



# **PURCHASE AND TENDER MANUAL (PTM)**

## **FOR**

### **PUBLIC ORGANISATIONS**

**Further Strengthening of the Public Procurement  
System in the Republic of Croatia**

**G2G07/HR/9/1**

- BIZOB, the Netherlands
- Ministry of Economy, Labour and Entrepreneurship/Directorate for the Public Procurement System (formerly PPO), Zagreb, Croatia

<b>Colophon</b>	
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<b>Summary:</b>	<p>The project purpose is to assist the MELE/Directorate for further strengthening of the PP system in the implementation of the legislation on public procurement in the Republic of Croatia, by supplying expertise and experiences for professionalization of the purchase and tendering function.</p> <p>The MELE/Directorate has the responsibility to ensure an adequate implementation of Public procurement legislation by national, regional and local government entities.</p>

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## 1. Introduction

The municipality is increasingly aware of the value of a well-implemented purchasing position for the operation of the entire organization. This becomes clear when one realizes that the Municipality of Zagreb purchases a large proportion of the total budget from external parties, and is therefore dependent on them.

Each year, the municipality purchases goods, services and works for a high value. The money spent is public money. It is understandable that a municipality has an obligation to its citizens and itself to ensure that this money is spent as efficiently and effectively as possible. The purchasing process and process of tendering will have to be realized lawfully and in a professional way.

The purchasing processes should be set up professionally not only because of the possible financial benefits, however, but also for the quality aspects of the purchasing. The quality of the purchasing translates, of course, into the quality of the products, services and works themselves, but also in the management of turnaround times and delivery terms, preventing unexpected budget overruns, preventing future problems and the integrity of the municipal organization and the municipal officers involved. Professional purchasing usually takes place in a team context in the organization, which ensures interactive decision-making and collective accountability. It therefore also has a major influence on the organizational work processes.

The influence that well-structured municipal purchasing processes can have on the municipal organization, the business community and the citizens, thanks to their exemplary function, plays an essential role in the development and maintenance of confidence in the way in which community money is spent. This procedure provides the working method and ensures the legitimacy of the processes of professional purchasing and tendering within the municipality.

Cooperative purchasing between the various organizations is not an objective in itself, but a means to achieve the objectives. Cooperative purchasing focuses on increasing purchasing knowledge and purchasing skills, on avoiding fragmentation and on obtaining economies of scale. Cooperative purchasing is not free of obligation, the goal is to become purchasing partners. It must be realized that cooperative purchasing must always be structured according to the situation. A determination must be made, on a project-by-project basis, as to which organizations will cooperate in which way in the project in question.

The term 'tendering' is often seen as something separate from purchasing. In reality, tendering is often no more or less than one of the possible purchasing techniques, and one that is used frequently in the case of works. In order to keep the text readable, we will only be referring to 'purchasing' below, although in

certain cases it should also be read as 'tendering'. For the same reason, the term supplier is also used to refer to service providers or contractors.

A purchasing process can be the result of a considered decision to contract out matters which were originally realised in-house (outsourcing, or alternatively in the other direction: insourcing). The economic and organisational research into the consequences of such a process (a make or buy decision) does not form part of this procedure.

## 2. Objective of purchasing and tendering procedure

The purchasing and tendering policy is based on the general principles of sound administration: ***openness, objectivity*** and ***due care***.

Openness means that purchasing processes must be transparent (though not necessarily always public), and that it must therefore be possible to account for them. Objectivity means that purchasing processes are based on facts, not on gut feelings and prejudices. For example, no external parties, products, services or works should be excluded in advance. Due care means working in a professional manner and being accountable from a purchasing point of view.

**The objective of the policy of purchasing and tendering is the acquisition in a responsible manner from both a legal and a purchasing point of view, of necessary products, services and works of the desired quality, for low comprehensive costs in the long term.**

The desired quality means optimally suitable for the functional need, no more and no less. The right quality, in the broadest sense of the word, is always the starting point. Quality does not always only mean the quality of the product, service or work, but also the quality of matters directly related to them, such as service, logistics, information, guarantee, conditions, etc.

Low comprehensive costs means that all the costs, throughout the entire lifecycle, which are directly related to the choice of a product, service or work, are taken into account in the financial decision-making process (the TCO or Total Cost of Ownership).

This means working together to achieve an optimum price-quality ratio. The challenge is to do more with less money.

### **3. Commercial procurement in a public setting / business approach**

#### **3.1. Best value for money**

Commercial procurement is essentially about getting best value for money. Why should this be any different for procurement in a public setting? Governments should care about the effectiveness of their spending as it is public funds they are dealing with (taxpayers money). Not only because with effective procurement there is money left for other purposes in society. Also in cases where budget constraints are not crucial, professional procurement will guarantee a better outcome in terms of quality of the product or guarantees that the product will be delivered in time.

Public procurement according to the European directives<sup>1</sup> sometimes seems to be contradictory to the objectives of commercial procurement. This however is not the case. It is true that the public procurement directives are designed to open up the European public expenditure markets as they represent a vast amount of money (in 2002 the total EU procurement market was worth €1.5 trillion or over 16% of EU GDP)<sup>2</sup>. Also the need for best value for money has been acknowledged as one of the goals of this procurement legislation<sup>3</sup>. This is also reflected in the structure of the public procurement directives and many of its principles and provisions. In this chapter we are going to demonstrate the parallels between the content and the structure of the public procurement directive 2004/18/EC and the principles of commercial procurement.

#### **3.2. Definition of scope**

Before presenting any further details of the system of procurement according to the directives we first need to make a short stop to determine the place and the scope of these rules.

The first thing we need to establish is the place of the public procurement rules in the commercial process. From procurement theory three levels in purchasing can be distinguished. This ranges from the strategic level to the operational level:

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<sup>1</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (30.04.2004) and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (30.04.2004)

<sup>2</sup> EU Commission report "European Union rules deliver big savings for taxpayers; scope for more gains" of 03.02.2004.

<sup>3</sup> See for example considerations 5 and 46 of Directive 2004/18/EC.

### *Strategic*

This level concerns the purchasing strategy of a company or institution as a whole. It considers all contracts and is focussed on strategic, long term decisions. Often it has elements of change management, because decisions on this level have an impact on the structure of the organisation.

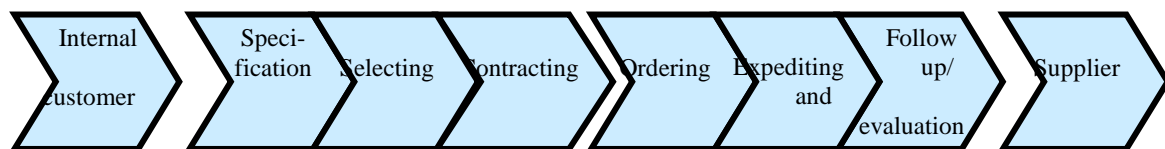
### *Tactical*

Here the focus is one or several contracts for a specific part of the organisation. Also a specific contract for the whole organisation would qualify as tactical level purchasing (for example ICT hardware or stationary). Also the time scope of the activities on this level is often more limited than on strategic level.

### *Operational*

The execution of a contract is central at this level. The activities on the operational level are limited to the scope and duration of a specific contract or bundle of contracts.

For clarity it should be noted that European public procurement legislation is intended for the tactical level. It does not concern itself with strategic organisational issues or with operational issues in the contractual stage. Procurement legislation is concerned with the manner in, the procedure according to which contracts are concluded. It concerns the stages of “specification”, “selecting” and “contracting” (see overview below).



The procurement directives themselves however have limited their scope. The most important are:

- Contracts placed on the market by “contracting authorities” only. The directive 2004/18/EC for example defines what government organisations and government influenced organisations are covered by its regulations<sup>4</sup>.
- Only contracts not specifically excluded to the scope of the directives<sup>5</sup>.
- Contract with a value that exceeds the threshold values<sup>6</sup>.

<sup>4</sup> See article 1, paragraph 9 of 2004/18/EC.

<sup>5</sup> See section 3 of 2004/18/EC.

<sup>6</sup> Articles 7 and 8 of 2004/18/EC.

### 3.3. Concrete parallels between business and legislation

As said, the structure and content of the public procurement directives is conducive to commercial procurement. More specific, we can provide three main examples how the system from the directives targets the same objectives as procurement in a private setting:

- Basic principles of public procurement
- Use and setting of criteria
- Sculpting of the contract documents

The first two of them stem directly from the system of the legislation itself, the third on the practical implementation into practice.

#### Basic principles of public procurement

The system of the public procurement directives is based on a few general principles. Not only do they form the basis of this detailed legislation, but they are also applied in concrete cases. Any court in the member states of the European Union can and should evaluate the conduct of contracting authorities also according to these principles. As we can see from the overview of the most important principles below, also commercial objectives are served with their application.

#### **Principle of equal treatment**

Also: non-discrimination principle or the level playing field principle

##### *Meaning*

It is the key principle. This principle ensures that all bidders are treated equally, which means that no distinction should be made without a justified and objective cause. It also prohibits making decisions solely based on the nationality of bidders. It is not only applied in the setting of criteria, but also in the execution of procedures.

##### *Impact on commercial procurement*

Making sure that all decisions are solely based on the needs of the contracting authority enables this authority to profit from optimal competition. No companies are excluded based on irrelevant facts. As it excludes irrelevant, irregular or possibly illegal decisions it therefore bans a lot of commercially bad decisions. Last but not least, it makes sure that the market stays competitive and companies stay on edge. This results in better offers and better conditions for contracting authorities.

## **Principle of transparency**

### *Meaning*

The principle of transparency ensures that contracting authorities set and communicate clear rules before the procedures starts and justify their decisions based on these rules. This principle also enables that the principle of equal treatment can be verified and that public contracts are advertised.

### *Impact on commercial procurement*

The key commercial effect of transparency is that the market for public contracts becomes transparent. Because notices of contracts are published enterprises have easy access to information about the existence of these contracts. For the contracting authorities this means that they will create optimal competition. Any private entity interested in a contract can make a bid or submit a request for participation. Thus increasing the possibilities to achieve best value for money. Also enterprises can use the information from the publication of awards to improve their bids for the next tender.

Last but not least, justification and publication makes nepotism and corruption in public procurement much harder.

## **Principle of proportionality**

### *Meaning*

This principle requires that all requirements and criteria applied in public procurement must be related to the subject matter of the contract. In other words they must be proportional to the object of the contract. This proportionality applies both to the size of criteria/requirements (for example turnover values) and to the nature of the criteria/requirements (no irrelevant issues, such as the amount of money spent on charity by the personnel of the company).

### *Impact on commercial procurement*

The principles of proportionality also has a positive effect on competition and best value for money. It makes sure that the requirements and criteria set in tender procedures are cut to the bone and all irrelevant considerations are excluded. It makes sure that the award is done in a economical setting.

## The setting of criteria

The setting of criteria and requirements in public procurement procedures is a crucial stage. This is due to the fact that criteria and requirements carry two very important functions to the market:

- Description of the contract: the requirements and criteria provide the market with a description of the contract that is being tendered. The more accurate this description, the more accurate the market can make its bids. Of course, the contrary applies as well: garbage in, garbage out.

- Tool for evaluation: on the side of the contracting authority the requirements and criteria provide a tool for making procurement decisions. It decides who gets selected and who does not, who will get the award and who will be rejected.

The required accuracy of the formulation of these criteria and requirements is in many cases not possible without prior knowledge of the market and knowledge of its own needs. So conducting market analysis and in some cases market consultations are necessary tools.

The provisions in the public procurement directives for example for technical specifications and the case law of the Court of Justice oblige contracting authorities to be clear and unequivocal in the setting of such requirements.

Also within the scope of the public procurement directives contracting authorities have many possibilities to sculpt certain needs or requirements in different manners. It can for example choose to address security of supply for a winter salt contract by means of:

- Technical specification: # tons reserved
- Selection criterium: quality control measures, past performance or percentage subcontracting
- Award criterion: security of supply (specific measures taken for this contract)
- Contract execution clause: fines in case of lack of performance

But also within these requirements public procurement legislation requires contracting authorities to be specific about the precise settings of their criteria of requirements. For example for the award criteria it is obliged to indicate the different weighing factors. Enterprises use this information to assess the attractiveness of the tender and reduces transaction cost for those bidders not interested or capable.

#### Sculpting of contract documents

Business should be done in the most effective manner possible. Creating maximum transparency and equality helps engage with the highest number of potential suppliers. Effective setting of criteria according to the regulations helps prevent enterprises from entering into impossible tenders and reduces evaluation costs. Last but not least, drawing up these requirements and criteria in an effective document is the crucial end of the pipe line. An effective document means at least the following:

- Keep uniform structure with every tender
  - Easy evaluation every time (internal management can be optimized).
  - Predictability for bidders in each tender.
  - Lower transaction costs.

- Clear division between types of requirements
  - Legal obligation to distinguish!
  - Clear overview for authority.
  - Less chance on errors with bidders or in the evaluation.
  
- Work with formats/forms where possible
  - Reduces chances for making mistakes.
  - Enables easy evaluation.
  
- Work where possible with “self declaration”
  - Verification only of “winners”.
  - Reduces administrative burden and evaluation time.

Although not all of these issues are directly stated in the public procurement directives, they enable the effective use within procurement procedures.

## 4. Policy on purchasing and tendering

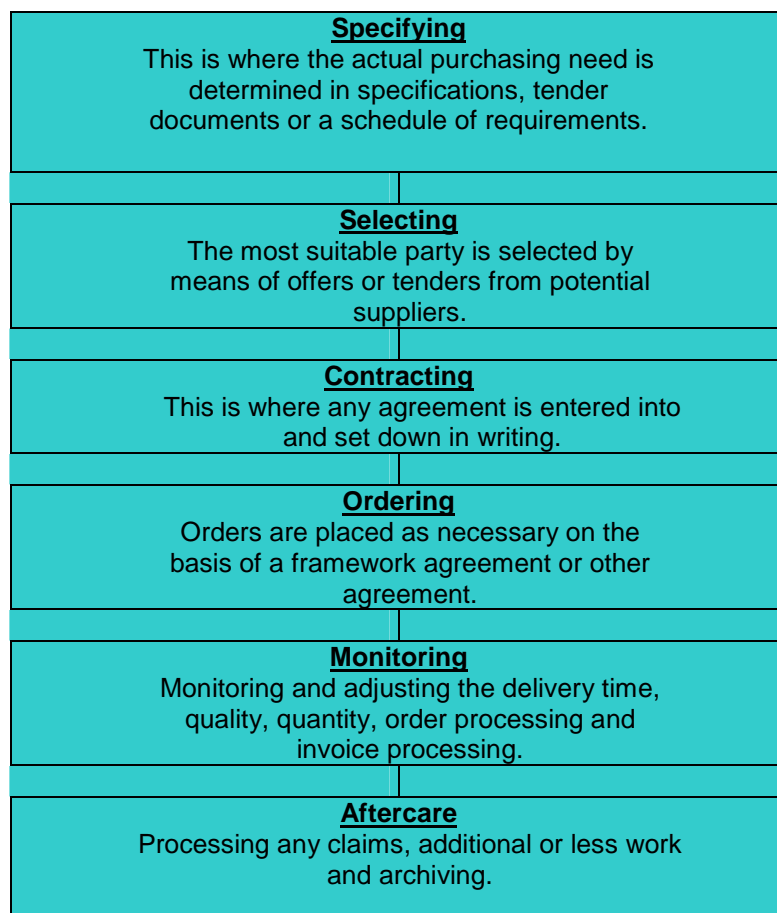
Purchasing and tendering includes, in principle, all matters for which an external invoice is submitted. The municipality receives invoices if an external party has delivered a performance, usually after order placement. Such a performance can relate to the delivery of goods, the performance of services or the realisation of works. The words 'purchasing' and 'tendering' are interchangeable. The word 'purchasing' is used more often with regard to goods and services, the term 'tendering' is used more often with regard to works.

### 4.1. Purchasing process

The total process for the acquisition of goods and the commissioning of the provision of services and works is referred to as the purchasing process.

The following 6 phases are distinguished in every purchasing process. Each of the 6 phases are inextricably linked to one another and a phase cannot start until the previous phase has been completed properly.

The 6 phases of the purchasing process are:



This procedure for purchasing and tendering is only applicable to the **tactical purchasing activities**, in other words phases 1 through 3 (specifying, selecting and contracting). Major financial benefits and quality improvements can be achieved by professionalisation in these three phases. The greatest influence can be realised, and therefore also the largest benefits achieved, by professionalising the first three phases.

Professional purchasing certainly adds value to the **operational activities**, phases 4 through 6 (ordering, monitoring and aftercare), in the long term, but not so much initially. For this reason, this procedure will only be focusing on the tactical purchasing activities.

#### **4.2. Purchasing strategy**

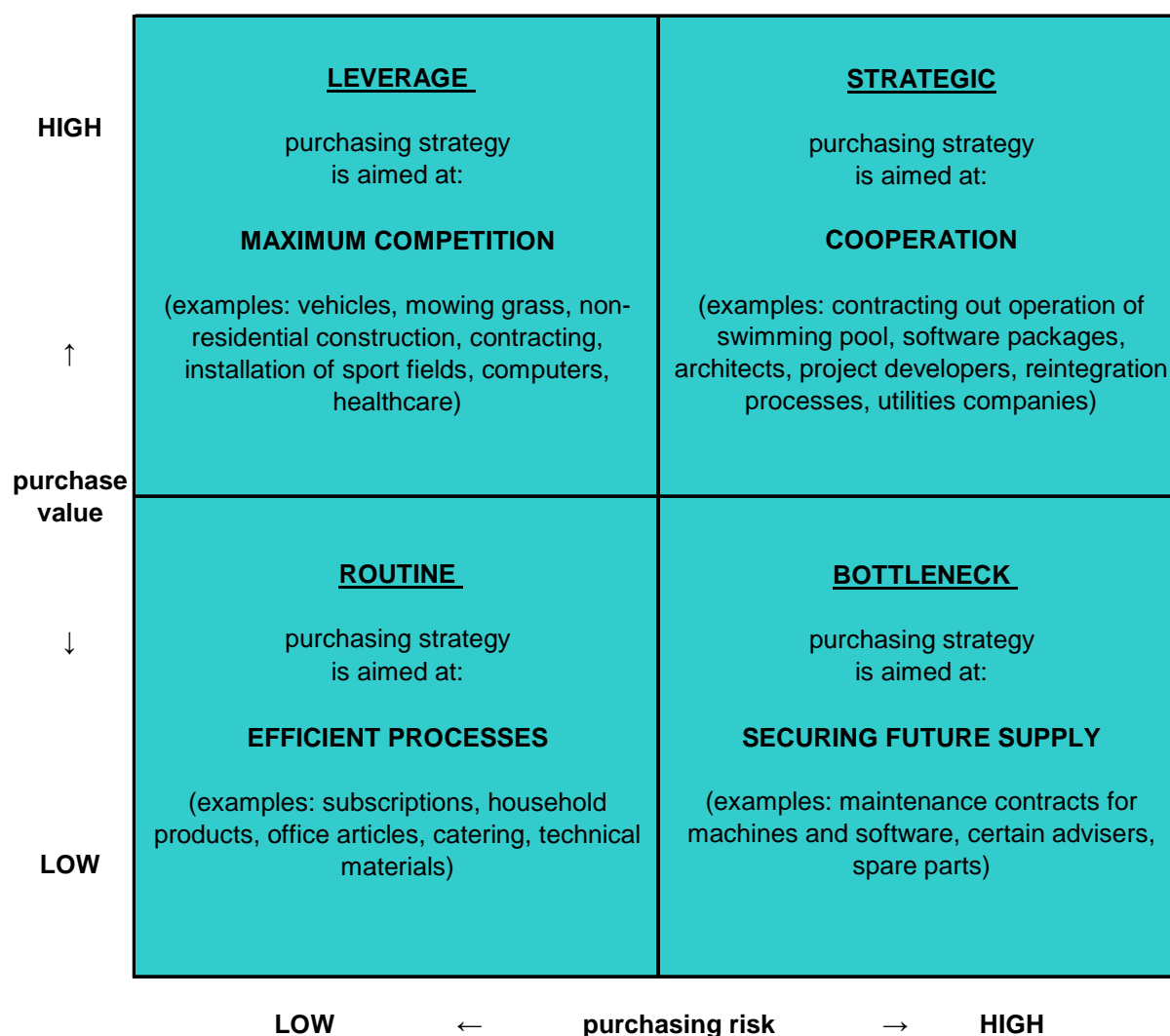
There is no single, unambiguous general purchasing strategy which is suitable for all goods, services and works to be purchased. The best purchasing strategy is dependent on the product, service or work to be purchased, and the specific market situation applicable.

The purchasing strategy to be applied is determined by a combination of 2 factors:

- a the estimated **value** of the order
- b the **purchasing risk** (are there alternatives or is the municipality, for whatever reason, strictly tied to one or an extremely limited number of suppliers, service providers or contractors).

Each purchasing segment has its applied purchasing strategy.

## Kraljic portfolio



(Harvard University, Peter Kraljic, Business Review 1983)

The purchase value of the order is important, because it is obvious that we need to behave differently when purchasing a ballpoint pen than when we are entering into a long-term framework contract for the supply of wheelchairs, for example. The purchasing risk is important because it indicates how freely the municipality can or wishes to move in the market. If there are many suppliers who can supply the products, we can fully exploit the competition in the market. If there are only a very few potential suppliers, due to a lack of alternatives, then cooperation and securing future supply become necessary.

- Leverage products - purchasing strategy: maximum competition
- Products, services and works can be supplied by many different suppliers. Changing supplier is relatively easy. Realising maximum competition will result in the most attractive offer. Bringing individual sales or contracting out of works into long-term framework agreements increases the value to be purchased (leverage effect, bulk = savings) and reduces the total purchasing efforts.
  
- Routine products - purchasing strategy: efficient processes
- This category, with many potential suppliers and relatively low purchase values, demands a great deal of time and attention from the municipality. The added value of competition is very low. The strategy for this must be aimed at reducing the logistic efforts and red tape: standardisation, limiting the number of suppliers, contracting out logistic and administrative processes, reducing the number of invoices, combining into framework agreements. Bringing individual sales or contracting out of works into long-term framework agreements increases the value to be purchased (leverage effect, bulk = savings) and reduces the total purchasing efforts.
  
- Strategic products -- purchasing strategy: cooperation
- Products, services and works in this category have a large value to the municipality, while the municipality is dependent on one or a very limited number of suppliers. This is often the result of monopolies in the market, but also often of choices made in the past (self-created monopolies).
- In view of the high importance and risk, the purchasing strategy must be targeted at developing alternative products or suppliers (reducing risk). If this is not possible, efforts must be made to achieve long-term and intensive cooperation (partnership relationships) to secure the interests of the municipality through negotiations on the basis of openness, arguments and facts.
  
- Bottleneck products -- purchasing strategy: securing future supply
- Low value category, which nevertheless involves a large risk for the municipality in the event of incorrect realisation of the order. The added value of competition is again very low. The strategy must be targeted at: developing alternatives, securing the supply, creating a preferential position for the suppliers / service providers/ contractors involved, taking measures to reduce purchasing risk.

In the case of leverage products, the most money can be saved through professional purchasing. These are also the products for which the desired conditions and necessary quality can most easily be stipulated (the purchasing power lies with the municipality).

The largest proportion of municipal purchases falls within this segment.

In the event that the purchasing segment and appropriate purchasing strategy cannot be determined, the purchasing strategy for routine or leverage products will be applied.

Ordering goods and services on the basis of an existing written framework agreement, and commissioning works on the basis of a framework agreement, are not covered by this purchasing and contracting-out procedure (because this only involves placing an order). Entering into the framework agreement itself is, of course covered.

#### **4.3 Ethical and economic policy starting points**

Ethical and economic policy starting points establish a relationship between the standards and values which the municipality wishes to promote and the economic starting points on the one hand, and the purchasing and tendering policy on the other. The pattern of standards and values of the municipality is bound up with the principles of sound administration (openness, objectivity and due care).

Economic starting points are based on choices made by the municipality. A number of specific policy starting points are important in purchasing and tendering policy.

- Striving for integrity, transparency, objectivity and non discrimination
- This refers to the organisation's policy on integrity. It is important that the people involved in a purchasing or tendering process maintain a business relationship with suppliers and potential suppliers, service providers and contractors. A division of responsibilities in the various tasks in the purchasing process is therefore extremely important.
- Transparency in purchasing processes means that all steps, considerations and choices in the process must be made transparent, and therefore must be able to be accounted for and reproducible.
- Objectivity means excluding, as much as possible, subjective steps, considerations and choices.
- Non discrimination means preventing the exclusion of market parties from purchasing processes for random reasons.

- Compliance with legislation and regulations
- Compliance with legislation and regulations is an obligation, not a choice. Compliance with the rules is included explicitly as a policy starting point, in order to ensure closer compliance with European directives on tendering, for example, but also with local and national regulations, as is the case with this PTM. Compliance with these is a requirement, in the context of legality and the annual audit.
  
- Ethical requirements for suppliers
- Requirements can be set of suppliers, service providers and contractors with regard to their role as employer. They are expected to observe prevailing standards and values in the area of working conditions (including no use of child labour, no discrimination, etc).
- It is also possible to include additional requirements in the specifications for each project, as appropriate, on social and environmental aspects of the products to be supplied.
- Social aspects could include recruitment of employees from disadvantaged groups (in the context of reintegration or policy on the disabled, for example) or the requirement of places for trainees.
- Environmental aspects could include the integration of sustainability criteria into the purchasing process (stipulating that suppliers have in place an environmental care system, for example, or have an environmental hallmark -- Sustainable Purchasing).
  
- Declaring social and/or environmental aspects applicable can only take place if this has already been included, in detail, in the specifications, so that all potential suppliers are subject to the same requirements. The requirements must be targeted specifically at the product to be purchased.
  
- *Use in projects for benefit claimants as an additional requirement, condition, awarding criterion.*  
*This refers to the possibility to make arrangements (in the form of a condition) that benefit claimants are used in short-term projects for the purpose of gaining work experience.*
  
- Balance in evaluation of price and quality
- In the evaluation of offers, the following awarding criteria could be selected: the lowest price (only checking whether the minimum quality requirements have been met, after which the offer price is determinative) or the economically most advantageous offer (a number of supplementary criteria are determinative along with the price, such as quality, risk, delivery time, reliability, etc.). The awarding criterion of 'lowest price' can only be applied if the content and quality in the specifications are described unambiguously. In all

other cases, the content and quality of that being offered must also be evaluated along with the price.

- Regional or local suppliers
- There is no direct policy on preferential treatment with regard to purchasing from regional or local suppliers. The policy starting point of nondiscrimination means that they have the same opportunities and possibilities as any other supplier. They often already have a natural advantage, thanks to their knowledge of the local situation and the short travel distances.

On the other hand, the council certainly feels it has a social involvement with and partial responsibility for local economic circumstances and local businesses. The council emphatically wishes to give local businesses the opportunity to compete for municipal orders, in competition with other companies (outside the municipality, for example Zagreb).

#### **4.4. Application of Purchasing and Tendering Manual**

The purchasing and tendering manual are applicable to the acquisition of all goods, services and works by the municipal or other public organisations.

The application of the European directives on government orders which is necessary in certain cases is integrated into this purchasing and tendering manual. This Act transposes into the national legislation of the Republic Croatia, the Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of manual for the award of public works contracts, public supply contracts and public service contracts (UL L No 134 of 30 April 2004, p. 114) and Commission Directive 2005/51/EC of 7 September 2005 amending Annex XX to Directive 2004/17/EC and Annex VIII to Directive 2004/18/EC of the European Parliament and the Council on public procurement (UL L No 257 of 1 October 2005, p. 127) (hereinafter: Directive 2004/18/EC).

Any future amendments to the articles, applications and/or threshold amounts will automatically be applicable in the Purchasing and Tendering Manual (PTM).

The purchasing and tendering manual must be evaluated at least once every year. If necessary, the manual must be updated to be brought in line with municipal or national developments, or developments in the market situation.

#### **4.5. Purchasing cooperation through a joint Purchasing and Tendering Bureau**

There has been interest in the purchasing function in recent years. A new generation of professional buyers has made its entrance in local government. A joint purchasing cooperative can be established, with the objective of achieving:

- a greater purchasing volume, better prices and conditions for all cooperating public organisations (bulk = savings);
- lower purchase prices, by entering into framework agreements from which the participating public organisations can order;
- improved product specifications;
- terms and conditions of purchasing;
- control of the processes;
- full knowledge of European tendering;
- continuity of professional purchasing within the organisation (independent of person);
- several public organisations are too small to be able to employ their own buyers;
- low availability of professional government purchasing officers;
- knowledge centre.

## **5. Procedure for goods**

Definition of delivery: *a written agreement for the purchase, lease, hire or hire purchase of a product in return for payment.*

'In return for payment' means that the supplier and the client deliver a performance to one another (the delivery on the one hand and the payment on the other). Products are defined as all moveable goods for which the client acquires ownership. Additional work involved in the delivery, fitting or installation of the products is deemed to form a part of the product.

### **5.1 Procedure**

The cost estimate must be drawn up professionally and on the basis of realistic and current factors. In the case of long-term agreements or agreements for an indefinite period, the total value of the order is determinative for the tendering procedure, with a maximum value equal to an agreement for 48 months (four years). It is not permitted to divide a project into parts, or to amend the cost estimate in order to fit it into a different category.

For the purchasing procedure according to the National law and the European Directives for government orders, reference is made to the Public Procurement Act (October 2007) of the Republic of Croatia.

### **5.2 Specifications of product**

Specifications for a product are drawn up specifically for the needs of the municipality, taking into account the market circumstances for the product group in question. Specifications describe as completely as possible all the requirements and wishes with which the product must comply.

The desired quality level must be stipulated in the specifications. The supplier to be selected in the tendering process must comply with the quality level stated in the specifications, and this must of course also be checked.

The specifications must be objective and as functional as possible. Functional means that the functions are described which the product to be purchased must fulfil for the user. This is in contrast with technically detailed specification. Functional specification is simpler, more targeted, and avoids problems arising from incompleteness. In principle, specifications do not contain brand names, do not exclude any suppliers in advance and are drawn up in accordance with the SMART principle (specific, measurable, acceptable, realistic and time-limited).

In order to maintain control and a grip on the delivery being purchased, it is of the utmost importance that the client itself - with the help of an external party, if appropriate - uses the drawing up of the specifications to conceive and determine what the municipality explicitly needs for the realisation of its duties. Well thought-through specifications are an absolute requirement for a successful purchasing process, and it is certainly not something you should leave to the supplier!

### 5.3 Selection of supplier

The selection process selects the supplier which can comply with the specifications drawn up for the most beneficial comprehensive conditions, and is therefore given preference in the awarding of the order.

The selection process starts with a market orientation and drawing up of a list of potential suppliers, the shortlist. A shortlist is not a fixed list, but is always drawn up specifically for each project. A shortlist is a list of suppliers which can be expected to be able to make an interesting offer. A shortlist is *varied* (different sorts and types of suppliers), *challenging* (new and existing suppliers) and *qualitatively sufficient* (supplier must have the ability, from a technical, logistical, quality and business economics point of view, to be able to supply the requested product within the set timetable).

The content of the shortlist is determined on the basis of product knowledge, market knowledge, own experience, experience of others, curiosity and, if necessary, pre-selection. Parties which have played a role in the preliminary process (such as advising on drawing up specifications) cannot compete for the order, as this would be ethically unsound.

The selection of the supplier takes place by means of sending *written* requests for proposals to the necessary number of most interesting suppliers on the shortlist. If a potential supplier cannot or does not wish to issue an offer, another supplier from the shortlist is approached. The request for proposal is identical in every respect for all suppliers.

The request for proposal contains:

- the drawn-up specifications
- an overview of the selection criteria (minimum requirements of product or supplier)
- a list of the awarding factors, in general terms, along with the weighting factors applicable to each of them
- a reference to the applicability of the General Purchasing Terms
- an overview of the purchasing procedure to be followed, including periods.

Potential suppliers should preferably be given the opportunity to put additional questions (in writing only). The questions asked, along with the correct answers, are set down in writing in an Information

Memorandum, which is sent to all potential suppliers in such a way that each supplier has access to the same information.

Only written offers which meet the specifically drawn up selection criteria will be considered. All offers given consideration are analysed and evaluated in a full, equal, ethical, transparent and reproducible manner, solely on the basis of the requirements and wishes in the request for offers (supplemented by the Information Memorandum, as appropriate).

The assessment is compared with all the specifically drawn up awarding criteria (weighted and integral) in a matrix. This reveals which offer has the highest score. The best offer from this assessment is given first preference for awarding of the order.

After a well-realised purchasing process, negotiations provide relatively few results. This is because the margins and options have already been settled before this. Nevertheless, it is usually very useful to carry out this final round of negotiations exclusively with the preferred supplier, if this is combined with clarification of matters which were not specified in sufficient detail in the offer, and with discussions about the content of the contract to be entered into. Except in the case of European tenders, when negotiation is usually not permitted, most suppliers always leave themselves some room for negotiation up to the last moment. It is important to make use of this room.

## **6 Procedure in case of service**

Definition of services: *a written agreement for the performance of services in return for payment.*

'In return for payment' means that the supplier and the client deliver a performance to one another (the actual performance on the one hand and the payment on the other).

The term services means all performances which do not fall under goods or works.

### **6.1 Procedure**

The cost estimate must be drawn up professionally and on the basis of realistic and current factors. In the case of long-term agreements or agreements for an indefinite period, the total value of the order is determinative for the tendering procedure, with a maximum value equal to an agreement for 48 months (four years). It is not permitted to divide a project into parts, or to amend the cost estimate in order to fit it into a different category.

For the purchasing procedure according to the National law and the European Directives for government orders, reference is made to the Public Procurement Act (October 2007) of the Republic of Croatia.

When purchasing services, it is sometimes not possible or very difficult to determine an exact scale/quantity in advance. It often involves engaging the services of people or agencies for an indefinite period. It is often also the case that only the initial order is contracted, although it is to be expected that follow-up orders will be carried out by the same service provider. In this situation, efforts must be made to enter into a framework agreement with a service provider which determines aspects such as quality, personnel to be deployed, hourly rates and terms and conditions of termination, etc. This does not involve agreement on the quantity, however, although this can be indicated as a non-binding estimate. In this way, framework agreements can also be entered into for multiple projects or multiple years.

All the desired elements of the framework agreement are laid down, as much as possible, in a schedule of requirements (also functionally specified wherever possible) and put out to tender in accordance with the normal procedure.

### **6.2 Specification of services**

Specifications for a service are drawn up specifically for the needs of the municipality, taking into account the market circumstances for the product group in question. Specifications describe as completely as possible all the requirements and wishes with which the service provision must comply.

The desired quality level must be stipulated in the specifications. The service provider to be selected in the tendering process must comply with the quality level stated in the specifications, and this must of course also be checked.

The specifications must be objective and as functional as possible. Functional specification means that it is not the effort but the end result of the service provision that are described. Every effort should be made to enter into a result-based agreement; an agreement on the basis of hours worked should be avoided where possible. Functional specification in the case of services appears more difficult initially, but is more targeted and gives a far greater guarantee of the realisation of the end result.

Wherever possible, the specifications should contain references to recognised regulations or standards, existing guidelines and quality regulations. In principle, specifications do not exclude any service providers in advance and are drawn up in accordance with the SMART principle (specific, measurable, acceptable, realistic and time-limited).

If an explanation or a presentation by the service providers is deemed necessary in the selection process, this must be described in detail and included in the schedule of requirements.

In order to maintain control and a grip on the service being purchased, it is of the utmost importance that the client itself - with the help of an external party, if appropriate - uses the drawing up of the specifications to conceive and determine what the municipality explicitly needs for the realisation of its duties. The specifications must not be drawn up by the service provider!

### **6.3 Selection of service provider**

The selection process selects the service provider which can comply with the specifications drawn up for the most beneficial comprehensive conditions, and is therefore given preference in the awarding of the order.

The selection process starts with a market orientation and drawing up of a list of potential service providers, the shortlist. A shortlist is not a fixed list, but is always drawn up specifically for each project. A shortlist is a list of service providers which can be expected to be able to make an interesting offer. A shortlist is *varied* (different sorts and types of service providers), *challenging* (new and existing service providers) and *qualitatively sufficient* (service provider must have the ability, from a technical, logistical, quality and business economics point of view, to be able to provide the requested services within the set timetable).

The content of the shortlist is determined on the basis of knowledge of the desired service, market knowledge, own experience, experience of others, curiosity and, if necessary, pre-selection. Parties which have played a role in the preliminary process (such as advising on drawing up specifications) cannot compete for the order, as this would be ethically unsound.

The selection of the service provider takes place by means of sending *written* requests for quotations to the necessary number of most interesting service providers on the shortlist. If a potential service provider cannot or does not wish to issue a quotation, another service provider from the shortlist is approached. The request for an offer is identical in every respect for all service providers.

The request for an offer contains:

- the drawn-up specifications
- an overview of the selection criteria (minimum requirements of product or service provider)
- a list of the awarding factors, in general terms, along with the weighting factors applicable to each of them
- a reference to the applicability of the General Purchasing Terms
- an overview of the purchasing procedure to be followed, including periods.

Potential service providers should preferably be given the opportunity to put additional questions (in writing only). The questions asked, along with the correct answers, are set down in writing in an Information Memorandum, which is sent to all potential service providers in such a way that each service provider has access to the same information.

Only written offers which meet the specifically drawn up selection criteria will be considered. All offers given consideration will be analysed and evaluated in a full, equal, ethical, transparent and reproducible manner, solely on the basis of the requirements and wishes in the request for offers (supplemented by the Information Memorandum, as appropriate).

The assessment is compared with all the specifically drawn up awarding criteria (weighted and integral) in a matrix. This reveals which offers has the highest score. The best offer from this assessment is given first preference for awarding of the order.

After a well realised purchasing process, negotiations provide relatively few results. This is because the margins and options have already been settled before this. Nevertheless, it is usually very useful to carry out this final round of negotiations exclusively with the preferred service provider, if this is combined with clarification of matters which were not specified in sufficient detail in the offer, and with discussions about the content of the contract to be entered into. Except in the case of European tenders, when negotiation is usually not permitted, most service providers always leave themselves some space for negotiation up to the last moment. It is important to make use of this room.

## **7 Procedure for works**

Definition of works: *the realisation of the products of construction or roadbuilding works which are intended to fulfil an economic or technical function.*

The term works therefore means the construction of, large-scale maintenance on and modification of civil engineering, parks and gardens, cultural and roadbuilding structural facilities in the public space.

Repetitive regular maintenance to parks and gardens and small repairs to roads and structural works do not fall under the definition of works but are defined as services.

### **7.1 Procedure**

The cost estimate must be drawn up professionally and on the basis of realistic and current factors. In the case of long-term agreements or agreements for an indefinite period, the total value of the order is determinative for the tendering procedure, with a maximum value equal to an agreement for 48 months (four years). It is not permitted to divide a project into parts, or to amend the cost estimate in order to fit it into a different category.

For the purchasing procedure according to the National law and the European Directives for government orders, reference is made to the Public Procurement Act (October 2007) of the Republic of Croatia.

Tendering methods for integrated cooperation, such as the construction team and the innovative forms of Design & Construct and Turnkey can be used for projects with huge values. By putting the design, realisation and, if appropriate, later phases such as maintenance and operation, out to tender as a whole, this gives market parties more space in order to draw up a more interesting offer. This can reduce the eventual risk for the municipality, increase the quality and reduce the total costs. Innovative tendering methods are applied primarily to put the risks where they can best be managed. This approach does make greater requirements of both the market parties and the municipality.

In the case of the innovative tendering methods, the tendering procedure is followed as normal, in principle. In the case of the construction team model, the pricing does not take place at the time the parties are selected, but only later, during the design process. At the time of selection of the parties, it is also not known which obligation will be entered into. The construction team model can be useful in the case of bottleneck and strategic works (works for which the municipality is dependent on one or a very few number of tenderers). The selection of parties will have to take place on the basis of primarily qualitative awarding criteria on the parties to be contracted, and less on the substantive aspect of the work. The procedure for the purchase of services is applicable in this respect.

Each realised work is evaluated immediately after completion, as a set part of the tendering procedure. This evaluation is carried out by the client and a written report on it is drawn up.

## 7.2 Specification for works

The specifications are drawn up in the form of technically detailed specifications: the standard specifications. The client specifies in detail what must be realised, in such a way that the contractor to be selected only has to realise the work.

The desired quality level must be stipulated in the specifications. The contractor to be selected in the tendering process must comply with the quality level stated in the specifications, and this must of course also be checked.

The functional specifications (schedule of requirements) is applied to works with huge values, and - or in combination with - an innovative tendering method.

In the case of tendering for works of a limited size (for example < 40.000 euro in the Netherlands) a description of the work may be sufficient. In the case of tenders for categories (> 40.000 euro), standard specifications drawn up must be applied to civil engineering and cultural works, and according to standard methodology in the case of construction works.

In order to maintain control and a grip on the work being realised, it is of the utmost importance that the client itself - with the help of an external party, if appropriate - uses the drawing up of the specifications to conceive and determine what the municipality explicitly needs for the realisation of its duties. Well thought-through specifications are an absolute requirement for a successful tendering process.

## 7.3 Selection of contractor

The selection process selects the contractor which can comply with the specifications drawn up for the most beneficial comprehensive conditions, and is therefore given preference in the awarding of the order.

The selection process starts with a market orientation and drawing up of a list of potential contractors, the shortlist. A shortlist is not a fixed list, but is always drawn up specifically for each project. A shortlist is a list of contractors which can be expected to be able to make an interesting offer. A shortlist is *varied* (different sorts and types of contractors), *challenging* (new and existing contractors) and *qualitatively sufficient* (service provider must have the ability, from a technical, logistical, quality and business economics point of view, to be able to provide the requested works within the set timetable). The content of the shortlist is determined on the basis of knowledge of the work, market knowledge, own experience, experience of others in the context of the suitability demonstrated, curiosity and, if necessary, pre-selection. There is, of course, no shortlist in the case of public tenders.

Parties which have played a role in the preliminary process (such as advising on drawing up specifications), or parties affiliated to them, cannot compete for the order, as this would be ethically unsound.

The selection of the contractor takes place in accordance with the rules contained in the the National law and the European Directives for government orders, reference is made to the Public Procurement Act of the Republic of Croatia (October 2007).

With traditional tendering, the quality aspects of the work to be realised are detailed and set in stone in the specifications, and the price is the primary or only awarding factor.

In the case of innovative tendering methods, however, quality aspects form a very important role in the awarding factors. All offers given consideration are analysed and evaluated in a full, equal, ethical, transparent and reproducible manner, solely on the basis of the requirements and wishes in the request for offers (supplemented by the Information Memorandum, as appropriate). The assessment is compared with all the specifically drawn up awarding criteria (weighted and integral) in a matrix. This reveals which offer has the highest score. The best offer from this assessment is given first preference for awarding of the order.

## 8 General

### 8.1 Determination of need

In order to realise the programme and product objectives set by the municipality, needs occur in a wide number of areas in the organisation. Needs can be met by carrying out work internally, or by purchasing products and services from external parties or having works carried out by external parties. A purchasing process then becomes the direct consequence of the needs of the municipality.

The budget holder must continually critically examine the translation of a need into a purchasing process. A sound problem analysis is crucially important.

An assessment must be made of the advantages and disadvantages of *internal realisation* and *contracting out* to third parties (make or buy). This assessment is based on policy, strategic, product-related, organisational, risk-related and financial considerations. This is a dynamic process, in which the assessment can change as a result of policy or changing market conditions. In the decision as to whether to bring in third parties or to have matters carried out by third parties, the need must be determined as accurately (which is not quite the same as detailed) as possible. The determination of the need must therefore be functional and end-result-oriented. It is not important in this respect which solution is chosen, but primarily which condition the solution must meet. This forms the qualitative basis for the start of an effective purchasing or tendering process.

### 8.2 Division of tasks and purchasing teams

The purchase of products, services and works is primarily the responsibility of the *appropriate head of department*. They have an attainment target for the realisation of the product. In order to ensure the most efficient and effective use of resources during the various purchasing and tendering processes, *departments* are given specialist support. This support can consist, among other things, of field-related, purchasing, business economics or legal support.

The divisions of tasks in the realisation of professional and results-oriented purchasing and tendering processes is explicitly determined for the various disciplines in the organisation. Generally speaking, it is the primary task of the appropriate budget holder to determine what is purchased, and the primary task of the purchasing team to determine how and from whom it is purchased. They support one another during a large part of the process, resulting in improved quality of the purchasing process and in a better guarantee of integrity.

The task division between the budget holder on the one hand and group purchasing on the other is set down in the appendix for the various phases of the purchasing and tendering processes.

In the case of purchasing of larger goods, services and works (for example above 100.000 euro, in the Netherlands), it is highly recommended that the various disciplines work through the purchasing process in the form of a multidisciplinary purchasing team, operating on a project basis. The various disciplines each add their own expertise to the purchasing team. It is important that the purchasing team is already operating in the specification phase. After the contract has been entered into, the purchasing team can be disbanded.

### **8.3 Framework agreements (framework contracts)**

In each purchasing or tendering process, efforts must be made to achieve the greatest possible combination of purchasing volume. Except in the case of specific market circumstances, a larger purchasing volume usually means that better qualitative and price-related purchasing volumes can be stipulated.

Purchasing volume can be combined by bringing together the needs of various departments and various public organisations in a single purchasing or tendering process, and by combining the needs for a number of years. The latter in particular usually results in an interesting purchasing package, for which suppliers are prepared to make a generous offer.

A framework agreement is the desired end result, which involves more than one single need being agreed with a supplier at one go. It is not necessary that the client reaches a concrete agreement regarding all the purchasing variables. The purchasing volume, in particular, is often either not agreed or only agreed as an indication, or as a graduated list. In some cases, concrete pricing may not even be agreed, due to agreement being reached on discounts on controllable, objective price lists. (If we also have an agreement on the volume to order in the agreed period we speak of a framework contract). By combining the purchasing volume, the purchasing value of the contract increases and, generally speaking, the leverage or strategic purchasing strategy will have to be applied. This results in relatively greater purchasing power for the municipality, and therefore in more advantageous conditions, if the right tenderer is chosen. (If we also have an agreement on the volume to order we speak of a framework contract)

The period of such an agreement is usually set at 3 years. After this period, the purchasing need of the municipality and/or the external market situation have usually changed to such an extent that a new purchasing or tendering procedure is usually preferable. Long-term agreements also give suppliers certainty in the long term, which can make specific investments in capital goods (and sometimes in personnel) interesting. In such situations, the period of the agreement should match the depreciation period as closely as possible.

## **8.4 Terms and Conditions of Purchasing**

Products, services and works are usually offered subject to terms set down in the terms and conditions of sale of the external market party. Generally speaking, these terms and conditions are not beneficial to the municipality. In many cases, however, the purchasing power lies with the purchasing municipality, however. The municipality therefore determines what it purchases, and under what conditions. 'General Terms and Conditions of Purchasing' have been specially developed for the municipality for this purpose. These are included in the appendix.

In the case of leverage and routine products, it is relatively easy to ensure that the municipality's own purchasing terms and conditions are applied. The municipality ensures that the purchasing terms and conditions are declared applicable and any terms and conditions of the other party are explicitly rejected during the first official step towards the external parties (the written request for an offer). It is then extremely difficult for the external party to reject the municipality's purchasing terms and conditions. The most effective method is to include the above provision in the specifications or the schedule of requirements, and to send a copy of the purchasing terms and conditions with the request for an offer.

In the case of strategic and bottleneck products, it is often difficult to apply one's own purchasing terms and conditions, as the power in the purchasing process lies primarily with the external party. The external party will often only supply under its own terms and conditions of sale, or not at all. In the case of strategic products, in particular, a balance must be found, through negotiation and consultation, between the terms and conditions of sale of the external party and the purchasing terms and conditions of the municipality (specific to each situation). In the case of bottleneck products, acceptance of the terms and conditions of sale is often unavoidable, although one should always attempt to negotiate.

## **8.5 Evaluation method for offers**

All valid offers must be analysed and evaluated in an objective and reproducible manner, on the basis of the awarding criteria stated in the specifications. If necessary, main criteria are divided into subcriteria. Each offer is evaluated for each criterion and, if appropriate, subcriterion. This evaluation results in a mark out of 10 (normal ranking, which can be understood by everyone: a 9 is very good, a 6 is just good enough and a 4 is unsatisfactory).

The offer price is also expressed as a mark out of 10, so that the price-quality relationship can easily be weighed up. The average price of all offers, which is theoretically the average market price is six out of 10, with a deviation per percentage point expressed as a fraction of a point added or subtracted.

The marks out of 10 are multiplied by the mutual ranking percentages, and added up. This results in a total final mark out of 10 for each offer, on the basis of the awarding criteria. The offer with the highest total final mark out of 10 would appear to be the best offer.

## 8.6 Contracting

After the official awarding by the officer authorised to do so (see applicable mandate regulation and/or budget regulation) the agreement is laid down in writing.

In the case of goods, services and works till 100.000 Kuna, a written confirmation of the order by means of letter or order slip which includes a reference to the specifications, the purchasing terms and conditions and the offer, is sufficient. In the case of goods, services and works above 100.000 Kuna, a contract signed by both parties is required.

A contract is nothing more or less than a written record of an agreement, which arranges what the parties have agreed. The largest and by far the most important part of the agreement is already in writing in the form of the specifications, the information memorandum, the offer issued (including any supplements to it) and the purchasing terms and conditions. These matters must therefore be declared applicable in the contract.

### 8.6.1 What makes a valid contract?

Offer and acceptance together form an agreement: and make a valid contract.

*The offer should:*

- clearly specify any terms and conditions
- that are pertinent to making an agreement
- including what is expected from each party
- what each will receive in return and consideration of the contract.

*Acceptance:*

There are two forms of acceptance:

- direct acceptance: there is a valid contract
- no direct acceptance, but 'counter-offer': this is the start of negotiations

*Form:*

The form in which the contract is made can be:

- verbally
- written

*Written is better:*

- leaves less possibilities for misunderstandings
- better chance of recourse in case of breach of terms and conditions

### **8.6.2 Practical Aspects of Offers and Agreements:**

- Always go for communication in writing. Be clear. As civil servant you are at a disadvantage in law suits: the judge will expect a high level of professionalism and clarity from you.
- Be aware of contacts between business partners and the mayor/eldermen. Oral agreements on this level are binding!
- Be aware of general conditions of the other party. Reject them in your own general conditions.
- In contracts with highly paid advisors (lawyers, consultants): make sure they do the work themselves, in person, and not some underpaid trainee.

In appendix D a checklist and tips are given.

### **8.7 Purchasing results and purchasing control**

Part of the purchasing process is making the results of purchasing transparent. This applies to both the financial and the qualitative results. The purchasing results are included in the normal management reports. The destination of any benefits realised is a matter for administrative decision-making.

Purchasing control is not so much controlling the purchasing process, but more the control of purchasing flows. The control of purchasing flows consists of:

- Collecting the appropriate management information
- Realisation of quantitative and qualitative analyses of the content and scale of the purchasing volume (suppliers and invoices)
- Initiating targeted activities based on this information. The purpose of these activities is to draw up proposals for improvement to optimise purchasing packages, leading eventually to savings on the total costs.
- Monitoring the realisation of and progress on these activities.

This is not a one-off activity but a continual process of measuring and adjusting in accordance with the principles of the Deming Circle. Close harmonisation of the activities of the budget holders, the controller and the purchaser is an absolute requirement for good realisation.

## **8.8 Deviations from the Purchasing And Tendering Procedure *only by means of a council decision***

The purchasing or tendering procedure to be applied is determined by the manual applicable to goods, services and works. The interpretation of these is carried out by the purchasing team.

It is permitted to apply a more extensive procedure (higher category) than prescribed.

Sufficient time and budget must be reserved for the realisation of the correct purchasing or tendering procedure. Lack of time and/or budget is therefore not, generally speaking, a reason to deviate from the procedure.

If it is impossible for urgent reasons to apply the prescribed procedure, a request to this effect must be submitted to the council in advance, giving reasons, by the budget holder together with the group purchasing team.

**Division of responsibilities in purchasing and tendering processes**

<b>Phases in the purchasing and tendering process</b>	<b>Task BUDGET HOLDER</b>	<b>Task PURCHASER</b>	<b>Comments</b>
<b><u>Preliminary purchasing process</u></b>			
Determination of need	IMPLEMENTING	NONE	
Determining purchasing strategy and purchasing procedure	ADVISORY	IMPLEMENTING	According to PTM
Budget	IMPLEMENTING	ADVISORY	Orientation offer/estimate where necessary
Budget application	IMPLEMENTING	NONE	
<b><u>Specifications</u></b>			
Drawing up specifications or schedule of requirements	IMPLEMENTING	ADVISORY	
Drawing up product description	IMPLEMENTING	ADVISORY	
Drawing up description of services	IMPLEMENTING	ADVISORY	
Drawing up description of work	IMPLEMENTING	ADVISORY	
<b><u>Selection</u></b>			
Determination of candidate(s) (shortlist) request for offer	ADVISORY	IMPLEMENTING	In the case of private tenders
Publication / request for offer	NONE	IMPLEMENTING	
Evaluation of preliminary selection	IMPLEMENTING	IMPLEMENTING	
Information memorandum	IMPLEMENTING	IMPLEMENTING	
Tender meeting	ADVISORY	IMPLEMENTING	
Control of documents	IMPLEMENTING	IMPLEMENTING	
Offer analysis and evaluation	IMPLEMENTING	IMPLEMENTING	
Negotiations	IMPLEMENTING	IMPLEMENTING	If permitted
European procedure	NONE	IMPLEMENTING	If required by law
<b><u>Contracting</u></b>			
Drawing up draft contract	ADVISORY	IMPLEMENTING	
Awarding procedure	IMPLEMENTING	ADVISORY	
Granting of order	IMPLEMENTING	NONE	
<b><u>Ordering - Monitoring - Aftercare</u></b>			
All work	IMPLEMENTING	ADVISORY	

**Traditional tendering methods in the case of works**

Tendering for works can take place according to standard, traditional tendering methods.

**Public tendering**

The familiar tendering method, for which anyone can tender.

**Public tendering with pre-selection**

A tendering method which is published in advance and for which anyone can apply as a candidate via a public procedure, but for which at least one and a maximum of the number of candidates stated in the publication can be invited to tender.

Depending on the national law procedures below are applicable

**Multiple private tendering**

A tendering method for which a limited number of at least two natural persons or legal entities are invited to tender.

**Multiple private tendering after selection**

A tendering method for which a limited number of at least two natural persons or legal entities are given the opportunity to participate in a selection, after which one or more of them can be invited to tender.

**Single private tendering**

A tendering method in which one natural person or legal entity is invited to participate in a price offer. Single private tendering can also be applied on the basis of an open budget, providing the municipality with detailed insight into the constructor's costs.

**Advantages and disadvantages of the various tendering forms**

It goes without saying that each of the tendering methods has its advantages and disadvantages, depending on the scale of the work, the level of difficulty or the specialised nature of the work, the repetitive nature of the work, etc.

## 1. **Public tendering(Open procedure)**

### Advantages:

- Each contractor can find out about the tendering (it is published in national professional journals and internet) and can compete for awarding of the work.
- Results in major competition in principle, resulting in the best chance of a competitive price, particularly in times when there is little work in the market.
- Possibility for the municipality to find out which businesses are operating in the market.
- Gaining insight into the market situation and relationships.

### Disadvantages:

- There is a chance that the lowest tenderer (and sometimes also the next highest) does not have sufficient quality to complete the work satisfactorily. This is because everyone can tender, including financially weaker and incompetent businesses. In such cases, the procedure requires more time. Setting suitability requirements and awarding criteria in the publication and/or specifications can limit this problem.
- The specifications must be clear, unambiguous and extremely detailed. Additional work and changes to the specifications are usually expensive. Additional time (= money) must therefore be spent on management and supervision, in order to monitor and guarantee the quality of the work.
- The longer tendering process can slow down the work process.
- No direct influence on the pricing, if the price is too high, additional credit will be needed or the work will have to be carried out internally. It is not possible to simply request a price from a different company; the work is then 'contaminated'. Placing the work on the market again in another form is not easy and moreover costs extra time and money. There is also a real risk of a claim for compensation by the lowest tenderer in such cases.

## 2. **Tendering with preliminary selection(Open procedure with pre selection)**

### Advantages:

- By applying the selection methodology, a choice can be made from the candidates which have applied; in other words, including unknown companies with good references.
- Businesses deemed less suitable can be rejected, thus ensuring better quality to a certain extent.
- The competitive element remains
- The client gains insight into the market situation and relationships.

Disadvantages:

- The selection process to limit the number of tenderers, such as by drawing lots or by applying tough selection criteria, could result in the rejection of a potentially good tenderer.
- Preliminary selection requires additional efforts and time.
- The tendering procedure takes a long time and costs relatively more money.
- There is again no direct influence on the pricing. In the event of higher than expected prices, prices cannot simply be requested from other companies. The work is 'contaminated'.

3. **Multiple private tendering** (only below threshold and if permitted by national law)

Advantages:

- Possibility to invite only expert businesses. The quality is ensured to a greater extent.
- Short tendering procedure and relatively low costs.
- The businesses to be invited will attempt to build a good relationship with the client by providing good work at reasonable prices.

Disadvantages:

- Due to the limited competition, contractors are less inclined to offer their best conditions.
- Less insight into the market situation and relationships.
- In the event of higher than expected prices, prices cannot simply be requested from other contractors, because the work is 'contaminated'.

4. **Multiple private tendering after selection** (only below threshold and if permitted by national law)

Advantages:

- Possibility to invite only expert businesses. The preliminary selection provides better assurance of quality.
- The businesses to be invited will attempt to build a good relationship with the client by providing good work at reasonable prices.

Disadvantages:

- Due to the limited competition, contractors are less inclined to offer their best conditions.
- Less insight into the market situation and relationships.
- In the event of higher than expected prices, prices cannot simply be requested from other contractors, because the work is 'contaminated'.
- The selection process takes more time and therefore costs more money.

5. **Single private tendering** (only below threshold and if permitted by national law)

Advantages:

- The procedure is short and costs relatively little money.
- Maximum possibility to take into account the specific expertise of businesses.
- There is often a relationship of trust with the contractor, which means that less supervision is needed. The contractor is familiar with the municipality's working methods.
- In the case of an open budget, price consequences and any adjustments can be set and agreed clearly. This means there is less risk of additional work.

Disadvantages:

- No competitive pricing, although negotiation is possible (also on the basis of an open budget). The contractor must obtain a monopoly, created by the municipality, on the work.
- Often only a limited number of businesses from which to choose, danger of weakened vigilance.
- When working with open budgets, great cost expertise is required of the municipality.

**Innovative tendering methods for works (integrated cooperation)**

With these tendering methods, the preparation, implementation and any later phases of the work come into being in the form of a cooperation between the client and the contractor. The responsibilities of the parties within these methods of tendering are described in greater detail for each project in an agreement to be drawn up jointly between the municipality and the contractor.

**1. Design & Construct (D&C)**

A design & construct contract is an agreement on the basis of which the contractor enters into an obligation vis-à-vis the client. The objective of this is to realise a structure on the basis of a schedule of requirements and a design or draft design, in which a choice is made of at least a solution in principle. The contractor works according to a design drawn up by or on behalf of the contractor, and interim results are presented to the client for approval. If the client rejects the interim results and breaks the contract, the supplier can invoice the design costs incurred.

A Design & Construct contract can be entered into in any phase of the project preparation (from research to realisation), on the understanding that the client has not yet developed the design to completion in accordance with the specifications. It can also be dissolved at any moment during the design phase.

In the context of management of the contract, the client must in any event have completed the following steps before contract formation:

- various studies (including feasibility, soil and geological studies)
- unambiguous and complete specifications of requirements and wishes (functional / technical for the development of the schedule of requirements) and description of limiting conditions for the realisation
- preliminary design, including complicated design choices (in cooperation with the tenderers, if appropriate)
- acquisition of permits and following administrative (approval) manual
- as concrete as possible risk analysis

Points of departure to be agreed for the rest of the process completion are:

- the agreement with the description of the acceptance procedure
- the project data provided by the client (including schedule of requirements and draft design, if appropriate)
- the points of departure applied and explicitly described by the contractor for its offer (including draft design)
- the supplement to the risk analysis to be developed by the contractor
- the quality plan drawn up by the contractor
- the timetable plan drawn up by the contractor
- the payment schedule, including moments for payment.

By accepting the order, the contractor accepts responsibility for the (complete) design, within the agreed division of risks which has been set down in writing. After the order placement, the contractor, or an external advice bureau acting on behalf of the contractor, develops the design. The contractor submits the interim results to the client for approval, in accordance with the agreed acceptance procedure.

This contract form is interesting in the case of civil engineering and construction works with a highly concrete schedule of requirements, whereby savings can be realised in the form of a better and more efficient design (more effective and with lower cost), faster completion time and lower advice costs.

## 2. **Turnkey**

A turnkey contract is an agreement under which the contractor enters into an obligation vis-à-vis the client to realise the construction project on the basis of a schedule of requirements drawn up by the client, on payment of a lump sum, according to a design to be created by the contractor.

The contracting of the work takes place on the basis of the schedule of requirements drawn up by the client. It may also be the case that the contractor takes the initiative for the project and offers it to the client. In such cases, the client also enters commits itself to the schedule of requirements as the point of departure for the contract. The contractor is then responsible for the development of the design, and its realisation. The client in principle only becomes actively involved in the work at completion of the building.

Interim results in the design and realisation process are not submitted to the client for approval, but only for information purposes. If the client decides, on the basis of the information provided to

it, to amend the schedule of requirements or make them more specific, or to intervene in the design process, in many cases this will result in higher costs (additional work).

Apart from the description of the points of departure for the building in question, the contract also contains:

- the assumptions and points of departure for the contractor's offer
- the quality plan drawn up by the contractor
- points of departure for planning and the exchange of information
- the payment schedule, including moments for payment.
- 

The contractor accepts the consequences of the content of the schedule of requirements drawn up by the client within the agreed and determined division of the risks. The contractor is fully responsible for the further detailing and realisation of the complete design and realisation process.

Depending on the contract conditions, the contractor will notify the client during the realisation about the content of and progress on the project. The status is informative.

This contract method is interesting in the case of civil and construction works of a standard nature, the schedule of requirements for which is clear and in respect of which which savings can be made in the form of time and advice costs.

### **3. The construction team**

The construction team can be described as a cooperative venture in which the team members work together in a coordinated manner on the preparation of the construction project, while each retaining their independence and responsibility. The following can participate in the construction team: the client (or its representative), the architect, advisor, contractor, structural designer and, if appropriate, representatives of related or other disciplines.

Characteristic of the construction team is that the contractor joins in discussions and assessments as early as in the design phase as a realisation expert. The cooperation between the construction partners to gear the design and the realisation to one another then forms the basis of the construction team model.

The advantages of a construction team form are primarily in terms of time savings and possible savings in realisation costs. On the other hand, the client must enter into multiple contracts and cannot clearly demarcate responsibilities, a monopoly position is created for the contractor (which can increase the costs again) and the client must enter into multiple contracts and a large number of obligations at an early stage.

**Contract checklist (drafting tips)**

**1. Identity of Parties**

- Name
- type of entity of each party (corporation, LLC etc)
- addresses

**2. Recitals**

- background of agreement
- purpose for entering into the contract
- key assumptions for the contract

**3. Obligations of the Parties**

- what is each side required to?
- by what date?
- If something has to be delivered, whose obligation is it and at who's cost?
- what quality standards must be met for the obligations to be deemed fully?
- what are the consequences of failing to meet these obligations/

**4. Terms of the contract**

- Is the contract a one-shot situation or will it last for some designated period of time?
- how can the term be renewed or extended?

**5. Price**

- What is the price for the product or service, how much is being paid and by whom?
- is it a fixed price, determined by a formula, by a project fee, or some other manner?
- who pays any tax?
- will interest be charged?

## 6. Payment terms

- when is the payment to be made?
- what steps have to occur before payment is required?
- what is the form of payment? Is it by check, wire transfer, certain procedures or something else?
- what impact will early contract termination have on payment?
- is there a penalty for late payment?

## 7. Representations and Warranties

- what representations and warranties are to be made by the parties?
- are certain warranties disclaimed (e.g.: fitness for particular purpose?)
- how long are warranties good for?

## 8. Liability

- what limitations of liability exist? (e.g. no liability in excess of payment received, or no liability for consequential damage or lost profits)?
- under what circumstances is one party liable (e.g. material breach of agreement or grossly negligent in performing services)?

## 9. Termination of contract

- when can one party terminate the contract early?  
a small breach (not material to the contract) will have limited remedies in the contract (e.g. a fine)  
a material breach could provide for some or all of the following rights:
  - the right to recoup all losses
  - the right to suspend performance
  - the right to terminate the contract
  - the right to get *injunctive relief*, that is to stop the other side from continuing to breach the contract
  - the right to *specific performance*, that is to force the breaching party to live up to its obligations under the contract

## **Contract drafting tips**

### **Establish Your Objectives Strategy**

Take the time to map out what you want out of the contract and how you intend to achieve that end. Also, consider what you are and are not willing to pay or give up.

### **Take charge of the draft**

Always write the first draft yourself, it will give you a tremendous advantage in shaping the negotiations.

Writing the first draft allows you to:

- define the issues to be addressed in the contract
- set the tone of the business negotiations with the language of your choice
- potentially limit the issues raised by the other party, since they may respond to the points raised in your draft before raising deal points of their own
- structure the deal based on your own wish list, with payment and delivery terms most beneficial to you
- avoid the hassle of renegotiating the other party's draft, which may be more time consuming than preparing your own first draft. Preparing the first draft of a contract can be a ton of work, but it is worth the effort.

### **Look at sample contracts and forms**

The best way to start drafting a contract: look at several sample forms similar to your situation

They will:

- alert you to issues that you may not even have thought about
- provide you with the necessary and appropriate language for your contract
- look on the Web or in forms books

### **Don't be too reliant on a "standard" form or sample contract**

- use forms as a starting place
- they will not be 'custom made' for your situation
- they may be drafted for the benefit of the wrong side
- they may be just plain lousy.

Standards and samples need to be revised to reflect your particular transaction

**Example Framework Agreement**

**Presentations workshops Zagreb / Split**

## Handouts:

- |     |  |                                   |
|-----|--|-----------------------------------|
| 1.  | Introduction project Further Strengthening of the Public Procurement System in the Republic of Croatia | Martien Vromans                   |
| 2.  | Business Approach and European procurement legislation   | Ditmar Waterman                   |
| 3.  | Business Approach in public procurement  | Marcel Stuijts                    |
| 4.  | Market Research  | Inge de Vos<br>Bart van Brunschot |
| 5.  | Sustainable procurement in the Netherlands   | Ditmar Waterman                   |
| 6.  | Functional specification   | Ralph Rheiter<br>Eric Zwitterloot |
| 7.  | Contract   | Rob Schnepper                     |
| 8.  | Framework Agreements   | Rob Schnepper                     |
| 9.  | e-auctions   | Ralph Rheiter<br>Eric Zwitterloot |
| 10. | Integrity  | Inge de Vos<br>Bart van Brunschot |
| 11. | Outsourcing  | Rob Schnepper                     |
| 12. | Theses Local Sourcing  | Together                          |
| 13. | The answer on joint procurement  | Alfred Veltman                    |
| 14. | (Business) Opportunity's in Public Procurement   | Marcel Stuijts                    |
| 15. | BIZOB operating procedure and networking   | Eric Zwitterloot                  |
| 16. | Practice joint procurement   | Inge de Vos                       |

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**Actual information and developments in public procurement**

- Procurement as a shared service in local government
- Partnership and public procurement : building social capital through supply relations
- European briefing : Will there ever be a Free Market in Europe for Industries Previously Influenced by National Government?
- Supplier relationship management : a framework for understanding managerial capacity and constraints
- The importance of reputation in awarding public contracts
- Do European procurement rules generate or prevent crime?
- Supply Management in the Public Sector
- Transforming government procurement