



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 14 June 2012**

---

---

**Interinstitutional File:  
2011/0438 (COD)**

---

---

**11269/12**

**MAP 46  
MI 431  
CODEC 1650**

**NOTE**

---

from: General Secretariat  
to: Working Party on Public Procurement

---

No Cion prop.: 18966/11 MAP 10 MI 686

---

Subject: Proposal for a Directive of the European Parliament and of the Council on  
public procurement  
- Cluster 7: Other procedural requirements

---

Delegations will find in the Annex a non-paper prepared by the Commission services (DG Internal Market) on Cluster 7 of the above proposal.

=====

## Cluster 7

### Other procedural requirements

---

Changes to the substance are highlighted in **bold**; minor modifications or purely linguistic adaptations are not highlighted. *Please note that comments are set out as compared to the Commission's initial proposal of 20<sup>th</sup> of December 2012. Where changes proposed by the Presidency in subsequent documents would suggest that changes could be envisaged to ensure coherence, these are indicated below.*

#### 1. Publication/transparency and time limits

*Article 45*

*Setting time limits*

*[Directive 2004/18/EC: Article 38(1) and (7)]*

1. When fixing the time limits for the receipt of tenders and requests to participate, contracting authorities shall take account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set out in Articles 24 to 30.
2. Where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the procurement documents, the time limits for the receipt of tenders shall be extended so that all economic operators concerned may be aware of all the information needed to produce tenders.

The provisions of this Article are unchanged as to substance; paragraph 2 has been streamlined: given the new provisions on electronic availability of procurement documents from the beginning of procurement procedures (Article 51 of this proposal), the current provisions concerning late delivery of such documents are no longer needed.

## SECTION 2 PUBLICATION AND TRANSPARENCY

*Article 46*  
*Prior information notices*  
*[Directive 2004/18/EC: Article 35(1), 36(1)]*

1. Contracting authorities **may** make known their intentions of planned procurements through the publication of a prior information notice as soon as possible after the beginning of the budgetary year. Those notices shall contain the information set out in Annex VI part B section I. They shall be published either by the Commission or by the contracting authorities on their buyer profiles in accordance with point 2(b) of Annex IX. Where the notice is published by the contracting authorities on their buyer profile, they shall send a notice of the publication on their buyer profile in accordance with point 3 of Annex IX.

The voluntary character of these prior information notices has been rendered more clear than is the case under the current Directive, which on the one hand states that contracting authorities "shall make known ..." and on the other hand adds that publication of such prior information notices shall "be compulsory only where the contracting authorities take the option of shortening the time limits ...". Similarly, as prior information notices are entirely voluntary, all references to the aggregated values of at least € 750 000 for supplies or services contracts or at least € 5 million for works contracts have been eliminated, since they are not needed.

2. **For restricted and competitive procedures with negotiation, sub-central contracting authorities may use a prior information notice as a call for competition pursuant to Article 24(2), provided that the notice fulfils all of the following conditions:**
  - (a) **it refers specifically to the supplies, works or services that will be the subject of the contract to be awarded;**
  - (b) **it indicates that the contract will be awarded by restricted or competitive procedure with negotiation without further publication of a call for competition and invites interested economic operators to express their interest in writing;**

- (c) **it contains, in addition to the information set out in Annex VI part B section I, the information set out in Annex VI part B section II;**
- (d) **it has been published not more than 12 months prior to the date on which the invitation referred to in Article 52(1) is sent.**

**Such notices shall not be published on a buyer profile.**

This provision is new. As explained in relation to Article 24(2) (examined under cluster 1), this provision gives additional flexibility under the GPA available to sub-central contracting authorities. As it is envisaged under cluster 1 that Member States would be competent to decide whether to make this additional flexibility available to sub-central contracting authorities (or certain categories thereof) or not, this provision may need to be adapted accordingly. The provision adapts the corresponding provisions, notably Article 42(3), of Directive 2004/17/EC to the context of this proposal without any changes as to substance.

*Article 47*  
*Contract notices*  
*[Directive 2004/18/EC: Articles 35(2), 36(1)]*

All contracting authorities **may** use a contract notice as a means of calling for competition in respect of all procedures. Such notices shall contain the information set out in Annex VI part C and shall be published in accordance with Article 49.

This provision has been adapted to take into account the possibility that sub-central contracting authorities may use a prior information notice as a means of calling for competition, but it is otherwise unchanged as to substance. The situation is therefore the following: **central government authorities** shall – as under the current Directive - use contract notices as the sole means of calling for competition for all procedures with prior publication. Similarly, sub-central contracting authorities shall continue to use contract notices as the sole means of calling for competition in respect of open procedures and competitive dialogues; they shall also use it in respect of the new innovation partnership. According to Article 24(2) (**as set out in document 8764/12 of**

**17 April 2012**), sub-central contracting authorities (or categories thereof) may use a prior information notice as a means of calling for competition in respect of restricted procedures and in respect of competitive procedures with negotiations, where the Member State concerned has rendered that possibility available.

*Article 48*  
*Contract award notices*  
*[Directive 2004/18/EC: Article 35(4), 36(1)]*

This provision is unchanged as to substance, except for two aspects:

- paragraph 2, 1<sup>st</sup> subparagraph, has been introduced in order to ensure that the standing publication of prior information notices used as means of calling for competition, cf. Article 49(4)(a) of this proposal, continue only for as long as the notice is of interest for economic operators, that is for as long as specific contracts related to the prior information notice may be awarded;
- the 4<sup>th</sup> subparagraph of Article 35(4) of Directive 2004/18/EC, which set out specific rules for contract award notices in respect of B-services, has been abolished to ensure coherence with the proposed abolition of the distinction between A- and B-services. In respect of social services, see Article 75(2) on contract award notices.

1. Not later than 48 days after the award of a contract or the conclusion of a framework agreement, contracting authorities shall send a contract award notice on the results of the procurement procedure.

Such notices shall contain the information set out in Annex VI part D and be published in accordance with Article 49.

2. **Where the call for competition for the contract concerned has been made in the form of a prior information notice and the contracting authority does not intend to award further contracts during the 12-month period covered by the prior information notice, the contract award notice shall contain a specific indication to that effect.**

In the case of framework agreements concluded in accordance with Article 31, contracting authorities shall not be bound to send a notice of the results of the procurement procedure for each contract based on that agreement.

3. Contracting authorities shall send a notice of the result of the award of contracts based on a dynamic purchasing system within 48 days of the award of each contract. They may, however, group such notices on a quarterly basis. In that case, they shall send the grouped notices within 48 days of the end of each quarter.
4. Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.

#### *Article 49*

##### *Form and manner of publication of notices*

*[Directive 2004/18/EC: Articles 36, 37, 79(1)(a)]*

1. Notices referred to in Articles 46, 47 and 48 shall include the information set out in Annex VI in the format of standard forms, **including standard forms for corrigenda.**

Practice shows that users request a standard form for corrigenda, a reference to them has therefore been added so as to give the Commission mandate to develop a standard format for corrigenda pursuant to the 2<sup>nd</sup> subparagraph.

The Commission shall establish those standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 91.

This corresponds to the provision of the current Article 79(1)(a), which gives the Commission a mandate to amend "the procedures for the drawing-up, transmission, receipt, translation, collection and distribution of the notices referred to in Articles 35, 58, 64 and 69 ..." by comitology (advisory procedure).

2. Notices referred to in Articles 46, 47 and 48 **shall be drawn up, transmitted by electronic means** to the Commission and published in accordance with Annex IX. Notices shall be published not later than five days after they are sent. The costs of publication of the notices by the Commission shall be borne by the Union.

The current provisions of Article 36(2) gives contracting authorities the choice between electronic transmission of the notices – already today chosen in 94% of cases - or transmission by other means of communication. As part of the overall policy in favour of e-procurement, electronic transmission is made mandatory. As a consequence, the current provision in Article 36(3)2<sup>nd</sup> subparagraph obliging the Commission (i. e. the Publications Office of the European Union) to publish notices within at the most 12 days, when transmitted otherwise than by electronic means of communications in the appropriate format, is abolished. The obligation to publish within 5 days is maintained unchanged (cf. the current Article 36(3)1<sup>st</sup> subparagraph) as is the provision set out in the 2<sup>nd</sup> subparagraph of the current Article 36(4) according to which publication costs are borne by the Union.

3. Notices referred to in **Article 46(2)** and Article 47 shall be published in full in an official language of the Union as chosen by the contracting authority. That language version shall constitute the sole authentic text. A summary of the important elements of each notice shall be published in the other official languages.

With the exception of the reference to prior information notices used as a means of calling for competition, this provision is unchanged as to substance. It reproduces the current provisions set out in Article 36(4).

4. **The Commission shall ensure that the full text and the summary of prior information notices referred to in Article 46(2) and calls for competition setting up a dynamic purchasing system, as referred to in Article 32(3)(a) continue to be published:**
- (a) **in the case of prior information notices, for 12 months or until receipt of a contract award notice as provided for in Article 48 indicating that no further contracts will be awarded during the 12-month period covered by the call for competition;**
  - (b) **in the case of calls for competition setting up a dynamic purchasing system, for the period of validity of the dynamic purchasing system.**

This provision is entirely new; it ensures the continuous publications of notices for longer "on-going" procurements, i. e. setting-up a dynamic purchasing system as well as prior information notices used as call for competition. Both will thus stay in the section for "current publications" for as long as they present an interest for economic operators, i. e. until no further contracts will be awarded (p.i.n.) or until the validity of the system expires. There is thus full transparency in order to ensure that the systems are genuinely open for as long as they are valid, which avoids that the longer systems lead to market closure. For further comments, see Article 48 above and the comments to Article 32 in cluster 6.

5. Contracting authorities shall be able to supply proof of the dates on which notices are dispatched.

The Commission shall give the contracting authority **confirmation of the receipt of the notice and** of the publication of the information sent, indicating the date of that publication. Such confirmation shall constitute proof of publication.



This provision reproduces the current provisions of Article 36(7) and (8), unchanged as to substance with the exception of the additional obligation for the Commission to confirm the receipt of notices transmitted for publication. This gives contracting authority the possibility to correct possible transmission problems at the outset – currently they might only be alerted through the absence of the confirmation of the actual publication, some 5 days later.

6. Contracting authorities may publish notices for public contracts that are not subject to the publication requirement laid down in this Directive **provided those notices are sent to the Commission by electronic means in accordance with the format and procedures for transmission indicated in Annex IX.**

The possibilities for contracting authorities to obtain voluntary publication of notices in the OJ is conserved; compared to the current provisions of Article 37 it will, however, be conditional upon electronic transmission of the notices, in the usual format and according to the normal procedures. This requirement is necessary in order to ensure that the cost of publication – which, also in this case, are borne by the Union – are kept at a reasonable level by being able to use the same tools and procedures that are used for notices whose publication is obligatory.

Annex VI, parts A to D, and Annex IX, are relevant to Articles 46 to 49.

The relatively few changes to Annex VI are in some cases direct consequences of changes proposed elsewhere in the proposal (e. g. the new section II of Annex VI, part B – "Additional information to be supplied where the notice is used as a means of calling for competition", which is very closely modelled on the corresponding Annex XV A, part II of Directive 2004/17/EC). Other changes (e.g. NUTS codes, information on whether contracts are awarded by central purchasing bodies etc. – already required in the standard forms) are aimed at facilitating the compilation of detailed statistics, which the Commission will undertake to carry out, thus relieving Member States of that task, cf. Art. 86 and the comments thereto under cluster 9.

The only substantial change of Annex IX is in point 2a which now reflects the proposed obligatory electronic availability of procurement documents, cf. Art. 51, and comments thereto in cluster 4.

**ANNEX VI**  
**INFORMATION TO BE INCLUDED IN NOTICES**  
*[Directive 2004/18/EC: ANNEX VII A AND VII D]*

**PART A**  
**INFORMATION TO BE INCLUDED IN NOTICES OF THE PUBLICATION OF A PRIOR**  
**INFORMATION NOTICE ON A BUYER PROFILE**  
**(as referred to in Article 46(1))**

1. Name, **identification number (where provided for in national legislation)**, address **including NUTS code, telephone, fax number, email and internet address** of the contracting authority and, where different, of the service from which additional information may be obtained.
2. **Type of contracting authority and main activity exercised.**
3. **Where appropriate, indication that the contracting authority is a centralised purchasing body; or that any other form of joint procurement is involved.**
4. CPV Nomenclature reference No(s).
5. Internet address of the "buyer profile" (URL).
6. **Date of dispatch of the notice of the publication of the prior information notice on the buyer profile.**

**PART B**  
**INFORMATION TO BE INCLUDED IN PRIOR INFORMATION NOTICES**  
**(as referred to in Article 46)**

*I. INFORMATION TO BE INCLUDED IN ALL CASES*

1. Name, **identification number (where provided for in national legislation)**, address **including NUTS code, telephone, fax number, email and internet address** of the contracting authority and, where different, of the service from which additional information may be obtained.

2. **Email or internet address at which the specifications and any supporting documents will be available for unrestricted and full direct access, free of charge.**
3. **Type of contracting authority and main activity exercised.**
4. **Where appropriate, indication that the contracting authority is a centralised purchasing body or that any other form of joint procurement is involved.**
5. CPV Nomenclature reference No(s); where the contract is divided into lots, this information shall be provided for each lot.
6. **NUTS code** for the main location of works in case of works contracts or **NUTS code** for the main place of delivery or performance in supply and service contracts; where the contract is divided into lots, this information shall be provided for each lot.
7. Brief description of the procurement: nature and extent of works, nature and quantity or value of supplies, nature and extent of services.
8. **Where this notice is not used as a means of calling for competition**, estimated date(s) for publication of a contract notice or contract notices in respect of the contract(s) referred to in this prior information notice
9. Date of dispatch of the notice.
10. Any other relevant information.
11. Indication whether the contract is covered by the Agreement.

*II. ADDITIONAL INFORMATION TO BE SUPPLIED WHERE THE NOTICE IS USED AS A MEANS OF CALLING FOR COMPETITION (ARTICLE 46(2))*

This section, which is new, is closely based on Annex XV A, part II of Directive 2004/17/EC, points 11 and 12 new.

- 1. A reference to the fact that interested economic operators shall advise the authority of their interest in the contract or contracts.**
- 2. Type of award procedure (restricted or competitive procedures with negotiation, dynamic purchasing system, competitive dialogue or innovation partnership).**
- 3. Where appropriate, indication whether:**
  - (a) a framework agreement is involved,**
  - (b) a dynamic purchasing system is involved.**
- 4. As far as already known, time-frame for delivery or provision of goods, works or services and duration of the contract.**
- 5. As far as already known, conditions for participation, including:**
  - (a) where appropriate, indication whether the public contract is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes,**
  - (b) where appropriate, indication whether the execution of the service is reserved by law, regulation or administrative provision to a particular profession,**
  - (c) brief description of selection criteria.**

- 6. As far as already known, brief description of criteria to be used for award of the contract: ‘lowest cost’ or ‘most economically advantageous tender’.**
- 7. As far as already known, estimated total value of contract(s); where the contract is divided into lots, this information shall be provided for each lot.**
- 8. Time limits for receipt of expressions of interest.**
- 9. Address where expressions of interest shall be transmitted.**
- 10. Language or languages authorised for the presentation of candidatures or tenders.**
- 11. Where appropriate, indication whether:**
  - (a) E-submission of tenders or requests to participate will be required/accepted,**
  - (b) E-ordering will be used,**
  - (c) E-invoicing will be used,**
  - (d) E-payment will be accepted.**
- 12. Information whether the contract is related to a project and /or programme financed by European Union funds.**
- 13. Name and address of the oversight body and the body responsible for review and, where appropriate, mediation procedures. Precise information concerning time limits for review procedures, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.**

**PART C**  
**INFORMATION TO BE INCLUDED IN CONTRACT NOTICES**  
**(as referred to in Article 47)**

1. Name, **identification number (where provided for in national legislation)**, address **including NUTS code**, telephone, fax number, email **and internet** address of the contracting authority and, where different, of the service from which additional information may be obtained.
2. **Email or internet address at which the specifications and any supporting documents will be available for unrestricted and full direct access, free of charge.**
3. **Type of contracting authority and main activity exercised.**
4. **Where appropriate, indication that the contracting authority is a central purchasing body or that any other form of joint procurement is involved.**
5. CPV Nomenclature reference No(s); where the contract is divided into lots, this information shall be provided for each lot.
6. **NUTS code** for the main location of works in case of works contracts or **NUTS code** for the main place of delivery or performance in supply and service contracts; where the contract is divided into lots, this information shall be provided for each lot.
7. Description of the procurement: nature and extent of works, nature and quantity or value of supplies, nature and extent of services. Where the contract is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.
8. Estimated total value of contract(s); where the contract is divided into lots, this information shall be provided for each lot.

9. Admission or prohibition of variants.
  
10. Time-frame for delivery or provision of supplies, works or services and, as far as possible, duration of the contract.
  - (a) In the case of a framework agreement, indication of the planned duration of the framework agreement, stating, where appropriate, the reasons for any duration exceeding four years; as far as possible, indication of value and frequency of contracts to be awarded, number and, where appropriate, proposed maximum number of economic operators to participate.
  
  - (b) In the case of a dynamic purchasing system, indication of the planned duration of the system; as far as possible, indication of value and frequency of contracts to be awarded.
  
11. Conditions for participation, including:
  - (a) where appropriate, indication whether the public contract is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes,
  
  - (b) where appropriate, indication whether the provision of the service is reserved by law, regulation or administrative provision to a particular profession; reference to the relevant law, regulation or administrative provision,
  
  - (c) a list and brief description of criteria regarding the personal situation of economic operators that may lead to their exclusion and of selection criteria; minimum level(s) of standards possibly required; indication of required information (**self-declarations, documentation**).
  
12. Type of award procedure; where appropriate, reasons for use of an accelerated procedure (in **open**, restricted and competitive procedure with negotiation);

13. Where appropriate, indication whether:
  - (a) a framework agreement is involved,
  - (b) a dynamic purchasing system is involved,
  - (c) an electronic auction is involved (in the event of open, restricted or competitive procedures with negotiation).
  
14. Where the contract is to be subdivided into lots, indication of the possibility of tendering for one, for several or for all of the lots; **indication of any possible limitation of the number of lots that may be awarded to any one tenderer. Where the contract is not subdivided into lots, indication of the reasons therefore.**
  
15. In the case of a restricted procedure, a competitive procedure with negotiation, a competitive dialogue **or an innovation partnership**, where recourse is made to the option of reducing the number of candidates to be invited to submit tenders, to negotiate or to engage in dialogue: minimum and, where appropriate, proposed maximum number of candidates and objective criteria to be used to choose the candidates in question.
  
16. In the case of a competitive procedure with negotiation, a competitive dialogue or an innovation partnership, indication, where appropriate, of recourse to a staged procedure in order gradually to reduce the number of tenders to be negotiated or solutions to be discussed.
  
17. Where appropriate, particular conditions to which performance of the contract is subject.
  
18. Criteria to be used for award of the contract or contracts ‘lowest cost’ or ‘most economically advantageous tender’. Criteria representing the most economically advantageous tender as well as their weighting shall be indicated where they do not appear in the specifications or, in the event of a competitive dialogue, in the descriptive document.



19. Time limit for receipt of tenders (open procedures) or requests to participate (restricted procedures, competitive procedures with negotiation, dynamic purchasing systems, competitive dialogues, **innovation partnerships**).
20. Address where tenders or requests to participate shall be transmitted.
21. In the case of open procedures:
  - (a) time frame during which the tenderer must maintain its tender,
  - (b) date, time and place for the opening of tenders,
  - (c) persons authorised to be present at such opening.
22. Language or languages in which tenders or requests to participate must be drawn up.
23. **Where appropriate, indication whether:**
  - (a) **E-submission of tenders or requests to participate will be accepted,**
  - (b) **E-ordering will be used,**
  - (c) **E-invoicing will be accepted,**
  - (d) **E-payment will be used.**
24. **Information whether the contract is related to a project and/or programme financed by European Union funds.**

25. Name and address of **the oversight body and** the body responsible for review and, where appropriate, mediation procedures. Precise information concerning deadlines for review procedures, or if need be, the name, address, telephone number, fax number and email address of the service from which this information may be obtained.
26. Date(s) and reference(s) of previous publications in the *Official Journal of the European Union* relevant to the contract(s) advertised in this notice.
27. In the case of recurrent procurement, estimated timing for further notices to be published.
28. Date of dispatch of the notice.
29. Indication whether the contract is covered by the Agreement.
30. Any other relevant information.

**PART D**  
**INFORMATION TO BE INCLUDED IN CONTRACT AWARD NOTICES**  
**(as referred to in Article 48)**

1. Name, **identification number (where provided for in national legislation)**, address **including NUTS code, telephone, fax number, email and internet address** of the contracting authority **and, where different, of the service from which additional information may be obtained.**
2. **Type of contracting authority and main activity exercised.**
3. **Where appropriate, indication whether the contracting authority is a central purchasing body or that any other form of joint procurement is involved.**

4. CPV Nomenclature reference No(s).
5. **NUTS code** for the main location of works in case of works contracts or **NUTS code** for the main place of delivery or performance in supply and service contracts.
6. Description of the procurement: nature and extent of works, nature and quantity or value of supplies, nature and extent of services. Where the contract is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.
7. Type of award procedure; in the case of negotiated procedure without prior publication (Article 30), justification.
8. **Where appropriate, indication whether:**
  - (a) **a framework agreement was involved,**
  - (b) **a dynamic purchasing system was involved.**
9. Criteria referred to in Article 66 which were used for award of the contract or contracts.  
**Where appropriate, indication whether the holding of an electronic auction was involved (in the event of open, restricted or competitive procedures with negotiation).**
10. Date of contract award **decision or decisions;**
11. Number of tenders received with respect of each award, including:
  - (a) **number of tenders received from economic operators which are small and medium enterprises,**
  - (b) **number of tenders received from abroad,**

- (c) **number of tenders received electronically.**
12. For each award, name, **address including NUTS code, telephone, fax number, email address and internet address** of the successful tenderer(s) including
- (a) **information whether the successful tenderer is small and medium enterprise,**
- (b) **information whether the contract was awarded to a consortium.**
13. Value of the successful tender (tenders) or the highest tender and lowest tender taken into consideration for the contract award or awards;
14. Where appropriate, for each award, value and proportion of contract likely to be subcontracted to third parties.
- 15. Information whether the contract is related to a project and /or programme financed by European Union funds.**
- 16. Name and address of the oversight body and** the body responsible for review and, where appropriate, mediation procedures. Precise information concerning the deadline for review procedures, or if need be, the name, address, telephone number, fax number and email address of the service from which this information may be obtained
17. Date(s) and reference(s) of previous publications in the *Official Journal of the European Union* relevant to the contract(s) advertised in this notice.
18. Date of dispatch of the notice.
19. Any other relevant information.

**PART E**  
**INFORMATION TO BE INCLUDED IN DESIGN CONTEST NOTICES**  
**(as referred to in Article 79(1))**

1. Name, **identification number (where provided for in national legislation)**, address **including NUTS code**, telephone, fax number, email **and internet** address of the contracting authority and, where different, of the service from which additional information may be obtained.
2. **Email or internet address at which the specifications and any supporting documents will be available for unrestricted and full direct access, free of charge.**
3. **Type of contracting authority and main activity exercised.**
4. **Where appropriate, indication whether the contracting authority is a central purchasing body or that any other form of joint procurement is involved.**
5. **CPV Nomenclature reference No(s); where the contract is divided into lots, this information shall be provided for each lot.**
6. Description of the principal characteristics of the project.
7. Number and value of any prizes.
8. Type of contest (open or restricted).
9. In the event of an open contest, time limit for the submission of projects.

10. In the event of a restricted contest:
  - (a) number of participants contemplated,
  - (b) names of the participants already selected, if any,
  - (c) criteria for the selection of participants,
  - (d) time limit for requests to participate.
11. Where appropriate, indication that the participation is restricted to a specified profession.
12. Criteria to be applied in the evaluation of the projects.
13. Names of any members of the jury who have already been selected.
14. Indication whether the jury's decision is binding on the contracting authority.
15. Payments to be made to all participants, if any.
16. Indication whether any contracts following the contest will or will not be awarded to the winner or winners of the contest.
17. Date of dispatch of the notice.
18. **Any other relevant information.**

**PART F**  
**INFORMATION TO BE INCLUDED IN NOTICES OF THE RESULTS OF A CONTEST**  
**(as referred to in Article 79(2))**

1. Name, **identification number (where provided for in national legislation)**, address **including NUTS code**, telephone, fax number, email **and internet address** of the contracting authority and, where different, of the service from which additional information may be obtained.
2. **Type of contracting authority and main activity exercised.**
3. **Where appropriate, indication whether the contracting authority is a central purchasing body or that any other form of joint procurement is involved.**
4. **CPV Nomenclature reference No(s).**
5. Description of the principal characteristics of the project.
6. Value of the prizes.
7. **Type of contest (open or restricted).**
8. **Criteria which were applied in the evaluation of the projects.**
9. **Date of the jury decision.**
10. **Number of participants.**
  - (a) **Number of participants who are small and medium enterprises.**

- (b) Number of participants from abroad.
- 11. Name, address including NUTS code, telephone, fax number, email address and internet address of the winner(s) of the contest and indication whether the winner(s) are small and medium enterprises.**
- 12. Information whether the design contest is related to a project or programme financed by Union funds.**
13. Date(s) and reference(s) of previous publications in the *Official Journal of the European Union* relevant to the project(s) concerned by this notice.
14. Date of dispatch of the notice.
- 15. Any other relevant information.**

**ANNEX IX**  
**FEATURES CONCERNING PUBLICATION**  
*[Directive 2004/18/EC: ANNEX VIII]*

This Annex is unchanged as to substance except for the fact that point 2a has been changed in order to ensure coherence with the provisions of Article 51.

1. Publication of notices

The notices referred to in Articles 46, 47, 48, 75 and 79 must be sent by the contracting authorities to the Publications Office of the European Union and published in accordance with the following rules:

Notices referred to in Articles 46, 47, 48, 75 and 79 shall be published by the Publications Office of the European Union or by the contracting authorities in the event of a prior information notice published on a buyer profile in accordance with Article 46(1).



In addition, contracting authorities may publish this information on the Internet on a ‘buyer profile’ as referred to in point 2(b).

The Publications Office of the European Union will give the contracting authority the confirmation referred to in Article 49(5), second subparagraph.

## 2. Publication of complementary or additional information

- (a) Contracting authorities **shall** publish the specifications and the additional documents in their entirety on the Internet.
- (b) The buyer profile may include prior information notices as referred to in Article 46(1), information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled and any useful general information, such as a contact point, a telephone and a fax number, a postal address and an e-mail address.

## 3. Format and procedures for sending notices electronically

The format and procedure for sending notices electronically as established by the Commission are made accessible at the Internet address ‘<http://simap.europa.eu>’.

*Article 50*  
*Publication at national level*  
*[Directive 2004/18/EC: Article 36(5)]*

The current provisions allow contracting authorities to proceed to a publication of notices at the national level as of **the date of transmission** of the draft notices to the Commission for publication in the OJ. This means that there may be a difference of up to 5 - 12 days between the apparition of notices in national media and in the OJ. This difference may create competitive advantages for economic operators who get their knowledge of procurement opportunities through publications at national level rather than the OJ, in addition to possible advantages linked to language issues. Given also the general shortening of deadlines it is important to ensure equal treatment by prohibiting earlier publication at the national level than at the EU level. The only exception is for prior information notices which are **not** used as a call for competition: Pursuant to paragraph 3 of this Article, these notices may continue to be published on the buyer profile as of the transmission to the Commission of the notice of their publication in that form. The reason is that such notices do not present the same degree of time-sensitivity as the other types of notices.

1. Notices referred to in Articles 46, 47 and 48 and the information contained therein shall not be published at national level before **the publication** pursuant to Article 49.
2. Notices published at national level shall not contain information other than that contained in the notices dispatched to the Commission or published on a buyer profile, but shall indicate the date of dispatch of the notice to the Commission or its publication on the buyer profile.
3. Prior information notices shall not be published on a buyer profile before the dispatch to the Commission of the notice of their publication in that form. They shall indicate the date of that dispatch.

*Article 52*

*Invitations to submit a tender or to participate in the dialogue; invitations to confirm interest  
[Directive 2004/18/EC: Article 40]*

1. In restricted procedures, competitive dialogue procedures, **innovation partnerships** and competitive procedures with negotiation, contracting authorities shall simultaneously and in writing invite the selected candidates to submit their tenders or, in the case of a competitive dialogue, to take part in the dialogue.

**Where a prior information notice is used as a call for competition pursuant to Article 46(2), contracting authorities shall simultaneously and in writing invite the economic operators having expressed their interest to confirm their continuing interest.**

The 2<sup>nd</sup> subparagraph is new; it is closely modelled on the corresponding provision of Article 47(5), 1<sup>st</sup> subparagraph of Directive 2004/17/EC.

2. The invitations referred to in paragraph 1 shall include a reference to the electronic address on which the specifications or the descriptive document and any other supporting documents have been made directly available by electronic means. **In addition, they shall include the information set out in Annex X.**

This provision has been streamlined in two respects: firstly it is no longer necessary to require that the invitations be accompanied by the specifications (in the sense of "procurement documents") etc. as these documents must be rendered electronically available from the beginning of the procedure pursuant to the proposed Art. 51, which also renders the current provisions of Art. 40(3) superfluous. Secondly, the detailed provisions as to precisely what information must be provided in the invitations have now been transferred to Annex X.

## ANNEX X

### CONTENTS OF THE INVITATIONS TO SUBMIT A TENDER, PARTICIPATE IN THE DIALOGUE OR TO CONFIRM INTEREST PROVIDED FOR UNDER ARTICLE 52

*[Directive 2004/18/EC: Article 40(5)]*

Paragraph 1 is unchanged as to substance except for the adaptations that are necessary as a consequence of the new possibility for sub-central contracting authorities to use a prior information notice as a means of calling for competition and the introduction of the innovation partnership.

1. The invitation to submit a tender or to participate in the dialogue provided for under Article 52 must contain at least:
  - (a) a reference to the **call for competition** published;
  - (b) the deadline for the receipt of the tenders, the address to which the tenders must be sent and the language or languages in which the tenders must be drawn up;
  - (c) in the case of competitive dialogue the date and the address set for the start of consultation and the language or languages used;
  - (d) a reference to any possible adjoining documents to be submitted, either in support of verifiable declarations by the tenderer in accordance with Articles 59 and 60 and, where appropriate, Article 61 or to supplement the information referred to in those Articles, and under the conditions laid down in Articles 59, 60 and 61;
  - (e) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, where they are not given in the contract notice, in the invitation to confirm interest, in the specifications or the descriptive document.

However, in the case of contracts awarded through a competitive dialogue **or an innovation partnership**, the information referred to in point (b) shall not appear in the invitation to participate in the dialogue or to negotiate but it shall appear in the invitation to submit a tender.

Paragraph 2 is new in the context of the Classic Directive, however, it copies Article 47(5) of Directive 2004/17/EC without changes other than purely terminological ones.

- 2. When a call for competition is made by means of a prior information notice, contracting authorities shall subsequently invite all candidates to confirm their interest on the basis of detailed information on the contract concerned before beginning the selection of tenderers or participants in negotiations.**

**This invitation shall include at least the following information:**

- (a) nature and quantity, including all options concerning complementary contracts and, where possible, the estimated time available for exercising these options for renewable contracts, the nature and quantity and, where possible, the estimated publication dates of future notices of competition for works, supplies or services to be put out to tender;**
- (b) type of procedure: restricted or competitive procedure with negotiation;**
- (c) where appropriate, the date on which the delivery of supplies or the execution of works or services is to commence or terminate;**
- (d) the address and closing date for the submission of requests for procurement documents and the language or languages in which they are to be drawn up;**
- (e) the address of the entity which is to award the contract and the information necessary for obtaining the specifications and other documents;**

- (f) economic and technical conditions, financial guarantees and information required from economic operators;**
- (g) the amount and payment procedures for any sum payable for obtaining procurement documents;**

Due to an oversight, point (g) has been retained unchanged from the corresponding provision in Directive 2004/17/EC. It should have been omitted in order to ensure coherence with the provisions of Article 51 of this proposal ("...offer unrestricted and full direct access free of charge ...").

- (h) the form of the contract which is the subject of the invitation to tender: purchase, lease, hire or hire-purchase, or any combination of these; and**
- (i) the contract award criteria and their weighting or, where appropriate, the order of importance of such criteria, where this information is not given in the prior information notice or the specifications or in the invitation to tender or to negotiate.**

*Article 53*

*Informing candidates and tenderers*

*[Directive 2004/18/EC: Article 41]*

This provision is largely unchanged as to substance compared to the current Article 41 of Directive 2004/18/EC; however, there is one new provision, namely the requirement in point d of paragraph 2, which increases transparency in the context of competitive procedures with negotiations and competitive dialogues. This is part of the package of procedural safeguards, examined in the context of cluster 1. It should be noted that the deletion of the last half-sentence of the current Article 41(1) ("that information shall be given in writing upon request to the contracting authorities.") does not imply any change of substance, given the provisions on means of communications as set out under Article 19 of the proposal.

1. Contracting authorities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement, not to award a contract for which there has been a call for competition, to recommence the procedure or not to implement a dynamic purchasing system.
2. On request from the party concerned, the contracting authority shall as quickly as possible, and in any case within 15 days from receipt of a written request, inform:
  - (a) any unsuccessful candidate of the reasons for the rejection of its request to participate,
  - (b) any unsuccessful tenderer of the reasons for the rejection of its tender, including, for the cases referred to in Article 40(5) and (6), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,
  - (c) any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement,
  - (d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.**

Contracting authorities may decide to withhold certain information referred to in paragraph 1, regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system, where the release of such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between them.

## 2. Variants

*Article 43*

*Variants*

*[Directive 2004/18/EC: Article 24]*

In the interest of furthering innovation, the possibility to use variants has been broadened through the elimination of the condition that variants may be admitted only where the award criterion is the economically most advantageous tender. Under the proposal, contracting authorities may therefore authorise the use of variant in all cases, including where the award criterion is the lowest price only.

It has also been clarified that, when setting the award criteria, contracting authority must bear in mind that these must be applicable to both "standard solutions" as well as variants that meet the minimum requirements they have set.

1. Contracting authorities may authorise tenderers to submit variants. They shall indicate in the contract notice or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest whether or not they authorise variants. Variants shall not be authorised without such indication.
2. Contracting authorities authorising variants shall state in the procurement documents the minimum requirements to be met by the variants and any specific requirements for their presentation. **They shall also ensure that the chosen award criteria can be usefully applied to variants meeting those minimum requirements as well as to conforming tenders which are not variants.**
3. Only variants meeting the minimum requirements laid down by the contracting authorities shall be taken into consideration.



In procedures for awarding public supply or service contracts, contracting authorities that have authorised variants shall not reject a variant on the sole ground that it would, where successful, lead to either a service contract rather than a public supply contract or a supply contract rather than a public service contract.

### **3. Design contests**

#### *Article 77*

#### *General provisions*

*[Directive 2004/18/EC: Article 66]*

Unchanged as to substance.
----------------------------

1. The rules for the organisation of design contests shall be in conformity with this Chapter and shall be communicated to those interested in participating in the contest.
  
2. The admission of participants to design contests shall not be limited:
  - (a) by reference to the territory or part of the territory of a Member State;
  
  - (b) on the grounds that, under the law of the Member State in which the contest is organised, they would be required to be either natural or legal persons.

*Article 78*

*Scope*

*[Directive 2004/18/EC: Article 67]*

The scope of this provision has been slightly enlarged through the proposed slimlining of thresholds in two respects: firstly, the special threshold for design contests relating to the former "B-services" has been eliminated as a consequence of the proposed elimination of the distinction between A and B services; secondly, the special threshold for design contests relating to R&D services and certain telecommunications services (currently set at 200 000 € that applies to "the services listed in Category 8 of Annex IIA, Category 5 telecommunications services the positions of which in the CPV are equivalent to CPC reference Nos. 7524, 7525 and 7526") has been eliminated. A similar simplification of thresholds already applies under the current Utilities Directive, whose Article 16(a) provides for a unified threshold applicable to all design contests, whether concerning A or B services and including design contests relating to the just-mentioned R&D and telecommunications services.

This Chapter shall apply to:

- (a) design contests organised as part of a procedure leading to the award of a public service contract;
- (b) design contests with prizes or payments to participants.

The current provisions of Article 68 are incorporated in Articles 7, 8, 9, 14 and 19 of this proposal.

In the cases referred to in point (a), the **threshold referred to in Article 4** is calculated on the basis of the estimated value net of VAT of the public service contract, including any possible prizes or payments to participants.

Due to an oversight, the provisions of Article 67(2)3<sup>rd</sup> sub-paragraph of Directive 2004/18/EC has been omitted; it should be reintroduced has been chosen, adapted as follows:

" In the cases referred to in (b), the threshold refers to the total amount of the prizes and payments, including the estimated value net of VAT of the public services contract which might subsequently be concluded under Article 30(4) if the contracting authority **has announced its intention to award such contract** in the contest notice."

*Article 79*

*Notices*

*[Directive 2004/18/EC: Articles 69, 70]*

Article 79 of the proposal has not been amended as to substance, but it has been simplified insofar as it unites the content of what used to be two different Articles in one.

1. Contracting authorities that intend to carry out a design contest shall make known their intention by means of a contest notice.

**Where they intend to award a subsequent service contract pursuant to Article 30(3), this shall be indicated in the contest notice.**

The second subparagraph reflects the above-mentioned provisions of Article 67(2)3<sup>rd</sup> sub-paragraph of Directive 2004/18/EC; knowing that a subsequent service contract will be awarded **without further calls for competitions** to (one of) the winner(s) is a crucial information for economic operators when deciding whether or not to participate in the design contest.

2. Contracting authorities that have held a design contest shall send a notice of the results of the contest in accordance with Article 49 and shall be able to prove the date of dispatch.

Where the release of information on the outcome of the contest would impede law enforcement, be contrary to the public interest, or prejudice the legitimate commercial interests of a particular enterprise, whether public or private, or might prejudice fair competition between service providers, such information may be withheld from publication.

3. The notices referred to in paragraphs 1 and 2 of this Article shall be published in accordance with Article 49(2) to (6) and Article 50. They shall include the information set out in Annex VI part G in the format of the standard forms.

The Commission shall establish the standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 91.

#### *Article 80*

##### *Rules on the organisation of design contests and the selection of participants*

*[Directive 2004/18/EC: Articles 66, 72]*

Article 80 of the proposal is unchanged as to substance. The reference in paragraph 1 to the provisions of "this Directive", which replaces the previous reference to the provisions of the specific Title on design contest is necessary because of the changed structure of the proposal compared to Directive 2004/18/EC (e. g. the provisions on exclusions and means of communication have been transferred to Title I Scope, definitions and general principles.

1. When organising design contests, contracting authorities shall apply procedures which are adapted to **the provisions of this Directive**.
2. Where design contests are restricted to a limited number of participants, the contracting authorities shall lay down clear and non-discriminatory selection criteria. In any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition.

*Article 81*  
*Composition of the jury*  
*[Directive 2004/18/EC: Article 73]*

Unchanged.

The jury shall be composed exclusively of natural persons who are independent of participants in the contest. Where a particular professional qualification is required from participants in a contest, at least a third of the members of the jury shall have that qualification or an equivalent qualification.

*Article 82*  
*Decisions of the jury*  
*[Directive 2004/18/EC: Articles 74]*

Unchanged as to substance.

1. The jury shall be autonomous in its decisions or opinions.
2. The jury shall examine the plans and projects submitted by the candidates anonymously and solely on the basis of the criteria indicated in the contest notice.
3. The jury shall record its ranking of projects in a report, signed by its members, made according to the merits of each project, together with its remarks and any points that may need clarification.
4. Anonymity shall be observed until the jury has reached its opinion or decision.
5. Candidates may be invited, if need be, to answer questions that the jury has recorded in the minutes to clarify any aspect of the projects.
6. Complete minutes shall be drawn up of the dialogue between jury members and candidates.