terms of financial strength, it is important to clearly formulate this capacity requirement. The legislation provides three options for this in the above-mentioned Article 2.91, first paragraph. These are the ways in which financial strength must in principle be demonstrated. It is advisable to be reticent when setting deviating requirements, for example financial ratios. Problems tend to arise with regard to the comparability of those ratios due to diversity in book-keeping methods, which does not make the use thereof desirable. Problems with the comparability of ratios can be prevented by clearly defining the ratios in the tender documents.

According to the law the basic principle is that no turnover requirement shall be set. If a contracting authority nevertheless wishes to set a turnover requirement, substantiated reasons must be presented therefor in the tender documents.

A contracting authority needs bricks for the construction of a complex, which it will make available to the building contractor. This concerns a standard type of stone, which can be obtained from many suppliers without a long delivery time. The order for the stones is a one-off contract. The risk that due to the tenderer going bankrupt the relevant building project will come to a halt, is minimal as there are enough competitors, who can take over supplying the stones should the supplier go bankrupt. Setting a turnover requirement for the supplier will have no added value in such case.

A municipality is building a sports hall. The planning is fairly broad, complexity is limited, there is no compelling reason that completion could not be one or two months later. At the same time, in cooperation with the local high school, the municipality is building a complex of 5 sports halls and a sports academy.

The completion date is fixed (start of the school year), because a delay of even only a few weeks could by definition mean a delay of an entire school year with huge practical problems and extra costs. The financial requirements (does the contractor have sufficient means to quickly acquire new materials for the next building phase) will be set much lower for the first project than for the second project. The requirements are aligned to the specific contract, and although different, both can be seen as proportional.

Setting a turnover requirement can be relevant when there are de facto risks with regard to the available capacity of personnel and material on behalf of the timely, correct completion of the contract by the ultimate contractor. In such case a turnover requirement of 0 (i.e.: none), 1, 2 or 3 years can be chosen. With many contracts no turnover requirements need/can be set at all. It is also advisable when setting requirements for, for example, the free and intellectual professions to emphasise professional skill and not financial/economic strength in terms of turnover requirements and the like.

If a turnover requirement is applied, this relates to a capacity requirement and is not intended to review the specific competencies of an economic operator. In principle the matter concerns the total turnover (and thus not a specific turnover), as the matter concerns an item on the income statement which says something about, inter

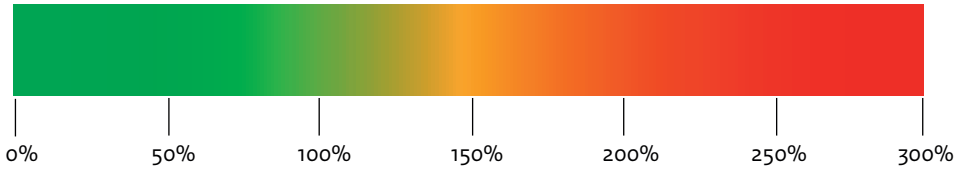
alia, the possibility of putting in personnel and material and organisational power with regard to contracts of a specific size.

If a turnover requirement has to be set, it is desired, in line with the legislation, to relate it to a maximum of 3 financial years. A shorter period is allowed (provided it is not discriminatory), a longer one is not. As turnover fluctuates it is good when choosing for turnover related to several years, to apply an average.

When determining requirements to be set, specific attention is requested for newcomers and what is available on specialist (new) markets. If long-term turnover is requested, it must be realised that newcomers, in connection with the non-discrimination principle, will be reviewed against the same requirement and consequently can miss out. If a contracting authority comes to the conclusion that a contract is to be put out on a relatively new market, or it wants newcomers to compete (market analysis), it is therefore wise, when formulating the requirements, to take this into account. In addition, a newcomer, on the basis of the above-mentioned Article 2.91, third paragraph of the Act, can be given the opportunity to demonstrate his financial strength with other proof.

For the construction of an asphalt road whereby excavation work has to be carried out and new sewage pipes must be laid, in general the company's turnover can be requested. Often the economic operator will be asked as to turnover earned in civil and hydraulic engineering works, but the relevant turnover can also have been earned from, for example, activities in residential and non-residential construction. It is important to realise that the necessary experience, with 1. excavation work, 2. laying sewage pipes, 3. laying asphalt, will not be translated to the turnover requirement, but can be laid down in specific experience requirements. The question whether in a given case a turnover requirement is actually necessary and whether it is not possible to suffice with merely setting experience requirements is not taken into consideration here for the sake of convenience.

With regard to the amount of the turnover requirement it is good to assume a sliding scale. Per contract the issue is to consider the practicality and need for a turnover requirement. With a simple contract the importance of a turnover requirement will be at the bottom of the scale. As the work becomes more complicated, a turnover requirement of some size may be desirable, for example 50%, 100% or 150% of the estimate. With very complex, risky projects (provided they are properly substantiated) a turnover requirement can be asked up to 300%. Everything over 300% will not only be deemed disproportional, but is also not permitted by law. Naturally in those exceptional cases 200 and 250%, or anything in between can be requested. This can be visually represented as follows:



With a contract with a performance term shorter than one year, it is not always proportional to convert the turnover requirement to one year. The same also applies to contracts for longer than one year. It is important per contract to think critically about the relationship between the turnover and the time period required to perform the contract.

Rule 3.5 D:

1. *The contracting authority shall not demand security to be given which is not related to the covering of risks with regard to the performance of the contract.*
2. *If the giving of security is desired, it shall be at most 5% of the contract value.*
3. *The contracting authority shall not demand the giving of double security.*
4. *The second paragraph does not apply if payment prior to performance is part of the contract.*
5. *The contracting authority shall not demand assignment of insurance pay-outs.*

The giving of security burdens the liquidity of an economic operator. In addition, there are high costs for the tenderers with regard to acquiring such security. For that reason it is therefore advisable to only stipulate that security be given if this is strictly necessary for the performance of the concrete contract. A maximum of 5% of the contract value is a proportional guideline in this respect; only in very exceptional cases is it permitted to deviate from this guideline (provided properly substantiated). If the giving of security is stipulated, it is wise to not have the giving of security last longer than necessary, so that the tenderer is not unnecessarily hindered in his financial scope. If a substantial part of the contract is completed, the security can be adjusted downward. Double security (for example, bank guarantee and withholding payments) are obviously not proportional.

The fourth paragraph ensues from and must be read in conjunction with what has been laid down in the Regulations for Advances 2007 ('*Regeling verlening voorschotten 2007*') which apply pursuant to the Dutch Government Accounts Act 2001 (*Comptabiliteitswet 2001*). This relates to the situation where payment prior to the performance is part of the contract. Under certain circumstances it may be necessary and proportional to demand that security is given. This must be reviewed against the first paragraph. The amount of the security need not, for the cases to which the arrangement applies, be limited to 5% of the contract value, but should be related to the amount of the advance or the advance payment. Demanding an assignment of insurance pay-outs is often not permitted by the insurer; it is therefore highly recommended to avoid this.

Rule 3.5 E:

1. *The contracting authority shall not demand of a tenderer. until after notice of the award decision. the presentation of an unqualified auditor's report regarding the financial statements. An auditor's review report or compilation report shall suffice for economic operators who are not required by law to prepare financial statements.*
2. *The contracting authority shall not demand that a tenderer present a separate sectoral opinion prepared by an auditor which relates to one or more parts of the financial statements.*

Requiring an unqualified auditor's report with the financial statements, from an economic operator who is not obliged to prepare financial accounts according to Book 2 of the Dutch Civil Code entails an extra administrative burden and is consequently in principle disproportional. For these economic operators who are not obliged by law to prepare financial statements, reference is made to the 'compilation report'. These economic operators will not have an unqualified auditor's report. These economic operators do not have any obligation to have audited, unqualified financial statements under the law. It is therefore deemed proportional to deem the auditor's review report or compilation report for these economic operators to be sufficient. If one of these two reports is required, presentation thereof should only be demanded of the economic operator who is expected to be eligible for the contract.

Requesting deviating or additional statements is also seen as disproportional. If the economic operator possesses a statement relating to the turnover, this can be very

burdensome from an administrative perspective, if a separate statement is then requested for turnover relating to specific reference projects. The specified reference projects do not have to be confirmed an additional time by means of a statement. With a company that belongs to a concern which only possesses consolidated financial statements, it is sufficient to ask for the consolidated financial statements instead of an auditor's report relating to one company. In such a case it is reasonable to ask that the concern stands as guarantor for the relevant company, with regard to the requirements which have been set. This too is possible with a simple statement of the economic operator.

3.5.2.2 *Requirements relating to technical and professional skill*

Article 2.90

1. A contracting authority can, after use of the online certificates database e-Certis, set suitability requirements for candidates and tenderers.
2. The suitability requirements referred to in the first paragraph can relate to:
   a. the financial and economic strength;
   b. technical skill and professional skill;
   c. professional qualifications.

...

8. When preparing and concluding a contract, a contracting authority shall only set requirements for the tenderer and the tender which are related to and which are reasonably proportional to the subject-matter of the contract.

The following is laid down in Article 2.93 with regard to proof:

1. An economic operator shall demonstrate his technical skill or professional skill in one or more of the following ways, depending on the nature, the quantity or scope and the goal of the works, supplies or services:
   a. by means of a list of the works which were carried out in the past time period of no more than five years, which list shall be accompanied by certificates which prove that the most important works were properly executed, both with regard to the method of execution and with regard to the result;
   b. by means of a list of the most important supplies or services which were provided in the past time period of no more than three years, stating the amount and the date and the public or private law bodies for which they were intended;
   c. by means of a specification of the technicians or technical bodies, which may or may not be part of the economic operator's business, in particular those who are charged with quality control and, in the case of public contracts for works, of those who will be available to the contractor to execute the works;
   d. by means of a description of the technical equipment of the supplier or the service provider, of the measures he takes to safeguard the quality and the possibilities he offers with regard to design and research;
   e. by means of a specification of the systems for the management of the supply chain and the tracking systems which the economic operator can apply in the framework of the performance of the public contract;
   f. in the case of complex products or services or if these must correspond with a special goal, by means of a check by the contracting authority or, in its name, by a competent official body of the country where the supplier or the service provider is based, subject to reservation of consent by said body, which check relates to the production capacity of the supplier or to the technical capacity of the service provider and,
   g. by means of the educational and professional qualifications of the service provider or the contractor or of the managerial personnel of the economic operator, provided this is not used as an award criterion;
   h. by means of the specification of the measures relating to environmental management which the economic operator can apply for the performance of the public contract;

i. by means of a statement concerning the average annual labour force of the business of the service provider or the contractor and the size of the executive staff during the last three years;
j. by means of a statement regarding the equipment, the material and the technical equipment which the service provider or the contractor possesses for the performance of the public contract;
k. by means of the description of the part of the public contract that the service provider may wish to sub-contract;
l. as regards the products to be supplied by means of samples, descriptions or photos, for which on the request of the contracting authority the veracity can be demonstrated or by means of certificates which have been issued by a recognised organisation, in which it is stated that products clearly identified by references correspond with certain specifications or standards.

2. The supplies and services referred to in the first paragraph, sub-paragraph b, shall be demonstrated in the case of supplies or services for a contracting authority, by certificates which the contracting authority has issued or co-signed or in the case of supplies or services for a customer acting in a private capacity, by certificates of the customer or, in the event this is lacking, a statement of the economic operator.
3. A contracting authority which sets as suitability requirement that the candidate has performed earlier contracts as referred to in the first paragraph, sub-paragraphs a and b, shall ask with regard to parts of the contract as to previously performed contracts which are comparable and not as to previously performed contracts which, in view of the nature, the quantity or size and the goal of the contract, are the same.
4. In deviation from the first paragraph, sub-paragraphs a and b, the contracting authority can take works, supplies or services into consideration over a longer time period than stated in those parts, if that is necessary to safeguard sufficient levels of competition.

Rule 3.5 F:

The contracting authority shall establish core competencies for the reviewing of technical skill and professional skill which correspond with the desired experience on essential points of the contract.

Skill requirements say something about the degree in which tenderers may be deemed able to properly carry out the actual activities. When setting those requirements it is important to look for a formulation which aligns with the core competencies which are relevant for a specific contract. The critical formulation of core competencies is essential in this respect; it is necessary to look for experience on points which are of essential importance (core competencies). It is sometimes difficult to remain limited to the most essential core competencies, but it is necessary to achieve the best possible market working. References form a commonly used method for making core competencies visible and measurable. Defining too many and overly specific core competencies and asking for references per core competencies could be like looking for a four-leaf clover. This severely narrows the market, which is neither in the interests of contracting authorities nor in the interests of potential tenderers. For that same reason it is wise on new markets (products and services which are still fairly new, and with which no or only a very limited number of providers have gained experience) to be reticent in setting too many requirements and/or references. In such a market it is more logical to make

A municipality wants to design a 'community school' and puts this out to tender in the market. Instead of setting the reference requirement that a tenderer must have designed a community school on 3 previous occasions, the municipality requests references to be selected by the tenderer which provide insight into the requested competency, such as a previously designed school, child care centre or multifunctional building.

a strong functionally described tender, whereby the market is encouraged to help come up with innovative solutions.

A translation has to be made of the core competencies to the necessary requirements of (technical) skill. It is important in this respect not to ask for more of the same, as this will make the circle of potential tenderers very small. What is important, is to look for all those economic operators who, whether or not in a number of different projects, have gained the necessary experience.

Rule 3.5 G:

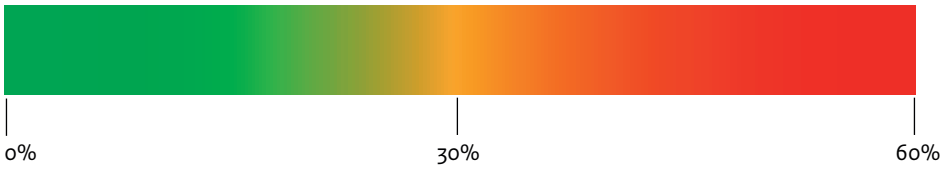
1. *The contracting authority shall ask for a maximum of one reference per core competency mentioned.*
2. *The contracting authority shall not demand that reference projects have a value of more than 60% of the estimate of the contract in question.*

One reference contract per relevant competency is deemed sufficient. The requirements to be set must be both proportional by nature and by size of the contract. The guideline is that the value which the requested reference must have, must be between 0-60% of the estimate of the contract in question. In this case 0% means that there is no reference requirement (see illustration below). Here too the matter concerns a sliding scale whereby it must be seriously reviewed per contract whether requirements at the beginning, or at the end of the scale are realistic. Deviation from this general guideline must of course be substantiated. The law assumes a reference term of a maximum of 5 years for works and 3 years for supplies and services; shorter is allowed, longer, in principle, is not. A longer period is possible if there are otherwise insufficient candidates who can satisfy the reference requirements. This can be the case in an industry in which systematically relatively few contracts are performed or in an industry in which systematically relatively few contracts are performed or in an industry in which during a certain period fewer contracts were performed. In order to maximise competition, it is desirable to adhere to those maximum terms as much as possible. It must be borne in mind that for sporadically occurring contracts, in any case it is unwise to opt for a shorter term.

A municipality places biweekly orders for its public library books. After delivery, they go through a process of processing to then, a few weeks to a month later, end up on the library shelves. A regional training center wants to be able to order separate digital copies of books for its teachers for all its study courses, with a guaranteed delivery time.

Teachers can discover at the last moment that a book is missing, management assistants of the various departments can themselves place their orders digitally, delivery must take place within 48 hours or 5 days (foreign literature). Although this matter in principle concerns the same product, the underlying process it totally different, and completely different experience requirements will be set in the second example than in the first.

A contracting authority wants to put a contract to design a building on the market. Partly in view of the market circumstances, architects have generally had few contracts in the preceding years. The contracting authority may then opt to apply a longer reference period to enable more architect firms to participate in this tender procedure.



3.5.3 Selection criteria

Article 2.99

1. When applying the restricted procedure, the competitive dialogue procedure, the competitive procedure with negotiation and the innovation partnership procedure, the contracting authority can limit the number of candidates that it will invite to tender or participate provided there are a sufficient number of suitable candidates.
2. The contracting authority shall state in the notice the number of candidates it intends to invite.
3. The number of candidates that the contracting authority intends to invite shall be at least five in the restricted procedure and at least three in the competitive dialogue procedure, the competitive procedure with negotiation and the innovation partnership procedure.
4. The number of invited candidates shall guarantee proper competition.
5. If the number of candidates that is not excluded and that satisfy the suitability requirements and selection criteria is lower than the number fixed by the contracting authority for an invitation to tender, the contracting authority can continue the procedure by inviting the candidate or candidates who satisfy the suitability requirements.
6. When applying the fifth paragraph the contracting authority shall not invite economic operators who have not requested to participate, nor economic operators to whom an exclusion ground applies or who do not satisfy the suitability requirements.

Selection criteria are criteria on the basis of which a contracting authority can limit the size of the number of candidates invited to tender. This possibility exists in the restricted procedure, the competitive dialogue procedure, the competitive procedure with negotiation and the innovation partnership procedure, and shall be used in particular with contracts in markets for which large numbers of candidates are expected. These procedures consequently consist of 2 stages, the selection state and the award state. In principle, all stakeholders can participate in the first stage in such sense that they can request to be a candidate. No tender need to be made, except in the event of the procedure of the innovation partnership whereby economic operators who compete for admission to participate in the partnership elaborate their proposed solutions in their tender. These stakeholders will be reviewed on the basis of exclusion grounds and suitability requirements. The total number of candidates who turn out to be suitable to tender or participate (in the event of an innovation partnership) will be invited in the second stage, can be further limited

A contracting authority wants to realise a concrete bicycle tunnel below the railway tracks with an estimate in the order of € 3,000,000. In order to successfully complete the construction of the bicycle tunnel, the contracting authority sets as core competency that candidates must possess sufficient experience in the execution of concrete constructions, instead of asking after experience with similar works (read: bicycle tunnels).

The contracting authority is of the opinion that a company with 6 reference works is no more suitable than a company with 3 reference works. This is not used as a ranking criterion. In addition, a turnover requirement has been set that a company must on average have realised 4.5 million in turnover per year over the past 3 years.

with the help of selection criteria. This pre-selection round is thus not relevant in an open procedure. The substance of selection criteria can in principle be comparable to the suitability requirements as these are set in an open procedure. The various options for setting suitability requirements was discussed in §3.5.2.

In this respect too they do not value a tenderer higher if he has a turnover of 10 million. This does not provide any greater certainty for the correct execution of the work.

As with the setting of suitability requirements it is not mandatory to apply selection criteria. A contracting authority will have to determine in advance whether there is a reason to limit the number of tenders to a specific maximum. It must be borne in mind that all economic operators who in the first phase have satisfied the suitability requirements, are in principle suitable to perform the contract. It is therefore of great importance to properly and carefully consider the setting of selection criteria. If selection criteria are set, these can in any event not be formulated in the form of a 'knock-out' criterion.

The Act states a minimum number of tenderers to be invited, whereby the actual competition must be guaranteed. When determining the number of tenderers to be invited it is important that it is reviewed whether competition is always safeguarded with the chosen number. If there is a de facto decision to limit the number of participants in the procurement procedure, the basic principle is that the selection criteria to be set are transparent, objective and non-discriminatory. Ranking on the basis of financial/economic strength, size or number of references or number of employees is not recommended, as more is not always better.

3.5.4 Requirements for consortiums

Rule 3.5 H:

The contracting authority shall not set higher requirements for consortiums of tenderers (joint ventures) than it sets for a single tenderer.

In practice, consortium forming only takes place when the parties have clear reasons to present a joint rather than an individual tender. This always concerns a need to cooperate, not only because of the necessary spreading of risks and allocation of resources, but also to bundle joint competencies and to utilise residual capacity. If an economic operator is always independently able to tender for a contract, in practice consortium forming will not be logical, because economic operators in general would prefer not to bring in another economic operator (competitor) if they can perform the contract themselves. In addition, economic operators *are only allowed* to work together under certain circumstances.[9] Having determined this, there is then no reason whatsoever to treat such a consortium in a different manner than an independent tenderer when reviewing against the requirements. Setting increased requirements for consortiums can quickly be deemed disproportional. Pursuant to Article 2.52,fourth paragraph of the Act it is not permitted to set a legal form requirement in the tender stage. This would be undesirable from the perspective of administrative burdens. This obliges economic operators to have completed their negotiations before they actually know whether they have the contract.

9 Policy rules on combined contracts 2013, Netherlands Bulletin of Acts and Decrees 2013, 9223.

Article 2.52

…

4. A contracting authority shall not demand with regard to the submission of a tender or a request to participate of a joint venture of economic operators that the joint venture of economic operators has a specific legal form.
5. A contracting authority can determine in what manner a joint venture should satisfy the requirements of economic and financial strength and technical skill and professional skill referred to in Article 2.90, second paragraph, sub-paragraphs a and b, these requirements must be based on objective grounds and must be proportional.
6. A contracting authority can set other requirements for a joint venture than for individual participants with regard to the execution of a public contract, provided these requirements are based on objective grounds and are proportional.

…

3.5.5 Award criteria

Article 1.10 (1.13 and 1.16 contain corresponding provisions for national tenders and multiple private tenders)

1. When preparing and concluding a public contract, a special sector contract or a concession contract or organising a design contest, a contracting authority or a special sector company shall only set requirements, conditions and criteria for the tenderers and the tenders which are reasonably proportional to the subject-matter of the contract.
2. When applying the first paragraph the contracting authority or the special sector company, in so far as applicable, shall in any event take the following into account:

…

   f. **the award criteria**;

…

Article 2.113

The contracting authority shall review the tenders against the standards, functional requirements and performance requirements set by the contracting authority in the tender documents.

Article 2.113a

1. Award criteria guarantee the possibility of de facto competition and are accompanied by specifications on the basis of which the information provided by the tenderers can actually be reviewed to evaluate how good the tenders satisfy the award criteria.
2. In the event of doubt, the contracting authority shall effectively check the accuracy of the information and proof provided by the tenderers.

Article 2.114

1. The contracting authority shall award a public contract on the basis of the tender which is most economically advantageous in the opinion of the contracting authority.
2. The most economically advantageous tender shall be determined by the contracting authority on the basis of the:
   a. best price-performance ratio,
   b. lowest costs calculated on the basis of cost effectiveness, such as life cycle costs, referred to in Article 2.115a, or
   c. lowest price.
3. When applying the first paragraph the award shall be effected on the basis of sub-paragraph a of the second paragraph.
4. In deviation from the third paragraph, the contracting authority can award on the basis of sub-paragraph b or sub-paragraph c of the second paragraph. In that case the contracting

authority shall present reasons for the application of that criterion in the tender documents.

5. The determining of the most economically advantageous tender purely on the basis of the award criterion referred to in the second paragraph, sub-paragraph b or sub-paragraph c, is not permitted with regard to categories of contracting authorities and kinds of contract to be designated by or pursuant to General Administrative Measure.
6. The proposal for an General Administrative Measure to be determined pursuant to the fifth paragraph shall be made no earlier than four weeks after the draft has been presented to both houses of the States General.

Article 2.115

1. The contracting authority which determines the most economically advantageous tender on the basis of the best price-quality ratio, shall announce in the notice of the public contract what additional criteria it sets with an eye on the application of this criterion.
2. The additional criteria referred to in the first paragraph are connected with the subject-matter of the public contract and can relate to, inter alia:
   a. quality, including technical accomplishment;
   b. aesthetic and functional characteristics;
   c. accessibility;
   d. suitability of the subject-matter for all users;
   e. social, environmental and innovative characteristics;
   f. the trade and the conditions on which it takes place;
   g. the organisation, the qualification and the experience of the personnel for the execution of the contract, if the quality of that personnel can have a considerable affect on the level of the execution of the contract;
   h. customer service and technical assistance;
   i. delivery conditions, such as delivery date, delivery method, delivery period of term for completion.
3. Additional criteria as referred to in the first paragraph are connected with the subject-matter of the public contract when they relate to the works, supplies or services to be effected in the framework of that public contract, in all respects and in every stage of their life cycle, including factors relating to:
   a. the specific production process, the offering or the trading of these works, supplies or services, or
   b. a specific process for another phase of their life cycle, even if these factors do not form part of their material basis.
4. The contracting authority shall specify in the tender documents the relative weight of each of the additional criteria chosen by it for determining the most economically advantageous tender on the basis of the best price-performance ratio. This weight can be expressed by means of a margin with an appropriate difference between minimum and maximum.
5. If weighting is not possible for objective reasons, the contracting authority shall state the additional criteria in descending order of importance in the tender documents.

The legislation leaves the choice between the award criteria ' lowest price' (LP), 'lowest costs on the basis of cost effectiveness' (Lowest CBC) and best price-performance ratio (Best PPR), but takes the Best PPR as the starting point. In order to be able to utilise the innovations from the market, it is also desirable to award on the basis of Best PPR (Best PPR unless). The criterion Best PPR offers the possibility of obtaining distinctive (qualitative) offers from the market.

When applying the award criterion Best PPR, the relative weight of the chosen additional (sub-)criteria must be determined in the notice or the tender documents.

This weight can be expressed by means of a margin with a suitable difference between minimum and maximum. If a weighting cannot be given for demonstrable reasons, the criteria will have to be ranked in descending order of significance. The criteria must be objective and clear. Award criteria relate to the contract. Alignment with the contract is therefore logical. For example, the desired degree of elaboration of a plan of approach must be requested, for example, objectively and against prior clear criteria. The effort this requires from every tenderer must be observed; in the event of extreme requirements in the framework of a tender, a tender compensation can be made available.

In order to prevent that in application of the criterion Best PPR, the price ends up implicitly being the only decisive factor, the following precautions, among others, must be taken into account:

- The number of points that are awarded to the qualitative criteria compared to the number of points that are awarded to the criterion of price, must be sufficiently high to make a difference.
- For all evaluation criteria, apply a proper and transparent scale division and avoid unequal units, such as simultaneous use of a scale from 0 to 10 for valuation of the one criterion and valuation with good/bad for the other criterion.
- The qualitative criteria must play a decisive role. If it is to be expected that every tenderer will score (virtually) equally high on this criterion, the price will ultimately be decisive. Criteria which are more or less obvious and where all tenderers will score virtually the same, can therefore better be translated into requirements than into scalable wishes so that only wishes with a distinctive capacity (and not requirements) are considered in the evaluation.
- There must be sufficient differentiation in the evaluation scale. In addition, the full breadth of the evaluation scale must be used in the evaluation. If in the evaluation of qualitative criteria the scores are only between 5 and 7 (on a scale of 10), the price will ultimately be decisive.
- It is recommended to test the evaluation scale to be applied in advance, for example by means of a trial calculation.

In the award criterion Lowest CBC, in addition to the acquisition price other cost criteria are also considered. An example of this is considering costs connected with the entire economic life of a product, maintenance costs, removal costs at the end of the economic life, etc., i.e. total cost of ownership.

If there really are not sufficient distinguishing criteria, on which tenderers can provide added value, it is wiser to explicitly opt for LP or the Lowest CBC, then to implicitly / pro forma opt for this. When the contracting authority, in deviation from the primary rule, wants to award on the basis of LP or Lowest CBC, it must state this with adequate reasons in the tender documents.

The term Most Economically Advantageous Tender is used to collectively refer to the three criteria (LP, Lowest CBC and Best PPR); in order to prevent misunderstandings (this term used to have the meaning Best PPR) it is wise to no longer use the term Most Economically Advantageous Tender in procurement procedures.

3.5.6 Sustainability/social conditions

Sustainability criteria, including social conditions, concern complex material which is subject to the necessary discussion. This Guide does not lend itself for exhaustive discussion of this subject. The intention here is to only touch upon a number of matters, which in the framework of a procurement procedure require further attention from the perspective of proportionality. Sustainability criteria can occur in the form of (technical and functional) specifications, suitability requirements, selection

criteria, award criteria or contract terms and conditions. The relevant paragraphs are therefore relevant for the discussion of this topic.

In random order reference is made to the following:

- When setting sustainability criteria, it is proportional to consider the contract in the choice for setting requirements in this area. This does not mean that no sustainability criteria may be set for small contracts.
- The criteria with regard to sustainability including social conditions must on the one part be reasonably proportional to the nature and scope of the contract, but on the other hand must be aligned to what the relevant market can offer. If market research shows that a broad range of economic operators satisfy the specific criteria, these can be generically applied and included as a requirement. If it concerns innovations on the market which only a limited number of economic operators can satisfy, then it would be better to include them as one of the sub-criteria within the award criterion Best PPR. Including technical specifications and requirements which only a very limited part of the market satisfies and consequently competition is no longer guaranteed, is not only disproportional, but also unwise.
- The basic principle is that the sustainability criteria in the framework of the evaluation for Best PPR receives a realistic valuation and is objectively measurable.
- Proportionality of sustainability criteria is promoted when contracting authorities at all times enter into talks with (potential) tenderers on the ideas and possibilities which exist with regard to sustainability. Any form of market consultation as referred to in § 2.5 and in Article 2.25 of the Act could be a means to do so.
- The following is relevant in the definite choice for setting sustainable criteria .
  1. Clarity: When choosing, alignment must in the first instance be sought with generally applicable criteria geared to the relevant industries (drawn up by PIANOo).[10]
  2. Formulation of own deviating criteria can in the case of functional specifications and/or a tender on the basis of Best PPR be an option, provided it has been reviewed by means of a market survey that sufficient market parties can comply.
  3. In general it is in any event wise not to work too much with suitability requirements in this area; if as an organisation you want to encourage sustainability and go further than the PIANOo criteria, it is highly recommended to do so in the form of award criteria: this promotes the further development of sustainability, without a priori exclusion of economic operators who do not (yet) comply.
- Realistic transition time period: If requirements are set in the area of sustainability, it is pointed out that the market must be given the opportunity to align the business activities with requirements established within the organisation of the contracting authority; continual changing of conditions is also not deemed suitable in this context.
- When asking for references relating to sustainability the same applies as for references in general. The references must clearly show that the tenderer possesses the competencies to put the requested sustainability

A municipality is going to build a school, and in the procurement procedure asks for experience with geothermal heat. A reference has to be submitted for this, which clearly shows that this technique has been put into practice, regardless of the kind of building (a Town Hall, a fire station or an office building). By asking about general experience and not about experience in exactly comparable circumstances this requirement is proportional.

10 The criteria documents of PIANOo are updated with a certain regularity.

into practice, it is not necessary to ask after an identical comparable project; sustainability is closely related to innovation and being able to offer variants. The goals which are set must be derived from the national sustainability topics. Lastly proof relating to sustainability must take place in the last phase, just as with other suitability requirements and award criteria.

- The inclusion in tender documents of an obligation for the economic operator to report on sustainability aspects must take place in conformity with the advice of the SER[11] and the Dutch Accounting Standards Board (*Raad voor de Jaarverslaggeving*)[12]. Other reporting is thus deemed disproportional.
- Social conditions for sustainable purchasing are concerned with the social situation in the (international) production chain. This includes such things as compliance with universal rights of humans, including trade union freedom, prohibition of child labour, forced labour and discrimination. This only concerns a reasonable obligation of endeavours, depending on a reasonable estimation of the risks.[13]
- Reference to specific hallmarks is allowed. This is subject to a number of conditions:
  - all hallmark requirements must be connected with the subject-matter of the contract;
  - they must be based on objectively verifiable and non-discriminatory criteria;
  - they must have been established by means of an open and transparent procedure;
  - whereby the economic operator who applies for the hallmark cannot exercise any decisive influence on the contents of the hallmark.

A municipality wants natural stone paving for the townhall and puts out a call to tender. The materials to be supplied for this are costly and form a large part of the contract price, while the laying of the stones itself requires specific expertise. The municipality has set the following requirement in this respect: This procurement procedure is subject to the arrangement set by the municipality for putting the unemployed to work (known as the '5% arrangement'). The contractor who is awarded the contract, is obliged on the basis thereof to spend at least 5% of the contract price on putting unemployed people to work. Due to the proportionally minor share of the payroll in this contract price and the specialism involved, this social return clause is disproportional.

5% of the contract price on putting unemployed people to work. Due to the proportionally minor share of the payroll in this contract price and the specialism involved, this *social return* clause is disproportional.

11 http://www.ser.nl/nl/publicaties/adviezen/2010-2019/2010/b28646.aspx.

12 http://www.rjnet.nl/Documents/Uitingen%202009/0000026826_RJ_Uiting_2009_8_Herziene_Richtlijn_400_Jaarverslag_en_ Handreiking.pdf.

13 Social conditions are to be laid down a manual. There will be a need for conditions regarding what must be seen as reasonable. From the perspective of proportionality, care must be taken that the economic operators are not disproportionally burdened with the risks.

Sustainable purchasing within Multi-Functional Accommodation
Within the purchasing project of a Multi-Functional Accommodation (MFA) the market was challenged to make a good weighing up within their offer between sustainability and costs. By means of functional tendering, as principal you indicated what goals (performance requirements) you wanted to achieve instead of describing how these performance requirements were to be achieved (for example energy-neutral instead of specific energy requirements). Within this procurement procedure a system was used whereby an ambitious but realistic lower limit (minimum requirement) was set in the area of sustainability which was recognisable for the market developments, and in addition more sustainable solutions were valued with a higher score. The price offer was offered on the basis of user costs for 15 years (TCO during 15 years), thus not only the acquisition price, but the economic life was taken into consideration, because this is often where the most benefit can be found with regard to sustainability. By means of the GPR building system (www.gprgebouw.nl/website/gebouw.aspx) the tenderers were able to offer their sustainable solutions in an objective and clear manner. The lower limit was fixed at an average GPR score of 8 (PIANOo uses a minimum of 7). A higher score provided an extra valuation which was weighted at 15% in the total evaluation. All tenderers made use of this opportunity and offered a higher GPR score than was minimally required. A functional approach thus encouraged innovation and competition and got the best out of the market. 3 out of 5 tenderers even received the maximum valuation, including the party which was ultimately awarded the contract. The MFA was realised with a GPR score of 8.7 which will lead, inter alia, to a lower environmental burden and lower costs during the entire economic life. By means of the system which was used, the tenderers were given the freedom to implement sustainable solutions with the best 'price/quality' ratio (Best PPR).

3.5.7 Relationship with other legislation

In general it is good to realise that there are legislation and regulations which can have an effect on a tender or on a tenderer. For example, listed companies have to deal with stock exchange rules. For example, these rules say something about whether or not certain information may be disclosed. The requirement, for example, that a tenderer must immediately notify the contracting authority when he presents a claim under his insurance, is contrary to these stock exchange rules. These state that when it comes to price-sensitive information (which is how loss claims can be viewed), everyone must be able to take note thereof at the same time. Other rules which companies sometimes come up against when it comes to possibilities (or impossibilities) when it comes to submitting a tender, are the rules relating to accounting. For example, many companies have to deal with European or American accounting rules (also known as IFRS or US GAAP). These rules state, inter alia, that a company may not book turnover if there is a possibility that it has to repay part or all of a contract amount to a customer (in this case: the contracting authority). Provisions in which it is stated that discounts may have to be granted later (such as the 'most-favoured customer' clause in some contracts) have a greater effect than many contracting authorities realise. This also includes long-term (maintenance) guarantees which are accompanied by the possibility for a contracting authority to cancel the contract (without a company having influence on this) after X number of years. As regards contract terms and conditions in general, reference is made to § 3.9. Naturally there can be reasons for contracting authorities to nevertheless set these requirements. In this case the contracting authority will have to make a substantiated consideration between the reason(s) and the possibility that it excludes companies from tendering for the relevant contract.

3.6 Time limits

The Act has several provisions in which time limits are cited. These provisions are briefly set out below.

Article 1.10

1. When preparing and concluding a public contract, a special sector contract or a concession contract or organising a design contest, a contracting authority or a special sector company shall only set requirements, conditions and criteria for the tenderers and the tenders which are reasonably proportional to the subject-matter of the contract.
2. When applying the first paragraph the contracting authority or the special sector company, in so far as applicable, shall in any event take the following into account:

…

   e. the time limits to be set;

…

Time limits are then stated in:

Article 2.54

1. A contracting authority shall provide additional information about the tender documents at latest ten days before the tender deadline, provided the request for information has been made in due time before the deadline for submitting the tenders.
2. In deviation from the first paragraph, the time limit referred to in said paragraph in the event of application of the open procedure, restricted procedure or competitive procedure with negotiation, where there is application of Article 2.74, is four days.

§ 2.3.2.3 Time limits

Article 2.70

The contracting authority shall set the time limits for submitting requests to participate or tenders, taking account of the subject-matter of the contract, the time necessary for the preparation of the request or the tender and the rules set in this paragraph regarding time limits.

Article 2.71

1. For open procedures the time limit for submitting the tenders shall be at least 45 days, to be counted as of the date the notice is sent.
2. For restricted procedures and competitive procedures with negotiation the time limit for submitting the requests to participate is at least 30 days, to be counted as of the date the notice of the public contract is sent.
3. For competitive dialogue procedures and innovation partnership procedures, the time limit for submitting the requests to participate is at least 30 days, to be counted as of the date the notice of the public contract is sent.
4. For restricted procedures the time limit for submitting tenders is at least 40 days, to be counted as of the date the invitation to tender is sent and for competitive procedures with negotiation the time limit for submitting the first tenders is also at least 40 days, to be counted as of the date the invitation to tender is sent.
5. If the contracting authority has given a prior information notice as referred to in paragraph 2.3.2.1, it can shorten the time limit for submitting the tenders referred to in the first and fourth paragraph to 29 days, but in no case to fewer than 22 days.
6. The shortening of the time limit referred to in the fifth paragraph is only permitted, if the prior information notice contains all information which is demanded in the notice of the public contract, referred to in Annex V, Part B, section I of Directive 2014/24/EU, in so far as this information is available at the time that the prior information notice is announced and provided this prior information notice is sent at least 52 days and at most 12 months before the notice of the public contract is sent.

Article 2.72

1. A contracting authority shall extend the time limit for submitting the tenders referred to in Article 2.71, first and fourth paragraph, by five days in the cases referred to in Article 2.66, third and fourth paragraph.
2. The first paragraph does not apply in a case as referred to in Article 2.74.

Article 2.73

1. A contracting authority shall extend the time limits for submitting the tenders in such way that all economic operators involved can take note of all necessary information for preparing the tenders, if:
   a. tenders can only be made after a visit to the location,
   b. tenders can only be made after inspection on site of the documents which support the tender documents,
   c. the additional information which has been requested in time, which is of significance for preparing the tenders, has not been provided at latest ten days or, in a case as referred to in Article 2.74, sub-paragraphs a and c, at latest four days before the date of submission of the tenders, or
   d. the tender documents have changed considerably.
2. In the cases referred to in the first paragraph, sub-paragraphs c and d, the duration of the extension must be reasonably proportional to the significance of the information or change.

Article 2.74

In the event of an urgent situation, which the contracting authority has properly substantiated, in which the time limits stipulated in Article 2.71, first, second and fourth paragraph cannot be observed, a contracting authority can fix the following time limits:

a. in the event of an open procedure, a time limit for submitting the tenders of at least fifteen days, to be counted as of the date the notice of the public contract is sent;
b. in the event of a restricted procedure or a competitive procedure with negotiation, a time limit for submitting the requests to participate of at least fifteen days, to be counted as of the date the notice of the public contract is sent;
c. in the event of a restricted procedure or a competitive procedure with negotiation, a time limit for submitting the tenders of at least ten days, to be counted as of the date the notice of the public contract is sent.

Article 2.74a

1. A contracting authority which is not a central contracting authority can, in deviation from Article 2.71, fourth paragraph, fix the time limits for submitting the tenders in a restricted procedure or the time limit for submitting the first tenders in a competitive procedure with negotiation in consultation with the selected candidates, provided all selected candidates get the same amount of time to prepare and submit their tender.
2. If no agreement is reached on a time limit as referred to in the first paragraph, it shall be at least 40 days, to be counted as of the date the invitation to tender is sent.

Article 2.74b

A contracting authority can shorten the time limit for the submission of the tenders, referred to in Article 2.71, first and fourth paragraph, and Article 2.74a, second paragraph, by five days, if it agrees that tenders may be submitted electronically.

Article 2.103

1. A contracting authority shall give written notice of the rejection or exclusion of candidates and tenders as soon as possible.
2. On the request of a relevant party a contracting authority must notify a rejected candidate

as soon as possible, but at latest within fifteen days after receipt of his written request, of the reasons for the rejection of his request to participate.

3. On the request of a relevant party the contracting authority shall notify every rejected tenderer as soon as possible, but at latest within fifteen days after receipt of his written request, of the reasons for the rejection of his tender, including with regard to the cases referred to in Articles 2.77 and 2.78, the reasons for its decision that there is no equivalency available or that the works, supplies or services do not satisfy the functional or performance requirements.
4. The first and second paragraph apply mutatis mutandis to the tenderer referred to in Article 2.101, third paragraph.

Rule 3.6:

The contracting authority shall consider applying a longer time limit than the minimum time limits.

If the law sets minimum time limits, it must be critically considered per contract whether the time limits which have been stipulated are realistic and proportional to the action to be taken. For example, in a complicated project it is wise to set longer time limits, so that the parties will have sufficient opportunity to submit tenders. Contracting authorities will have had months, sometimes half a year or a year to think about the procurement procedure before publication: it is also in the interests of the contracting authority to give tenderers sufficient time to present a good offer. The statutory time limits are expressed in calendar days and do not take account of holiday periods and other periods in which a request to participate or tender can be prepared, or any other necessary action can be taken in the procurement procedure. Unfortunately it is rather common in practice that time-limited correspondence is in fact sent shortly before such a common (for the industry) holiday period. Think of such things as an intention to award, whereby the possibility to start up a procedure is limited to 20 calendar days. Strictly formally, the statutory time limits may be applied and it is not prohibited to publish a call to tender before the holiday, and immediately engage in selection or award after the holiday. However, this will not benefit the quality of the offers and may also exclude a significant part of the potential tenderers. In such situations it is proportional to extend the fixed time limit by the holiday period so that there can be optimal market working and the legal protection is not limited.

The procedure description of a contracting authority includes the following passage: In the period 24 July to 15 August, the purchasing department cannot be reached, in connection with holidays.

Any questions during this period will be answered after 15 August. In connection with this holiday, the time limit for submitting the tenders will be extended by 3 weeks compared to beyond the statutory periods.

If questions have been presented regarding information which can have far-reaching consequences for the offers to be submitted, for example because changes are made in the contract, it is recommended to leave extra scope for this in the elaboration (i.e. longer than 10 days). If answering questions in the first instance leads to new questions, it may even be proportional to allow extra time for the answering thereof. Intentionally asking questions at the last minute, without good reason, in order to frustrate the process, is deemed unprofessional with regard to contracting authorities.

If a contracting authority changes the tender documents to a considerable degree or does not furnish relevant additional information as requested in time, the contrac-

ting authority must extend the applicable time limits. The extra time depends on the nature and the degree of the changes or the missing information and the effect thereof on the contract. Substantial modifications with regard to technical specifications can, for example, give rise to a considerable extension of the time limits. Considerable changes, certainly if they lead to adjustment of the time limits, must be published on the relevant publication platform by means of a rectification of the original notice. It is thus not necessary to fully withdraw a call to tender and publish it again, it suffices to make it sufficiently clear in the rectification what has changed, and what the new time limits are.

Article 2.109

1. In the event of a malfunction of the electronic system by means of which the registration must be submitted, which prevents submission of the tender shortly before the expiry of the deadline, the contracting authority can extend this time limit after the end of the deadline, provided it has not yet taken note of the contents of any tender.
2. All non-rejected candidates and tenderers shall be notified by the contracting authority of the extension referred to in the first paragraph, and shall be given the opportunity to change or supplement their tender within the extension period.

Article 2.127

1. A contracting authority shall take account of a postponement period before it concludes the contract pursuant to the decision to award.
2. The postponement period referred to in the first paragraph starts on the day after the date when the notice of the award decision has been sent to the relevant tenderers and the relevant candidates.
3. The postponement period referred to in the first paragraph shall be at least 20 calendar days.
4. A contracting authority does not have to apply the first paragraph if:
   a. this Act does not require publication of the notice of the public contract by means of the electronic tender system;
   b. the only tenderer involved is the party to whom the public contracts is granted and there are no candidates involved;
   c. it concerns contracts based on a framework agreement or specific contracts based on a dynamic purchasing system as referred to in part 2.4.2.

3.7 Variants

Article 2.83

1. A contracting authority can permit the tenderers to propose variants or to demand that they submit variants.
2. A contracting authority shall state in the notice of the public contract whether it permits or wants variants. A contracting authority shall only permit variants if it has stated in the notice that they are permitted or wanted.
3. A contracting authority which permits or wants variants, shall state in the tender documents what requirements these variants must at least satisfy, how they are to be submitted and whether variants can only be submitted if a tender which is not a variant, has been submitted.
4. A contracting authority shall safeguard that the chosen award criteria can be applied to variants which satisfy the relevant requirements and to compliant tenders which are not variants.
5. Variants are connected with the subject-matter of the contract.
6. A contracting authority shall apply the chosen award criteria to variants which satisfy the relevant requirements and to compliant tenders which are not variants.

7. A contracting authority shall only take variants which satisfy the relevant requirements into consideration.
8. In procedures for the awarding of public contracts for supplies or public contracts for services, a contracting authority which permits or wants variants, shall not reject a variant purely because this variant, if it were chosen, might lead to a public contract for services or a public contract for supplies, or would probably lead to a public contract for supplies or a public contract for services.

Rule 3.7:

The contracting authority shall consider permitting tenders to propose variants.

The legislation offers the possibility of permitting variants. A contracting authority can also demand de facto variants, regardless of the chosen award criterion. If in the procurement procedure the submission of variants on what has been requested in the specifications is possible, the contracting authority must indicate what requirements these must satisfy. In the event of variants too it must be indicated whether or not a compliant tender is required.

Practice teaches that this option is seldom applied. In practice it sometimes turns out to be difficult to formulate evaluation criteria in such way, that variants can be included in a transparent and fair manner in the evaluation. Nevertheless, permitting variants is very much worthwhile, and must be seriously considered in that sense. Providers can come up with ideas that a contracting authority may not have thought of, which could, for example, be cheaper, more efficient and more cost-effective.

Contracting authorities are expected, in the framework of proportionality on the basis of the contract, to critically review the number of desired variants; tenderers are expected to carefully look at the number of variants to be submitted in order to avoid unnecessary costs and efforts of all parties.

In practice, the full or partial functional specification of a contract is seen as an alternative for permitting variants. In both cases, this means that maximum use is made of the knowledge on the part of the tendering parties to realise the most suitable solution for the contracting authority.
In addition, permitting variants or the functional specification, including in the framework of encouraging innovation, are definitely important advantages.

3.8 Tendering costs

Article 1.10 (1.13 and 1.16 contain corresponding provisions for national procurement procedures and multiple tender procedures)

1. When preparing and concluding a public contract, a special sector contract or a concession contract or organising a design contest, a contracting authority or a special sector company shall only set requirements, conditions and criteria for the tenderers and the tenders which are reasonably proportional to the subject-matter of the contract.
2. When applying the first paragraph the contracting authority or the special sector company, in so far as applicable, shall in any event take the following into account:

...

g. compensation for high costs of a tender;

...

Rule 3.8:

The contracting authority shall offer compensation if a part of the contract to be placed must be performed in order to submit the tender.

Just as a contracting authority has to incur costs for putting a contract out to tender, the tenderers / candidates must incur costs for the actual tender. It is important not to allow these costs to rise unnecessarily, nor to allow too many tenderers at once to incur costs. If it is unavoidable that proportionally considerable costs (think of personal presentations, mock-ups and models, sketches or (construction) costings) have to be made per tender, it is proportional to give a tenderer compensation therefor.

A municipality and a college which are going to realise five sports halls and a teaching building together, decide on the basis of the market knowledge of

architects to organise a restricted tender. 113 candidates download the selection guidelines, 36 architecture firms decide to register their interest. After evaluating the 36 registrations, 5 firms are invited to submit a tender, whereby a personal presentation (not a design!) forms part of the award. After awarding, the 4 firms which were not awarded the contract will receive reasonable compensation for their efforts with regard to the personal presentation.

3.9 Contract terms and conditions

Article 1.10 (1.13 and 1.16 contain corresponding provisions for national procedures and multiple private tender procedures)

1. When preparing and concluding a public contract, a special sector contract or a concession contract or organising a design contest, a contracting authority or a special sector company shall only set requirements, conditions and criteria for the tenderers and the tenders which are reasonably proportional to the subject-matter of the contract.
2. When applying the first paragraph the contracting authority or the special sector company, in so far as applicable, shall in any event take the following into account:

...

h. the terms and conditions of the contract.

Proportionality extends to all stages of the procurement procedure and thus also to the contracts and the contract terms and conditions. As tendering subject to conditions is not permitted, this specifically concerns terms and conditions which the contracting authority itself states apply to the contract to be awarded. This includes such things as specification conditions and any purchasing conditions of a contracting authority.

Contracting authorities and companies make considerations as to whether contract, purchasing and delivery conditions are acceptable. The use of proportional conditions is therefore also in the interest of both the contracting authority and the tendering parties. The entirety of clauses in a contract including purchasing conditions are best seen in conjunction with each other. The individual provisions can be proportional on their own, but in conjunction they might, due to cumulative effects, become disproportional. The following points in any event deserve attention in the framework of contract terms and conditions:

- whether individual contract provisions are usual in the relevant market. It must also be reviewed in this respect whether the provisions are usual in contracts between economic operators;
- whether it is desirable that in provisions in a contract in which a burden, obligation, undertaking or limitation is placed on the tenderer to the disadvantage of the tenderer, there should be deviation from the statutory system of the law of obligations.

Rule 3.9 A:

The contracting authority shall allocate the risk to the party which can best manage of effects of the risk.

- Who should bear the various risks which are encompassed in a contract? Allocate the risk to the party which can best manage and/or influence the risk, be it the contracting authority or the tenderer. The following aspects must be included in the weighing up of the risks:
  - the chance that a risk will be realised and
  - the consequences of the circumstance that a risk will be realised.
  Placing a risk with a tenderer which is not or is barely foreseeable which will only arise in exceptional cases as well as of a risk with potential effects which can or will undermine the continuity of the supplier, is more likely to be disproportional than a reasonably foreseeable risk with minor or overseeable effects.
- Is the risk for one of the two parties insurable on reasonable/realistic conditions (note: A much heard misconception is that everything can be insured. This is not true. It must be borne in mind in this respect that if insurance is available on the market, this does not always mean that all risks will be covered under that insurance. In particular guarantee obligations, penalties or indemnifications are as a rule uninsurable.)

Rule 3.9 B:

During the procurement procedure, the contracting authority shall offer potential tenderers the opportunity to make suggestions for modifications to the draft agreement or to deviate from the purchasing terms and conditions.

During the procurement procedure potential tenderers must always have the opportunity to make suggestions for modifications to draft agreements or to deviate from the purchasing terms and conditions. As contracting authority you can provide the opportunity to include substantiated proposals. Imposing a contract without any possibility for the tenderer to present suggestions is in principle disproportional.

Rule 3.9 C:

In cases in which for a specific kind of agreement there are contract models or collective general terms and conditions, the contracting party shall apply them in full.

In cases in which for a specific kind of agreement there are contract models or general terms and conditions, which have been collectively agreed by a number of parties, they should in principle be applied in full as they concern a balanced package of terms and conditions. Examples are the Uniform Administration Conditions (UAV) versions 1989 and 2012 and the UAV-GC 2005. Project-specific situations can make it necessary to deviate from those models or conditions, but reasons must be given for the deviations.

If the submission of variants is permitted in a procurement procedure, the tenderer must be given the scope to make suggestions with regard to the standard contract or the standard terms and conditions of the contracting authority. A variant is in such

case only feasible if suitable terms and conditions are agreed in that procurement procedure.

In addition to offering the possibility of presenting suggestions it is also an option not to impose a contract in advance, but to draw up a contract after awarding which is based on the specifications and offer. A choice can be made in this respect to include a proposal for a contract or a model contract in the tender documents in which the specifications and offer are to incorporated.

3.9.1 Individual contract clauses

In addition to what has already been stated above in a general sense regarding contracts and general terms and conditions, a number of specific contract clauses are discussed below (the examples listed are not exhaustive). Naturally other contract terms and conditions must also be proportional.

3.9.1.1 Liability clause

Rule 3.9 D:

1. *The contracting authority does not want liability which is not limited in any way.*
2. *When evaluating what limitation of liability is proportional, the contracting authority shall in any event take note of:*
   - *the risks which the contracting authority actually runs;*
   - *the usual liability requirement in the relevant industry or for the relevant contract by nature and size.*

The liability paragraph often gives rise to much discussion between the two parties. The risks in the relevant contract play a role for both parties. Liability which is in no way limited, is presumed not to be proportional. Liability can be limited in kind, amount and duration.
With regard to kind of liability, a distinction can be made between direct and indirect loss. It must be review per contract on the basis of the considerations at the beginning of this paragraph and the specific considerations hereafter what limit is proportional in a given case.
Sometimes no or hardly any risks are connected with the contract; in another case these risks can be very substantial (think of situations where there may be personal injury, but also situations whereby errors in a relatively small consultancy contract can have significant financial consequences for the contracting authority). What limitation is proportional, is therefore not easy to quantify in percentages of the contract and can differ per industry and/or contract. In order to evaluate what liability limit is still proportional, the following aspects can be reviewed:

- what risks does a contracting authority actually run: a liability requirement must be attached to this;
- what is a common liability requirement in the relevant industry and/or for the relevant contract by nature and size. There can be a review of the provisions in the contracts which are common in that industry and of what is commonly insurable[14] in that industry and/or for that type of contract. For example, in some industries and/or for some types of contract, consequential loss is not insurable and guarantees are seldom insurable.

In some industries percentages have been fixed in collectively agreed general terms and conditions. If said terms and conditions are applied, alignment can be sought with the percentages laid down therein.

14 'Commonly insurable' means insurable at reasonable rates and conditions.

With regard to liability for personal injury, death and property damage, alignment should preferably be sought with the standards from the insurance industry for that industry and/or for the relevant contract.

With regard to the duration, the general basic principle is that the liability is linked to a percentage of the contract value of one year. With a time limit for performance which is shorter or longer than one year, it is not always proportional to calculate the liability on the basis of a year. A liability clause for an indefinite period of time is deemed to be disproportional .

3.9.1.2 *Intellectual property*

In accordance with the Dutch Copyright Act, the intellectual property lies with the maker thereof. In many sectors the intellectual property in a product is the only thing that has any true value and/or is crucial for the regular business activities of tenderers. For the contracting authorities it is often important to prevent that they become dependent on an economic operator with regard to products made for them. For that reason they want to have the intellectual property. To prevent this problem the intellectual property is not as such necessary, but usually an extensive right of use will suffice. If the latter is assumed, justice is done to the position of both the tenderer and the contracting authority.

3.9.1.3 *Most-favoured customer clause*

Rule 3.9 E:

A contracting authority shall not require a tenderer to guarantee in advance, that in the event a contracting party other than the relevant contracting authority is offered a better price for the same product or service, to offer the same to the contracting authority with retroactive effect.

This clause entails, in short, that a tenderer must guarantee in advance that in the event a contracting party other than the contracting authority in question is offered a better price for the same product or service, the contracting authority must also receive such offer with retroactive effect. In general this provision can be deemed disproportional. In some countries in Europe this provision is prohibited by law.

4. Tender stage

4.1 Questions for and notices of contracting authority

As of the time of publication of the procurement procedure, potential tenderers may ask questions in connection with the tender document or the selection guidelines. From a legal perspective, questions must be answered by the contracting authority at least 10 days before the request to participate or offer has been received. Both parties will benefit from questions being presented as quickly as possible and also being answered as quickly as possible. Depending of the subject-matter of the tender, it is sometimes also useful to organise a 'prebid meeting' or a visit to the location (e.g. for cleaning, catering or technical maintenance/renovation of buildings). Questions are answered in one or more information notices which are made available to all potential tenderers digitally (mandatory as of 1 July 2017). Questions which are received will be published immediately and as soon as the answer is available, it will be added. This manner of providing information has the advantage of a rapid response of the contracting authority to questions of tenderers and of preventing redundant questions.

> The procedure description of a contracting authority includes the 'information notice' as follows:
> - Questions can only be present by email and in Dutch, addressed to info@publieke.instelling.nl, with the reference '<<tender subject-matter>>';
> - The questions and answers thereto, as well as clarification of the contracting authority of its own volition, will be published in anonymised form on a tender platform. All tenderers are themselves responsible for regularly consulting this site;
>
> Mention can be made of references to previous questions.

This does not affect the fact that for the sake of clarity, the definite Information Notice with all questions and answers bundled together will be published at latest 10 days before submission of the request to participate/the tender. When furnishing a lot of information, it may also be advisable to extend the tender submission period.
Despite the basic principle of electronic information exchange, other kinds of communication remain possible (think of presentations, interviews and location visits). A condition for use of other kinds of communication is that the contents of that communication are sufficiently documented and made available to all stakeholders (non-discriminatory, transparent and objective).

4.2 Formal requirements

Rule 4.2:

The contracting authority shall demand no other formal requirements of a tenderer than those intended to come to an objective comparison of the tenders.

Every tender document shall set out the formal requirements applicable to a registration of interest or tender. The goal of these formal requirements is to be able to come to an objective comparison of tenders. For example, it can be asked that a tender form/answer table must be completed, and a specific numbering of

annexes might be requested. More requirements can be added, depending on the subject-matter of the tender (think of test prints in a tender procedure for printed material). Nevertheless, this too encompasses a clear proportionality component. Every formal requirement which is set, means more work for a (potential) tendering party. For example, a contracting authority must always consider whether five copies are really necessary (for paper tenders) and what reliability level is proportional (for digital tenders). It is logical to align with the tools for reliability levels for authentication with electronic public services (version 3) of 'Forum Standardisation and for the submission of tender documents to apply a reliability level (which in any event is no higher than) 3.[15] A contracting authority runs the risk that if the formal requirements are excessively high, the number of tendering parties will substantially decrease (restricting competition), the chance of errors will increase or that the form becomes more important than the contents.

The desire that every page is signed or initialled does not seem to be necessary. In addition, the setting of formal requirements relating to such things as references should also be applied with reserve. In practice this could mean that a tenderer has to go back to his referee for every contract to get a signature again for the same reference (which may have been obtained years ago), always under another reference model. Aside from possible obstacles, such as the persons involved with that specific contract no longer working with the organisation in question or the new form not fitting with the original contract, this will lead to an unwanted administrative burden.

4.3 Standstill period

The *standstill* period of 20 calendar days is emphatically a minimum time limit. Extension of that period can in some circumstances be possible and/or wise, both in the interests of the contracting authority and in the interests of tendering parties. If the provisional award is just before a holiday, it is not realistic to expect that market parties will be able to study the provisional award within the 20 calendar days and to decide whether or not to take any measures. This may be convenient for a contracting authority, but it also entails that it can be a reason for a tendering party to go straight to court, in view of the unrealistic period. A substantiated explanation of the result of the procurement procedure (in the award, but if more detail is desired, also on the request of the tendering parties) is important for all parties. Should it not be possible in terms of the agenda to schedule the requested consultation within the 20 days, it is possible to extend that time limit by, for example, a week to 'let things settle down', provided this does not frustrate the performance of the contract.

4.4 Complaints procedure (proportionality aspect of complaints procedure)

In addition to statutorily determined forms of legal protection, there is a great need for low-threshold forms of complaints handling. It is proportional to prevent and/or resolve any complaints and ambiguities at the earliest possible stage of the procurement procedure and to thereby have an interim effect on the procedure. This can not only have the effect of saving time and costs, but it can, in addition, ensure that the ((pre-) contractual) relationship between the parties is not unnecessarily put under pressure. Economic operators are sometimes reticent in questioning ambiguities/in-

15 Reliability levels for authentication by electronic public services (version 3) of Forum Standardisation, https://www.forumstandaardisatie.nl/fileadmin/os/publicaties/HR-Betrouwbaarheidsniveaus-v3-2014.pdf

accuracies out of fear of being seen as a complainer (do not bite the hand that feeds you). The following is deemed proportional:

- as contracting authority taking complaints and questions into account at an early stage, presented by individual economic operators, their industry organisations, or already existing, industry-related or otherwise, tender consultancy centres, which where necessary/possible can lead to adjustments in the procedure;
- compliance with the substantiation and transparency principle to prevent complaints / ambiguities.

In the framework of professional procurement, every contracting authority should have a specific form of complaints procedure in accordance with the above. A standard has been fleshed out in this respect, as flanking policy next to the law.[16] This Guide limits itself to pointing out the above-mentioned proportionality aspects in complaints procedures.

16 The definite advice on Complaints Procedures in Public Procurement was established on 1 March 2013. See also https://www.rijksoverheid.nl/ onderwerpen/aanbesteden/documenten/regelingen/2013/03/07/klachtafhandeling-bij-aanbesteden

IBR PUBLICATIES

The award of public contracts has to comply with among others the principle proportionality. In many instances during the tender procedure the contracting authorities has to pay particular attention to the principle of proportionality. Think of the following topics: suitability requirements, requirements relating to financial and economic strength, requirements relating to technical and professional skill, selection criteria, requirements for consortiums and the award criteria.

For many civil servants acting according to the principle of proportionality is an abstract concept that places them for difficulties when working on tender documents. The Dutch government is aware of this problem and offered a helping hand by having a special guide written solely on the principle of proportionality.

This guide contains explanations, arguments and examples to help in the daily practice of all those working in tender situations: contracting authorities and economic operators. The Proportionality Guide is considered to be very helpful in the Dutch tender practice and it is for that reason the Dutch Institute of Construction Law took the initiative to translate the guide into English so it can be of use outside of the Netherlands as well.

ISBN 978-94-6315-044-6
NUR 822

9 789463 150446 >