

The advantages and disadvantages of the various procurement procedures

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Abstract

The present paper aims at providing the reader with an overview of the procurement procedures under the current legal framework in the European Union. At first, they will be described and subsequently inherent advantages as well as disadvantages will be manifested. Having regard to the significant amount of discretion which the Public Service Directive leaves to Member States, it will be argued that national contracting authorities remain flexible when balancing between the principles of transparency and equal treatment on the one hand and conducting a fast and efficient procurement on the other. Moreover, a brief look will be taken at the criteria that public entities do and should use when determining which procedure to apply. In addition to that, various possible methods and techniques for conducting procurement procedures as provided by the Directive as well as their positive and negative aspects will be shortly assessed. Finally, the procedural framework of the new proposal for a Public Service Directive will be briefly evaluated in order to examine whether the inherent advantages and disadvantages of the current system have been adequately considered.

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I. Introduction

The current legal framework of public procurement within the European Union aims to introduce a discipline of regulation in the relevant markets and in particular, to ensure that undertakings from across the Single market and beyond have the opportunity to compete for public contracts by removing legal and administrative barriers to participation in a cross-border tender. This is achieved by ensuring equal treatment and by abolishing any scope for discriminatory purchasing through enhanced levels of transparency and accountability.¹ Prior to the adoption of procurement rules on European level, market access was not sufficiently realised due to Member States' protecting measures and preferential purchasing practices². Moreover, the resulting distortion of competition prevented an efficient spending of tax payer's money.

Having regard to the above stated and guided by the EU primary law principles of transparency, equal treatment and non-discrimination, Directive 2004/18/EC³ sets up an extensive legal framework regarding the procurement of work, supply and service contracts. What is more, it satisfies the need for effective procedures and underlines why contracting authorities do not just negotiate or simply buy at the closest supplier. In this context, there are two main reasons for the use of specific procedures. First of all, the latter provide for more public accountability and therefore less corruption practices.⁴ Additionally, tender procedures aim to ensure the best value for money by making it necessary for suppliers to act highly competitive. As a result, market mechanisms will help facilitating the best possible price following the market investor principle.⁵ Yet, in situations where market mechanisms are not effective, tender procedures might lose their effectiveness as well.⁶ If for example there is a lack of competition due to the particular complexity of certain matters or due to otherwise resulting lower bidder interest, it might very well be that negotiations with just one or two suppliers would constitute the most efficient and costs saving

¹C.H. Bovis, "EU Public Procurement Law" (2012), p. 2.

² Heijboer and J. Telgen, 'Choosing the open or the restricted procedure : A big deal or a big deal?', *Journal of Public Procurement*, Volume 2 , Issue 2, p. 189.

³Directive 2004/18 EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts.

⁴ Holmes, 'To Tender or to Negotiate: the Buyer's Dilemma', *Journal of Marketing Practice: Applied Marketing Science* (1995), 1(3), pp. 7-17, found in: Heijboer and J. Telgen, 'Choosing the open or the restricted procedure : A big deal or a big deal?', *Journal of Public Procurement*, Volume 2 , Issue 2, pp. 187 - 216.

⁵Heijboer and Telgen, 'Choosing the open or the restricted procedure: A big deal or a big deal?', *Journal of Public Procurement*, Volume 2 , Issue 2, p.200.

⁶*Ibid*, p. 200.

manner to actually carry out the envisaged procurement project.⁷ Another reason for the importance of putting effective procedures in place is the phenomenon of the "*winner's curse*". It occurs in situations in which the winning bid was inaccurately calculated.⁸ From the bidder's point of view the bid turns out to be too low, leaving him with a non-profitable contract resulting in an incentive for bad performance.⁹

This paper aims at providing the reader with an overview of the procurement procedures under the present legal framework in the European Union. At first, they will be described and subsequently inherent advantages as well as disadvantages will be manifested. Furthermore, a brief look at the current procurement practice will be taken in order to examine the criteria that contracting authorities use when determining which procedure to apply. In addition to that, various possible methods and techniques for conducting procurement procedures as provided by the Directive as well as their positive and negative aspects will be shortly assessed. Finally, the procedural framework of the new proposal for a Public Service Directive will be briefly evaluated in order to examine whether the inherent advantages and disadvantages of the current system have been adequately considered.

Art. 28 of Directive 2004/18/EC¹⁰ constitutes the starting point when dealing with the choice of the procurement law procedure. In its second subparagraph, it states that the open and the restricted procedure are the regular ones to be used. What is more, they both require a contract notice and subsequently a contract award notice to be published in the Official Journal of the European Union (OJEU). In addition to that, no negotiations with suppliers are allowed and any substantive information has to be equally provided to all of them. Furthermore the contract specifications need to be written in a non-discriminatory manner.

The contracts in the open and restricted procedure are awarded on the basis of specified award criteria. Those can either be the lowest price or the economically most advantageous offer.¹¹ The latter award criterion may comprise a variety of objective criteria which are to be enumerated in the

⁷ Holmes, 'To Tender or to Negotiate: the Buyer's Dilemma', *Journal of Marketing Practice: Applied Marketing Science* (1995), 1(3), 7-17, found in: Heijboer and Telgen, 'Choosing the open or the restricted procedure: A big deal or a big deal?', *Journal of Public Procurement*, Volume 2, Issue 2, pp. 187 - 216.

⁸Heijboer and Telgen, 'Choosing the open or the restricted procedure: A big deal or a big deal?', *Journal of Public Procurement*, Volume 2, Issue 2, p. 201.

⁹*Ibid*, p. 201.

¹⁰ Further mentioned articles without a directive reference belong to Directive 2004/18/EC.

¹¹See Art. 53 of Directive 2004/18/EC.

invitation to tender. Possible criteria could be: price, quality, technical assistance and service, delivery period.

1. Open procedure

The open procedure is by far the most commonly used procurement method.¹² Over the last five years open procedures represent the lion's share of public procurement at about 73 per cent of all tender announcements in the Official Journal.¹³ Under this procedure the purchaser

- (1) has to establish specifications as the basis for any submission of bids,
- (2) shall advertise the contract in the Official Journal, and
- (3) shall allow any interested firm to submit a bid as well as evaluate the bids, as received, without entering into negotiations.

The open procedure is a one staged procedure in which any interested supplier may submit a quotation in response to the publication of an invitation to tender. Thus, the contracting authority does by no means try to limit the number of tenders. Already when publishing the invitation to compete the public agency needs to have all contracts and supporting documents ready and available. The minimum deadline for the receipt of tenders is 52 days after the publication of the notice.¹⁴

2. Restricted procedure

The restricted procedure on the other hand constitutes a two-stage procedure. At first, requirements are set out through a contract notice in the Official Journal and bidders are invited to express their interest in participating within the procurement procedure in question. Any interested supplier may submit a request in this regard within 37 days after the publication.¹⁵ This first stage could be described as a "screening process". Consequently, allowance to participate in the tender procedure will be given only to those being potentially able to fulfil the requirements necessary to execute the respective contract. Candidates will be selected based on objective criteria regarding the supplier. Possible criteria might be financial standing, ability and technical capability.¹⁶ The minimum number of bidders invited to tender shall not be less than five, yet the Directive does not prescribe a

¹² *Public Procurement in Europe: Cost and Effectiveness*, a study on procurement regulation prepared for the European Commission (2011), p. 15.

¹³ *Ibid*, p.15.

¹⁴ Art. 38 (2) of Directive 2004/18/EC.

¹⁵ Art. 38 (3a) of Directive 2004/18/EC.

¹⁶ Art. 45 to 52 of Directive 2004/18/EC.

concrete maximum number. Generally, the contracting authority must ensure that the number of providers invited to tender is sufficient to ensure genuine competition.¹⁷ In a situation where there are less than five candidates, the entity may nevertheless continue with the procurement procedure by inviting those that do fulfil the necessary requirements. Yet, it may not invite additional private actors who have not responded originally to the contract notice to participate in the envisaged procedure.

In the second stage the contracting authority sends an invitation to tender to the selected candidates and at that time all necessary documents have to be available. The minimum deadline for the receipt of tenders is 40 days after sending the invitation.¹⁸ After that the contract is awarded to the supplier with the best bid based on the award criteria. While the criteria of the qualitative selection stage focus on the suitability of economic operators, the awarding criteria deal only with the possible execution of the envisaged contract.¹⁹

3. Competitive Dialogue

The Competitive Dialogue constitutes a novel procedure within EU public procurement law first introduced by the Public Service Directive (PSD) in 2004. The main reason was to complement the classical open and restricted procedures regarding situations where the latter did not prove to be suitable enough especially due to the less amount of flexibility they offer. The newly established procedure provides contract authorities with an additional tool for dealing with “particularly complex contracts” (Art. 29 (1)). These are defined as contracts for which the entity is “objectively” unable to specify the technical means capable of satisfying its objectives or to set up the legal or financial framework of a project (Art. 1 (11 c)). In this context, Art. 29 (3) states that the aim of the dialogue is to identify and define the means best suited to satisfying the authority’s needs on the basis of which the candidates are invited to tender. Moreover, public entities may use the Competitive Dialogue only if they “consider” that the use of the open and restricted procedures will not allow the award of a particular contract (Art. 29 (1)). Unfortunately, the Directive does not provide clear guidance as to how broad the discretion of authorities regarding the choice for this new procedure is and whether the latter constitutes an exceptional procurement tool that is to be

¹⁷Art. 44 (3) of Directive 2004/18/EC.

¹⁸Art. 38 (3) (b) of Directive 2004/18/EC.

¹⁹Articles 45 – 52 (by contrast with Art. 53 and Art. 55 of Directive 2004/18/EC).

interpreted and applied strictly²⁰ (like the negotiated procedure with or without notice – as discussed further below)²¹.

The Competitive Dialogue can roughly be divided into four basic phases. During the first one (awarding phase) a contract notice shall be published in the EU's Official Journal setting out the needs and requirements of the authority (Art. 29 (2)). In this context, if the authority would like to make use of the possibility to undertake the following procedure in successive stages, thereby gradually reducing the number of solutions to be discussed during the dialogue stage applying the accordant award criteria, it shall state so already in the contract notice and/or the descriptive document attached thereto (Art. 29 (4)).

Within the selection phase the contracting authority will choose the participants for the dialogue procedure among those who have responded to the notice. The selection criteria applying are the same as within the restricted procedure, (Art. 45 to 52). Yet, there is one important difference stated in Art. 44 (3): the minimum number of participants to be invited is three (like within the negotiated procedure with a notice), rather than five (as within the restricted procedure). Nevertheless, all procedures are subject to the rule that there must be always a sufficient number of invited candidates for genuine competition.

The third and so-called award phase can on its part consist of several stages. At first the dialogue phase takes place for which a significant amount of flexibility is provided by the directive. The authority can require outline proposals from the invited participants that set out their solutions and key terms, discuss these with the participants and then ask them to amend or improve their initial proposals in order to meet the authority's needs and the objectives of the project, established and clarified, *inter alia*, during the discussion process itself. At this stage it is extremely important for the authority to observe the requirements stated in Art. 29 (3). It has to provide information to the dialogue participants in a non-discrimination manner and may not reveal confidential information communicated by a candidate to the other participants.

After completing the dialogue process, there is a formal closing thereof and a call for "final tenders" from the remaining participants based on the solutions presented and specified during the dialogue (Art.29 (6)). In the following the authority examines the submitted tenders and has to choose the

²⁰Arrowsmith, p. 186.

²¹Note that Art. 28 seems to pose a certain hierarchical relationship between the different procurement procedures, yet it also explicitly differentiates between Competitive Dialogue on the one hand and the negotiated procedures on the other. Due to the lack of jurisprudence regarding the grounds for using the Competitive Dialogue, their precise meaning remains a matter for theoretical debate.

most economically advantageous one pursuant to Art. 29 (7), 53 (1 a)). Thus, in comparison to all other procedures, here the “lowest price” criterion cannot constitute the basis for the award²².

Finally, it deserves to be noted that the possibility for a post-tender dialogue and amending or completing of the chosen tender exists, subject to certain conditions (Art. 29 (7)). As this constitutes an important advantage in comparison to other procedures, a more detailed discussion thereof can be found further below.

4. Negotiated procedures

Negotiated procedures constitute special public procurement tools whereby the contracting authorities consult the economic operators of their choice and negotiate the terms of a contract with one or more of these (Art. 1 (11 d)). There are two types of negotiated procedures – one with a prior publication of a contract notice, Art. 30, and one – without any publication of a contract notice, Art. 31. Regarding both of them the directive provides for an exhaustive list of cases in which they may and should only be applied (see also Art. 28, 3. sent.)

a. Negotiated procedure with a prior publication of a contract notice

The grounds for this procedure are stated in Art. 30 (1). In comparison to the Competitive Dialogue where it is sufficient for the contracting authority to only “consider” that the open and restricted procedures are not appropriate regarding the specific circumstances of the case, here a failure of an actual conducting of the classical procedures (i.e. the open and restricted ones) is necessary (Art. 30 (1 a)). The latter condition is fulfilled where irregular tenders were submitted in response to an open or restricted procedure in so far as the original terms are not substantially altered. Moreover, the same applies as to the submission of unacceptable offers under national provisions compatible to Art. 4 (the nature of economic operators), Art. 24 (variants included in the tender), Art. 25 (subcontracting), Art. 27 (taxing, environmental and social obligations of economic operators) as well as to the provisions of Chapter VII of the Directive dealing with the economic operator’s personal situation, economic and financial standing and technical and professional capacity.

Thus, the main difference between this procedure and the Competitive Dialogue seems to be that within the latter the authority itself needs further clarification as to certain specifications and particular complex issues of a project, while here the clarification need is present rather on the site

²²Note also that the Competitive Dialogue constitutes the only procedure which explicitly provides for prices or payments to the participants (Art. 29 (8)). Yet, this does not mean that payments are precluded within other procedures. It can rather be seen as a result of the particular concern in this regard exactly within the framework of the Competitive Dialogue for the latter can be extremely costly and thus deter a lot of firms from participating (see also Arrowsmith, p.193).

of the private actors. For no tenderer was obviously able to understand sufficiently the needs of the authority and to submit a regular and acceptable tender.

Other cases in which the negotiated procedure with a notice can be applied are given when overall pricing of works and services cannot be determined (Art. 30 (1b)), when certain technical specifications can otherwise not be drawn up (Art. 30 (1 c)) and, regarding public work contracts, where works to be carried out are purely for research, experiment and development.

As for the particular procedural requirements, they do not defer much from those of the restricted procedure and the Competitive Dialogue. A contract notice, i.e. a call for competition, is required. The selection criteria for bidders stated in Art. 45 to 52 apply. The minimum number of invited participants should be three (Art. 44 (3)) and the awarding criteria consists of both the lowest possible price and the MEAT (Art. 53 (1)). Yet, in comparison to the Competitive Dialogue the negotiations with the private actors are based on already submitted tenders and the aim is for the latter to be adapted to the requirements of the contracting authority. Moreover, a direct choice of a bidder already during this negotiating phase is possible, i.e. there is no “final” submission of tenders.

b. Negotiated procedure without a prior notification of a contract notice

The negotiated procedure without a notice, i.e. without any call for competition, reduces to a significant extent the scope of the transparency principle which is generally applied under EU procurement law to prevent discrimination. Therefore, the use of this procedure is very closely confined to those cases in which it is considered that national governments have a very good reason to depart from competitive and transparent procedures²³. The legitimate grounds for using that procedure are stated in Art. 31. They include, inter alia, cases where there is only one possible provider (of works, supplies or services) due to technical and artistic reasons or grounds related to exclusive rights; contracts for research and development (supplies only); follow-on contracts with an existing provider (e.g. for additional unforeseen works or repetition of previous works that is referred to in the contract notice). Further grounds are present in cases of extreme urgency or where open or restricted procedures have produced no (suitable) tenders. Finally, procedures following a design contest as well as purchases on commodity markets or purchases on particularly advantageous terms (e.g. in the event of a supplier’s bankruptcy) may also give rise for using the negotiated procedure without a notice.

²³Arrowsmith, p. 198.

Regarding this procedure more case law has been adopted which provides for two very important statements. First of all, due to the derogation from the basic principles of EU law, i.e. transparency and competition, the grounds for using the negotiated procedure without a notice (to a certain extent also the one with a notice) should be strictly interpreted²⁴. Secondly, the party invoking the derogation, i.e. the contract authority or the particular Member state, has to show that the circumstances justifying the use of that procedure are present²⁵. This does not mean that there is a general reversion of the burden of proof for a violation. Yet, the entity in question must put forward evidence to justify its reliance on the derogation, rather than requiring the other party to show that the conditions for its use are not met. The evidence provided by the procuring entity must also be detailed in nature. However, once this is provided, the other party may be required to rebut it in order to win the case²⁶.

5. Design contest

Design contests are also mentioned in Art. 1 (11) as constituting procurement procedures. They involve a competition, in which a contracting authority invites the submission of plans and designs to be judged by a jury under the rules of competition. Moreover, sometimes prizes are awarded too. This procedure is mainly used in the fields of town and country planning, architecture and engineering or data processing²⁷. Yet, its use is so infrequent that we will not analyse this type of contracts further.

II. Assessment of the advantages and disadvantages inherent to the various public procurement procedures

1. Comparison of the classical procedures

Free entry of bidders, which is inherent in the open procedure, logically leads to a situation of maximum competition. Additionally, the lowest price offered in an open procedure will naturally be lower on average due to the higher number of bidders.²⁸ Yet, even though open bidding results in those advantages, it also comes along with certain disadvantages. Generally, the open procedure seems burdensome, simply resulting from the fact that all bidders and their bids have to be assessed.

²⁴Case C – 199/85 *Commission v. Italy* [1987] ECR 1039, para. 14.

²⁵Case C – 337/98 *Commission v. France* (“Rennes Railways”) [2000] ECR I-8377

²⁶Arrowsmith, p. 199.

²⁷“*Public Procurement in Europe, Cost and Effectiveness*”, a study on procurement regulation prepared for the European Commission (2011), p. 36.

²⁸Holt, ‘Uncertainty and Bidding for Incentive Contracts’, *American Economic Review* (1979), 69, pp. 697-705, found in: Heijboer, and Telgen, ‘Choosing the open or the restricted procedure : A big deal or a big deal’, *Journal of Public Procurement*, Volume 2 , Issue 2, pp. 187 – 216.

Moreover, one would also have to consider uncompetitive bids whereas within the restricted procedure the level of competition between companies willing to submit a tender will be more serious as the perceived chance of winning the contract will be higher. The lower chance of winning due to the free bidding by all interested parties within the open procedure could further result in limiting serious participation, especially if the financial resources required for drafting a tender are considerable.²⁹

Secondly, one has to take a look at the evaluation costs that the contracting authority will bear in order to provide for an equal assessment of all tenders. What is more, in the case of open bidding the amount of time spend on evaluating could be tremendous as it increases with the number of tenders received. Another aspect to consider would be that in open bidding situations the number of bids that will be received is a matter of uncertainty. Therefore, predictions regarding the time necessary for sufficient evaluation of the received tenders are impossible.

Finally, another disadvantage of the open procedure could be the danger of low quality bids. In this context, it is important to realise that the specific level of quality envisioned by the contracting authority is not necessarily included clearly in the contract. In situations of free bidding, and thus in situations of high competition, a tenderer could take the opportunity to insert a bid with a lower quality standard in mind.³⁰ As a result, high competition mainly driven by means of the lowest price could very well result in quality being compromised.

In a situation where those deficiencies occur, one could opt for invited bidding by means of a restricted procedure. This procedure allows for the selection of tenderers and therefore might be more suitable in certain situations. Following the restricted procedure, the flaws of the open procedure will be addressed. By limiting the number of tenders by pre selection, uncertainty regarding the amount of time needed to evaluate a tender will no longer exist, resulting in a fixed timeframe and a more predictable situation. Furthermore, the danger of low - quality bids will also be decreased. Finally, the chances of uncompetitive bids will be much lower in a restricted procedure as, in contrast to the open one, the perceived chance of winning the contract will be much higher for the selected parties.

²⁹Hallwood, 'A Market in Action; Fuzzy Information and Trade-Offs between Operating Rules in the Invited Tender-Bid Procurement Auction', *Journal of Economic Studies* (1996), 23(3), pp. 34-43, found in: Heijboer and Telgen, 'Choosing the open or the restricted procedure : A big deal or a big deal?', *Journal of Public Procurement*, Volume 2 , Issue 2, pp. 187 - 216.

³⁰Kim, 'A Model of Selective Tendering: Does Bidding Competition Deter Opportunism by Contractors?', *Quarterly Review of Economics and Finance* (1998), 38(4), p. 907-925, found in: Heijboer and Telgen, ' Choosing the open or the restricted procedure : A big deal or a big deal?', *Journal of Public Procurement*, Volume 2 , Issue 2, pp. 187 - 216.

2. Practical consideration as to the use of open and restricted procedures

When comparing empirical evidence with regard to the open and restricted procedures, two main aspects should be considered. First, the usage patterns of those procedures on EU level as well as on national level. Secondly, the usage patterns of procedures in respect to the different kind of possible contracts which are awarded.

According to empirical data concluded in a *study on procurement regulation prepared for the European Commission*,³¹ the open procedure is the most commonly used procedure at EU level. Yet, it is interesting to take a look at the existing difference between EU member states regarding the preference of public entities for certain procedures. Most countries, just like on EU level, prefer the open procedure. In contrast, within the UK more than half of all procurements are done through the restricted procedure. Furthermore, the restricted procedure is also applied more frequently in Denmark Ireland and the Netherlands. A possible explanation for these varieties can be found in national legislation that contracting authorities have to comply with. Sometimes only one type of procedure is allowed, explaining why some countries prefer the open procedure³².

Another interesting aspect that is manifested in the PwC report on cost and effectiveness of public procurement within the EU are the differences that occur when distinguishing the award procedures used for different categories of contracts. The open procedure is used frequently within all kind of contracts, yet there is a clear trend to be applied mostly in work contracts (as compared to service contracts).³³ On the other hand, the report illustrates that the restricted procedure is used more often within service contracts than within supply or work contracts (without prejudice to the value of the contract of course, because increasing of the latter generally leads to a more frequent use of the restricted procedure).³⁴ A reason could be that specification of services constitutes a complex matter. As a result, contracting authorities should rather opt to focus more on the quality of suppliers which can be facilitated by the use of the restricted procedure.

³¹*Public Procurement in Europe, Cost and Effectiveness*, a study on procurement regulation prepared for the European Commission (2011), p. 31.

³² Note that Art. 28 of the Directive only obliges Member States to introduce the classical procedures (“open or restricted”) in their national law, leaving the determinations of the grounds and conditions for using those procedures as well as the relationship between them within the discretion of the national legislator. The latter applies also regarding the remaining procedures such as the Competitive Dialogue or the negotiated procedures.

³³*Public Procurement in Europe, Cost and Effectiveness*, a study on procurement regulation prepared for the European Commission (2011), p. 42.

³⁴*Public Procurement in Europe, Cost and Effectiveness*, a study on procurement regulation prepared for the European Commission (2011), p. 42.

3. Advantageous after all: general criteria for a choice between an open and restricted procedure

Having regard to the above said, it is clear that both procedures come along with advantages while at the same time resulting in deficits inherent to their structure and way of conducting. Thus, it is impossible to give a clear cut answer as to which procedure would generally be better. In this context, a flexible use of the open and restricted procedure seems to be the best approach towards the question which procedure is most suitable. Yet, taking this for granted, one would have to come up with the question as to which kind of criteria shall be used in assessing the suitability of a procedure in a specific situation.

One important factor to consider would be the expected level of competition. The latter is indicated mainly by two variables: (1) the expected spread in bids received, meaning the difference in value and quality of all submitted offers, and (2) the expected number of tenders in respect to the open procedure or participation requests to be received in a restricted procedure. Moreover, a high level of competition resulting from both the concrete number of tenderers as well as the content of their offers will increase the efficiency of the procurement in question and lead to more savings of tax payer's money. Logically, the open procedure seems to be more suitable in situations where a huge spread of bids is expected because it will allow the contract authority to benefit most from the competing process and choose the best offer. However, if almost no differences between the tenders to be submitted are foreseeable, yet a huge amount of participants is expected leading to higher evaluation costs and longer time frameworks, then the restricted procedure seems to constitute the better choice.³⁵

Another factor to be taken into account are the expected tendering costs. In this context, one has to differentiate between fixed and variable costs. Fixed costs include costs for setting up an award procedure. In practice they are similar in respect to the open and restricted procedure due to the fact that the same kind of documents need to be issued, such as specifications, invitations to tender etc.³⁶ In contrast, variable costs include the costs related to each tender and in case of the restricted procedure also the costs related to each request for participation. Unlike fixed costs, variable costs could differ considerably between open and restricted procedure. Variable costs for the restricted

³⁵Heijboer, and Telgen, 'Choosing the open or the restricted procedure : A big deal or a big deal?', *Journal of Public Procurement*, Volume 2 , Issue 2, p. 203.

³⁶Heijboer, and Telgen, 'Choosing the open or the restricted procedure : A big deal or a big deal?', *Journal of Public Procurement*, Volume 2 , Issue 2, p. 204.

procedure might be less as the restricted procedure provides much more certainty resulting from a limited number of tenders.

A third factor would be the time factor. By simply looking at the time frames, open procedures seem to be more favourable than restricted procedures. The minimum time period in respect to open procedures is 52 days. In contrast, the restricted procedure takes 77 days. Yet, one has to realise that with regard to the open procedure, exact specifications have to be concluded right from the start of the procedure whereas in case of a restricted procedure this only has to be in place after the selection of suppliers. As a consequence, selecting suppliers and issuing of specifications at once may lead to saving extra time. Yet, this will only be realistic in cases where sufficient resources are available.³⁷

Furthermore, it is important to notice, that after the deadline to submit tenders has elapsed, the conclusion and final award of a contract in the restricted procedure will probably be completed quicker than in an open procedure due to the smaller amount offers.

Finally, as seen above cultural differences and national legislation have to be considered too.

4. Advantages and disadvantages of the Competitive Dialogue

As a procedure in which the contracting authority can limit the possible tenders to a certain number, the Competitive Dialogue comprises all the advantages of the restricted procedure towards the open one which have been discussed above. In this context, especially the lower costs because of evaluating fewer tenders on behalf of the public authority as well as the smaller number of private actors who have invested financial resources in drafting tenders without winning, i.e. receiving an accordant pay off, should be highlighted.

Regarding a comparison with the restricted procedure itself, there are indeed various advantages that the Competitive Dialogue offers. At first, Art. 44 (3) should be mentioned which sets a minimum of invited participants to the number of three in comparison to the restricted procedure where the accordant minimum number is five. This difference provides for more flexibility on behalf of the contracting authority by allowing it to conduct a shorter dialogue phase and evaluate fewer tenders. Particularly in complex cases where there are serious concerns as to the level of bidder interest, a lower required number of participants allows for a procurement procedure to take place at all. Moreover, it contributes to a more effective fulfilment of the entity's purchasing plans, by still guaranteeing the presence of genuine competition.

³⁷Heijboer, and Telgen, 'Choosing the open or the restricted procedure : A big deal or a big deal?', *Journal of Public Procurement*, Volume 2 , Issue 2, p. 204.

One of the most important advantages of the Competitive Dialogue, which arguably also constituted the reason for introducing this procedure in the first place, can be seen in its suitability to deal with particularly complex contracts. It enables a public entity to benefit from the know-how of the private actors and conduct a procurement procedure even when it cannot define specific parameters or conditions governing the project to be implemented already at the beginning. Yet, that does not mean that there are no initial preparations on behalf of the authority. On the contrary, pursuant to Art. 29 (2) it is still obliged to publish a contract notice setting out its needs and requirements in order to provide for more transparency and equal treatment. However, by having the opportunity not to determine the final criteria already at the beginning of a procurement procedure, the authority remains flexible and can further adapt its requirements in accordance with what is technically possible and economically viable. Moreover, by maintaining the competitive tension between participants during the whole dialogue process, a better value for money can be achieved³⁸. In this context, the exclusion of the lowest price criterion pursuant to Art. 29 (7) also contributes a lot for securing the most economically advantageous conditions for a certain contract and to spending public money in the most sufficient manner.

Another positive aspect of the Competitive Dialogue is the fact that bidders are provided with greater clarity as to what will be expected from them not only throughout the procurement process but regarding the post tender phase as well. In that way, they can adapt earlier and better to the requirements of the public entity, thereby saving time and financial resources and avoiding eventual judicial procedures afterwards due to appearance of ambiguities or contentious points regarding the undertaken obligations.

In addition to what has been said already, the possibility to undertake the dialogue in successive stages, thereby reducing the number of solutions to be discussed during the dialogue (Art. 29 (4)), provides for more efficiency and cost savings on behalf of all parties. In doing so, the public authority can concentrate on the best suitable offers and evaluate only them. What is more, the less eligible candidates will be excluded already before submitting their final offers which will decrease the unrecoverable loss they make due to the investment of human and financial resources in drafting tenders which at the end will not pay off anyway.

Finally, the extremely limited but still present option of having post-tender negotiations pursuant to Art. 29 (7) also contributes to a more efficient procurement procedure, thereby providing for the clearance of any ambiguities already before the fulfilment of the contract has begun. As for the explicit allowance to pay certain remuneration to the participants in the dialogue, stated in Art. 29

³⁸OGC/HMT Guidance on Competitive Dialogue, p. 34.

(8), it is clearly to be seen as an advantage, especially regarding cases where an insufficient bidder interest is present due to the huge complexity of the issue in question. Yet, as stated above, the directive does not prohibit the specifying of prices or awarding of payments also within other procedures.

The Competitive Dialogue could have also certain disadvantages, yet most of them will result from the particular circumstances of the case or an eventual inappropriate use of the procedure itself rather than from any inherent deficiencies.

Clearly the quantitative dimension of competition will be less apparent due to the limited number of private actors participating in the procurement procedure. Yet, this will be compensated by the higher quality of the technical and economical level on which competing will take place. Moreover, not having the possibility to use the “lowest price” criterion can also be seen as a disadvantage not only because the authority’s flexibility as to the choice of award criteria is limited but also because it provides for an easier judicial review. However, the “lowest price” criterion already constitutes a part of the MEAT-criterion and it is left to the entity’s discretion to decide what particular weight it will grant to the price of the project. What is more, the “lowest-price” criterion would not seem to be appropriate within particular complex contracts also from the perspective of getting the best value for money.

Another disadvantage of the Competitive Dialogue could be seen in the extensive preparations which are required from the contracting authority. The latter must plan in advance and in detail how the entire process will be run. Moreover, there is not yet any specific legal interpretation of what is or is not permitted and thus a careful consideration of the legal boundaries is necessary³⁹. Finally, additional costs and resources may be required for the public entity to negotiate with more than one bidder, and for unsuccessful bidders because they have to develop solutions or even final bids which are in accordance with the particular complexity of the procedure in question. Yet, all the just present disadvantages result rather from the nature of the procurement issue and its eventual complexity and are not to be observed as a deficiency of the procedure itself.

Finally, the Competitive Dialogue could raise also some confidentiality issues. The contracting authority has to be extremely careful when striking the right balance between keeping the necessary competitive tension among participants and not revealing any confidential information provided by a candidate without his agreement (Art. 29 (3,3)).

To sum up, the Competitive Dialogue constitutes a necessary procurement tool which provides for more flexibility regarding particular complex issues where only a low bidder interest is expected.

³⁹OGC/HMT Guidance on Competitive Dialogue, p. 34.

Moreover, it indeed may reduce to some extent the competition on a quantitative level, yet it will produce better procurement quality and value for money. Finally, it allows the public authority to use the know-how of the private market by negotiating contract conditions within a dialogue procedure, without however to abolish one of the most important requirements within procurement law: the submission of “final” offers and their objective evaluation. For only in that way sufficient transparency and equality can be guaranteed and any distortion of competition prevented. What is more, the practice of mostly using the competitive dialogue within high value projects and particularly complex issues⁴⁰, such as PPPs for example, due to which it was actually introduced, shows that it constitutes an important and needed procedure that can be of disadvantage only if used in an inappropriate manner.

5. Advantages and disadvantages of the negotiated procedures

Regarding the positive and negative aspects of the negotiated procedures, one should first of all bear in mind that those procurement tools are even less transparent and thus potentially more harmful to the principle of equal treatment and genuine competition than the Competitive Dialogue. Consequently, all the above made comparisons between the latter on the one hand and the open and restricted procedures on the other and the conclusions reached in this regard apply fully also to the negotiated procedures. What is more, both Art. 30 and 31 provide for an exhaustive list of cases in which their scope is applicable, the latter being in addition to that restrictively implemented by the CJEU⁴¹. The legal certainty which results from this definitely constitutes an advantage towards other procedures and a contribution to the successful achievement of procurement law objectives. Nevertheless, there are certain characteristics regarding these two procedures which require a further separate review.

a. Negotiated procedure with a prior publication of a contract notice

Besides the bigger legal certainty, the exhaustive list of Art. 30 also provides for more flexibility on behalf of the authority in the accordant exceptional cases mentioned there. If there were no suitable tenders after conducting an open or restricted procedure, it is more than clear that something went wrong and the authority should change its strategy in order to put into effect its procurement plans in the first place. As a matter of course, a Competitive Dialogue seems to be possible in such a situation because both procedures allow for the authority to negotiate with bidders in order to adapt their solutions/(initial) offers to its requirements. Yet, as already stated, the directive provides for no

⁴⁰ ‘*Public Procurement in Europe, Cost and Effectiveness*’, a study on procurement regulation prepared for the European Commission (2011), p. 15.

⁴¹ *supra* note 24 and 25.

hierarchical relationship between the Competitive Dialogue and the negotiated procedures. Moreover, the Competitive Dialogue constitutes a tool for situations where the public entity cannot formulate the technical or economic specifications itself, rather than where no one was able to present compliant offers with already determined specifications.

Arguably the most important difference between the negotiated procedure with a notice and the Competitive Dialogue is the fact that only within the latter there is an official concluding of the negotiating phase and a call for final tenders. From the perspective of being more flexible and having to assess fewer tenders in order to save money and time, the above presented difference definitely constitutes an advantage on behalf of the negotiated procedure. Yet, the lack of a final submission of offers significantly reduces the transparency of the procedure and thus affects the equal treatment principle. By having the opportunity to suspend the negotiations at any time and simply choose one of the tenderers, a public entity may easier circumvent the requirements of EU public procurement law and distort competition. Now, it may be true that the authority is still bound by the originally stated award criteria and shall treat all participants equally (Art. 30 (2 and 3)). Yet, the procedure is used in order to adapt the participants to specific public requirements and it is exactly this adaptation activity that seems to be hardly judicially reviewable. In contrast, the final offers submitted within the Competitive Dialogue contribute a lot to more transparency and accountability (i.e. the chances for any misuse on behalf of contracting authorities due to corruption practices or protectionism goals are smaller).

Nevertheless, given the little scope, the strict conditions and the restrictive judicial interpretation of Art. 30, the negotiated procedure is still to be considered as an advantageous one.

b. Negotiated procedure without a prior publication of a contract notice

As already stated, this procedure constitutes the most non-transparent one and is thus very harmful to a genuine competition. Yet, if one is to take a closer look at it, the conclusion will undoubtedly be that it also constitutes a necessary tool within EU procurement law. All the cases in which this procedure may be applied pursuant to Art. 31⁴² are extremely exceptional ones where a derogation of the general procurement principles should take place in order to achieve better efficiency and value for money or preserve other important values like the protection of intellectual property rights for example. Therefore, provided that this procedure is not interpreted extensively and misused for other purposes, its advantages regarding the cases where it is applicable outweigh its negative aspects.

III. The use of different methods / techniques and their role in procurement procedures

⁴² See also above p. 10, 11.

Even though not described as procedures, there are certain methods and techniques to be used which are closely linked to the procedures in public procurement. They are not all mutually exclusive, meaning that they can be combined. In this context, multiple combinations are possible, yet framework agreements and dynamic purchasing systems may not be used simultaneously. 84 per cent of purchases are done without the use of a particular technique.⁴³ About 15,5 per cent of purchases use some sort of technique or a combination thereof.⁴⁴

1. Prior information notice (PIN)

A prior information notice (PIN) is a notice published in the OJEU which sets out the contracting authority's purchasing intentions.⁴⁵ Yet, publishing such notice does in no way create an obligation for the contracting authority to actually commence procurement. It simply serves as a means of information for the market. Even though Art. 35 creates the impression of a PIN being a mandatory requirement, it is only mandatory for the contracting authority in situations where it wishes to reduce the times scales of the procedure used in a particular case. The information that has to be included in the PIN is depended upon the type of contract listed in the PIN. Pursuant to Art. 35 such notices have to contain:

- (1) for supply contracts, the total estimated spend under the relevant contracts over the next 12 month for the relevant good
- (2) for services, the total estimated spend under the relevant contract in each category of Part A services
- (3) for works, it is about the characteristics of each covered work contract expected at that time to be awarded.

The PIN should include all possible information that would usually be provided in the contract notice. Yet, this is only possible to the extent that such information is available at the time a PIN is published. As a result, it will usually contain more general information as opposed to the contract notice.

In case a valid PIN has been put in place, it enables the contracting authority to shorten the time limits under both the open and the restricted procedure. PIN leads to the shortest possible time limits available without the necessity of justification which is necessary in regard to the use of an

⁴³ *'Public Procurement in Europe, Cost and Effectiveness'*, a study on procurement regulation prepared for the European Commission (2011), p. 26.

⁴⁴ *'Public Procurement in Europe, Cost and Effectiveness'*, a study on procurement regulation prepared for the European Commission (2011), p. 26.

⁴⁵ Art. 78 (2) of Directive 2004/18/EC.

accelerated procedure.⁴⁶ In case a PIN was published no more than 12 month and no less than 52 days from the dispatch of a contract notice, it leads, with regard to the open procedure, to the possibility to reduce the standard timescale from 52 days to 36 days⁴⁷. Dealing with the restricted procedure, a correctly published PIN will lead to the possibility that the 40 days of the second stage of the procedure may be reduced to 36 days but under no circumstances can it be reduced to less than 22 days⁴⁸.

2. Accelerated procedure

Directive 2004/18/EC offers the opportunity of accelerated procedures where there is a case of urgency. Those situations require short time frames due to practicability concerns. For example, the situation of an economic crisis could justify the use of the accelerated procedure reducing considerably the overall time limit of procedures.

Accelerated procedures are accepted with respect to the restricted procedure and the negotiated procedure.

a. Accelerated restricted procedure

This procedure may be used in clearly defined cases of extreme urgency.⁴⁹ The time limits of stage 1 of this restricted procedure may, under the accelerated restricted procedure be reduced to 15 days. According to that, the period from publication of the contract notice in the OJEU for suppliers to express their interest in taking part in the bidding is 15 days.⁵⁰ With regard to the second stage, there shall be a minimum of 10 days from the date of sending the invitation to tender.⁵¹

b. Accelerated negotiated procedure

According to Art. 38 (8) (a) the period from publication of the contract notice in the OJEU for suppliers to express their interest in taking part in the bidding is 15 days. With regard to the second stage of the negotiated procedure, there is no minimum period defined for the return of the tender documentation. Yet, this period should be reasonable and should take into account the complexity of the exercise which is often to be observed in the case of negotiated procedures.

⁴⁶ See below; Art 38 (8) of Directive 2004/18/EC.

⁴⁷ Art 38 (4) of Directive 2004/18/EC.

⁴⁸ Art 38 (4) of Directive 2004/18/EC.

⁴⁹ Art 38 (8) of Directive 2004/18/EC.

⁵⁰ Art. 38 (8) (a) of Directive 2004/18/EC.

⁵¹ Art. 38 (8) (b) of Directive 2004/18/EC.

According to the Commission report, the accelerated procedure is hardly ever used as the numbers amount to only less than half a per cent. This underlines the restrictive approach regarding this derogation and manifests that a PIN⁵² allows for the shortest possible time limits available without the necessity of justification. Therefore, the PIN seems to be the more suitable approach in practice.

3. Dynamic purchasing systems

A dynamic purchasing system (DPS) is defined in Article 1 (6) of Directive 2004/18/EC. It constitutes a completely electronic system which can be used for repeated standardized purchases. Moreover, the DPS is limited in duration (4 years except in duly justified exceptional cases) and open throughout its validity to any economic operator⁵³ who satisfies the selection criteria and has submitted an indicative tender that complies with the specification. It is important to realise that, unlike framework agreements where membership is fixed at the moment the agreement is set up, under a dynamic purchasing system new economic operators are free to join the system at any time.⁵⁴ Furthermore, existing operators within the system are free to improve their indicative tender at any time.⁵⁵ Contracting authorities willing to use such system are obliged to invite tenderers from all economic operators registered in the system as well as advertising the opportunity in the Official Journal of the European Union.⁵⁶ This enables those not registered in the system to participate. This is, as will be pointed out later, an important difference to framework agreements which do not allow for the entry of new suppliers after its establishment. It could therefore be held that a DPS constitutes a kind of an “open” framework agreement which is conducted electronically.

The reason why the directive contains specific rules on the use of such systems is explained in its recitals. At first, such system is a means to facilitate an increase of competition and streamline public purchasing, particularly in terms of the savings in time and money which their use will allow.⁵⁷ Consequently, appropriate rules should be put in place in order to enable contracting authorities to take full advantage of the possibilities offered by such systems.⁵⁸ Resulting from this, it is necessary to define a complete set of rules for the setting up and operating of such systems in order to make sure that economic operators having taken part therein will be treated equally.⁵⁹

⁵² ‘*Public Procurement in Europe, Cost and Effectiveness*’, a study on procurement regulation prepared for the European Commission (2011), p. 16.

⁵³ Art. 33 (2) and Art. 33(7) of Directive 2004/18/EC.

⁵⁴ Art. 33 (4) of Directive 2004/18/EC.

⁵⁵ Art. 33 (2) of Directive 2004/18/EC.

⁵⁶ Art. 33 (2) of Directive 2004/18/EC.

⁵⁷ Recital 12 of Directive 2004/18/EC.

⁵⁸ Recital 13 of Directive 2004/18/EC.

⁵⁹ Recital 13 of Directive 2004/18/EC.

Art. 33 sets out the procedures for a dynamic purchasing system. According to it, for each individual contract, a simplified contract notice is published inviting indicative tenders, which must be evaluated within 15 days. Those tenders that meet the requirements set up by the contracting authority are then admitted to the system. Following the rules of the open procedure, the system is open to any economic operator who fulfils the selection criteria and submits a tender considered suitable.⁶⁰

Finally, the contract will be awarded to the tender offering the best value for money on the basis of the award criteria specified in the contract notice establishing the DPS. In other words, DPS could be described as an electronic marketplace for purchases in which public purchasing takes place through a number of comparisons among suppliers concluded completely by electronic means.

There are various advantages resulting from the use of the DPS. On the one hand, for public authorities it offers the opportunity to use an entirely digitalised process in which offers may be improved in successive stages of the process. Furthermore, such a procedure provides for a high level of transparency and competitiveness in realising gains in terms of savings of time and money. On the other hand, the use of a DPS also offers advantages for suppliers. The latter too benefit from the high level of transparency and competition being offered by using a DPS. It represents a market permanently open throughout the duration of the DPS. Additionally, as stated above, it allows for a dynamic participation as offers may be constantly improved. This is not only beneficial for contract authorities receiving successively improved bids but also for suppliers being able to change their initial offer in situations where they have created the possibility to offer better conditions.

Even though there are obvious advantages resulting from the use of DPS, it is interesting to look at empirical data regarding the use of DPS in the European Union. In the PwC's *Report on Cost and Effectiveness of Public Procurement*⁶¹, it is to be seen that regarding the percentage of total usage dynamic purchasing systems are on average (therefore regarding all procedures within the Public Sector Directive) only used in 1.1 per cent of procedures. Nevertheless, member states seem to be reluctant to actually make use of the dynamic purchasing systems. This might be caused by the fact that such systems are entirely digitalised. Even though this comes along with a lot of advantages, as stated above, it also leads to issues regarding data integrity, as those kind of systems might be attacked by hackers. As a result, member states, according to the report, are hesitant to make use of the system up until today. After all, the use of techniques like the dynamic purchase system is an

⁶⁰ Art. 33 (2) of Directive 2004/18/EC.

⁶¹ '*Public Procurement in Europe, Cost and Effectiveness*', a study on procurement regulation prepared for the European Commission (2011), p. 25.

option for member states.⁶² In the end they can decide how far these methods will be successful. Yet, looking at the continuous issues of data integrity, it is highly doubtful that the dynamic purchase system's total usage with regard to public procurement procedures will experience a rise in the near future.

4. Electronic auctions

E-Auctions are being held on an online platform. Within such auctions, suppliers get the chance to improve their initial proposals based on market feedback following the conduct of a full tender procedure.⁶³ As is the case for dynamic purchase systems, electronic auctions are justified by the idea that electronic means may help to facilitate an increase of competition and streamline public purchasing, particularly in terms of the savings in time and money which their use will allow.⁶⁴

Electronic auctions include both price and non-price parameters in order to facilitate the overall best total value.⁶⁵ Moreover, they may only be used in situations where specifications can be drawn up precisely.⁶⁶ Consequently, there are a number of purchases where the method of electronic auctioning would not present a suitable method (e.g. situations in which more complex needs must be tailored for a particular project). Moreover, the contracting authority needs to consider the possible use of such device thoroughly. If it is willing to purchase goods easily to be specified and if there is a sufficient degree of competition on the market relating to that type of goods, an electronic auction will be suitable. In contrast to that, a contract for complex medical equipment would not constitute a suitable situation for an electronic auction.

An electronic auction will take place at the final stage of a tender procedure and may be used in the following situations by contracting authorities when they conduct:

- an open procedure to select economic operators and receive tenders⁶⁷
- a restricted procedure to select economic operators and receive tenders⁶⁸
- a negotiated procedure with prior publication of a notice in the case where a previous open or restricted procedure has failed resulting from unacceptable offers.⁶⁹

⁶² Recital 16 of Directive 2004/18/EC.

⁶³ Art 1(7) of Directive 2004/18/EC.

⁶⁴ Recital 14 of Directive 2004/18/EC.

⁶⁵ Art. 54 (2) of Directive 2004/18/EC.

⁶⁶ Recital 14 of Directive 2004/18/EC.

⁶⁷ Art. 54 (2) of Directive 2004/18/EC.

⁶⁸ Art. 54 (2) Directive 2004/18/EC.

⁶⁹ Art. 54 (2) of Directive 2004/18/EC.

In the same circumstances, an electronic auction may be held on the reopening of competition among the parties to a framework agreement as provided for in the second indent of the second subparagraph of Article 32(4) and on the opening for competition of contracts to be awarded under the dynamic purchasing system referred to in Article 33 of Directive 2004/18/EC.⁷⁰

In each of those alternatives, the contracting authority is obliged to indicate its intention to make use of such electronic auction in the original contract notice.

The contracting authority will receive initial tenders from all participating economic operators and conduct a full evaluation of those. Subsequently, it will proceed with an electronic auction.⁷¹ The electronic auction will then be used to request new prices, revised downwards. In cases where the award criteria will be the most advantageous offer, the electronic auction will also facilitate possible changes to other elements than price.

According to the rules for dynamic purchase systems, there is a set of specific rules that must be followed in the context of using electronic auctions methods. Those are, inter alia:

- All participants must be invited simultaneously by electronic means to submit new prices and /or values.⁷²
- Such auction might take place in different phases. As a result, there must be a timetable for the respective phases of the auction in the initial invitation to participate therein.⁷³
- Throughout each phase, the contracting authority is obliged to submit information to all tenderers that enables those to ascertain their standing within the auction.⁷⁴
- An invitation to participate must contain a list containing information regarding the conduct of the process. Furthermore, this will be flanked, after the award of a contract, by the full evaluation of the tenderers tender. Consequently, each tenderer receives evaluation of its own bid, yet will not be informed of anything relating to other tenderers bids.⁷⁵

With regard to the closure of the auction, there are different possibilities. The contracting authority has a choice and therefore might close the auction at the date and time specified in the initial

⁷⁰ Art. 54 (2) of Directive 2004/18/EC.

⁷¹ Art. 54 (4) of Directive 2004/18/EC.

⁷² Art. 54 (4) of Directive 2004/18/EC.

⁷³ Art. 54 (3)(c) of Directive 2004/18/EC.

⁷⁴ Art. 54 (6) of Directive 2004/18/EC.

⁷⁵ Art. 54 (5) of Directive 2004/18/EC.

invitation.⁷⁶ As an alternative, it could, in case where it does not receive new prices or values for a pre specified time limit, close the auction at that moment.⁷⁷ Finally, it could also close the auction after the pre-specified number of phases of an auction has elapsed.⁷⁸

After the auction is closed, the award of the contract will be commenced on the basis of its results.⁷⁹

The method of electronic auctioning comes along with many advantages for both, the contracting authority as well as the suppliers. With regard to contracting authorities, it leads to an increase of transparency as an electronic auction is an entirely transparent process. Furthermore, it enhances competition between suppliers. Finally, it also will lead to tangible savings regarding money and time as for example contracts can be awarded faster.

Focusing on the supplier's perspective, it is to be seen that the greatest advantage for suppliers will be the gain in transparency. This results from the fact that the latter will be able to benchmark themselves against the market place. Additionally, this will lead to the fact that suppliers will get clear information regarding the question why have they not been awarded the contract. Furthermore, an electronic auction will lead to fair results, as by strictly objective standards "the best in class" will obtain more business. Moreover, due to the increased level of transparency as well as clarity resulting from the partly computer based estimation system, inefficient suppliers will immediately appear and thus eliminated quicker.

Electronic auctions are, as well as dynamic purchase systems, used only to a very small degree. According to the report of PwC drafted for the Commission its percentage of total use amounts to 0,6 per cent.⁸⁰ Obviously, a possible explanation could be, as is the case for dynamic purchase systems, the uncertainty regarding data integrity. Thus, it is seldom used on the basis of security concerns.

5. Framework agreements

A framework agreement is an arrangement in which purchasers and providers agree on the terms on which specific purchases may or will be made over a period of time.⁸¹ They are not to be considered as an award procedure, but represent a a specific variation of the normal procedures under the

⁷⁶ Art . 54 (7)(a) of Directive 2004/18/EC.

⁷⁷ Art . 54 (7)(b) of Directive 2004/18/EC.

⁷⁸ Art . 54 (7)(c) of Directive 2004/18/EC.

⁷⁹ Art 54 (8) of Directive 2004/18/EC.

⁸⁰ *'Public Procurement in Europe, Cost and Effectiveness'*, a study on procurement regulation prepared for the European Commission (2011), p. 25.

⁸¹ Arrowsmith, p 213.

directives normal procedures.⁸² The exercise of a framework agreement is especially recommendable in situation in which a contracting authority has recurring or continuing needs to purchase certain products or service.⁸³ This will be even more so in situations where the contracting authorities do have no specific knowledge with regard to quantity and timing of their requirements.⁸⁴ There are two basic categories of framework agreements. One would be a single-supplier framework which can take the form of a binding contract or result from the setting up of terms of future contracts between the contracting authority and the respective party. Regarding the latter, a legal commitment will be undertaken only in case an actual order is made.

The other alternative is called a multi-supplier contract which involves an initial competition in order to select several potential suppliers. Based on that selection, the contracting authority will in case of an arising requirement choose from that list of prior selection one of the potential framework suppliers to fulfil the order. In comparison to the single-supplier framework, here the entity may choose the best supplier for each order, while again a new procedure. Moreover, it is also able to ensure a better security of supply and remains more flexible.⁸⁵

The provisions of the public sector directive expressly authorise the use of framework agreements while at the same time regulating the conditions for their application in order to ensure transparency as well as a sufficient degree of competition.

Art 1(5) provides a definition of framework agreements which is valid for the both types thereof mentioned above. In Art. 32 (1) framework agreements are expressly authorised. According to Art. 32 (2) entities shall follow the normal rules of the directive up to the moment of the award of a contract.

With regard to multi-supplier frameworks, Art. 32 (4) sets up the requirement that at least three framework suppliers shall be selected. Subsequently, it states that for each order the winner may either be selected based on the original tenders, meaning that no new competition will be commenced or through reopening competition under a “ mini – tender procedure ”. Based on the selection of suppliers, all framework suppliers shall then be invited to the mini – tender. During the course of that procedure, original tenders may be adapted to the particular requirements of the respective situation.

⁸² ‘*Public Procurement in Europe, Cost and Effectiveness*’, a study on procurement regulation prepared for the European Commission (2011), p.22.

⁸³ Arrowsmith, p 213.

⁸⁴ Arrowsmith, p 214.

⁸⁵ Arrowsmith, p 214.

According to Art 32 (2) a procuring entity shall not add new suppliers to a framework agreement during its time of existence resulting in the fact that, once established, a framework agreement constitutes a “closed system”.

Dealing with the control of such agreements, framework agreements shall not exceed a time frame of four years, “save in exceptional cases”⁸⁶. The latter is also to be observed in the case of a dynamic purchase system. Regarding both, the presence of an exceptional situation will be evaluated by considering the circumstances of the case in question as well as the subject being procured.

Another aspect with regard to the admissibility of framework agreements is that they shall in no way restrict or distort competition.⁸⁷

As for determining whether the relevant thresholds have been exceeded, Art. 9 (9) states that the value of contracts is the maximum estimated value of all the contracts envisaged under the framework agreement, which is a rule that is also valid with regard to utilities.

The reason to opt for a framework agreement is to enable the respective parties to establish the terms regarding future transactions in advance of specific orders in order to speed up procedures and reduce costs when it comes to actually placing the order. This amounts to effective procurement as it provides flexibility for the total duration of the agreement and is therefore to be seen as an advantage of framework agreements. However, there are also downsides to the use of these agreements. Following the above, it is to be seen that a framework agreement is, after it was established, a “closed system” as it does not allow for new suppliers to enter into the agreements after it has been put in place. This is a huge difference in comparison to dynamic purchase systems as seen above. Another disadvantage in the exercise of a framework agreement is the fact that the parties may under no circumstances make substantial changes to the terms in the framework agreement. This shall be particularly so in the case of a framework with single operators.⁸⁸ Due to the fact that, regarding framework agreements, usually a longer period of time will elapse before the award of a contract this limitation is even more complicated than it is for other options of awarding contracts to suppliers. However, non –substantial changes seem to be possible under a framework agreement as Art 32 (3) seems to be subject to that possibility.⁸⁹

⁸⁶ Art. 32 (2) of Directive 2004/18/EC.

⁸⁷ Art. 34 (2) of Directive 2004/18/EC.

⁸⁸ Art. 32 (2) of Directive 2004/18/EC.

⁸⁹ Arrowsmith, p. 215.

According to the PwC report framework agreements are used for about eleven per cent of all contract award notices⁹⁰ thereby becoming by far the most frequently used technique available under the public sector directive. As a result, it is to be seen that framework agreements are used much more frequently than dynamic purchase systems as was pointed out above. At first sight, this might seem surprising as dynamic purchase system do represent an open system whereas in contrast to that framework agreements are rather a closed system once they have been established. Consequently, a dynamic purchase system does offer even more flexibility than a framework agreement. After all, this manifests the reluctance of contracting authorities to make use of electronic means.

IV. The new directive proposal and the changes within procurement procedures

With regard to the proposal for a new directive regarding the public sector⁹¹, one of the major goals to be achieved was an increase of efficiency of public spending. In order for that to be accomplished the proposal envisages to put in place simpler and more flexible procedures in the field of public procurement. Following changes are to be observed:

- 1) When a contract is awarded by a restrictive or a competitive procedure, contracting authorities may use the PIN as a call for a tender without publishing a further contract notice.⁹² Such an approach would generally decrease the time framework of those procedures.
- 2) Moreover, the time limit for receiving tenders within the open procedure is reduced to 40 day (currently 52) and the accordant limits within the restricted procedure to 30 and 35 days (currently 37 and 40 days).⁹³
- 3) A new procurement method which is called “the innovation partnership” (Art.29) is planned to be introduced aiming at giving contract authorities that want do develop together with a partner services or works currently not presented on the market an opportunity to do so. It will facilitate activities in the areas of R&D, new technologies and health care while contributing to a better regulated and thus more efficient procurement procedures

Regarding any substantive changes, most of the current procedures and the conditions for their application have been kept. Yet, one significant change has been made: the negotiated procedure

⁹⁰ ‘*Public Procurement in Europe, Cost and Effectiveness*’, a study on procurement regulation prepared for the European Commission (2011), p.22.

⁹¹ Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0896:FIN:EN:PDF>> (last visited 31.05.2013).

⁹² See Art 24 (2) and Art. 46 (2) of the new proposal.

⁹³ See Art. 25 (1) and 26 (1) and (2) of the new proposal.

with a prior publication of contract notice has been abolished and instead a new “competitive procedure with negotiations” has been introduced.⁹⁴ In this context, Art. 27 (6) should be highlighted because it states that “any new or revised tenders shall be submitted upon a common deadline”. On the one hand that seems to be limiting the opportunity for extensive negotiations. However, effectiveness is also dependent upon cost issues. By including this common deadline, costs may very well be lowered to a certain degree. Yet, the most important aspect of this change constitutes the fact that the authority would not be allowed to choose a tender already during the negotiating phase but will have to call for submitting of final offers which then have to be evaluated. Hence, the transparency and equal treatment concerns inherent to the current Art. 30, i.e. the negotiated procedure with a notice, have been met while still paying attention to the need for negotiations with private parties in certain cases. What is more, the delimitation between the new competitive procedure with negotiations and the Competitive Dialogue seems to be even clearer now. The first will namely be used in cases where the open and restricted procedures were not successful due to the fact that no bidder could exactly understand and satisfy the requirements of contract authority. Yet, as mentioned above, the level of transparency and equal treatment will be the same as within the Competitive Dialogue because a final call for tenders is required.

As for the negotiated procedure without a prior publication of a notice, it will remain part of the procurement legal framework, thereby recognising once again the need for derogation from important procurement principles in exceptional cases where other values are at stake. Finally, the current situation as to contracts awarding additional works or services has been changed. The 50 per cent limit of Art. 31 (4) have been abolished and instead now the basic procurement project shall indicate the extent of possible additional work and services and the conditions under which they will be awarded. As a result the flexibility of the contracting authorities will be sufficiently decreased because they will be allowed to procure additional works without starting a new procedure only in case that these works were foreseeable and thus referred to already during the initial procedure. Yet, probably this change will lead to more transparency and genuine competition also within this procedure.

V. Conclusion

With regard to the classic procedures, relying on the empirical data shown above, it is clear that preferences vary in the different Member States of the Union. Thus, it could be assumed that this is the reason why there is a free choice between the open and the restricted procedure.⁹⁵

⁹⁴ Art. 27 of the new proposal.

⁹⁵ Heijboer and Telgen, ‘Choosing the open or the restricted procedure : A big deal or a big deal?’, *Journal of Public Procurement*, Volume 2 , Issue 2, p. 212.

As the European legal framework offers flexibility regarding the choice of procedures, contracting authorities should make use of that flexible approach in order to award contracts efficiently. However, in order to be efficient in the award of contracts it is necessary that choices for a specific procedure should rely on the right criteria as set out above. They should always consider the expected level of market competition, time issues as well as the expected tendering costs. Taking that for granted, the flexibility towards the use of the classic procedures seems to be an auspicious approach.

Considering the competitive dialogue and the negotiated procedures, one has to be aware of the problems inherent within these procedures relating to the principles of transparency and equal treatment. As a result, these procedures are only to be used in specific situations as pointed out above. However, it was illustrated during the course of this paper that those procedures are necessary as they simply come along with advantages that lead to the fact that their applicability regarding certain situations will be indisputable. It remains however important to strike the right balance between the need for negotiations in certain cases and the principles of transparency and equal treatment. In this context, the new proposal for a directive manages to achieve such a balance by keeping the exceptional procedures next to the classic ones, yet making their use dependant on even stricter conditions and requiring a final submission of tenders within every process of negotiations.

As for the additionally available methods and techniques under the public sector directive, the hesitation of contracting authorities regarding electronic means of awarding a contract has been manifested. It was shown that even though dynamic purchasing systems as well as the method of electronic auctions offer great advantages for both suppliers and contracting authorities they are almost never used in practice. With regard to that, it will be interesting to see how those techniques will develop in the future, especially considering the looming new directive.

In contrast to that, framework agreements are by far the most frequently used technique in procurement matters. They facilitate a more effective procurement as they speed up procedures and reduce costs. However, as framework agreements are rather static in comparison to dynamic purchasing systems, it appears that dynamic purchase systems would be, if used more frequently, even more beneficial to contracting authorities than framework agreements.

Considering the prior information notice, it appears that it leads to the shortest possible time limits available without the necessity of justification which is necessary for the applicability of the accelerated procedure. As the applicability of the accelerated procedure will be interpreted

restrictively, prior information notices seem to be the easiest way of reducing time frames. The use of prior information notices will probably become even more attractive under the new directive as was outline before.

Finally, the marginal substantive changes regarding the procedural framework of EU public procurement law which are to be implemented if the new proposal for a public service directive comes into force, constitute one of the strongest arguments for the sufficiency of the current procedures. The already existent procurement tools are namely multifaceted and allow the authorities to deal effectively with various problematic situations while at the same time preserving the main objectives and principles of EU law. Hence, the most important advantage of the present system is its variety and flexibility and the only disadvantage – an eventual inappropriate choice of the procedure to be followed in a particular case.

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