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METHODOLOGY FOR DETERMINATION OF THE ESTIMATED VALUE OF PUBLIC PROCUREMENT

Belgrade, August 2018

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The main purpose of the project is to support the strengthening and developing of a stable, transparent and competitive public procurement system in the Republic of Serbia in accordance with EU standards, including improved implementation of the public procurement strategic and policy framework for an effective and accountable public procurement system.

The results required from the project include:

- strengthened and further developed the strategic, legal and institutional framework for public procurement aligned with the EU legislation,
- improved implementation of regulations in area of public procurement in practice
- E-procurement platform developed and established and
- strengthened capacities and professional skills of the Serbian Public Procurement Office and other relevant target groups.





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INTRODUCTION

It has to be said from the very beginning that the planning process is crucial for the success of the procurement procedure. The better a procurement is planned, the easier, more efficient and more effective the entire process is running.

After the strategic goals of the contracting authority/entity have been defined, a needs' assessment shall be performed every year in order to identify the goods, services or works that can contribute to the achievement of specific objectives. All the options should be considered, by starting with few basic questions, such as:

- *What to buy?*
- *Why buy it?*
- *What's the objective of the purchase?*
- *How much does it cost?*
- *How many resources are available?*
- *Where can we find the resources?*
- *How to buy it?*
- *What are the risks?*

In this context, determination of the estimated value of the subject-matter of procurement represents an essential element in the pre-award phase of the public procurement process.

Estimated value of the subject-matter of procurement is an economic concept that refers to the most likely price that is supposed to be paid by the contracting authority/entity for the purchase of goods, services or works, on a given date¹ and in given circumstances.

The main purposes of estimating the value of the subject-matter of procurement are:

- Quantification of the financial resources necessary to achieve the goal of procurement;
- Identifying the potential sources of funding and securing financing of the procurement;
- Identifying of relevant rules applicable to the procurement;
- Choice of the public procurement procedure for awarding the respective contract.

Having in mind those purposes, contracting authorities/entities must act in good faith and use good judgement to estimate the value of procurement. They shall include the estimated value in their public procurement plans.

¹ The estimated value should be valid at the moment a public procurement procedure is launched: procurement notice is published or invitation to take part in the procedure is sent to economic operators.





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METHODS FOR DETERMINING THE ESTIMATED VALUE

The value of procurement can be estimated on the basis of past procurements or can be based on forecasting methods. Cost estimates must be realistic and should take into account possible variations of the contract over time. Complex projects, such as large-scale infrastructure projects or complex information technology projects are likely to require external specialist advice.

1. Market research

Catalogues and published price lists are a product of a competitive market place. Analysis of information provided by the catalogues/price lists may be an appropriate method for establishing the estimated value, particularly in case of commonly used or off-the-shelf products, the characteristics of which are generally available on the market.

The main advantage of this method consists in its simplicity. However, it has some drawbacks which should be mentioned, such as:

- Catalogues/market price lists are sometimes out-dated so the staff of the contracting authority/entity involved in market research should verify whether the catalogues/price lists are regularly maintained and if they provide updated prices;
- Contracting authorities/entities could be tempted to perform the analyses with focus on a particular product, instead to take into consideration a wider variety of options;
- Differences among particular elements of “similar” products must be identified and analysed, for ensuring the correctness and reasonableness of the estimated value.

In case of complex contracts, good practice would suggest conducting in-depth market consultation to estimate the likely costs of the procurement.

2. Value estimation by analogy

This method uses as inputs to determine the estimated value the actual costs incurred by a contracting authority or any other organization in carrying out similar activities or in meeting similar needs, in similar circumstances.

Own experience of the contracting authority/entity’s staff, related to the previous procedures organised for similar goods/services/works could be used for establishing the estimated value of a new contract.

In the absence of such experiences, information can be collected from other contracting authorities/entities, by direct contact or by searching on the Public Procurement Portal. Award notices may be useful, as a first step for identifying similar procurements and their prices.

However, it is not sufficient to take, without further analysis, as the basis of the estimation of the procurement value, the price proposed by a winning tenderer in other procurement procedure. That price may be no longer relevant so the contracting authority should check whether certain requirements of the previous procurement procedure were different in





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comparison with the current needs, or whether the market conditions have changed in the meantime.

Thus, the contracting authority/entity should take into consideration, when basing the estimation of the value of the subject-matter of procurement on prices submitted in procedures conducted in the past, the following main factors:

a) Similarity of the procurement

Previous procurement must be sufficiently similar to the current procurement; otherwise, the value should be adjusted accordingly taking account of differences between the product or service bought in the past and the one which is subject of the new procurement procedure.

First of all, technical specifications of the previous procurement should be analysed, in order to identify whether the main functional and performance characteristics are similar. Identification of such differences may require in some cases the assistance of a technical specialist.

Other important elements that could have impact on the final price may be the geographic location, term of delivery and/or conditions for payment.

b) Quantity

The quantity of items procured usually has a significant impact on the price per unit. Historical prices are not comparable to current prices unless the quantities are similar.

As a practical approach and in order to avoid unnecessary complication of the analysis, quantities may be considered similar if the new quantity is bigger than half and smaller than double of the previous quantity.

0.5 Q_{previous} < Q_{new} < 2 Q_{previous}

What if the quantities are not similar? If the contracting authority/entity can collect sufficient information, it could apply a special technique - the so-called Learning Curve Analysis (LCA)² - to adjust the price/estimated value.

The golden rule of the LCA is the following: each time the number of attempts of a given process is doubled, the overall cost will decrease by a constant amount.

The LCA can be applied to business perspective as well³, meaning that the unit price or cost of an item tends to decrease by a predictable percentage each time the total quantity of items is doubled. This percentage decrease can be predicted when the learning curve slope is known.

² A learning curve is a graphical representation of how an increase in learning (measured on the vertical axis) comes from greater experience (the horizontal axis).

The first person who described the learning curve was Hermann Ebbinghaus in 1885, in the field of the psychology of learning.

³ The learning effect can be represented by a line called a learning curve, which displays the relationship between the total direct labour per unit and the cumulative quantity of a product or service produced. The learning curve was developed in the aircraft industry prior to World War II, when analysts discovered that the direct labour input per airplane declined with considerable regularity as the cumulative number of planes produced increased. Once production started, the direct





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For example, if the slope is 90%, the price of the item will decrease by 10% each time the quantity is doubled.

Example:

QUANTITY	UNIT PRICE
100	1000 Total price expected to be paid: 100.000
200	900 (1000 x 0.9 = 900) Total price expected to be paid: 180.000 (instead of 200.000)
400	810 (900 x 0.9 = 810) Total price expected to be paid: 324.000
800	729 (810 x 0.9 = 729) Total price expected to be paid: 583.200
1600	656 (729 x 0.9 = 656.1) Total price expected to be paid: 1.049.600
3200	591 (656.1 x 0.9 = 590,4) Total price expected to be paid: 1.891.200

The learning curve slope for a given item can be determined where information regarding the prices for various quantities is available. This is the main difficulty for applying the LCA, because this type of information cannot be found easily in all the cases.

- If past prices and quantities are known, the learning curve slope can be calculated.
- Another option is to request pricing for various quantities from the suppliers during the market consultation. The quantities should reflect doubling so the learning curve slope can be easily calculated.
- If available, consult recognised sources of industry data.

labour for the eighth unit was only 80% of that for the fourth unit, the direct labour for the twelfth was only 80% of that for the sixth, and so on. In each case, each doubling of the quantity reduced production time by 20%. Because of the consistency in the rate of improvement, the analysts concluded that the aircraft industry's rate of learning was 80% between doubled quantities of airframes.





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General Guidelines for Slopes⁴

- If an operation is in 75% conducted manually and in 25% automated, slopes are generally close to 80%.
- If it is 50% manual and 50% automated, slopes can be expected to be about 85%.
- If it is 25% manual and 75% automated, slopes can be expected to about 90%.

For repetitive operations within certain industries, typical slopes are:

- Electrical: 75-85%
- Electronics: 90-95%
- Machining: 90-95%
- Raw materials: 93-96%

c) Inflation

Inflation may have a significant impact on the price over time. Historical prices, to be comparable with the current prices should be adjusted for inflation.

As a practical approach and in order to avoid unnecessary complication of the analysis, historical prices can be considered recent (= current prices) if they have been paid within the last 12 months.

Where information about prices is not recent, the prices should be adjusted in order to establish a fair estimated value.

Example:

The unit price of the previous purchase was 10 000 euro.

The price index is currently 1.291. The index for the previous purchase was 1.173.

The amount of inflation is $1.291/1.173 = 1.1\%$.

EUR 10 000 (previous price) * 1.1% = EUR 10 011 (adjusted price)

In conclusion, a historical price of another product can be used for price analysis if the following requirements are satisfied:

- It was obtained based on adequate competition
- It was paid for a similar product
- It is adjusted for quantity
- It is adjusted for inflation.

4

ICEAA 2016 Bristol <http://www.iceaaonline.com/ready/wp-content/uploads/2016/10/TRN03-Learning-Curve.pdf>





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3. Parametric estimation

Independently or in combination with the methods described above, the estimated value can be determined using the parametric method, where the total price calculation is made on the basis of the costs of each major element/activity of the subject-matter of procurement.

The method can be used especially for services or works contracts.

First of all, it is necessary to know the type of resources needed to carry out each activity and the costs associated with those resources.

For example, the parametric method may be used for a technical assistance service. Let's suppose that the execution of services contract will require two types of activities: (i) one involves many travels of the experts at the location of beneficiary, (ii) the other contains mainly deskwork. The cost elements include amounts for the experts' fees, transport and accommodation, materials and equipment.

Cost Activity 1:	
Necessary resources	
- Materials, equipment	10 000 EUR
- Human resources	45 000 EUR
- Logistics (transport, accommodation)	12 000 EUR
Total 1:	77 000 EUR
Cost Activity 2:	
- Materials	500 EUR
- Human resources	31 000 EUR
- Logistics (transport, accommodation)	1 500 EUR
Total 2:	33 000 EUR
Total Activities 1 + 2	110 000 EUR
Indirect expenses rate: 5%	5 500 EUR
The rate should be within the typical range of the sectorial activity/industry. If the proposed indirect rates are not typical or are not known, a reasonable factor – based on market research – can be used in the analysis.	
Profit: 10%	11 000 EUR
The rate should be within the typical range of the sectorial activity/industry. If the proposed indirect rates are not typical or are not known, a reasonable factor – based on market research – can be used in the analysis.	
TOTAL:	126 500 EUR





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The value of the contract is normally calculated for the entire duration of the contract. It must be calculated without VAT. But obviously the contracting authority, in particular if it is a public institution, should take into account, in calculating how much it will eventually cost, also the value of due taxes, so to ensure enough money in the budget. Options and renewal clauses must be included as if they will be utilized⁵. Contracting authorities/entities must ensure timely budget approval and verify that funds are available. In the budget planning stage, it is of particular importance that skilled officials provide a realistic budget, relying on external experience if necessary.

APPLICATION OF EU RULES RELATED TO THE ESTIMATION OF PROCUREMENT VALUE

The application of both EU and national provisions on public procurement normally depends on the value of the subject-matter of procurement in question.

The EU Directives apply only to values of procurement that are equal or exceed specific financial limits⁶, net of VAT:

Directive 2014/24/EU on Public Procurement		
Central Government authorities	Works contracts	€5,548,000
	All services concerning social and other specific services (listed in Annex XIV)	€750,000
	All other service contracts, all design contests and all supplies contracts	€144,000
Sub-central contracting authorities	Works contracts	€5,548,000
	All services concerning social and other specific services (listed in Annex XIV)	€750,000
	All other service contracts, all design contests and all supplies contracts	€221,000

⁵ Options and renewal clauses will be available according to the new Serbian legal framework on public procurement (Article 5 paragraph 1 of the Directive 2014/24/EU).

⁶ Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 amending Directive 2014/24/EU in respect of the application thresholds for the procedures for the award of contracts, Commission Delegated Regulation (EU) 2017/2364 of 18 December 2017 amending Directive 2014/25/EU in respect of the application thresholds for the procedures for the award of contracts and Commission Delegated Regulation (EU) 2017/2366 of 18 December 2017 amending Directive 2014/23/EU in respect of the application thresholds for the procedures for the award of contracts.





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Directive 2014/25/EU on Procurement by Entities operating in the Water, Energy, Transport and Postal Services Sectors	
Works contracts	€5,548,000
All services concerning social and other specific services (listed in Annex XIV)	€1,000,000
All other service contracts, all design contests and all supplies contracts	€443,000

Directive 2014/23/EU on the award of Concession Contracts	
All works or services concessions: €5,548,000	€5,548,000

EU Directives set minimum harmonised rules only for award of contracts whose monetary value is equal or exceeds the above-mentioned amounts. It is presumed that contracts of those high values are of cross-border interest.

The types of procedures provided by the EU Directives are the following:

- **Open procedure**
- **Restricted procedure**
- **Competitive Dialogue**
- **Competitive procedure with negotiation/Negotiated procedure with prior publication**
- **Innovation Partnership**
- **Design Contest**

In very limited circumstances:

- **Negotiated procedure without prior publication**

For contracts of lower value, national rules apply, which nevertheless have to respect general principles of EU law⁷. Serbian legislation on public procurement contains different types of thresholds compared to EU rules; the applicable rules above and below of each of those thresholds have various degree of complexity.

The contracting authorities/entities must calculate the value of each subject-matter of procurement in order to determine whether the procurement is above or below certain threshold values. Therefore, it is of major importance for the contracting authorities/entities to observe the rules provided for estimating the value of procurement and to act in good faith.

Contracting authorities/entities are sometimes tempted to calculate the estimated value of the subject-matter of procurement in such a manner that it remains below certain thresholds. It is important to highlight that the infringement of procurement rules occurs if the contracting

⁷ https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en.





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authority/entity underestimates the value of the contract in order to avoid the application of specific EU and/or national rules.

1. Rules⁸ applicable for all types of contracts

a) *The estimated value should be calculated without VAT*

As long as the thresholds are established without taking into account VAT, the estimated value shall be calculated in the same way. Moreover, it is possible the fiscal law to be changed over time and VAT to have a different value in accordance with the new provisions.

b) *The estimated value shall be updated*

In practice, it often happens certain time elapses between the moment when the estimated value was determined and the date of initiating the procurement procedure.

Contracting authorities/entities should estimate the value of the subject-matter of procurement at the beginning of the planning process together with the definition of the subject-matter. However, in order to avoid the potential discrepancies between the originally calculated value and the current one, **the estimation shall be valid at the moment at which the call for competition is sent for publication**. In cases where a call for competition is not foreseen, the estimated value shall be valid at the moment at which the contracting authority/entity initiates the procurement procedure, for instance, in case of negotiated procedure without prior publication, by contacting the economic operator(s) in relation to the procurement.

c) *The estimated value should take into consideration **all activities that are certainly scheduled** to be carried out, and also any **potential** activities related to the subject-matter of the procurement.*

The calculation of the estimated value shall be based on the total amount payable for the total volume of the services, supplies or works to be purchased for the full duration of the contract including all options or possible renewals of the contracts (even if those options or renewals are not subsequently exercised)⁹. It comprises the total estimated remuneration of the contractor, including all types of expenses such as human resources, materials, transport, travel and subsistence expenses.

Example 1 – Supply contract

Purchasing of 10 air-conditioning equipment involves estimating the total value of the products plus the cost of installation and commissioning.

	Quantity	Estimated unit price (RSD)	Estimated total price (RSD)
Equipment	10	38 000	380 000

⁸ Article 5 of Directive 2014/24/EU, Article 16 of Directive 2014/25/EU.

⁹ Options and renewals will be available according to the new Serbian legal framework on public procurement (Article 5 paragraph 1 of the Directive 2014/24/EU).





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Installation and commissioning services	10	7 000	70 000
TOTAL			450 000

If the contracting authority/entity ignores the cost of Installation and commissioning services, it will consider that the contract does not fall under the scope of the Public Procurement Law and will purchase the air-conditioning without observing any specific rules. However, according to the definition of the supply contract, such a contract may include, as an incidental matter, siting and installation operations, which means that both the activities (delivery of the equipment and installation and commissioning services) must be taken into account when the estimated value is calculated. Based on the result obtained by aggregating the two values, the obligation of the contracting authority/entity shall be to apply a low-value public procurement procedure.

Example 2 – Services contract¹⁰

A contracting authority/entity intends to award a contract for the development of a new IT system (which it referred to as the “test” version, dedicated to one single internal activity/department).

The estimated value of the “test” version is 390 000 RSD; this value apparently places the contract outside of the scope of the Law on public procurement.

The objective of the contracting authority is - provided that the “test” version will be successful - to develop and extend it for all the activities/departments. The estimated value of the potential development and extension of the “test” version is 4 500 000 RSD.

In practice, many IT companies retain the source code of the software application and/or the copyrights related to the system. As a result, they acquire implicitly an exclusive right concerning the further development of the IT system, which means that the contracting authority will have to award all the contracts related to the modernisation, development and/or extension of software to the same company.

The main risk in such a case is that the contracting authority/entity starts with a very modest-value of contract and then will entrust to the same economic operator, without any competition, the provision of services of a much higher value.

However, according to the rules for calculating the estimated value of procurement, any form of option and any renewals of the contract¹¹ shall be taken into account during the planning

¹⁰ Inspired from SIGMA Brief no. 29 - Detecting and Correcting Common Errors in Public Procurement

¹¹ According to the new Serbian legal framework on public procurement it will be mandatory for contracting authorities to take into account the value of possible options or renewals when calculating the estimated value of procurement (Article 5 paragraph 1 of the Directive 2014/24/EU).





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process. Based on the result obtained by aggregating the values of both scheduled and potential activities related to the subject-matter of the contract, the obligation of the contracting authority/entity shall be to apply an open or restricted procurement procedure.

Example 3 – Works contract

The contracting authority has decided to award a public works contract for the construction of two dormitory buildings for students.

Both constructions will be placed in the same campus and involve similar works, in conformity with the basic project.

The estimated value for the whole project is 800 000 000 RSD (400 000 000 RSD for each building).

The available budget of the contracting authority is, for the present, only 490 000 000 RSD, but there are forecasts that other financial sources will be identified in the near future, in order to implement the whole project.

Taking into account the available funds, the contracting authority launches the procurement procedure for the construction of one building.

The procurement procedure will be the same, irrespective if the value taken into consideration is 400 000 000 RSD or 800 000 000 RSD, but the special rules provided in the national law, such as those referring to publication of the notice on the Portal of Official Bulletins of the Republic of Serbia and Legislation Databases or the publication in a foreign language, are not applicable in the same way for the both values.

The contracting authority shall take into account the value of the whole project, since strictly legally speaking the two buildings as part of one and the same project are one subject-matter of procurement no matter the contracting authority has no budget available for building both buildings at the same time, when it compares the relevant thresholds with the estimated value.

*d) In the cases where procurement may result in contracts being awarded in the form of separate lots, account shall be taken of the **total estimated value of all such lots**.*

$$V_{\text{estimated}} = \sum V_{\text{lots}}$$

The aggregation provisions signify that in case of lots that are parts of the same contract (each of them may be below a specific financial threshold), all of them shall be taken into account. The provisions that are applicable above the threshold should also be applied to those contracts that, if taken separately, do not reach that threshold.





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If the contracting authority/entity decides to award a contract in lots it should take into account the value of all the respective lots and apply the provisions (procedures) that are relevant to the value of the subject-matter of procurement taken as a whole.

This requirement is the natural consequence of the “golden rule” of estimation, which stipulates that **the choice of the method used to calculate the estimated value shall not be made with the intention of excluding that procurement from the scope of the law or in order to avoid specific rules applicable for various thresholds.**

In particular, procurement **cannot be divided** with the effect of preventing it from falling within the scope of the law.

However, EU Directives provide an exception¹² for the application of the rule mentioned above. This exception gives the contracting authority/entity the possibility to award contracts for individual lots without applying the procedures applicable for all lots, provided that the estimated value net of VAT of the lot concerned is less than:

- EUR 80 000 for supplies or services;
- EUR 1 million for works.

In addition, the aggregate value of the lots to be awarded in such conditions must not exceed 20 % of the aggregate value of all the lots into which the proposed work, the proposed acquisition of similar supplies or the proposed provision of services has been divided.

National legislation regulates different thresholds than those provided in EU Directives, but the rules should be applicable in the same way.¹³

Example:

The City Hall intends to purchase *planting and maintenance services of green areas* for five parks.

Each of those five parks may represent a lot within one single procurement procedure (five lots awarded in the same procedure) or may be awarded separately, by organising five distinct procurement procedures for services concerning each park.

Total estimated value, excluding VAT, is EUR 270 000, out of which:

Lot 1 – Park 1 = EUR 108 000 (40 % of the total estimated value)

Lot 2 – Park 2 = EUR 80 000 (29,62 % of the total estimated value)

Lot 3 – Park 3 = EUR 55 000 (20,38% of the total estimated value)

Lot 4 – Park 4 = EUR 17 000 (6,3% of the total estimated value)

¹² Article 5 paragraph 10 of Directive 2014/24/EU, Article 16 paragraph 10 of Directive 2014/25/EU.

¹³ The current Law on Public Procurement does not regulate such exceptions, but it is expected that the new law will contain similar provisions.





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Lot 5 – Park 5 = EUR 10 000 (3,7% of the total estimated value)

Taking into account the total estimated value, in accordance with the **general rule the contracting authority should apply an open (or restricted) procedure** for awarding each of the contracts related to Parks 1 – 5 (because the total value of service related to all lots exceeds the relevant threshold for the application of the Directive).

However, when analysing the possibility to use the **exception** mentioned above, the contracting authority will notice that Lots 3, 4 and 5 fulfil the first condition - the estimated value of each of them is less than EUR 80 000. Lot 2 is valued exactly EUR 80,000 so does not qualify for the exemption.

Then, only Lots 4 and 5 fulfil also the second condition – their aggregate value (EUR 27 000) is well below the 20% limit of the estimated total value of procurement. In fact, the value of lots 4 and 5 amounts to only 10 % of the total estimated value of procurement. All other combinations of lots exceed the allowed threshold. In conclusion, the contracting authority will be allowed to use a low-value public procurement procedure (or, depending on the national applicable provisions not to apply any rules at all) for awarding the services contracts for Parks 4 and 5, while for Parks 1 – 3 it remains bound to apply the open (or restricted) procedure for awarding those contracts.

- e) *The estimated value should take into account **any prizes or payments to candidates or tenderers**, where the contracting authority provides for such incentives for the participants in competition.*

Possibility of awarding prizes or payments to the participants is provided by the law in case of competitive dialogue¹⁴ procedure as well as in case where the contracting authority/entity organises a design contest.

2. Particular rules applicable for supply and services contracts

*In the case of supply or service contracts which are **regular in nature or which are intended to be renewed within a given period**, the calculation of the estimated contract value shall be based on the following:*

- a) *either the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year, adjusted - where possible - to take account of the changes in quantity or value which would occur in the course of the 12 months following the initial contract; or*
- b) *the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year where that is longer than 12 months.*

¹⁴ According to the new Serbian legal framework on public procurement it will be possible for the contracting authorities to specify prizes or payments to the participants in the dialogue (Article 30 paragraph 8 of the Directive 2014/24/EU).





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Repeated procurement of goods and services, of the same category, during the same financial year, must be aggregated when calculating estimated value.

Examples of contracts which are usually regular:

- Office equipment and supplies
- Computer supplies
- Food for social canteens, prisons, military units
- Pharmaceutical products and medical consumables for hospitals
- Cleaning services
- Various repair and maintenance services
- Insurance services
- Refuse and waste related services

3. Particular rules applicable for supply contracts

*With regard to public supply contracts relating to the **leasing, hire, rental or hire purchase** of products, the value to be taken as a basis for calculating the estimated contract value shall be as follows:*

- a) *in the case of **fixed-term** public contracts, where that term is less than or equal to 12 months, the total estimated value for the term of the contract or, where the term of the contract is greater than 12 months, the total value including the estimated residual value.*

Example: Leasing for two cars, the term of the contract is 36 months

Estimated price of two cars, if the whole payment is made now (without recourse to a leasing system) = **RSD 2 700 000** (excluding VAT)

The contracting authority does not have the whole amount budgeted the current year, so it decides to distribute the purchase costs of the two cars over a period of three years. This is possible if the cars will be procured in leasing system.

A succinct market research leads to the conclusion that leasing companies typically accept a minimum advance payment of 15%. The contracting authority has financial resources to pay this amount. Market research also shows that the interest rate together with other administrative fees is around 18%, for a period of 36 months.

Determination of the estimated value (based on the assumptions described above):

Payment in advance 15% = **RSD 405 000**

Estimated residual value after 36 months (20%) = $2\,700\,000 \times 20\% =$ **RSD 540 000**





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Amount financed = 2 700 000 – 405 000 – 540 000 = RSD 1 755 000

Interest fixed rate and other administrative fees = 18% / 3 years

The estimated monthly rate:

$V_{\text{month}} = (1\,755\,000 / 36) + (1\,755\,000 / 36) \times 18\% = 48\,750 + 8\,775 = \text{RSD } 57\,525$

TOTAL: $V_{\text{total}} = 405\,000 + 57\,525 \times 36 + 540\,000 = \text{RSD } 3\,015\,900$

Contracting authority/entity shall apply open or restricted procedure for awarding the contract.

b) *in the case of public contracts **without a fixed term** or the term of which cannot be defined, the monthly value multiplied by 48.*

$V_{\text{estimated}} = V_{\text{month}} \times 48$

4. Particular rules applicable for services contracts

a) *With regard to public service contracts which **do not indicate a total price**, the basis for calculating the estimated contract value shall be the following:*

- *in the case of fixed-term contracts, where that term is less than or equal to 48 months¹⁵: the total value for their full term;*
- *in the case of contracts without a fixed term or with a term greater than 48 months: the monthly value multiplied by 48.*

b) *With regard to insurance services: the **premium payable** and other forms of remuneration*

- ✓ Note: The estimated value does not cover the value that should be paid by the insurance company in case the insured event occurs!

c) *With regard to banking and other financial services: the **fees, commissions payable, interest** and other forms of remuneration*

- ✓ Note: The estimated value does not include the total amount of money, which is administrated or operated by the bank/financial institution!

d) *With regard to design contracts: **fees, commissions payable** and other forms of remuneration*

- ✓ Note: The estimated value does not cover the estimated price of the work that will be executed based on the project prepared by the design company!

5. Particular rules applicable for works contracts

¹⁵ According to the PPL in force it is 36 months (see Article 66 paragraph 3).





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The calculation of the estimated value shall take account of both the cost of the works and the total estimated value of the supplies and services that are made available to the contractor by the contracting authority provided that they are necessary for executing the works.

In this context, it is important to underline the definition of the *works contract* and of the *work*¹⁶:

‘public works contracts’ means public contracts having as their object one of the following:

- (a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II;
- (b) the execution, or both the design and execution, of a work;
- (c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work;

‘a work’ means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function.

When the contracting authority has decided to award a contract for execution of a building, the contract shall be always included within the category of public works contracts, irrespective of the value of the raw materials, equipment and installations embedded in that construction.

This is because, according to the rules regarding mixed procurement, contracts which have as their subject two or more types of procurement (works, services or supplies) shall be awarded in accordance with the provisions applicable to the type of procurement that characterises the main subject of the contract in question. In this case, the main subject of the contract in question is the realisation of a work corresponding to the requirements specified by the contracting authority/entity.

There may be cases where the contracting authority/entity prefers to purchase separately certain installations/equipment, necessary for the building to be executed. That installation/equipment will be made available to the contractor for embedding them in the final construction.

In such cases, the estimated value of the installations/equipment must be added to the estimated value of the work.

Example:

Contracting authority awards a contract for execution of a new city hall building. The lifts shall be purchase separately.

Estimated value of the building (without the value of the lifts): RSD 495 000 000

¹⁶ Article 2 paragraph 1 (6) and (7) of Directive 2014/24/EU, Article 2 paragraph 1 (2) and (3) of Directive 2014/25/EU.





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Estimated value of the lifts: RSD 8 000 000

Total value of the work: 495 000 000 000 + 8 000 000 = RSD 503 000 000

Contracting authority shall apply open or restricted procedure for awarding the contract.

6. Rules applicable in case of innovation partnership¹⁷

The value to be taken into consideration shall be the maximum estimated value of the research and development activities to take place during all stages of the envisaged partnership as well as of the supplies, services or works to be developed and procured at the end of the envisaged partnership.

7. Rules for framework agreements and dynamic purchasing systems¹⁸

The value to be taken into consideration shall be the maximum estimated value of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system.

Breaking the rules concerning the estimation of contract value, in particular underestimation¹⁹ of the value and artificial division of the contract, constitute a substantial infringement, especially if it results in the application of non-transparent and non-competitive procedures (such as a direct award). In the context of EU procurement, underestimation or artificial splitting of the contract may lead to the situations where the publicity is made at national level only, thereby significantly limiting the access of foreign companies to information about the bidding opportunity.

RELEVANT ASPECTS FOR AVOIDING ARTIFICIAL DIVISION OF THE CONTRACTS

The topic of choosing the procurement procedure in relation to the estimated value of the contract is one of the most sensitive issues, because in practice it may occur that there are contradictory interpretations and divergences between practitioners and control bodies, which could generate uncertainty in the application of those rules.

As it was mentioned in Section III of this paper, the key element of the regulation is **the prohibition to divide the contract in order to avoid the application of specific rules** applicable above different thresholds provided by the law.

It is worth to mention that the division itself is not forbidden; the law is considered to be breached only where the division of the subject-matter of procurement has a negative effect on

¹⁷ Innovation partnership as a procurement procedure will be available to contracting authorities according to the new Serbian legal framework on public procurement.

¹⁸ Dynamic purchasing system as a procurement instrument will be available to contracting authorities according to the new Serbian legal framework on public procurement.

¹⁹ Overestimation of the value may be also a risk in certain cases. Applying a negotiated procedure without prior publication for concluding a contract with a company that offers a considerably higher-than-market price could indicate collusion between this company and the responsible procurement officer.





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the application of rules regarding advertising, deadlines, the degree of detail of the procurement documentation etc.

The rules related to estimated value are not violated if the contracting authority/entity divides a subject-matter of procurement with an estimated value higher than RSD 20 000 000 in 20 smaller contracts (each with a value of RSD 1 000 000), **but awards each of those contracts by applying, for instance, an open procedure.**

It follows that the issue that should be clarified is the answer to the following questions:

- When is a specific procurement considered to be **artificially divided** in order to avoid the application of specific rules? and, subsequently,
- When the values of certain subject-matter of procurement should be cumulated?

1. Public supply contracts

In order to identify the situations where an artificial division of supply contracts occurs, the most relevant aspect to be checked is "**similarity** of the products".

Recital 19 of Directive 24/2014/EU²⁰ provides explanations regarding the concept of "similar products":

"It should also be clarified that, for the purpose of estimating the thresholds, the notion of similar supplies should be understood as products which are intended for identical or similar uses, such as supplies of a range of foods or of various items of office furniture. Typically, an economic operator active in the field concerned would be likely to carry such supplies as part of his normal product range."

Examples (based on those mentioned in the text of Recital 19):

Example A.

Contracting authority has decided to purchase furniture, namely tables and cabinets. Are the two categories of products similar or not?

The first part of the text (*products are intended for identical or similar uses*) may lead sometimes to divergent interpretation in practice.

For instance, one could argue that tables are used to put the computers and printers on them, while the use of cabinets is to store documents. In such case tables and cabinets are not similar and the contracting authority may award two different contracts without having the obligation to cumulate the values of those two contracts.

On the other hand, one could say that these products are similar, because both of them are used for providing the necessary facilities for the normal day-to-day work in an office.

²⁰ Identical explanations are provided in Recital 29 of Directive 25/2014/EU.





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What is correct? Clarification comes, actually, from the second part of the text, which are turning our attention to the market.

Is it usual for economic operators with constant activity in the furniture sector to produce/sell both types of products - tables and cabinets? The answer can only be affirmative, which means that, in the given case, the use of the two apparently different office furniture items is similar, and **the products themselves must be regarded as similar**.

If the products are similar, the value of the contracts must be cumulated and, depending on the outcome of this aggregation, the applicable procurement procedure should be applied.

Example B.

Contracting authority has decided to purchase food, such as meat products, fruits and vegetables, and bread products.

Are the three categories of products similar or not?

As regards the uses of such products, it appears that all three categories ensure the nourishment, as appropriate, of children in a kindergarten, elderly people in a retirement house, patients in a hospital, etc. On the other hand, the second part of the text, which concerns the market situation, does not seem to lead to the conclusion that those products are similar. It is difficult to argue that meat products are part of the range of products that a baker, with constant activity in this sector, can easily deliver to his clients. In this case, the products are not similar and the value of the purchases should not be cumulated when the applicable procurement procedure is to be chosen.

This also seems to be the meaning of the text in Recital 19: while in the case of furniture, the wording used is "*various items*", in the case of food the wording is "*range of food*". That means as well, that it is forbidden to artificially divide a contract for a range of:

- meats products, in separate items, such as: salami, sausages and bacon; or
- fruit and vegetables, in separate items, such as: apples, pears, cabbage and tomatoes;
or
- bread products, in separate items, such as: bread, rolls, croissants and crumpets.

As a conclusion, the key element for a correct interpretation of the notion of "***similar products***" appears to be mainly link with the market conditions highlighted in the second part of Recital 19, namely that "*an economic operator active in the field concerned would be likely to carry such supplies as part of his normal product range*". This check should clarify whether or not the products in question have similar uses and, depending on the outcome of this analysis, contracting authority/entity can make the correct decision on the relevant awarding rules applicable to the supply contracts concerned.

2. Public works contracts



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EU Directives do not use the word “*similar*” in the context of the methods of calculating the estimated value of works contracts, which means that *similarity of the works* is irrelevant in this case.

In *Case C-16/98 Commission v. France*, the Court of Justice of the European Union clarified that the analysis of a possible artificial division of a works contract should be based on the functional definition of the *Work*, which is provided in EU Directives:

“a work’ means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function;”

C-16/98 Commission v. France

Sydev, an organisation responsible for electrification within the French département of Vendée, sent for publication in the Official French Bulletin of Notices (OFBN) a series of 37 invitations to tender for **electrification** and/or **street lighting** works, to be carried out over a three-year period in the department of Vendée. Those notices concerned works amounting in total to FRF 609 000 000 over the three years, out of which FRF 483 000 000 was for the value contracts for electrification and FRF 126 000 000 of contracts for street lighting (each of those two values were above the EU threshold for works contracts).

In all the notices published in the OFBN, Sydev was stated to be the *‘body which awards the contract’*; tenders were to be sent to the works management office of Sydev, indicating the name of the municipal grouping concerned in each case.

The description of the work to be carried out on the electricity supply networks was the same in all the cases: *‘electrification work and associated generated work such as, for example, civil engineering on the telephone network, civil engineering on the cable television network, the public address system’*.

The description of the work to be done on the lighting networks was also the same in the relevant notices: *‘street lighting work and associated generated work such as, for example, the public address system’*.

In two municipal grouping cases, the electrification work and street lighting work were included in the same contract notice.

Also, on 21 December 1994, Sydev sent for publication at EU level the six main contract notices concerning electrification. Those notices, which were published on 6 January 1995 in the Official Journal of the European Communities (OJEC)²¹, stated that tenders were to be sent to Sydev, indicating in each case the name of the local entity concerned. In all those notices Sydev was given as the name of the contracting entity, followed in all cases but one by the name of the local entity concerned.

Notices of the award of the 37 contracts - including the six contracts published in the OJEC, were published in the OFBN on 29 September 1995. In those notices Sydev was described as

²¹ Currently, the Official Journal of the European Union.





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the 'body which awarded the contract'. On the other hand, no notice on the award of the contracts was sent to the OJEC for publication.

The Commission took the view that the contested contracts were lots of a single 'work', which were initiated by a single contracting entity, that is to say Sydev, and that the rules of the Directive should have been applied to all of them, not merely to the six main lots. The main objections were related to:

- the artificial splitting of the lots into different contracts, both on a technical basis (separate contracts for electrification and street lighting) and a geographical basis (separate contracts for each joint municipal grouping); and
- the failure to publish two-thirds of the lots at Community level.

The French authorities denied the infringement complained, claiming that the contested contracts had not been artificially split but had genuinely been concluded by each of the joint municipal electrification groupings concerned in the département of Vendée and that, therefore, the threshold for publication of a notice in the OJEC had to be applied to each of the contracts individually. The joint municipal groupings are responsible for the low voltage electricity supply networks radiating from transformer substations which supply consumers in their territory with electricity.

CJEU verified whether those 37 works contracts and the analysis did not in any way call into question *the similarity* of the respective contracts. The decisive factor was whether such contracts had *a single technical-economic function or distinct technical-economic functions*²².

Main conclusions:

- The CJEU initially analysed whether the executed works were artificially divided on a technical basis, namely electrification and street lighting. Since it was established that a power supply network and a street lighting network had **a different technical and economic function**²³, the Court considered that there had been **no artificial division into several contracts** of these two types of works.
- In the case of contracts dedicated exclusively for the execution of works on electricity networks, the Court held that *“these networks are interconnected and, as a whole, fulfil a single economic and technical function consisting in supplying and selling electricity to consumers in the Vendée department produced and supplied by Électricité de France”*²⁴. As a result, it was considered that an **artificial division of a single contract** took place, dividing the single contract into several smaller contracts, and thus violating (among other things) the obligation of publishing the notices in OJEU.

²² See paragraphs 38 and 51 of the CJUE Decision in case C-16/98 Commission v. France.

²³ See paragraph 54 of the CJUE Decision in case C-16/98 Commission v. France.

²⁴ See paragraph 64 of the CJUE Decision in case C-16/98 Commission v. France.





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- In the case of contracts dedicated exclusively for the execution of works on street lighting networks, the Court stated that *"unlike power supply networks, street lighting networks are not necessarily **interdependent** from a technical point of view because they may be limited to built-up areas and no interconnection is required"*²⁵. Furthermore, the Court states: *"Even though the economic and technical function of each street lighting network is similar to that of all other Vendée departments, **it is not possible for all these networks to form an assembly with a single economic and technical function within department**"*²⁶. The Court considered that, in the case of street lighting networks, **there was no artificial division of a single contract into several contracts of lower value.**

T-384/10 Kingdom of Spain v. Commission

An identical approach is also found in the judgment of the Court of First Instance in Case T-384/10 Kingdom of Spain v. Commission, where the main element of the dispute was the same as in the previous case: artificial division of contracts. European Commission considered that Spain proceeded unlawfully when awarded a number of contracts separately, without observing the rules regarding publicity at EU level, and decided to reduce the financial contribution (financial corrections) granted under the Cohesion Fund to the following groups of projects:

1. "Water supply to the population living in the Guadiana River basin: the Andévalo region"
2. "Drainage and comb-out of the Guadalquivir basin: Guadaira, Aljarafe and EE NN PP in Guadalquivir"
3. "Water supply to the inter-communal systems in the provinces of Granada and Málaga".

The solutions and arguments of the Court of First Instance are identical for all three projects and are based essentially on the following considerations (set out in paragraph 66 of the judgment):

*"... it must be borne in mind that, according to Article 6 (4) of Directive 93/37, no work and no contract may be split in order to circumvent the directive. In addition, Article 1 (c) of that directive defines the term 'work' as the result of a set of construction or public works designed solely to perform an economic or technical function. Consequently, in order to determine whether the Kingdom of Spain has infringed Article 6 (4) of that directive, **it is necessary to ascertain whether the object of the public procurement contract in question was one and the same work within the meaning of Article 1 (c) of the same directive**".*

²⁵ See paragraph 69 of the CJUE Decision in case C-16/98 Commission v. France.

²⁶ See paragraph 70 of the CJUE Decision in case C-16/98 Commission v. France.





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According to the case-law of the CJEU, each procedure applied for the award of a contract must be assessed on the basis of the context and the specific characteristics of the contract. In each case, factors such as: the simultaneity of initiating the procurement procedures for the award of contracts concerned, the similarity of contract notices, the same geographic area in which they are initiated and the existence of a single contracting authority are to be considered. These factors are not decisive, but may constitute additional indications in favour of the assessment that certain public works contracts represent, actually, one single work.

In conclusion, unlike public supply contracts, the estimation of the value of procurement for public works contracts should not be related to the concept of *similar works*, but to the aspect of having *the same technical and economic function*. Depending on the outcome of this analysis, contracting authority/entity can make the correct decision on the relevant awarding rules applicable to the public works contracts concerned.

3. Public services contracts

As in case of public works contracts, EU Directives do not use the word “similar” in the context of regulating the methods of calculating the estimated value of public service contracts, which means that similarity of the services is irrelevant in this case, too.

In case of public service contracts, we can find indications on the proper approach to avoid artificial division in *Case C-574/10 Commission v. Germany*.

C-574/10 Commission v. Germany (unpublished decision):

In summary, the case was related to a series of contracts for architectural services, which the municipality of Niedernhausen concluded with an engineering company, without ensuring a Europe-wide invitation to tender. Although all the services in question referred to a single construction project - *the reconstruction of a public building (Autalhalle)* - the contracts' values were separately calculated for each individual contract and the contracting authority awarded those contracts separately (as individual tasks for the different parts of the building).

The European Commission was of the view that the services in question constituted a single contract, the division of which, into several individual contracts, was not justified by any objective grounds. Those services represent parts of the same task - reconstruction of a single building - that was planned, approved and implemented as a general project. **The services had that one and the same objective and were in close geographic, economic and functional relation**. Therefore, the value of the contract should have been calculated on the basis of the total value of all the architectural services provided in the context of reconstruction.

The construction of the building itself concerns a single public works contract for the purposes of the EU procurement law. That is at least a strong indication that the corresponding planning is also to be regarded as a uniform procurement procedure. If architectural services, such as in the present case, are connected with a uniform construction contract and its contents are defined by the planned construction, there is no logical reason to choose another method of calculation. Architectural services are therefore to a certain extent accessory to the





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construction itself. Why a uniform construction service would require a non-uniform architectural service was, in the opinion of the Commission, unclear.

The Court considered the unique economic and technical function of the individual parts of the contract as an indication of the existence of a single contract. Although the criterion of the functional approach was applicable for public works contracts²⁷, **the Commission was of the opinion that it should also be applied to service contracts.**

The criterion of the technical and economic uniformity of the architectural services was fulfilled in that case since it concerned the reconstruction of a single building.

The CJUE considered that an artificial/arbitrary division of the contracts is contrary to the directive. It would often lead to values artificially falling below the thresholds and thereby to a reduction of its scope of application. Budgetary reasons for the division into construction sections could also not justify an artificial division of a unified contract value. It is contrary to the objective of the European public procurement directives for a unified proposed purchase which is carried out in several stages purely for budgetary reasons to be considered solely for that reason to consist of several independent contracts and thereby to be prevented from coming within the scope of application of the directive.

In conclusion, as in case of public works contracts, the estimate of the value of public service contracts should not be related to the concept of *similar services*. Essential in this case is the aspect of performing *the same technical and economic function*. Depending on the outcome of this analysis, contracting authority/entity can make the correct decision on the relevant awarding rules applicable to the public services contracts concerned.

²⁷ See C-16/98 Commission v. France





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SUMMARY OF THE KEY ISSUES

Estimated value of the procurement expresses the most likely price that is supposed to be paid for the purchase of goods, services or works, on a given date and given circumstances.

The main purposes of estimating the value of the subject-matter of public procurement are:

- Quantification of the financial resources necessary to achieve the goal of procurement
- Identifying the potential sources of funding
- Choice of the public procurement procedure for awarding the respective contract.

The value of the contract can be estimated by using:

- Market research
- Analogy methods, taking into consideration the level of similarity of the purchases and other factors that may influence the result of comparison, such as quantity and inflation
- Parametric methods.

The estimated value of the subject-matter of procurement shall be valid at the moment of initiating the procurement procedure (if it was calculated earlier it should be adjusted if necessary) and shall be calculated without VAT.

The calculation of the estimated value shall be based on the total amount payable for the total volume of the services, supplies or works to be purchased for the full duration of the contract including all options, phases or possible renewals of the contracts (even if those options or renewals are not subsequently exercised).

The choice of the method used to calculate the estimated value shall not be made with the intention of excluding that procurement from the scope of the law or in order to avoid specific rules applicable for various thresholds.

Procurement cannot be divided with the effect of preventing it from falling within the scope of the law.

- In order to identify the situations where an artificial division of supply contracts occurs, the most relevant aspect to be checked is *similarity of the products*.
- In order to identify the situations where an artificial division of works contracts occurs, the most relevant aspect to be checked is whether the *works have the same technical and economic function*.
- In order to identify the situations where an artificial division of services contracts occurs, the most relevant aspect to be checked is whether the *services have the same technical and economic function*.

