

Tendering Procedures:
an update in light of the New Directives

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1. Introduction

The term 'procurement' refers to the function of purchasing goods or services from an outside body, which generally takes place through contractual arrangements.

The purpose of the European Union's public procurement policy is to attain fair and open competition for public contracts above certain thresholds, by allowing suppliers to gain the full benefit of the single market and contracting authorities to choose from a more competitive and wider range of bids. Transparency and equality of treatment are two important elements in the European public procurement process.

Many of you will be familiar with the much-heralded introduction of public private partnerships (PPP's) in Ireland. PPP's are forms of co-operation between public authorities and business set up, for example, in the public services sector or for the construction of large infrastructure projects. PPP's are seen as a potential spur to the economy and have developed in many areas of the public sector, such as transport, public health, education, public safety, waste management and water distribution. Many large scale infrastructure contracts have been put out to tender by the Irish Government such as the Luas line, Dublin Port Tunnel, educational infrastructure projects and for bypass roads and motorways that are currently under construction throughout the country.

But what of the legal procedures for practitioners involved in the PPP tendering process and the influence of European law on such procedures. This is governed by a well established European legal framework in respect of procurement of public contracts, which has been fully implemented in Ireland. However, on May 2004, nearly four years after the European Commission first put forward its package of amendments to simplify and modernize the public procurement regime, the European Parliament and the European Council of Ministers finally adopted two new Directives to replace the existing four directives in this area. These two new directives adopted on 31st March 2004 (**Directive 2004/18/EC of the European Parliament and the Council on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts Public Works, Supplies and Services Directive**) ("the New Directive") by the European Union introduced a new procedure called 'competitive dialogue', which appears to be particularly aimed at complex, large-scale projects. Interestingly, the other new directive (**Directive 2004/17/EC on the water, energy, transport and postal services sector**) ("the New Utilities Directive") did not implement this new "competitive" dialogue procedure.

The implications of these two new Directives in relation to their effect on the current tendering procedures applicable under the present Directives will be discussed

below. Member states have until 31st January 2006 to implement the changes introduced by these Directives.

2. Background to European Community Law relating to Public Procurement Rules.

The foundation of European Community law relating to public procurement rules can be found in the Treaty of Rome 1957, notably in those provisions which guarantee the free movement of goods, services and capital, establishing fundamental principles (equality of treatment, transparency and mutual recognition) and prohibit discrimination on the grounds of nationality¹. In addition, Article 163 guarantees that the Community support co-operation among undertakings, research centres and universities, inter alia to exploit the internal market “in particular through the opening-up of national public contracts”.

Much of this paper will look at the impact of the new Competitive dialogue introduced by the New Directive on tendering procedures. However, firstly the old Public Procurement Directives will have to be referred to.

3. The Old EU Public Procurement Directives

The Treaty provisions were rendered more effective by a series of detailed secondary legislation in the form of European Directives. Ireland does not have any binding domestic public procurement code and as such it relied upon the implementation of these Directives, by way of corresponding Statutory Instruments:

- **The Public Services Contracts Directive** - Council Directive 92/50/EEC (applicable to Services Contracts)
Implemented in Ireland - European Communities (Award of Public Services Contracts) Regulations 1993 (SI No. 173 of 1993);
- **The Public Supplies Directive** - Council Directive 93/36/EEC (covering Contracts for the purchase or hire of equipment and goods)
Implemented in Ireland - European Communities (Award of Public Supply Contracts)(Amendment) Regulations 1994 (SI No. 292 of 1994);
- **The Public Works Directive** - Council Directive 93/37/EEC (covering construction and engineering works)
Implemented in Ireland - European Communities (Award of Public Works Contracts)(Amendment) Regulation 1994 (SI No. 293 of 1994);
- **The Utilities Directive** - Council Directive 93/38/EEC (applies to “utility” companies operating in the sections of water, energy, telecommunications and transport sectors)

¹ See Article 12; Article 28 et seq.; Article 43 et seq. and Article 49 et seq. of the Rome Treaty.

Implemented in Ireland - European Communities (Award of Contracts by entities operating in the Water, Energy, Transport and Telecommunications Sectors) Regulations 1995 (SI No. 51 of 1995); and

- **The Remedies Directive - Council Directive 89/665/EEC (covers review procedures of procurement notes)**
Implemented in Ireland - European Communities (Review Procedures for the Award of Public Supply and Public Works Contracts) Regs, 1995 (SI 104/1993).

A further Public Procurement Directive 97/52/EC was adopted by the European Parliament and the Council of the European Union on the 13th October 1997. This was implemented in Ireland by the European Communities (Award of Public Services Contracts) Regulations, 1998 (S.I. No. 378 of 1998); the European Communities (Award of Public Supply Contracts) (Amendment) Regulations, 1998 (S.I. No. 379 of 1998); and the European Communities (Award of Public Works Contracts) (Amendment) Regulations, 1998. This Directive amended in different ways the Services Directive 92/50/EEC, the Supplies Directive 93/36/EEC and the Works Directive 93/37/EEC. The most relevant amendments were made in respect of procedures concerning the award notices, discrimination, debriefing requirements, disclosure, withholding information, and time limits.

Public Services, Supplies and Works Directives

The **Public Services Contracts Directive** covers contracts for public services, which means contracts in writing between a service provider and a contracting authority for the provision of a public service.

The **Public Supplies Directive** covers contracts in writing for the supply of public products involving the purchase, lease, rental or hire purchase, with or without the option to buy products between a service provider and a contracting authority.

The **Public Works Directive** covers public works contracts which are defined under Article 1 of the Public Works Directive as contracts which are concluded in writing which have as their object “either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work”. A work is defined as the outcome of building or engineering works taken as a whole that is sufficient in itself to fulfil an economic and technical function.

These sectors have now all been merged under the one **Public Works, Supplies and Services Directive** to remove anomalies.

Supplies, Services or Works?

It is not always easy to say which of these three Directives apply to a particular contract. Many large scale infrastructure projects may involve contracts which may be multi-faceted incorporating elements of public works, supplies and services. For example, if the contract involves an operational element, such as a contract for the

construction of a public transport system which involves the operation of the service after its construction, it could invariably be classified as both a services and supplies contract. As a result this renders the procedure less than clear.

For a supply and services contract the “relative value” of each element is the determinant. Therefore one should apportion the value of the contract between the different elements and the element with the highest value will indicate which of the Supplies or Services Directives will apply.

The Works and Services Directives do not give any indication in such circumstances which of the Directives should apply. For example, a PPP project for the construction of a clubhouse for a municipal golf course would involve elements of works (for the building) and services (involving the maintenance and running of the clubhouse). In this instance it is necessary to examine the main object of the overall contract as decided in the case *Hotelera International*³.

It is possible that a PPP project could be structured as a service contract and still be classified as a works or supplies contract. It is important to note however that the procedural requirements for works, supplies or services contracts under the Directives are quite similar and so the categorisation of a contract is not necessarily as critical as one might think.

The New Directive should remove some of these anomalies as the procedures are similar for all these areas whether they are Works, Supplies or Services.

Contracting Authorities subject to the Public Sector Directives

Each of the Services Directive, the Supplies Directive and the Works Directive apply to “contracting authorities” which are defined as:

“...the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law”.⁴

The Regulations apply to contracts awarded by the public sector in a wide sense. They apply not only to central government departments and local authorities but also to “bodies governed by public law”. The latter includes any organisation, which is established to meet the “needs in the general interest”, has legal personality and which is principally financed, supervised and appointed by the State or other public authorities.

Thresholds

³ C-311/92 of 19 April 1994.

⁴ Article 1(b) of the Services Directive, Council Directive 92/50/EEC. There is a non-exhaustive list of such bodies in Ireland set out in Annex 1 to the Works Directive 71/305/EEC.

⁵ Case 31/87 *Gebroeders Beentjes BV v Netherlands* [1988] E.C.R. 4635 and Case C-44/96 *Mannesmann Anlagenbau Austria v Strohalm Rotationsdruck GesmbH* [1998] E.C.R. 1-73.

⁶ Case C-306/907 *Connemara Machine Turf Co. Ltd. V Coillte Teoranta* [1998] E.C.R. 1-8761.

⁷ Case 31/87 *Gebroeders Beentjes BV v Netherlands* [1988] E.C.R. 4635.

Before the award of contracts is affected by the Public Procurement Directives the value of contracts must exceed the following thresholds, effective 1st July 2002 they are as follows:

- **e6,242,028 for works contracts** awarded by Government Departments and Offices, Local and Regional Authorities and other public authorities.
- **e162,000 public service contract for supplies and services contracts** applying to Government Departments and Offices.
- **e249,000 for supplies and services contracts** applying to Local and Regional Authorities and public bodies outside the Utilities sector.

These thresholds have not been materially changed under the New Directive.

Utilities Directive

The Utilities Directive covers contracts involving water, energy, transport and telecommunications and is concerned with those contracting authorities operating in the four sectors, water, energy, transport and telecommunications. Contracting authorities in these sectors largely operate in a commercial or quasi-commercial manner. In Ireland, the main bodies whose contracts are covered are the semi-State organisations and Local Authorities operating in these four sectors. Provisions in the Utilities Directive resemble those of the main Directives but they do allow for more flexible procedures as a result of the commercial nature of the bodies in question. This directive has been updated by the New Utilities Directive.

Remedies Directive

The Remedies Directive covers review procedures of procurement rules and is aimed at ensuring that review procedures are made available to any potential or actual tenderer for a contract who has been, or risks being, harmed by any infringement. These powers of review have been translated into statutory instruments in Ireland. For example, according to regulation SI No. 104 of 1993 implementing the Remedies Directive, the High Court has the power to review the award of a contract and does have the power to award certain remedies including: (i) declaring that a contract is void; (ii) order that the contract be varied; and/or (iii) award damages to any person who is harmed by an infringement of the public procurement rules. The European Commission also has the power to request an explanation from a Member State on any contract procedure in which it considers there has been a breach of Community procurement rules. The Member State has 21 calendar days in which to confirm that the breach has been either corrected; or give reasons why it has not been; or inform the Commission that the award of the contract has been suspended.

4. The Procedural Requirements

The old Directives established a framework whereby the tendering of certain projects could be carried out. These old EU Directives recognize three tendering procedures:

- **Open** - everyone is considered and any interested private sector contractor may tender. This procedure allows all interested private sector contractors to submit tenders in response to a notice in Official Journal of the European Communities advertising the existence of the project; and
- **Restricted** – any interested private sector contractor may submit a request for Prequalification, but only private sector contractors short listed by the contracting authority will be invited to submit tenders. The restricted procedure has been described as selective tendering because prospective tenderers are screened before being invited to tender. The restricted procedure is a tender procedure without the possibility of negotiation; and
- **Negotiated** – the contracting authority negotiates with the suppliers of its choice. This procedure is similar to the restricted procedure but allows for post tender negotiation. Only contractors short-listed by the contracting authority may submit proposals.

Under the open and restricted procedures the authority must choose among bidders on the sole basis of the written tenders that are submitted. The contracting authority discusses the tenders received of all the bidders¹⁰. In the case of PPP projects, detailed discussions and negotiations with bidders are necessary before deciding on one particular bidder. As a result, awarding authorities generally opt for the negotiated procedure.

Awarding authorities can always choose to opt for the open or restricted procedures, whereas a negotiated procedure may only be used in certain circumstances as laid out in the Directives (see below).

The negotiated procedure therefore is more suitable for PPP projects. There are two types of negotiated procedure:

- (i) negotiated procedure without prior advertisement (non-competitive negotiated procedure) capable of use in exceptional circumstances as set out in the Directives, such as absence of prior tenders, extreme urgency, additional services not originally tendered for; and
- (ii) negotiated procedure with prior advertisement (competitive negotiated procedure) capable of use in certain circumstances as set out below.

¹⁰ See the Statement concerning Article 7(4) of Council Directive 93/37/EEC of 14 June 1993, OJ [1994] L 111/114.

Contracting authorities involved in PPP's should be advised that the ECJ interprets the grounds for use of the negotiated procedure very narrowly.

In an Opinion on 13th September 2000 addressed to the UK Government,¹¹ the European Commission reprimanded the British Government for breaking the procurement rules over the use of the negotiated procedure in tendering for the PFI (the English equivalent of PPP's) deal for the redevelopment of the Pimlico School. The Commission stated that the contract did not, as determined by the British government, satisfy the criteria for use of the negotiated procedure, which should be used for a contract of an exceptional nature which, when considering the risks attaching to it, did not permit prior overall pricing. The Commission found that the use of the negotiated procedure should be limited to situations where the existence of any of the three contingencies under the Directives enabling the use of the negotiated procedure are concrete and can be proved by the awarding authority. These three contingencies under the Directives being:

- in exceptional cases, when the nature of the works or services, or the risks involved, do not permit prior overall pricing;
- in the event of irregular tenders in response to an open or restricted procedure; or
- when the nature of the service being contracted for, especially in the case of intellectual or financial services, is such that contract specifications cannot be established with sufficient precision to permit a contract to be awarded under the open or restricted procedures.

The Commission went on to point out that the procedure cannot merely cover the situations that involve risks that will normally be implied in any procurement contract. The Commission also decided that the type of works which may fall into this category includes highly innovative and complex works and where there is a possibility of finding archaeological vestiges at the site or where the geological character of the area is particularly unusual. In such cases the authority would be justified in opting for a negotiated procedure. The Commission stated that these circumstances did not apply in the Pimlico School's case and as such it concluded that the negotiated procedure was not permitted.

Following this Commission Opinion of 13th September 2000, the use of the most appropriate procedure for PPP projects, being the negotiated procedure, may be subject to doubts.

¹¹ The European Commission also sent a "reasoned opinion" to the UK government in respect of another negotiated procedure, which they found had breached the procurement rules, regarding the provision of community facilities in Ipswich.
See: http://europa.eu.int/comm/internal_market/en/publproc/infr/2k-869.htm for details on the Commission's Opinions.

5. Amendments to the EU Public Procurement Directives

In 1996 a Green Paper entitled “Public Procurement in the European Union: Exploring the way forward”¹⁸ gave rise to a debate on public procurement rules whereby the Commission found inconsistencies between the Public Procurement Directives. As a result, the European Commission has proposed a threefold objective to be achieved by the amendment of the Public Procurement Directives: modernisation, simplification and flexibility. The modernisation objective is intended to cater for new technologies and changes in the environment. The simplification and flexibility objectives are intended to simplify certain of the procedures which have been criticised as too rigid and complex. Two new directives were adopted in March 2004 but they have not yet been implemented into Irish law.

As mentioned, EU member states have been given until January 31, 2006 to implement the changes introduced by these directives.

The new Directives are as follows:

1. **Council Directive 2004/18/EC Directive on coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (“the New Directive”); and**
2. **Council Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy and transport sectors (“the New Utilities Directive”).**

The New Directive introduced a new type of tendering procedure called the ‘Competitive Dialogue Procedure’. This paper will discuss below the effects and implications of this new type of tendering procedure. It should be noted that The New Utilities Directive does not include this new procedure.

Simplification - Restructuring and Clarification of the Directives.

- Firstly, the three Public Sector Directives involving supplies, services and works were amalgamated into a single text in order to render the EU public procurement rules more comprehensible and consistent to both the supplier and the buyer. This may have the effect of eliminating the current confusion as to which Directive is to apply to a particular public contract.
- The structure of the new Directives is more user friendly. This means a reduction in the number of articles, more clearly laid out provisions and each chapter, section and article has a heading for ease of identification by the reader.
- The new provisions are set to logically follow the course of the contract award procedure. There is a strengthening of the provisions relating to award and selection criteria.

¹⁸ 21 COM(96) 583 final of 27 November 1996.

- The thresholds provisions are amended under the New Directive. All thresholds are to be expressed in euros and simplified and their application will depend on whether the contracting authority has the status of central or non-central authority. These are two thresholds applicable to public works contracts, which are: €162,000 (for public supply and service contracts awarded by contracting authorities which are listed as central government authorities in Annex IV), and €249,000 (for public supply and service contracts awarded by contracting authorities other than those listed in Annex IV) (non central government authorities) and €6,242,000 for public works contracts. There are two further thresholds of €6,242,000 and €249,000 applicable where contracts are subsidised by more than 50% by contracting authorities. These thresholds are set out at Article 8 of the New Directive.
- For contracts in the water, energy, transport and postal section there are two thresholds; €499,000 (in the case of supply and services contracts) and €6,242,000 (in the case of works contracts). These thresholds are set out at Article 16 of the New Utilities Directive.
- A Common Procurement Vocabulary (CPV) is proposed in order to simplify administrative procedures.
- The new Directives introduce some significant adjustments and clarifications to existing procedural requirements and also provides for several new types of award procedures, namely, Framework Agreements, Dynamic Purchasing and Electronic Auctions. These three new procedures are potentially relevant to regular or repetitive contracts for goods or services but are not generally suitable for large infrastructure contracts.

Under the New Directive there are two areas of change in the tendering procedure process that are of particular relevance to large infrastructure projects.

1. The New Directive includes certain clarifications regarding the “competitive negotiated procedure”, which is the award procedure that is currently used for most major, PPP-type projects.
2. The new “competitive dialogue” set out in the New Directive introduces an entirely new award procedure, which appears to be particularly aimed at complex large-scale projects.

The remainder of this paper will review the availability of the existing competitive negotiated procedure and then the new competitive dialogue procedure introduced by the New Directive and the effects, implications and availability of this new procedure will be discussed.

6. The Competitive Negotiated Procedure Updated?

6.1 The Relevant Grounds for using a Competitive Negotiated Procedure

Disappointingly, the rules governing the availability of a competitive negotiated procedure have not materially changed. Only on certain limited grounds may public authorities use a competitive negotiated procedure whereas the open and restricted procedures are available in all cases. The wording of those grounds for use of the negotiated procedure remains essentially unchanged under the old and new directive. Two of these grounds are potentially relevant for large infrastructure contracts:

1. In exceptional cases, when the nature of the works, supplies, or services or the risks attaching thereto do not permit prior overall pricing;
2. In the case of service, for example, Intellectual or Financial services, the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures.

To date authorities proposing to enter into a PPP project have relied upon these grounds to justify recourse to the competitive negotiated procedure. The first ground may apply on the basis that the precise scope of a PPP's subject matter is uncertainty at the outset, making "prior overall pricing" difficult if not impossible. The second ground above is only available where the PPP can be categorised as a service contract and may apply if the scope of the services to be provided under a PPP is uncertain at the outset and where, for example, specifications cannot be prescribed with "sufficient precision" at the outset. The manner in which these grounds are utilised has yet to be tested in the European Court of Justice however, as mentioned earlier, the European Commission has interpreted these grounds very narrowly in its Opinion to the British Government on 13th September 2000 (see above).

6.2 The Process to be followed under a Competitive Negotiated Procedure pursuant to the New Directive

The New Directive defines the negotiated procedure as "those procedures whereby the contracting authorities consult the economic operators of their choice and negotiate the terms of the contracts with one or more of them". This definition covers both non-competitive and competitive negotiated procedures. However, this definition is essentially the same as that found in the old directives and adds no further clarity on precisely how to conduct the competitive negotiated procedure although it does give some limited guidance on what should and may occur during a competitive negotiated procedure, which will be discussed below.

Under the New Directive the authorities remain obligated to undertake several minimum steps in order to pursue the negotiated procedure. These steps also apply to the restricted procedure.

These involve:

- 1) publication of a notice advertising the contract in the EU Official Journal;
- 2) pre qualification and short listing of at least 3 candidates by reference to their financial and technical capabilities;
- 3) award of the contract to the most economically advantageous offer in accordance with pre stated aware criteria.

Authorities thereafter are free to use their discretion to conduct the negotiated procedure as they see fit in accordance with good commercial practice and subject to the principle of equal treatment and non-discrimination.

Although the old procurement Directive did not provide expressly for stages to be followed in order to commence the competitive negotiated procedure, certain stages have become common practice. These will typically include the following phases:

- A. Informal consultation of private sector parties before publication of a notice in the EU Official Journal;
- B. After the selection of the short list of candidates, several rounds of negotiation may take place, which may include further formal written tenders. Candidates will be short listed and eliminated at different stages.

The authority may then invite “best and final offers” from the two or more candidates still in the process.

Finally, the preferred bidder is selected and a final period of negotiation and fine-tuning occurs with that bidder alone, in order to finalise details of the project and relevant contract terms and conditions.

The New Directive, however, does introduce some limited guidance on what should or may occur in a competitive negotiated procedure as discussed below.

6.3 ‘Clarifications’ introduced by the New Directive concerning the Competitive Negotiated Procedure

The new directive lays down at Articles 30(2) to 30(4), several ‘clarifications’ regarding conduct of a competitive negotiated procedure.

Article 30(2) states that:

“Contracting authorities shall negotiate with tenderers the tenders submitted by them in order to adapt them to the requirements which they have set out in the contract notice, the specifications and the additional documents, if any, and to seek the best tender in accordance with Article 53(1)”.

This Article does not shed much light on the process and merely indicates that one particular objective of the negotiations is to adapt tenders to the authorities requirements. It is not clear whether this adaptation process may also operate to allow authorities to adjust their requirements in order to reflect the solutions, which emerge as workable and affordable during the negotiation process.

Article 30(3) of the new directive provides that:

“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 may give some tenderers an advantage over others”.

This requirement is already implicit in other types of award procedures and merely confirms that the principle of equal treatment must be respected in the negotiation process.

Article 30(4) states that:

“Contracting authorities may provide for the negotiated procedure to take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria in the contract notice of the specifications. The contract notice or specifications shall indicate whether recourse has been had to this option”.

This statement clarifies the position in relation to a staged process under which the number of bidders is progressively reduced. It recognises the efficiency of allowing the authority to reduce the number of bidders for the purpose of inviting the best and final bids by using a staged process, whilst still maintaining sufficient competition throughout the process.

It is a new requirement, although already good practice, that if an authority wishes to conduct the competitive negotiated procedure in successive stages pursuant to Article 30(4), it is obliged to state this intention up front, either in the official journal notice or the contract specifications.

Article 30(4) has to be read in conjunction with Article 44(4) (the article dealing with the verification of the suitability and choice of participants and awards of contracts) which reiterates that an early elimination of tenders in a competitive negotiated procedure must be made on the basis of the authorities stated award criteria. It further states that, “In the final stage the number arrived at shall make for genuine competition insofar as there are enough solutions or suitable candidates”. Article 44(3) allows the number invited to negotiate at the outset to be as low as three. Although not expressly provided for, this allows for the possibility of the final numbers to be reduced to two pursuant to the staged process provided for at Article 30(4). This promotes the most effective competition, by giving those two final bidders a realistic prospect of success and hence the greatest incentive to commit their resources to producing a high quality tender.

Whilst these stages are currently adopted in practice the new directive gives some assistance on the Commissioner's views on the negotiated procedure.

7.1 Background to the New Competitive Dialogue Procedure

In the late 1990's the Commission recognised a need for amendments to simplify and consolidate the public procurement directives and the need to provide flexibility in the Directives' tendering procedures for certain complex contracts. The Commission's original proposal of May, 2000 introduced specific rules for particularly complex contracts (which were severely criticised and led to a number of fundamental changes) and also included a type of competitive dialogue procedure, although not named as such at that point. This was listed as a new type of competitive negotiated procedure. This procedure ultimately evolved into the distinct "competitive dialogue" procedure, as laid down in Article 29 of the new Public Works, Supplies and Services Directive. Although practitioners in the field of public procurement may welcome the flexibility of this new procedure, unfortunately, this provision has some shortcomings and does not necessarily produce the desired clarity and simplification envisaged.

7.2 Competitive Dialogue Procedure

According to the definition in Article 1(11)(c) of the New Directive:

“Competitive dialogue is a procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to the procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirement, and on the basis of which the candidates chosen are invited to tender”.

This new procedure is intended to allow authorities to hold discussions with short listed candidates regarding the authorities requirements before the authorities invite final written tenders. The purpose underlying the new procedure is summed up in Recital 31 of the Directive as follows:

“A flexible approach should be provided which preserves not only competition between operators but also the need for the contracting authorities to discuss all aspects of the contract with each candidate”.

The competitive dialogue procedure operates with a fundamental distinction to the competitive negotiated procedure. In the stage before the invitation to submit a bid, dialogue on all aspects of the contract is permitted (Art. 29(3)), which is not the case under the competitive negotiated procedure, whereas the dialogue after the invitation to submit a bid is limited, unlike the negotiated procedure where dialogue occurs after tenders have been received.

The procedure starts with the publication of a contract notice setting out the needs and requirements of the contracting authority, which they shall define in that notice

and/or in an associated descriptive document. It is to be expected that the tender notice and descriptive document will contain less information than usual tender documentation, as the purpose of the technical dialogue is to identify a solution to a complex need. At a minimum, the several requirements set out in Annex VII to the Directive outline the information to be inserted in the contact notice or descriptive document.

Although the Commission had originally envisaged that the competitive dialogue procedure would be a new “standard” procedure alongside the open and restricted procedures and would not be confined to exceptional circumstances, the Commission ultimately decided to insert strict limits on the procedures availability. Hence the competitive dialogue procedure is not available in all cases. It is only available where a contract is “particularly complex”.

7.3 Ground for use of Competitive Dialogue

7.3.1 “Particularly Complex” Contracts

Article 29(1) of the new directive specifies that:

“In the case of particularly complex contracts, Member States may provide that where contracting authorities consider that the use of the open or restricted procedures will not allow the award of the contract, the latter may make use of the competitive dialogue in accordance with this article”.

The definitions section of the directive (Article 1.11(c)) expands on this point by stating that, for the purpose of recourse to this procedure:

“A public contract is considered to be “particularly complex” where the contracting authorities are not objectively able to define the technical means in accordance with Article 23(3)(b), (c) or (d), capable of satisfying their needs or objectives, and/or: are not objectively able to specify the legal and/or financial makeup of a project”.

It is difficult to know precisely what exactly this is intended to cover. It seems that where the contracting authorities consider that the use of the open or restricted procedure would not allow the award of the contract, the contracting authority may make use of the competitive dialogue in accordance with Article 29. The reference in Article 1.11 to “technical means” for meeting the authorities needs is not defined and is a rather nebulous term but may be interpreted as referring to the skills, knowledge, technology or methods capable of realising the authorities overall objective. The subparagraphs of Article 23 referred to in Article 1.11, allow an authority to lay down technical specifications “in terms of performance or functional requirements”. This implies that only technological difficulties are envisaged here and not more general problems.

The definition of “particularly complex” in Article 1.11(c) is equally unclear it

defines particularly complex as for the purpose of recourse to the procedure mentioned in the first subparagraph, a public contract is considered to be “particularly complex” where the contracting authorities:

- “• **are not objectively able to define the technical means in accordance with Article 23(3)(b), (c) or (d), capable of satisfying their needs or objectives; and/or**
- **are not objectively able to specify the legal and/or financial make-up of a project.”**

At the start of most major transactions there is usually uncertainty regarding all the legal and financial matters therefore it is not clear exactly when a contract is deemed to be sufficiently ‘complex’ so as to be considered under the competitive dialogue procedure.

The term “legal and/or financial makeup” referred to in Article 1.11(c) is also not defined, and is potentially very broad. One possible interpretation may be that it refers to difficulties in predetermining matters such as the contractual structure of the arrangement, the underlying contract terms and conditions and/or the arrangements for funding the project.

The wording in Article 29(1) which states that a competitive dialogue is permitted “where contracting authorities consider that use of the open or restricted procedure will not allow the award of the contract”, gives the impression that contracting authorities are allowed a wide discretion to determine if a contract is particularly complex. However, the insertion of the word “objectively” in the definition (Article 1.11) of “particularly complex” suggests that some form of reasonableness standard may be applied to the authorities inability to define in advance the technical, financial or legal matters in question and the burden of proving that the contract in question is ‘particularly complex’ is on the contracting authority. Therefore, in the event that it is objectively determined that a reasonably diligent authority ought to have been capable of predefining these matters and the relevant authority has in fact failed to do so, the option of using the competitive dialogue may be deemed to be unwarranted.

It is likely that a contracting authority would interpret the concept of ‘particularly complex contracts’ in the wide sense in order to escape the open and restricted procedures and in order to justify recourse to the competitive dialogue procedure; therefore it follows that the competitive dialogue procedure may be applied in cases where it is not justified. This however remains to be seen in practice. There is a possibility that the grounds for using the competitive dialogue procedure will be interpreted less strictly at European level, than the wording the New Directive actually prescribes, in order to allow a higher degree of flexibility but it also remains to be seen how this will operate in practice.

7.3.2 Clarification given by Recital 31

Recital 31 to the Directive may be useful here in that it purports to give additional but limited insight into the intended scope of the phrase “particularly complex” as follows:

“Contracting authorities which carry out particularly complex projects may, without this being due to any fault on their part, find it objectively impossible to define the means of satisfying their need or of assessing what the market can offer in the way of technical solutions and/or financial/legal solutions. This situation may arise in particular with the implementation of important integrated infrastructure projects, large computer networks or projects involving complex and structured financing the financial and legal make up of which cannot be defined in advance”.

The recital expressly indicates that projects for integrated transport infrastructure or for large computer networks may be regarded as particularly complex, although the term “structured financing” is undefined and is vague in that most of the projects expressly mentioned require financing that is to some extent “structured”.

8.1 Comparison between the grounds for using a Competitive Negotiated Procedure and the Competitive Dialogue Procedure

There is a degree of overlap between the existing grounds for using the competitive negotiated procedure and the grounds for using the competitive dialogue procedure. For example, reference to an authorities inability to pre determine technical means in the definition of ‘particularly complex’ (Article 1.11(c)), and which is a pre requisite to the availability of the competitive dialogue procedure, seems broadly similar to an inability to establish contract specifications with sufficient precision, which is one ground for using a competitive negotiated procedure. Equally, the inability to determine ‘prior overall pricing’ which is a ground justifying the use of the competitive negotiated procedure is similar to the inability to objectively specify the ‘financial make-up’ of a project which is a ground justifying the use of the competitive dialogue procedure as the contract may be deemed to be ‘particularly complex’. Authorities may therefore rely on either of these grounds to proceed using either of the available procedures as some contracts will undoubtedly fall under the grounds justifying the use of the negotiated procedure and the dialogue procedure and in some cases it is therefore possible that the competitive dialogue may be used where it is not warranted. The lack of clarity in the definitions of both of the procedures makes it difficult to say exactly which is the correct procedure to follow. However, it appears that the competitive dialogue procedure seems to be no more flexible and advantageous to use than the existing competitive negotiated procedure, casting doubts over the future success and usefulness of the competitive dialogue procedure.

9.1 The Process to be followed under a Competitive Dialogue Procedure

If the contract is “particularly complex”, the awarding authority may chose to follow the competitive dialogue procedure. If so, it must follow the steps laid down in Article 29 of the new directive which may be summarised as follows:

1. The authority publishes a contract notice in the EU Official Journal, setting out its needs and requirements.
2. The authority selects a short list of at least three candidates in accordance with the directives usual qualification rules.
3. The authority opens a dialogue with those candidates.
4. The procedure may take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or the descriptive document, provided that the authorities stated in that notice or document that recourse may be had to this option.
5. The authority continues the dialogue until it can identify the solution or solutions, if necessary after comparing them, which are capable of meeting its needs.
6. The authority informs the participants that the dialogue is concluded and asks them to submit their final tenders on the basis of the solution or solutions presented and specified during the catalogue. These tenders shall include all the elements required and necessary for performance of the contract.
7. The authority may request that tenders be clarified, specified and fine tuned, but this may not involve changes to the basic features of the tender or the call for tender, variations in which are likely to distort competition or have a discriminatory effect.
8. The authority selects the most economically advantageous tender, on the basis of the award criteria that is laid down.
9. The authority may ask the winning tenderer to clarify aspects of the tender or confirm commitments contained in the tender provided that this does not have the effect of modifying substantial aspects of the tender or the call for tender does not risk distorting competition or causing discrimination.

Article 29 expressly allows a dialogue between the authority and bidders, distinguishing it from the open and restricted procedures. However, this dialogue is pre finish tender stage unlike the negotiated process where this dialogue is post tender stage.

9.2 Restriction on revealing one Bidder's Solution to Others

Article 29(3) prohibits an authority from revealing one participant's proposed solution (or other confidential information) to the other participants without that participants consent. This of course encourages and rewards innovation and the innovative bidder ought to be able to derive full benefit from having been the first to identify the best solution.

However, the practicalities of this limitation in the dialogue is debateable. A considerable number of contracting authorities may be tempted to set aside this ban in their contract notice so they can reveal to all participants the best proposed solution that comes out of the dialogue in order to obtain value for money and if this is the case there is a risk that the competitive dialogue procedure will be a failure, as many potential tenderers may oppose the sharing of their solutions and know-how and may choose not to participate in tender procedures with competitive dialogue where this might occur. However, given the potential unfairness to the innovative bidder, it is arguable that the general principle of non-discrimination, applicable to all procedures, already implies a duty on an authority not to convey one bidder's idea to the other bidders. However, the position is far from certain and has yet to be addressed in procurement case law. The only alternate for participants in the procedure is to agree that their solutions or other confidential information can be revealed and applied by the contracting authority (Article 29(3) provides that this can be done by agreement with the party who proposed the solution). It is not clear if participants must accept an assertion by the contracting authority that it may share its solution with the other participants in the competitive dialogue but if the contract notice specifically states this will be the case, it would appear that by entering into the process, participants will by implication have agreed that their solutions or other confidential information may be shared.

As the overall purpose of the competitive dialogue, is to identify the best means (or solution) for delivering the authorities needs before the final tenders are invited there may be a conflict between this particular ban and the possibility of a particular solution being claimed as the exclusive idea of one bidder.

To guard against this risk it may be in the authorities interest to try to foresee as many possible solutions and to identify these as possibilities at the outset in the invitation to tender (but without discouraging bidders from putting forward other ideas).

Further, if the authorities identify their preferred solution at an early stage and they then chose the most suitable tenderer, they are prevented from divulging this to the other bidders thereby making the final stage pointless as the authorities have essentially already made their decision.

9.3 Ability to conduct the Competitive Dialogue Procedure in Successive

Stages and Short Listing

Article 29(4) expressly allows the competitive dialogue procedure to take place in successive stages with a view to reducing the number of candidates engaged in technical dialogue and the number of solutions (thereby indirectly short listing the number of participants during the dialogue). The rationale is explained in recital 39, which states that:

“In a competitive dialogue and negotiated procedure, in view of the flexibility which may be required and the high level of costs associated with such methods of procurement, contracting authorities should be entitled to make provision for the procedure to be conducted in successive stages in order to gradually reduce, on the basis of previously indicated contract award criteria, the number of tenders which they will go on to discuss or negotiate”.

However, prior to utilising this option to reduce the number of candidates, there is a duty on the contracting authority to indicate the minimum and, if appropriate, the maximum number of candidates as well as the objective criteria to be used to choose that number of candidates.

Contracting authorities may frequently apply this option to shortlist during the dialogue phase as it is more efficient to identify a small group of bidders with the most realistic chances of being awarded the contract, at as early a stage as possible.

The short-listing of solutions shall be done by applying the award criteria in the contract notice or in the descriptive document (Art. 29 (3)). There is no possibility to change the award criteria during the dialogue stage.

The competitive dialogue and competitive negotiated procedures are therefore equally permissive in allowing the authority to carry out the award process in stages and to eliminate one or more candidates at each intermediate stage, provided this is done by reference to the authorities award criteria.

Given that the minimum number of 3 candidates may be invited to begin the dialogue (Article 44(3)), it follows therefore that this may be reduced and ultimately two tenderers may be invited to submit final tenders.

9.4 Adjustments to Final Bids

Article 29(6) provides that “tenders may be clarified, specified and fine tuned”, subject to the condition that this step may not involve changes to the basic features of the tender or the call for tender to the extent that these changes are likely to distort competition or have a discriminatory effect.

This provision therefore allows authorities some level of flexibility for a contracting authority to ask for clarification and adjustments to final bids, even though the “dialogue” stage has ended. This is unlike the competitive negotiated procedure where there is greater dialogue post receipt of tenders.

The references to “clarification” and “fine tuning,” are not defined in the legislation but it may be interpreted from this provision that the adjustments must be relatively minor subject to the requirement that the “basic features” of the tender may not be changed. The word “specifying” which is also not defined may refer to confirming or adjusting the technical specifications. It is not clear if it is only the contracting authorities who can take the initiative to have the tenders clarified, specified or fine-tuned but if this provision is interpreted strictly then the wording ‘ at the request of the contracting authorities’, confirms that only the contracting authority can request adjustments of the tender. However, for the sake of obtaining the best tender, a wider interpretation of the wording is suggested to allow the participants in the competitive dialogue to also take the initiative and introduce adjustments to the tender.

9.5 Clarification and Confirmation after Selection of the Preferred Tender

The dialogue continues until the contracting authority can identify the solution or solutions which are capable of meeting its needs (Art. 29(5)) and the dialogue is declared concluded by the contracting authority when it has identified the solution which is capable of meeting its needs. It shall then inform the participants of their conclusion (Art. 29(6)). It shall then ask them to submit their final tenders on the basis of the solution (s) presented and specified during the dialogue (Art. 29(6)).

After the authority has chosen the most economically advantageous tender, the authority may ask the preferred tenderer to clarify aspects of the tender or confirm commitments contained in the tender (Article 29(7)), subject to the condition that this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination. This Article does not expressly allow for post selection changes to tenders and it refers only to clarification and confirmation, suggesting that it may be intended to be more restrictive than Article 29(6), which also permitted specification and fine-tuning of tenders, although this is not entirely clear from the provision.

Recital 31 of the New Directive may be of some relevance here. It states that this competitive dialogue procedure may not be used in such a way as to restrict or distort competition, particularly by altering any fundamental aspects of the offers, or by imposing substantial new requirements on the successful tenderer, or by involving any tenderer other than one selected as the most economically advantageous. The references to “fundamental aspects” and “substantial new requirements” suggests that some lesser, but still significant, changes are permitted and that such changes may go beyond the mere “clarification” and “confirmation” referred to in Article 29(7) although it is unclear as to the extent of the permitted changes.

CONCLUSION

The long awaited adoption of these two consolidated Directives is to be welcomed. How the new regime will function in practice will only be seen once the Directives are implemented into national legislation within the next 21 months. Under the New Directive 2004/18/EC, the competitive dialogue procedure has the aim of attempting to introduce a more flexible process that is suitable for the award of large and complicated projects. However, this concept is vague and overlaps with the grounds for using the existing and better-known competitive negotiated procedure and the burden of proving that the contract in question is ‘particularly complex’ lies with the contracting authority.

Contracting authorities may interpret the concept of ‘particularly complex contracts’ in a wide sense in order to escape the ban on negotiations relevant to the open and restricted procedures. It follows that there is a possibility that the competitive dialogue will be applied in many cases where it is not justified. However, the interpretation and enforcement by the relevant bodies at national and European level remains to be seen.

It is hoped that the authorities may interpret the grounds for using the competitive dialogue less restrictively than the prescribed wording of the Directive. If they do not, there is a chance that the competitive dialogue procedure may become redundant, as it has nothing greater or more advantageous to offer the contracting authorities over and above the competitive negotiated procedure with which they are already familiar.

Unfortunately, the aim of the new competitive dialogue procedure is likely to be undermined by its more restrictive elements, for example:

1. the aim of the dialogue is confined to identifying the means best suited to satisfying the authorities needs;
- 2) the authority is prohibited from revealing one bidders solutions to the other bidders;
- 3) there is only a limited right to clarify or adjust final tenders either before or after selection of the preferred bidder.

These detailed procedural provisions conflict with the more simplified existing competitive negotiated procedure where the process is left largely to the discretion of the authorities. Rather than introducing greater clarity and flexibility the new procedure appears to create additional complexity, duplication and uncertainty and therefore there is a danger that the authorities will continue to use the competitive negotiated procedure and approach the competitive dialogue procedure with caution.

The new Directives also leave great uncertainty as to whether the scope for post tender negotiations and changes in a competitive dialogue procedure is smaller, greater or the same as that allowed under the competitive negotiated procedure. The express rules of the competitive dialogue procedure on this point appear more

restrictive than the general principles that have been applied to competitive negotiated procedure. Given that post tender negotiations are an essential and unavoidable step towards concluding any major project agreement, it is arguable that this potential inconsistency between the two procedures will be one further factor that is likely to induce authorities to continue using the competitive negotiated procedure rather than switching to the new competitive dialogue.

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