STEPPING

Supporting The EPC Public Procurement IN Going-beyond

Module 8 – Elaboration of tender schemes, contracts and specifications

Tender approaches

Within an EPC, if the public contracting authority has prepared and published its own tendering policy, then that contracting authority must also take into account the obligations arising from that tendering policy, in addition to the rules and principles governing tenders at European and national level. Regarding the regulatory framework, it should be noted that three new European tender directives have been published in March 2014.

Tender approaches

An energy performance contract with an ESCo can assume many forms. It can target

(i) just the implementation of energy management/monitoring (**ESCo light**),

(ii) a single specific measure, e.g. the delivery of LED lighting (**product ESCo**),

(iii) more radical energy-saving measures, such as the design and delivery of climate control systems (**system ESCo**),

(iv) more comprehensive measures in the envelope of a building with construction work, renovation, and the delivery of systems (**building ESCo**) or of multiple buildings in an area (**area ESCo**).

The contract can also entail the financing of work and systems, e.g through a loan, rent or lease, as well as administration and maintenance. Since the measures to be implemented can be very diverse (solar panels, insulation, wind, biomass, management systems, and lighting, for instance), this results in a wide range of possible services, supplies, and works that can make up an energy performance contract.

Tender approaches

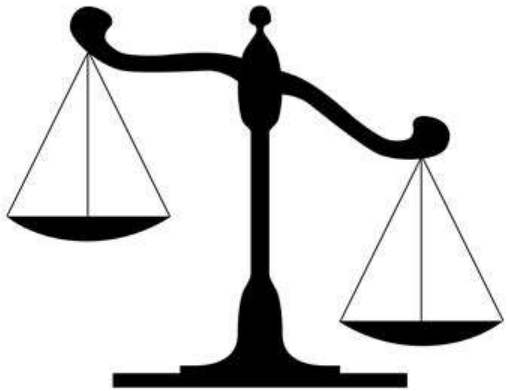
For the application of the European rules governing tenders, it is important to make a distinction between *public works* contracts, *public supply* contracts, and *public service* contracts.

- A “public works contract” pertains to (the design and) the execution of structural or civil-engineering works destined as such to fulfil an economic or technical function.
- A “public supply contract” pertains to the purchase, leasing, rent or hire-purchase, with or without purchase option, of products, potentially including the additional affixing and/or installation of that supply.
- A “public service contract” pertains to the performance of services, in which any potential products to be delivered are lower in value than those services and in which potential work to be performed is secondary in nature.

Energy performance contracts are often integrated contracts, which can comprise construction work in the building envelope, the supply of systems and energy, financing, management and maintenance services, and energy conservation guarantees. As a result, energy performance contracts are in most cases mixed agreements, consisting of a combination of public works contracts, public supply contracts and/or public service contracts, and may even contain a concession element.

Tender approaches

In the case of an energy performance contract that entails works as well as supplies and/or services, the ***contract's main subject*** must be used to determine whether it concerns a public works contract, a public supply contract or a public service contract. The main subject of the contract must be determined on the basis of the essential obligations that are typical of the concerned contract. The value of the various constituent parts of the contract is merely a factor in the determination of the main subject. When the services and/or supplies are secondary to the works, it concerns a public works contract and vice versa. The value of the supplies and/or services is decisive if the energy performance contract pertains solely to supplies and services. When the value of the services exceeds that of the supplies, it concerns a public service contract and vice versa.



Tender procedures

Contracts of departments inviting tenders of which the estimated value exceeds the European threshold values must in principle be put out to tender.

The ***open and private procedures*** are standard procedures that can in that case be used for any contract by the department inviting tenders.

The competitive dialogue and the ***negotiation procedures*** with and without prior notice are exceptional procedures that can only be used in special circumstances and for contracts with a value below the threshold value.

The competitive dialogue offers the most advantages in the case of more complex energy performance contracts.

Standard procedures

Standard procedures: open procedure and private procedure.

Open procedure

The open procedure is a standard procedure that can always be used. This procedure has a single round, in which all interested ESCo submit a tender. The disadvantage of this procedure is that everyone can submit a tender, which can raise the cost of the procedure and the time consumption for tenderers and departments inviting tenders. In the case of energy performance contracts, the open procedure can namely be suitable for less complex forms, such as an ESCo that solely focuses on the implementation of energy management/monitoring (ESCo light) or on a single specific measure, e.g. the supply of LED lighting (product ESCo). One of the other procedures is probably more suitable for more complex forms, in which e.g. the technical conservation measure to be implemented has not yet been selected.

Standard procedures

Standard procedures: open procedure and private procedure.

Private procedure

The private procedure is the standard procedure in which candidates and tenders are assessed in two different rounds. The first round (pre-qualification phase) serves to select those ESCos that will be invited to submit a tender. The tenders of the selected candidates are then assessed in the second round (award phase). The private procedure is more suitable than the open procedure as energy performance contracts are often more complex contracts and require more extensive tenders. However, neither the open nor the private procedure provide ESCos with much margin for innovative ideas.

The two standard procedures are probably not the most suitable tender procedures in situations in which multiple energy-saving solutions are possible and in which one or more measures have not yet been selected.

Exempted procedures: competitive dialogue and negotiation procedure

Competitive dialogue

The competitive dialogue can be used by departments inviting tenders for exceptionally complex contracts. A public contract is exceptionally complex when the department inviting tenders is objectively incapable of determining the technical resources or of specifying the legal or financial terms of a project. The competitive dialogue is the most suitable procedure in situations in which a department wants to put out to tender an energy performance contract for various drastic energy-saving measures, without being able to indicate in advance which solutions can resolve this or without being able to assess which technical and/or financial/legal solutions the market can provide. When selecting the competitive dialogue, the department inviting tenders conducts a dialogue with the selected candidates for the purpose of determining the resources/solutions that are most suitable for fulfilling the needs of the department inviting tenders as well as possible. The dialogue can cover all aspects of the concerned public contract. A department inviting tenders will continue the dialogue until it has selected, after comparison if necessary, the solutions that can fulfil its needs. After the dialogue, the participants are asked to submit a final tender for the select solution(s).

Exempted procedures: competitive dialogue and negotiation procedure

Negotiation procedure

The negotiation procedure is a procedure in which the department inviting tenders consults with the enterprises it selected and in which it determines the terms of the contract through negotiations with one or more of those enterprises. The special circumstances in which the negotiation procedure can be applied are interpreted very restrictively in the case law. The department inviting tenders that invokes one of the special circumstances must prove the existence of these circumstances. The cases in which the use of the negotiation procedure is justified can be divided into categories: those in which a prior notice of the contract must be published and those in which no prior notice must be published. The situations in which the negotiation procedure can be used without prior notice do not provide justifications specific to energy performance contracts. Two of the situations in which the negotiation procedure with prior notice may be used, may be relevant in special circumstances to putting energy performance contracts out to tender :

- When the nature and uncertain circumstances make it impossible to determine the total price in advance;
- When it concerns a public financial services contract or a public intellectual services contract for which the specifications for that public contract cannot be determined sufficiently accurately due to the nature of the services to be performed.

Awarding procedure

The award of a contract within the context of the invitation to tender is divided into (a) the selection of candidates with the required capacities by means of *selection criteria*, and (b) the selection of an tender on the basis of *award criteria*.

Selection criteria pertain to the enterprise that registers or submits a tender. Grounds of exclusion are used to check whether the candidate is subject to personal circumstances that preclude admission to the procedure. For example, enterprises that are in involuntary liquidation or that have obtained a moratorium on payments, that did not pay their taxes or social security contributions, that have committed serious professional errors or that have committed an offence.

Suitability requirements indicate the minimum level of the competences the tenderer must possess to qualify for being awarded the contract. The suitability requirements can be requirements that pertain to the economic and financial strength and the technical and professional competence.

Selection criteria are subsequently used in a pre-selection procedure to restrict the number of participants (shortlist) that will be invited to submit a tender.

Awarding procedure

The requirements with regard to **financial and economic strength** pertain to the strength of the candidate or tenderer and to potential third parties whose strength that candidate or tenderer can invoke. Giving substance to these requirements demands a tailor-made approach and depends on the nature, scope, and value of the energy performance contract. Normally this aspect is defined by national legislation: e.g. pieces of evidence with which the department inviting tenders can check these requirements, namely the banker's opinion, occupational hazard insurance, submission of balance sheets, and a statement concerning turnover. Financial ratios can be imposed, but this should be done carefully. Due to the diversity in accounting methods and differences between industries, it is not unusual for the mutual comparability of those ratios to be problematic. Potential ratios must therefore be defined clearly in the tender documents.

Awarding procedure

The requirements concerning **technical and professional competence** pertain to the required competence of the enterprise for the fulfilment of the energy performance contract. When imposing these requirements, it is important to find wording that fits in with the core competencies that are relevant to the fulfilment of the energy performance contract. Giving substance to the technical and professional competence also demands a tailor-made approach and depends on the nature, scope, and value of the energy performance contract.

In the context of energy performance contracts, environmental management measures at enterprises can namely be suitable to serve as evidence to demonstrate their technical capacity. Environmental management systems are tools that pertain to the enterprise itself and that target the improvement of its general environmental performance, including the use of natural resources, the training of employees, and the use of environmentally-friendly production methods.

Awarding procedure

If several suitable companies remain after verifying the registrations on their completeness, legal validity, grounds for exclusion, and suitability requirements, then the department inviting tenders can opt for restricting the number of candidates admitted to the next phase by means of (additional) selection criteria. One potential method of restricting that number is to create a ranking of the suitable candidates on the basis of the degree in which the reference projects supplied fulfil the requested core competencies and/or the number of competencies in a single reference/project. In addition, a further assessment can be made of the extent in which the core competencies pertain to e.g. the type of building to which the contract pertains or the specific background of the contracting authority. For example: ‘experience in energy conservation for office buildings/sports centres/[other]’, or ‘energy conservation for buildings with a public function’.

Award criteria for the assessment of tenders

Most of European legislations prescribe that a public contract must in principle be awarded on the basis of the criterion ‘economically most advantageous tender’. If the department inviting tenders nevertheless opts for awarding the contract on the basis of the lowest price in derogation of the previous sentence, the department must justify the application of that criterion in the tender documents. The lowest price criterion will be difficult to apply in many energy performance contracts and will require the use of a combination of award criteria.

It is possible to apply award criteria on the basis of environmental conditions, provided that these criteria:

- are connected with the subject of the contract;
- do not grant unlimited freedom of choice to the department inviting tenders;
- are announced in advance;
- are not selection criteria;
- are in agreement with the fundamental principles of EU law, non-discrimination in particular.

Award criteria for the assessment of tenders

Furthermore, a selection will have to be made of substantive requirements (specifications) to be attached to the contract. The (minimum) requirements that the contract must fulfil can be specified technically or functionally.

Technical specifications provide an exact description of the work, the service or product to be supplied (dimensions, performance, characteristics, etc.).

Functional specifications provide a description of the intended results, the required performance or the envisioned purpose of the work, the service or product to be provided. In that case, the tenderers must describe how the results will be achieved with their tender. In the case of energy performance contracts, it makes sense to provide functional specifications as it is often the purpose to make use of the knowledge, experience, and inventiveness of market parties with regard to energy-saving measures.

O&M Plan

Most ESCOs establish a training schedule for operation and maintenance (O&M) coinciding with the commissioning of the ECMs. If possible, the ESCO should involve the Public Body in the commissioning process and use that as a valuable part of training. If the Public Body will be using third parties for maintenance, then discussion should centre on how those parties could participate in training. In addition to initial training, the ESCO will likely suggest periodic training updates. This is particularly important if staff turnover creates gaps in knowledge. In such cases, the Public Body can usually request training, or the ESCO may offer training to new staff. It is strongly recommended that the ESCO be given this latitude to charge for training, as it has no control over Public Body's human resources management practices, which can directly impact on ECM O&M and therefore on the ESCO's guaranteed energy savings obligation.

O&M Plan

ESCOs will normally offer a regular training program as part of a continuous improvement processes. This is particularly evident when the ESCO is compensated for enhanced or over-performance (i.e. paid a bonus for exceeding the annual guaranteed energy savings amount). Through training, the ESCO can keep staff focused on energy savings and can also use their day-today experience to fine tune systems for even more savings. This ‘win-win’ strategy is one of the biggest benefits of a well-run EPC and it helps to ensure the sustainability of the savings well after the EPC has terminated. The additional benefit of training during ESCO projects is staff exposure to new equipment, standards of practice and general improvement in skills that otherwise would not have occurred.

This training usually improves morale and job satisfaction for the following types of reasons:

1. it shows interest by management in the O&M responsibilities and systems that may not have been evident before, demonstrating to staff that all areas are important to the success of the business;

2. it shows that the Public Body value its staff’s ability to contribute;

3. it enhances the Public Body staff’s skills and experience with new and state-of-the-art equipment; and

4. it demonstrates how changes can significantly impact on savings, which may lead to a more proactive approach to identifying operational changes in the future.

Examples of EPC contract clauses

1. Type of contract	In this part, a choice should be made between EPC or ESC. Since these kinds of specific contracts do exist in the contractual public law, it is necessary to look for a similar model. For example, in Spain, there are six types of contract in the Public Administration and an EPC could fix in several of them, it will depend on services which ESCO gives to the Municipalities. Choosing one contract or another also depends on who is responsible for operational risk. In Spain, ESCO takes this responsibility, then a "contrato de gestión de servicios en modalidad de concesion" (service management contract in a concession way) would be the best option, but, if Municipality tal the responsibility, it would be better choice a "contrato de servicios" (service contract).
2. Subject of contract: energy services with guaranteed energy savings	An EPC contract should include the following services: Energy supply Maintenance with total guarantee. In this point, it has to be defined which equipment and which facilities will be covered by the ESCO and which one by the Council. For instance, ESCO has to mainta only the heating system or it has to maintain the lighting system as well. Design and propose energy saving measurements. It is very important to consider technical paramet and financial parameters (it is recommended to include the project finance of the proposal) Measurement and Verification Plan of energy savings. In a EPC model, the energy savings will be measure in kWh.
3. Service level agreements	The Council/Municipalities have to define service level agreements (SLA), better than to define the technical proposal. These service level agreements will ensure comfort level of the citizens and work above anything else. SLA variations can be included in the contract and they will be related to energy baseline modifications. Here, excluded services should be explained in detail too. For example, who is the responsible for energy consumptions from sources not subject to the scope of the project.

EPC contract clauses

1. Goal of energy savings	The purpose of an EPC is to save a certain amount of energy, in comparison with energy baseline previous to the implementation of the contract. In this part of the contract, it has to appear how energy savings will be shared between ESCO and Municipality. Be aware that the consumption in the facilities can increase, because damaged equipment does not count (energy terms) before the replacement, but when this equipment is replaced, it consumes energy. Therefore, the definition of baseline is essential, and in the same way, it should be included how the energy saving potential has been calculated.
2. Ownership of energy supply contract	In an energy performance contract, where ESCO is responsible for energy management, the ownership of energy supply contract usually belongs to the ESCO. But in no way, the Municipality loses the energy control. Nowadays, in Spain, there is a problem when changing ownership of energy supply contract: this procedure takes a long time so there is a problem, because usually the ESCO starts the contract with public administration but it has not yet got the ownership of the energy supply. So it cannot manage the energy. A proposal to solve this issue is to start the contract when ESCO has the ownership, regardless of the ESCO has won the tender.
3. Contract length	The duration of the contract is usually more than the payback period. This issue is sometimes a problem for the ESCO, because in the middle of the contract or almost at the end, ESCO have to do a new replacement in order to continue achieving the energy saving, then in some cases, ESCO has not enough time to recover the second investment. A proposal to solve this issue, at the end of the contract, ESCO will transfer its debts to the Council, and at the same time, the Council will transfer this debt to the new contractors who win the new tender.
4. Assignment of collection rights	As a new financial mechanism for ESCOs, they have the possibility to sell their collection rights to a third party in order to get liquidity to develop other projects. In Spain, it is possible and this kind of clauses are contemplated in the contract. The only requirement is that ESCO has to notify the operation to the Council.

EPC contract clauses

1.	**Budget of project**	The Municipality will evaluate each different offer, so each ESCO should present a viability economical plan for its proposal.
2.	**Price review and energy baseline**	Both clauses are essential in an EPC. They are together in the same part because price review depends on the energy baseline and a change in the energy baseline affects to benefits of the contract. So, there is a mutual relationship between these issues. In addition, if in an EPC there is price review section, it would be important to set which items are or not included in the price review (for instance: only energy supply or maintenance as well)
3.	**M&V Protocol**	It is mandatory to describe the measurement and verification protocol to be used in the contract.
4.	**ESCO's credentials**	As described in section "8.2 Awarding procedure", selection criteria of ESCOs have to be clear in the tender.
5.	**Exclusions**	It is necessary to clarify by contract that energy savings cannot fund other external services (for example: wifi network, legalization of installations, etc.).
6.	**Maximum Budget**	The Municipality have to present how much money will be used to the different service level agreements (energy supply, maintenance, etc.), in this way, ESCO can present an offer, taking into account these limitations.

End of Module 8