COLLECTION

ADMINISTRATIVE LAW
DROIT ADMINISTRATIF

DIRECTOR JEAN-BERNARD AUBY

EU Public Contract Law

Public Procurement and Beyond

Editors:
Martin TRYBUS
Roberto CARANTA
Gunilla EDELSTAM

bruylant

CHAPTER 3
Classic Procurement Procedures: Open, Restricted, Negotiated

Julio González García

1. Introduction

The general procedures for the award of public contracts, both those known as 'classic' and those under the 'new procedures' – which shall be examined in the following Chapter 4 of this book – constitute the essential element in ensuring adequate performance for the contracting authorities, and as a result, for the general interest, given that they determine the form and the conditions of the contract to be concluded at the end of the award procedure. Moreover, and it is submitted that this is less important in qualitative terms, they constitute a crucial element in safeguarding the internal market, in so far as where the procedures are conducted properly, this will allow fair and open competition between the economic operators interested in providing the service to the contracting authority.

The Public Sector Procurement Directive envisages three procedures which may be defined as *classic* and which depend on the number of operators able to make their bids to the contracting authority – these would be the open, restricted, and negotiated procedures – and three *new* procedures – which would be competitive dialogue, framework agreements (which are often used by central purchasing bodies), and dynamic purchasing systems. Furthermore, these are the only procedures that may be used by contracting authorities in the EU, which may not resort to procedures which are not provided in the Directive: In deciding on an infringement action brought against France, the Court of Justice has held that:

> "Whilst it is true that Directive 2004/18 does not seek to establish complete harmonization of the rules governing public procurement in the Member States, the fact remains that the procedures for the award of public contracts that the

Member States are permitted to use are listed exhaustively in Article 28 of that directive."(1)

This Chapter examines the three classic procedures, the new procedures will be analysed in the Chapter Four.

There are therefore six procedures, sharing certain common principles which are set forth in Article 2 of the Public Sector Directive, pursuant to which the contracting authorities ensure 'equal treatment, non-discrimination, and transparency'. We shall return to this point in the next section.

As may be seen, the Public Sector Directive gives a prominent place to the economic operators, regulating their legal situation and how contracting authorities are to treat them in choosing their contractual partners. As a result, the overwhelming importance of competition concerns can be felt throughout the Directive. This is something that is to be expected in Directives that have the basic objective of regulating the procedure for awarding contracts. Other substantial aspects of the public procurement regime (such as which authorities are competent with reference to which procurement, or the warranties given by the suppliers), are left to be ruled by national provisions since they do not affect the functioning of the internal market. Facilitating cross-border procurement is indeed the reason for the promulgation of Directives of this kind for the harmonization of public procurement.(2)

The relevance of competition concerns in public procurement law is reflected throughout all the rules of award procedures. This is evident for instance in the rules on technical specifications and on performance conditions. All those aspects define what the contracting authority seeks to obtain from a public contract and how involved it is willing to be in the execution of the contract. It is precisely for this reason that the case law has held that it is compulsory for the technical specifications, and for the general and special administrative clauses, to be non-discriminatory.(3)

Lastly, it would be convenient to point out that public authorities have reached a significant degree of sophistication in their public procurement procedures. As already stated, with reference to the application of the principle

(1) Case C-299/08, *Commission* v. *France* [2009] ECR I-11587, paragraph 28; the Court clarifies the meaning of Joined Cases C-27/86 to C-29/86, *CEI and Bellini* [1987] ECR 3347, which France had referred to argue for a residual freedom of Member States to have different and alternative procedures.

(2) See Recital 2 and Article 2 of Directive 2004/18/EC; see also Case C-454/06, *Pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraph 31: "It is clear from the case-law that the principal objective of the Community rules in the field of public procurement is to ensure the free movement of services and the opening-up to undistorted competition in all the Member States (see Case 26/03, *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 44)".

(3) See above Chapter 2.

of budgetary stability,(4) it is even possible to talk of certain legal-financial engineering in public contractual activities. This requires the mechanisms for controlling public activity to go deep into the nature of the contract in order to assess which award procedures are suitable for a given contract. Some cases in which the negotiated procedure has been applied amount to a clear example of a situation where more competitive procedures were not suited.

The award procedures for contracts tend to give rise to complex case-files. Arguably, the challenge now facing European legislators is how to simplify procedures in order to allow awards to be made more rapidly.(5) This is a question concerning the effectiveness and efficiency of public procurement,(6) and it should not conflict in any way with the sustainability clauses contained in public procurement, given that procurement is also a mechanism for implementing public policies, such as environmental and social policies.(7)

In this introduction we should not overlook the sociological fact which even the Court of Justice has referred to: the difficulty involved in enforcing the public procurement Directives. The increase in the number of contracting authorities, some of which are very small and with poorly-qualified staff, the difficulties that sometimes arise in determining whether or not a particular service, and as such, a particular contract, falls within the scope of application of the Directive, and lastly, an uneven level of awareness of the specific legal problems involved in procurement on the part of the same contracting authorities, all make the enforcement of public procurement legislation rather complicated. This is not an excuse, obviously, but it does explain some of the events that have occurred.(8) It might also be for this reason that the 2004 Public Sector Directive has come a long way towards codifying the case law of the Court of Justice, given that many contracting authorities were even less aware of this case law.

2. *General principles in the award of contracts*

According to Article 2 of the Public Sector Directive, "contracting authorities shall treat economic operators equally and non-discriminatorily and shall

(4) González García, Julio, *Financiación de infraestructuras públicas y estabilidad presupuestaria*, Valencia, Tirant lo Blanch, 2007.

(5) Simplification is again among the aims behind the proposal for a new Public Sector Directive: COM(2011) 896 final.

(6) Green Paper on the Modernisation of EU public procurement policy Towards a more efficient European Procurement Market COM/2011/0015 final

(7) See below Chapter 7.

(8) See the Case C-225/98, *Commission* v. *France* [2000] ECR I-7445, paragraph 89: "In any event, the French Government itself recognises that those criticisms by the Commission are well founded but submits that the infringements committed are essentially the result of the inexperience of the contracting authorities in question in applying the Community rules on the award of public contracts".

act in a transparent way". In the future, the authorities "shall act in a transparent and proportionate manner" (article 15.1). Beyond the specific rules that shall be examined on the following pages, these are the principles that inspire all procurement procedures, and as a result, they must be taken into account when planning the procedures, and above all, when applying them.(9) The next Directive affirms that "the design of the procurement shall not be made with the intention of excluding it from the scope of the Directive or of artificially narrowing competition" (article 15).

The principle of equal treatment in public procurement has been clarified by the Court of Justice in these terms:

> "in that regard, it must be borne in mind that the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition in the fields to which they apply and which lay down criteria for the award of contracts which are intended to ensure such competition".(10)

Each situation must be assessed in accordance with its special features:

> "[...]furthermore, it is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified".(11)

One of the fields in which the principle of equal treatment has arguably had most significance at the European level has been that of nationality. There has been an undeniable tension between the interests of the economic operators in expanding the scope of their activities, and those of some public bodies in keeping the taxpayers' money within their jurisdictions.(12) This question has

(9) See CARANTA, Roberto, « Transparence et concurrence », *in* NOGELLOU, Rozen – STELKENS, Ulrich (eds.), *'Droit comparé des contrats publics. Comparative Law on Public Contracts'*, Brussels, Bruylant, 2010, p. 145 ff.

(10) Case C-513/99, *Concordia Bus Finland* [2002] ECR I-7213, paragraph 81 and the case-law cited there.

(11) Joined Cases C-21/03 and C-34/03, *Fabricom* [2005] ECR I-1559 paragraph 27; the Court quotes (Case C-434/02, *Arnold André* [2004] ECR I-11825, paragraph 68 and the case-law cited there, and Case C-210/03, *Swedish Match* [2004] ECR I-11893, paragraph 70 and the case-law cited there.

(12) This ban on discrimination based on nationality does not preclude the requirement of a registration obligation, given that "it is conceivable that the contractor in question may have carried on an economic activity in the contracting authority's Member State capable of giving rise to debts for social security contributions and tax in that Member State. Such debts could arise not only from economic activities carried on in the course of performing public contracts, but also from activities outside that framework. In addition, even if that contractor has not carried on any economic activity in the contracting authority's Member State, it is legitimate for that State's authorities to wish to be able to satisfy themselves of that fact": Case C-74/09, *Bâtiments et Ponts Construction* [2010] ECR I-7271, paragraph 41. The next Directive say that "economic operators that, under the law of the Member State in which they are established to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the concession is awarded, they would be required to be either natural or legal persons" (article 22).

naturally been important at the European level, but it has also been noted within the Member States, although with an indirect perspective, in relation to the conditions for the performance of the contract. Possibly one of the fields in which this has become most noticeable has been in the introduction of social contract performance conditions, especially with regard to the recruitment of people who are unemployed; contracting authorities would prefer to see local people employed in the performance of the procurement contracts, but this puts strain on the principle of non-discrimination on the basis of nationality.(13)

For its part, the principle of transparency, as it has been defined by the Court of Justice, has an ancillary role compared to that of equal treatment and non-discrimination, in so far as it constitutes an instrument that allows the other two to be pursued. As defined in the *Universale-Bau* judgement,

> "[...] that obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed."(14)

The duty of transparency "requires the subject-matter of each contract and the criteria governing its award to be clearly defined."(15)

Transparency in public procurement is achieved through EU-wide publicity and advertisement of contracts above certain thresholds by means of publication of three types of notices in the Official Journal or the European Communities: Periodic Indicative Notices; Invitations to Tender; and the Contract Award Notice. Every contracting authority must make known their intention to award public procurement contracts during the forthcoming financial year, providing an estimate of the intended purchasing and giving the supply side the necessary time for planning and responding to future opportunities.

(13) GONZÁLEZ GARCÍA, Julio, « Sustainability and Public Procurement in the Spanish Legal System », *in* CARANTA, Roberto and TRYBUS, Martin (eds), *The Law of Green and Social Procurements in Europe*, Copenhagen, DJØF, 2010, p. 250 ff. The following Directive say that "the technical specifications drawn up by public purchasers need to allow public procurement to be open to the competition as well as to achieve objectives of sustainability" [paragraph 27].

(14) Case C-470/99, *Universale-Bau AG*, [2002] ECR I-11617.

(15) Case C-299/08, *Commission* v. *France* [2009] ECR I-11587. In this regard, Recital 39 of the Directive states that "Verification of the suitability of tenderers, in open procedures, and of candidates, in restricted and negotiated procedures with publication of a contract notice and in the competitive dialogue, and the selection thereof, should be carried out in transparent conditions. For this purpose, non-discriminatory criteria should be indicated which the contracting authorities may use when selecting competitors and the means which economic operators may use to prove they have satisfied those criteria. In the same spirit of transparency, the contracting authority should be required, as soon as a contract is put out to competition, to indicate the selection criteria it will use and the level of specific competence it may or may not demand of the economic operators before admitting them to the procurement procedure".

All contracts above the relevant thresholds are to be tendered, and the notice containing the invitation must include information on the award procedure and the award criteria for the contact in question. This invitation is the most important tool for the creation of transparent and public markets in the European Union.

The Contract Award Notice is a form of notification after the award of the contract of the successful tenderer and the price of its offer, as well as the reasons for its selection by the contracting authority.

3. Open, restricted, and negotiated procedures: general considerations

Open, restricted, and negotiated procedures are distinguished by the way tenderers submit their bids. More specifically, under Article 1 (11) (a) Public Sector Directive, "Open procedures" are "those procedures whereby any interested economic operator may submit a tender". Moreover, Article 1(11) (b) Public Sector Directive provides that "restricted procedures" are "those procedures in which any economic operator may request to participate and whereby only those economic operators invited by the contracting authority may submit a tender", and finally, Article 1 (11) (d) states that "Negotiated Procedures" are "those procedures whereby the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of these."

It is the responsibility of the contracting authority to determine which of these procedures is suitable for each particular contract. For this purpose, the Directive lays down two rules: first, one of referral, which states that the contracting authorities "shall apply the national procedures adjusted for the purposes of this Directive". The second, meanwhile, is more clearly defined, and characterizes the three procedures as one extraordinary and two ordinary procedures:

> "They shall award these public contracts by applying the open or restricted procedure. In the specific circumstances expressly provided for in Article 29, contracting authorities may award their public contracts by means of the competitive dialogue. In the specific cases and circumstances referred to expressly in Articles 30 and 31, they may apply a negotiated procedure, with or without publication of the contract notice."(16)

(16) Article 28 (2) of the Public Sector Procurement Directive.

Leaving aside the case of competitive dialogue to be discussed in Chapter 4,(17) the use of the negotiated procedure is limited only to expressly described cases, where this is expressly allowed in the Directive. The objective here is to examine the options provided by European law when it comes to determining which procedure is more suitable for each case.

A different approach is followed by Directive 2004/17/EC, Utilities Procurement Directive. Open, restricted and negotiated procedures are all general procedures, provided that a call for competition has been made;(18) consequently, recourse of the negotiated procedure without prior publication of a contract notice only is considered limited to exceptional cases.(19) Similarly, under Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security, contracting authorities are given the choice between open, restricted, and negotiated procedure with prior publication of a contract notice.(20)

4. Open Procedure

The first procedure to be discussed is the open procedure. Under Article 1 (11) (a) of the Public Sector Directive, "Open procedures" are: "those procedures whereby any interested economic operator may submit a tender". It might have been more sensible to have included in the definition an important factor, that the opportunity to submit tenders is restricted to those operators which, in accordance with national rules, are qualified to provide the good, service, or work to the contracting authority. As will be examined in Chapter 6, under Article 44 of the Public Sector Directive, the determination of these requirements must be proportionate to the special features, the complexity of performance, and the economic value of the contract. Too high qualification thresholds will run counter to the principle of the widest competition possible for any procurement contract.

The open procedure has the following characteristics: It is an ordinary tendering process, which means that it may be used in all situations, as opposed to the negotiated procedure, which is limited in its scope by prescribed situations. Any economic operator may submit a bid, without the need to be specifically invited to do so (other than by the contract notice), which distinguishes

(17) I have voiced my criticism concerning competitive dialogue in González García, Julio, *Colaboración público privada e infraestructuras de transportes. Entre el contrato de colaboración entre el sector público y el sector privado y la atipicidad de la gestión patrimonial*, Madrid, Marcial Pons, 2010.

(18) Article 40 (2).

(19) See Case C-250/07, *Commission* v. *Greece* [2009] ECR I-4369.

(20) Article 25.

the open procedure from the other two procedures. Similarly, there is no preliminary selection or prequalification stage and there is no short listing.

The contract type, qualification and award criteria are set by the contracting authority. No negotiation is possible with the contractor chosen according to this procedure. The rules governing the open procedure are a manifestation of the principle of competition within the field of public procurement and are based on the Europe-wide publication of the contract notice. The information provided ought to allow any interested operator to submit a bid, and this involves a requirement to offer them sufficient information regarding the aim of the contract and its conditions.

It should be borne in mind that the complexity of the contract does not just affect the requirements, but it is also binding in terms of the time limits operators are allowed to submit their bids, without prejudice to the minimum time limit stated in the Directive. This time limit may be restricted where, as from the date on which the notice is published, access to the documents concerning the procurement process is available electronically.

5. *The restricted procedure: general aspects*

As already mentioned, under Article 11(1) (b) Public Sector Directive, "restricted procedures" are those procedures in which any economic operator may request to participate and whereby only those economic operators invited by the contracting authority may submit a tender.

Basically, the restricted procedure is an ordinary tendering process together with the open procedure. This means that it can be used in all circumstances, given that there are no restrictions on its applicability. Only invited parties may put forward their tender; this means it is a two-stage procedure: one for putting forwards one's candidature and one for submitting one's bid. This way, the number of economic operators that may submit bids can be limited. Finally, as in the case of the open procedure, negotiations between the Public Authority and the contractor are not allowed.

The restricted procedure is divided into two stages: one whose aim is to determine which operators meet the requirements in order to be invited to submit bids, and a second stage which will allow the awarding of the contract to one of those who have been pre-selected and who have subsequently submitted their tender. To put this graphically, first the companies are selected and then the winner is chosen on the basis of the tender submitted. The first stage allows all parties who wish to participate and meet the necessary requirements

stipulated in the contract notice to send a request to participate. The second stage, limited to the pre-selected tenderers, will allow the best bid to be identified.(21)

The restricted procedure is suitable for awarding contracts of a higher degree of complexity. In these circumstances, the economic operators, having been pre-selected, are more eager to shoulder the costs related to drafting complex tenders since the limited number of competitors invited raises the chances of each of them being awarded the contract. At the same time, economic operators have not been pre-selected are at least spared the costs of drafting the tender. For contracting authorities it is easier and less costly to decide between a limited number of preselected candidates.

The relative curb on competition entailed by this procedure should be examined.

First of all, it is necessary to justify the reasons that give rise to the restriction on the number of operators. It should be borne in mind that, although in normal situations it will be the nature of the contract that justifies this, the reasons that justify the said restriction must be clear, linked to both the nature of the contract and to the possible conditions under which they are to be exercised.

The second pertinent aspect is that relating to the minimum number of operators invited to take part. It must be a number that allows a certain level of competition to be maintained between the operators. As has been stated by the Court of Justice, the said minimum number must be determined in accordance with the nature of the contract, the operators that are potentially capable to perform the contract, and the aim of the contract in question. In the same manner, should the minimum number of operators not be reached, the procedure might be allowed to go on given that

> "[...] if it were otherwise, the social need which the contracting authority has stated and defined and intended to meet by awarding the contract in question could not be satisfied, not because of a lack of suitable candidates, but on account of the fact that the number of suitable candidates was below that lower limit."(22)

The criteria for pre-qualification are of a compulsory nature and must be stated in the contract notice.(23) The invitation to candidates shall include information on how to access the contract specifications and the other contract documents, when they are made directly available by electronic means in accordance with Article 38 (6) of Public Sector Directive or, failing that, a

(21) See below, Chapter 5.
(22) E.g. Case C-138/08, *Hochtief and Linde-Kca-Dresden* [2009] ECR I-9889, paragraph 43.
(23) Case C-470/99, *Universale-Bau AG* [2002] ECR I-11617.

copy of the specifications or of the descriptive document and any supporting documents (Article 40 (2)).

Obviously this procedure is based, on the one hand, on the determination of a suitable number of candidates. The rulings of the Court of Justice on this point have sought to ensure that this does not become a method for stifling competition, such that any number below five has been found to be inadequate for the purpose of safeguarding the aims of the procedure.(24) Indeed, under Article 44(3) Public Sector Directive, in the restricted procedure the minimum number of suitable candidates to be invited to the negotiations is five, but in any event, the number of candidates invited shall be sufficient to ensure genuine competition.(25)

The second step in the pre-qualification is the choice among the candidates if their number exceeds the maximum number set by the contracting authority. According to the prevailing opinion, the contracting authority shortlists those economic operators who will be invited to tender by reference to the selection criteria it has defined for the award of the contract; these must refer to the business activity of the economic operators concerned, such as professional experience, solvency, material resources, or where appropriate, to particular determining factors affecting the personnel working for the company in accordance with the nature of the work.(26)

Having determined the candidates who are to participate in the next phase of the award process, the Directive emphasises that they shall be treated equally: pursuant to Article 40 Public Sector Directive:

> "In restricted procedures, competitive dialogue procedures and negotiated procedures with publication of a contract notice within the meaning of Article 30, contracting authorities shall simultaneously and in writing invite the selected candidates to submit their tenders or to negotiate or, in the case of a competitive dialogue, to take part in the dialogue".

(24) E.g. Case C-225/98, *Commission* v *France* [2000] ECR I-7445: "58. Furthermore, under the second subparagraph of Article 22(2) of Directive 93/37, the number of candidates invited to tender is, in any event, to be sufficient to ensure genuine competition. 59. It is true that Article 22 (2) of Directive 93/37 does not provide for a minimum number of candidates which the contracting authorities are required to invite where they do not opt in favour of fixing a range as provided by that provision. 60. However, if the Community legislature considered that, in the context of a restricted procedure and where the contracting authorities prescribe a range, a number of candidates below five is not sufficient to ensure genuine competition, the same must be true *a fortiori* in cases where the contracting authorities opt for inviting a maximum number of candidates. 61. It follows that the number of undertakings which a contracting authority intends to invite to tender in the context of a restricted procedure cannot ever be less than five".

(25) In case the number of suitable candidates is less than five Case C-138/08, *Hochtief AG* [2009] ECR I-9889, paragraph 42, can be referred to by way of analogy.

(26) See the discussion in Chapter 5.

It is possible that recourse to this procedure will be extended in the future, in so far as it respects the balance between the value of the contract and the costs of the procedure. Similarly, it allows a more accurate assessment of companies – in various aspects such as the stability of the workforce or even the level of recruitment of people with disabilities and compliance with sustainability requirements contained in contracts – and in this way it would allow the public interest to be better served.

6. The negotiated procedure

As already mentioned, "negotiated procedures" are "those procedures whereby the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of these" (Article 1(11) (d) Public Sector Directive). Reasons of efficiency and speed are the main justifications for resorting to this procedure (additional reasons applicable in given circumstances will be mentioned below). For this reason the two characteristics that define the procedure are exceptionality and informality, which results in a reduction in the requirements concerning publicity, participation, and the non-existence of a procurement method: the contract is configured by direct discussions and negotiations between the contracting authority and the contractor.

The negotiated procedure is the most flexible, the one having the less developed procedure (because it is not reasonable to have a formal one, when flexibility is required), and at the same time, it is the one that gives rise to most concerns from the point of view of the internal market. It is for this latter reason that recourse is restricted to special situations according to the accurately worded rules laid down in the Public Sector Directive.

These concerns are obviously more important in case of negotiated procedures without prior publication of a contract notice, since there is no a priori transparency measure. They still hold in case of negotiated procedures with prior publication of a contract notice, because it is feared that negotiation could be abused in favour of some of the participants, and especially to the benefit of domestic or local economic operators.

In fact, Article 30 of the Public Sector Directive sets out four situations in which the negotiated procedure with prior publication of a contract notice may be used. They are exceptional cases, and as a result, they may not be extended even by analogy.(27)

(27) Case C-160/08, 29 April 2010, *Commission* v. *Germany* nyr, paragraphs 82 ff: "However, such rights cannot, as such, be regarded as having a direct and specific connection with the exercise of official authority in the absence, on the part of the providers concerned, of official powers or of powers of

The first situation in which recourse to negotiated procedures with prior publication of a contract notice is the case of bids put in an open or restricted procedure or in a competitive dialogue which all turn out to be irregular or inacceptable. This is the case, for instance, in situations where bids are submitted by applicants who do not have the necessary capacity because they do not meet high requirements set by the contracting authority, or who infringe conditions put on the possibility to submit variants, or who submitted abnormal or disproportionate tenders. To avoid abuse, the original terms of the contract are not to be substantially altered, and only all of the tenderers who satisfy the qualification criteria and have submitted tenders in accordance with the formal requirements of the tendering procedure, are to be invited.

The second case refers to the impossibility of setting an overall price. This may be the situation for instance with maintenance and upgrading contracts for a building where the magnitude of the works to be done can be identified only during the works themselves. The third situation is similar to the one just mentioned, and it refers to services, including intellectual services, whose nature is such that contract specifications cannot be established with sufficient precision to permit the award of the contract.

Finally, recourse to negotiated procedures with prior publication of a contract notice is allowed for works which are performed solely for purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs.

A longer list of cases justifying use of the negotiated procedure without prior publication of a contract notice is to be found in Article 31 of the Public Sector Directive. Three cases are relevant for works, supplies, and services procurement, while numerous other cases apply to only some of the contracts just mentioned.

The first of the three hypotheses of general application is the case where no tenders, no suitable tenders, or no applications have been submitted in response to an open procedure or a restricted procedure; it is not immediately clear what the difference is between a non-suitable and a non-acceptable tender,

coercion falling outside the scope of the general law for the purposes of ensuring that those rights are observed, which, as the parties agree, is within the competence of the police and judicial authorities (see, to that effect, *Commission* v. *Italy*, paragraph 39, and *Commission* v. *Portugal* paragraph 44). Nor can matters such as those raised by the Federal Republic of Germany – concerning special organisational powers in the field of the services delivered, the power to request information from third parties and the deployment of other specialist services, or even involvement in the appointment of civil service administrators in connection with the services at issue – be regarded as reflecting a sufficiently qualified exercise of official powers or of powers falling outside the scope of the general law. As the Federal Republic of Germany also asserted, the fact that the provision of public ambulance services entails collaboration with the public authorities and with professional staff on whom official powers have been conferred, such as members of the police force, does not constitute evidence that the activities of those services have a connection with the exercise of official authority either (see, to that effect, *Reyners*, paragraph 51)".

as referred to in Article 30 (1) (a).(28) The proposed definition for 'not suitable tender' in the proposal for a new Public Sector Directive is therefore to be welcomed. In any case, here again the initial conditions of contract cannot be substantially altered to avoid abuses of the negotiated procedures. At the same time, if the conditions are not changed in any significant way, it is improbable that any economic operator will be interested if no one answered the initial call for competition.(29)

The second case refers to single source procurement in case of technical or artistic reasons and when there is not competition for technical reasons or the protection of exclusive rights. It is to be recalled that under Article 23 (8) of the Classic Sector Directive, reference to the technical specifications to a specific make or source, or a particular process, or to trade marks, patents, and so on, is allowed on an exceptional basis only, where a sufficiently precise and intelligible description of the subject-matter of the contract is not possible; moreover, such reference shall be accompanied by the words "or equivalent". Therefore, recourse for the negotiated procedure, without publication of a contract notice under this hypothesis, is permitted only in situations where either the contracting authority can show that there is no functional alternative to the specific work, good, or service it intends to procure,(30) or for artistic reasons. The latter condition seems flexible enough to allow wide discretion to the contracting authority, but of course aesthetic merit is not relevant with reference to most procurements.(31)

The last case of general application refers to urgency situations. To prevent abuses, urgency is narrowly defined: it must be extreme; brought about by events unforeseeable by, and in any case, not attributable to the contracting

(28) In Case C-250/07, *Commission* v. *Greece* [2009] ECR I-4369 paragraphs 43 ff, the Court of Justice held that tenders not in conformity with the technical specifications were not suitable rather than irregular.

(29) To the effect that, by analogy with the Court's dicta regarding the renegotiation of contracts already awarded (see Case C-454/06, *Pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraph 35), the amendment of an initial contract condition can be regarded as substantial "inter alia, where the amended condition, had it been part of the initial award procedure, would have allowed tenders submitted in the procedure with a prior call for competition to be considered suitable or would have allowed tenderers other than those who participated in the initial procedure to submit a tender", see Case C-250/07, *Commission* v. *Greece* [2009] ECR I-4369, paragraph 52.

(30) Joined cases C-20/01 and C-28/01, *Commission* v. *Germany* [2003] ECR I-3609: "Article 11 (3) (b) of Directive 92/50 cannot apply unless it is established that for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, only one undertaking is actually in a position to perform the contract concerned. Since no artistic reason, nor any reason connected with the protection of exclusive rights, has been put forward in this instance, it is appropriate solely to ascertain whether the reasons relied on by the German Government are capable of constituting technical reasons for the purposes of Article 11 (3) (b)" (§ 59)

(31) See by analogy Article 53 (1) (a) Classic Sector Directive, under which aesthetic characteristics need to be linked to the subject matter of the contract.

authority; and finally, respecting the time limit foreseen for the other procedure will cause undue delay.

An interesting case concerned the direct award by the Italian Home Office of helicopters for fighting fires. Italy claimed urgency was the reason for the use of the negotiated procedure without the prior publication of a contract notice. The Commission countered that fires were hardly unforeseeable in Italy during the summer months. The Court of justice did not address the merits of the case because of a procedural ground. Advocate General Jacobs however considered that, while the Commission's submission was in general accurate, the summer in question had seen exceptional temperatures and consequent fires, which went beyond what was usual, and therefore recourse to direct award was justified.(32)

Under Article 44 (3) Public Sector Directive, in the negotiated procedure with prior publication of a contract notice, the minimum number of suitable candidates to be invited to the negotiations shall be three; in any event, the number of candidates invited shall be sufficient to ensure genuine competition. The Court of Justice has held that where the number of suitable candidates is below the lower limit prescribed for the procedure in question, "the contracting authority may, nevertheless, continue with the procedure by inviting the suitable candidate or candidates to negotiate the terms of the contract".(33)

Besides these situations which generally allow recourse to the negotiated procedure without publication of a contract notice, Article 31 (2) to (4) Public Sector Directive provides a considerable list of additional grounds which may apply depending on the nature of the contract (works and/or supplies and/or services).

The reasons for derogation to the general rules on competitive award of public procurement contracts are different for different hypothesis. For instance, in the case of supplies quoted and purchased on a commodity market (Article 31 (2) (c)) there is not even derogation to the said principle: here the competitive working of a commodity market takes the place of the competitive award. A special chance to save money is behind the possibility to purchase supplies from either a supplier, who is definitively winding up its business activities, or the receivers or liquidators of a bankruptcy and similar (Article 31 (2) (c)).

Detailed rules have been enacted for the award of additional contracts through negotiated procedures without prior publication of a contract notice. On the one hand, when satisfied with what they have got, purchasers – and not just contracting authorities – would naturally stick to the same contractor

(32) Case C-525/03, *Commissione* v. *Italy* [2005] ECR I-9405, paragraphs 64 ff.
(33) Case C-138/08, *Hochtief AG* [2009] ECR I- 9889, paragraph 42.

time after time. As it is often the case, what is usual practice with reference to private purchasing does not necessarily go well with public procurement, and especially so with public procurement in Europe, where the legislation aims at opening up procurement markets traditionally fragmented along national lines. This is why the provisions on the award of additional contracts are somewhat permissive, but at the same time lay down clear limits.

Concerning public supply contracts, under Article 31 (2) (b), direct award of additional contracts to the original supplier is allowed when a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; however, the duration of such contracts as well as that of recurrent contracts may not exceed three years.

The corresponding provision in the old Directive 93/36/EEC coordinating procedures for the award of public supply contracts was considered by the Court of Justice in an infringement case brought against Italy.(34) Italy used to award directly to Agusta SpA, contracts for the purchase of helicopters to meet the requirements of its military and civilian corps. Among the defense raised by Italy was the requirement for homogeneity of the fleet of helicopters; the Italian government maintained that, having regard to their technical specificity, the manufacture of the helicopters in question could be entrusted only to Agusta. It further contended that this was necessary to ensure the interoperability of its fleet of helicopters, in order, particularly, to reduce the logistic, operational and pilot-training costs. The Court reasoning was not so much focused on the applicable provisions, but turned on the burden of proof in infringement procedures. According to the Court:

> "the Italian Republic has not discharged the burden of proof as regards the reason for which only helicopters produced by Agusta would be endowed with the requisite technical specificities. In addition, that Member State has confined itself to pointing out the advantages of the interoperability of the helicopters used by its various corps. It has not however demonstrated in what respect a change of supplier would have constrained it to acquire material manufactured according to a different technique likely to result in incompatibility or disproportionate technical difficulties in operation and maintenance".(35)

The approach to additional contracts is even more restrictive with reference to additional works or services. Under Article 31 (4), direct award to the original contractor is possible in two cases only. The first case concern additional

(34) Case C-337/05, *Commission* v. *Italy* [2008] ECR I-2173; see the case note by Trybus, Martin, in *Common Market Law Review, 2009*, p. 973.
(35) Paragraph 59.

works or services not included in the initial contract but which have, through unforeseen circumstances, become necessary for the performance of the works or services described therein. Even so, direct award is possible only if a) the additional works or services cannot be technically or economically separated from the original contract without major inconvenience, or b) although separable, they are strictly necessary for its completion; in both circumstances, however, the aggregate value of contracts awarded for additional works or services may not exceed 50 % of the amount of the original contract. The second hypothesis refers to new works or services consisting of the repetition of works or services similar to those awarded an original contract. In this case, however, the additional works or services must be in line with a basic project for which the original contract was awarded according to the open or restricted procedure; the possible award of additional contracts was already foreseen in the notices having led to the award of the original contract; the total estimated cost of subsequent works or services had been taken into consideration for calculating the threshold, and finally the usual three years limit following the conclusion of the original contract applied.

The Court of Justice has consistently held that these are exceptional conditions, and as a result, their application is restrictive. This in turn means that when it comes to deciding upon the legality of recourse to negotiated procedure in any given case, the burden of proof rests with the contracting authority.(36) It also amounts to a duty which the Court of Justice consistently enforces. This is the case with regard to the substance of the exception, since the Court has on many occasions stuck to a strict reading of the conditions allowing recourse to

(36) By way of example, see Case C-394/02, *Commission* v. *Greece* [2005] ECR I-4713, paragraph 33: "it should, as a preliminary point, be noted that, as derogations from the rules relating to procedures for the award of public procurement contracts, the provisions of Article 20 (2) (c) and (d) of Directive 93/38 must be interpreted strictly. Also, the burden of proof lies on the party seeking to rely on them (see, to that effect, in the context of Directives 71/305 and 93/37, Case C-199/85, *Commission* v. *Italy* [1987] ECR 1039, paragraph 14; Case C-57/94, *Commission* v. *Italy* [1995] ECR I-1249, paragraph 23; and Case C-385/02, *Commission* v. *Italy* [2004] ECR I-8121, paragraph 19)"; Case C-385/02, *Commission* v. *Italy* [2004] ECR I-8121, "19. The provisions of Article 7 (3) of the Directive, which authorise derogations from the rules intended to ensure the effectiveness of the rights conferred by the EC Treaty in relation to public works contracts, must be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances (see, to that effect, Case C-57/94, *Commission* v. *Italy* [1995] ECR I-1249, paragraph 23, and Case C-318/94, *Commission* v. *Germany* [1996] ECR I-1949, paragraph 13). 20. Accordingly, the Italian authorities must prove that technical reasons made it necessary to award the relevant contracts to the contractor who was entrusted with the original contract (see, to that effect, *Commission* v. *Italy*, paragraph 24). 21. It is true that the aim of ensuring the continuity of works under complex projects which relate to the flood safety of an area is a technical reason which must be recognised as being important. However, merely to state that a package of works is complex and difficult is not sufficient to establish that it can only be entrusted to one contractor, particularly where the works are subdivided into lots which will be carried out over many years. 22 In the present case, the Italian Government has confined itself to referring in general terms to the contents of an opinion of the Public Works Authority, without providing the detailed explanations on which the need to use a single contractor could be based".

the negotiated procedure. For instance, in an infringement procedure against Greece, and with reference to the Utilities Directive then applicable, it stressed

> "As regards, first of all, Article 20(2)(c) of Directive 93/38, it follows from the case law that the application of that provision is subject to two cumulative conditions, namely, first, that there are technical reasons connected to the works which are the subject matter of the contract and, second, that those technical reasons make it absolutely necessary to award that contract to a particular contractor".(37)

In principle, the negotiated procedure is a summary procedure with limited formalism, and the aim and conditions of the contract being negotiated remain at the discretion of the contracting authority. Negotiation may cover all aspects of the contract, whether of a technical nature or even those of an economic nature.

Article 30 of the Public Sector Directive lays down a number of procedural rules for the negotiated procedure with prior publication of a contract notice which go beyond the publication of the notice. It is worth emphasizing that in normal situations, negotiations shall take place on the basis of the conditions that the public authority has specified in its contract notice, as is envisaged at Article 30 (2):

> "In the cases referred to in paragraph 1, contracting authorities shall negotiate with tenderers the tenders submitted by them in order to adapt them to the requirements which they have set in the contract notice".

Moreover, under Article 30 (3), during the negotiations, contracting authorities shall ensure the equal treatment of all tenderers. In particular, they shall not provide information in a discriminatory manner which might give some tenderers an advantage over others.

On the contrary, Article 31 of the Public Sector Directive on negotiated procedure without prior publication of a contract notice does not provide any procedural rule. The reason for this difference is difficult to understand. It is true that under Article 44 (3) of the same Directive, negotiated procedure with prior publication of a contract notice entails a choice between competing economic operators, at least three being necessarily invited to the negotiations. It is also true that a number of cases of negotiated procedure without prior publication of a contract notice are actually single source procurement, only one economic operator being contacted by the contracting entity. This is the case when exclusive rights do exist (Article 31 (1) (b)), or, when a public service contract follows a design contest and must, under the applicable rules, be awarded to the successful candidate (Article 31 (3)).

(37) Case C-394/02, *Commission* v. *Greece* [2005] ECR I-4713.

However, in many cases of negotiated procedure without prior publication of a contract notice, competition among economic operators is possible and even desirable and in some cases, expressly foreseen. Urgency (Article 31 (1) (c)), or the fact that the products to be supplied are manufactured purely for the purpose of research, experimentation, study or development (Article 31 (2) (a)) are not necessarily inconsistent with some form of competition among economic operators. Moreover, for public service contracts following a design contest it is the same Article 31 (3) to provide that, if they must, under the applicable rules, be awarded to one of the successful candidates, then all successful candidates must be invited to participate in the negotiations.

In such cases, the general principle of equal treatment, as specified in Article 30 (3) will be applicable by analogy, and also to negotiated procedures without prior publication of a contract notice.

7. Publication

As was stated at the beginning of this chapter, one of the basic principles behind the Public Sector Directive is transparency. Transparency is projected directly to the elements that the contracting authority must make public at the time the procurement procedure is commenced; a notice must be published in the Official Journal, in accordance with the provisions of Commission Regulation No 1564/2005 of 7 September 2005, establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council and the complementary rules of the Directive and the Regulations. Furthermore, the principle of the priority of European notices over national notices, confirmed by Article 36 (5) of the Public Sector Directive, should be recalled, pursuant to which

> "Notices and their contents may not be published at national level before the date on which they are sent to the Commission".

These are EU-wide rules on notices which must necessarily be applied to those contracts that exceed the different threshold laid down in the Directives with regard to the different kinds of public contracts. In this regard it must be borne in mind that the calculation of the estimated value of a public contract shall be based on the total amount payable, net of VAT, as estimated by the contracting authority. This calculation shall take into account the estimated total amount, including, according to Article 9 (1) of the Public Sector Directive, any form of option and any renewals of the contract. As it will be recalled, this provision, is echoed in Article 30 (4), with reference to negotiated procedures for the award of additional works or services to the original contractor.

Moreover, Article 39 Public Sector Directive provides that

> "[...] in open procedures, where contracting authorities do not offer unrestricted and full direct access by electronic means in accordance with Article 38(6) to the specifications and any supporting documents, the specifications and supplementary documents shall be sent to economic operators within six days of receipt of the request to participate, provided that the request was made in good time before the deadline for the submission of tenders".

In addition to this obligation there is a requirement to supply the complementary documents set forth at Article 39(2):

> "Provided that it has been requested in good time, additional information relating to the specifications and any supporting documents shall be supplied by the contracting authorities or competent departments not later than six days before the deadline fixed for the receipt of tenders".

In the future, the Annex VI of the Directive explain all the in to be included in the publications.

This rule envisages one of the most important elements in the configuration of the European market for public contracts, which is the transparency of all the elements of the contract.

Obviously, one of the elements that must be included within the contract notice is the description of the subject matter of the public contract, which must be set forth in full in the notice. Clear information as to the possibility to propose variants under Article 24 of the Public Sector Directive must be included in the contract notice. Therefore, a generic reference to national legislation will not be sufficient to allow a very generous submission of variants by the candidates for the contract.(38)

(38) Thus, with regard to one of the concessions awarded by the Kingdom of Spain under the previous Government, the Case C-423/07, *Commission* v. *Spain* [2010] ECR I-3429, held as follows: "It must be noted that, for the purposes of clarification of the requirements of a concession, it is sometimes inevitable that the notice or tender specifications refer to the national rules concerning the technical specifications on safety, health, environmental and other requirements. The fact that such a reference is possible cannot, however, enable the concession-granting authority to escape the advertising obligations laid down in Directive 93/37, pursuant to which the object of the concession must be defined in the notice and the tender specifications, which must contain the information referred to in paragraph 55 of the present judgment. Nor can it be accepted that it was necessary to interpret the notice or the tender specifications in the light of such rules in order to discern the true object of a concession. 65 That requirement must be interpreted strictly. Thus, the Court, in the context of a public works contract, has declared unlawful a reference from tender specifications to national legislation concerning the possibility that tenderers may submit variants of their tenders, in accordance with the first and second paragraphs of Article 19 of Directive 93/37, having regard to the fact that the minimum conditions which those variants were to meet were not specified in the tender specifications (see Case C-421/01, *Traunfellner* [2003] ECR I-11941, paragraphs 27 to 29). With regard to an obligation of transparency designed to ensure observance of the principle of equal treatment of tenderers, which must be observed in any procurement procedure governed by Directive 93/37, that finding of the Court is also valid as regards works concessions".

One question often arising in this area is that of the procedure to calculate whether or not a contract reaches the EU thresholds. It is precisely for this reason that the Court of Justice has established that it is compulsory to perform reliable calculations, which include the whole of the service to be provided, in order to avoid any improper evasion of the European rules governing public contracts.(39) This issue has also been addressed in the context of Chapter 1 on the scope of the Directives.

EU-wide publicity for the award procedures for contracts is initially based on the prior information notice published by the Commission or by the contracting authorities themselves on their "buyer profile". This notice must list the country and name of the contracting authority, the internet address of the buyer profile and any applicable CPV nomenclature reference numbers. Contracting authorities should not publish notices and their contents at national level before the date on which they are sent to the Commission for publication in the Official Journal.

Secondly, publicity entails the need that contracting authorities who wish to award a public contract or a framework agreement by open, restricted or, under the conditions laid down in Article 30, negotiated procedure with prior publication of a contract notice or, under the conditions laid down in Article 29, a competitive dialogue; shall make known their intention by means of a contract notice. Contract notices must be published in full in the official language of one of the Member States as chosen by the contracting authority, this original language version constituting the sole authentic text. A summary of the important elements of each notice must be published in the others official languages.

The date of the publication of the contract notice is relevant because from it, the time limits for submitting tenders in an open procedure or requesting to participate in a restricted procedure start running. Under Article 38 (8) of the Public Sector Directive, the time limits may be exceptionally shortened when urgency so requires.

(39) Thus, with regard to the reliability of the rules, the judgment in Case 271/08, *Commission* v. *Germany* [2010] ECR I-7091, is illustrative: "Furthermore, such a calculation would fail to observe the principle of legal certainty as, at the time when these various potential separate contracts are concluded, their individual value cannot even be estimated, in light of the impossibility of forecasting, even approximately, the proportion of employees wishing to participate in the salary conversion measure who will subsequently choose each of the undertakings concerned. Such a calculation, based on a purely mathematical division of the estimated total value of the contract by the number of separate pension insurance contracts envisaged, might thus result in all of those pension insurance contracts being removed from the field of application of European Union public procurement rules whilst it would subsequently turn out that the value of some of them reaches or exceeds the relevant application threshold because of the number of participating employees and the amount of the premiums paid to the undertaking concerned".

Finally, for the purposes of notice and, where appropriate, of challenging the contract, in accordance with the provisions of Article 35 (4) Public Sector Directive:

> "[...]contracting authorities which have awarded a public contract or concluded a framework agreement shall send a notice of the results of the award procedure no later than 48 days(40) after the award of the contract or the conclusion of the framework agreement".

Advertising aims at enabling a sufficient number of possible competitors to submit their bids in through the pertinent procedure. It is precisely for this reason that Article 38 (1) of the Public Sector Directive insists on the time conditions for this publication, such that:

> "When fixing the time limits for the receipt of tenders and requests to participate, contracting authorities shall take account in particular of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set by this Article".

This time frame will range from between 22 and 52 days minimum depending on the conditions for the procedure.

Article 36 (5) of the Public Sector Directive lays down the principle of compatibility between the European notice and the notice published nationally. Notices published at national level shall not contain information other than that contained in the notices dispatched to the Commission or published on a buyer profile in accordance with the first subparagraph of Article 35 (1) of the Public Sector Directive, but shall mention the date of dispatch of the notice to the Commission or its publication in the buyer profile.

Likewise, we should not forget that there is a complementary rule for those contracts that are not subject, or not fully subject to the application of the Procurement Directives. According to well established case law, if these contracts have a cross-border interest, the principle of non-discrimination and the ensuing duty of transparency require contracting authorities to publish prior notices of their intention to award any such contract.(41)

(40) 30 days in the forthcoming Directive.

(41) E.g. Case C-507/03, *Commission* v. *Ireland* [2007] ECR I-9777: "The Commission considers that the fact that the contract at issue in this case falls within the scope of Council Directive 92/50/EEC as amended by European Parliament and Council Directive 97/52/EC does not preclude the application of the principle enunciated in *Telaustria* deriving from the fundamental freedoms laid down in the Treaty and the application of general principles which are given specific expression in those fundamental freedoms. The obligation on Member States to comply with general principles is confirmed, within the Directive itself by Article 3 (2) (see above), a general obligation on contracting authorities to avoid all discrimination between service providers. That obligation is incumbent on the Irish authorities in respect of Annex 1B services just as much as in respect of Annex 1A services". It is submitted that the Commission's analysis is the only one which can be regarded as consistent with the internal market logic of the Treaty.

8. New Directives and classic procedure

The new Directives don't introduce importants changes in the basic regulation of the classic procedures. Open, restricted and negociated are well established standard procedures and the basic rules to them have not changed much over the time. And the new Directives introduce only a few changes in details of the regulations.

Actually, we can say that the new Directives assume the principals of the jurisprudencia of the ECJ. It should be noted that the most important changes are in social element of the procedure, that are studied in other chapter of the book.

9. Conclusions

Open, restricted, and negotiated procedures are the well established standard procedures for the award of contracts under the Public Sector Directive. The basic rules applicable to them have not changed much over time. Likewise, the exceptional character of the negotiated procedure has always been the cornerstone of EU public procurement law because of the limits to the full and open play of competitive forces such a procedure entails. With the 2004 Public Sector Directive, the rigidity of the open and restricted procedures has been compensated with the introduction of the competitive dialogue, a new – and exceptional – award procedure which will be analysed in the following chapter.

The proposal for a new Public Sector Directive is therefore instigating a revolution with the introduction of a competitive procedure for negotiation, which is a more procedurally articulated version of the old negotiated procedure of prior publication of notice. The proposed new procedure would be a 'general' procedure *au par* with the open and restricted procedure, allowing for more flexibility in the choice of the contractual partner. The more 'liberal' and different approach followed by Directives 2004/17/EC and 2009/81/EC thus seems set to become the accepted standard.

At the same time, reinforced procedural safeguards should assuage – but not necessarily dispel – the fears of distortions of the open and fair competition between economic operators linked to a wider recourse to negotiated procedures.

CHAPTER 4
New Award Procedures

François LICHÈRE(1)

1. Introduction

The present chapter relates to the previous one in the sense that it also deals with award procedures, however, it focuses on the new procedures introduced in 2004, i.e. competitive dialogue and framework agreements. Dynamic purchasing systems will also be considered as well as electronic auctions: institutions. Finally, we will look at the proposal for a new directive on public procurement issued by the European Commission.

Award procedures are not defined in Directive 2004/18/EC, or Directive 2004/17/EC. They can be simply defined at this stage as the different ways contracting authorities may follow under the Directives to award public procurement contracts above the European thresholds, i.e. to purchase goods and services likely to meet their needs.

The question of award procedures is clearly a technical one and many people – including specialists – may find it dry. There is no room to reflect on the transparency of the award criteria or on the potential use of public procurement to achieve secondary objectives such as innovation, environmental protection and social policies as these issues are related to the general rules on contract award rather than to rules specific to any award procedure. On the contrary, it often deals with the precise process of selecting the economically most advantageous offer, for example by setting minimum time limits for the receipt of requests to participate and for receipt of tenders or by dealing with possibilities of pre or post award modifications of the bids. However, behind each technical rule, the general objectives of transparency and equal treatment, and some specific ones such as flexibility, lay hidden and they require the reader's full attention to trace them.

It is generally understood that Directives 2004/18/EC and 2004/17/EC have set several new procedures compared to what existed in the 1989, 1992 and 1993 Directives. However, strictly speaking, only one award procedure

(1) Professor of Public Law, Aix-Marseille University, France.