



EJTN ADMINISTRATIVE LAW PROJECT Public Procurement Seminar [AD/2021/04]

Legal themes of the EU Public Procurement Directives

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EU Public Procurement Framework

**Utilities Directive
2014/25/EC**

**Public Sector
Directive
2014/24/EC**

**Remedies
Directive
2007/66/EC**

**Concessions
Directive
2014/23/EC**

**Defence
Directive
2009/82/EC**

The Public Sector Directive 2014/24/EU

- Contracting authorities (state, central government, regional municipalities and local authorities)
 - Bodies governed by public law

bodies governed by public law i) must be established for the specific purpose of meeting needs in the general public interest not having an industrial or commercial character; ii) they must have legal personality; and iii) they must be financed, for the most part, by either the state, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by these bodies, or having an administrative or supervisory board, more than half of whose members are appointed by the state, regional or local authorities or by other bodies governed by public law.

The 2014/25 Utilities Directive

Activities covered

- The gas and heat sector
- The electricity sector
- The water sector
- Transport services
- Postal services
- Exploration for, or extraction of, oil, gas, coal or other solid fuels
- Ports and airports
- Contracts covering several activities

The Concessions Directive 2014/23/EU

- Codifies jurisprudence (essential treatment and procurement requirements)
- Clarifies definitions including thresholds 5m EURO
- Solidifies legal regimes of public sector and utilities for works and services concessions
- Brings into play Remedies Directive
- Concession – a format of public contract but economic consideration consists in the right to exploit the work or services (sometimes with payment from public sector)
 - right to exploit implies a transfer of operating or demand risk
 - transfer of risk is assumed where no guarantee to recoup investment of concessionaire.
- Duration of concessions as long as necessary to recoup ROCE
- Demarcation of concessions from licenses, franchises, asset lease

The EU Defence Procurement 2009/81/EU

Borderline of EU competence and Member State sovereignty

Regulatory issues

- Free movement of goods (Article 36 TFEU)
- Competition, state aid, intra-Community transfer, third country export control
- Article 346 TFEU

The Remedies Directives in Public Procurement 2007/66

- Effectiveness
 - Swift dispute resolution
 - Enforceability
- Non-discrimination / Equivalence
 - Contract review procedures
 - Actions for damages
- Procedural autonomy
 - Judicial *fora*
 - Administrative *fora*

Legal Principles of Public Procurement

EU Public Procurement Directives	EU Treaties
<ul style="list-style-type: none">• Transparency• Equality• Objectivity• Legal certainty	<ul style="list-style-type: none">• Free Movement of goods<ul style="list-style-type: none">• Right of establishment• Right to provide services<ul style="list-style-type: none">• Non-discrimination

The Traction of EU Public Procurement Rules

**Contracting
Authorities /
Entities**

**Material
Coverage**

Public Contracts

Advertisement and Publicity

Contract Specifications

Selection & Qualification

Award procedures

Award criteria

Legal Concepts of EU Public Procurement Law

- Must be cumulatively present for the rules to apply

**Contracting
Authorities
/ Entities**

**Material
Coverage/
Thresholds**

**Public
Contracts**

Material Coverage

Thresholds for Public Works, Public Supplies, Public Services and Concessions

Public Contracts				Utility Contracts <small>Thresholds are exclusive of VAT</small>			
	Supply, Services and Design Contracts	Works Contracts	Social and other specific services		Supply, Services and Design Contracts	Works Contracts	Social and other specific services
Central Government	£122,976 €139,000	£4,733,252 €5,350,000	£663,540 €750,000				
Other Contracting Authorities	£189,330 €214,000	£4,733,252 €5,350,000	£663,540 €750,000				
Small Lots	£70,778 €80,000	£884,720 €1,000,000	N/A	Utility Authorities	£378,660 €428,000	£4,733,252 €5,350,000	£884,720 €1,000,000

Concession Contracts <small>Thresholds are exclusive of VAT</small>	
	Concession Contracts
All Authorities	£4,733,252 €5,350,000

Defence and Security Contracts <small>Thresholds are exclusive of VAT</small>			
	Supply, Services and Design Contracts	Works Contracts	Social and other specific services
Defence and Security Authorities	£378,660 €428,000	£4,733,252 €5,350,000	N/A

Flexibility and Sub-dimensional Public Contracts

- Below threshold contracts are excluded from the scope of the public procurement Directives but liable to compliance with the fundamental rules of the Treaty.
 - Transparency
 - Non-discrimination
 - C-324/98 *Telaustria and Telefonadress*; C-59/00 *Vestergaard* C-6/05 *Medipac-Kazantzidis AE*; C-231/03 *Coname*; C-458/03 *Parking Brixen*; C-264/03 *Commission v France*; C-147/06 and C-507/03 *Commission v Ireland*; C-412/04 *Commission v Italy*; C-148/06, *SECAP SpA*

CAVEAT

- Certain cross-border interest
 - C-507/03 *Commission v Ireland*
 - C-412/04 *Commission v Italy*
 - C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado*

The Concept of Contracting Authorities

- Contracting authorities (state, central government, regional municipalities and local authorities)
 - **Bodies governed by public law**
 - i) must be established for the specific purpose of meeting needs in the general public interest not having an industrial or commercial character;
 - ii) they must have legal personality; and
 - iii) they must be financed, for the most part, by either the state, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by these bodies, or having an administrative or supervisory board, more than half of whose members are appointed by the state, regional or local authorities or by other bodies governed by public law.

Bodies Governed by Public Law as Contracting Authorities

1) The Term is interpreted in broad and functional terms.

2) the Crucial component is the existence of Public interest

Examples

- **private law entities**
 - C-214/00 *Commission v Spain* [2003]; C-283/00 *Commission v Spain*
- **private entities for industrial and commercial development**
 - C-373/00 *Adolf Truly*; C-18/01 *Korhonen and Others*
- **entities meeting needs of general interest**
 - C-470/99 *Universale-Bau and Others*
- **semi-public undertakings**
 - C-26/03 *Stadt Halle*
- **state controlled commercial companies**
 - C-283/00, *Commission v Spain*; C-373/00 *Adolf Truly*; C-18/01 *Korhonen and Others*
- **statutory sickness funds**
 - C-300/07, *Hans & Christophorus Oymanns*

Bodies governed by public law – Flexibility

- *dualism* → ability of contracting authorities to pursue market oriented activities without losing their classification as contracting authorities
 - C-44/96 *Mannesmann Anlagenbau Austria*
Caveat State Aid
- *commercialism and competitiveness* → profitability and commercially motivated decision-making render the public procurement directives inapplicable
 - competitive markets in utilities (telecoms)
 - elements of competition diluting the notion of body governed by public law
 - C-223/99 *Agora Srl v Ente Autonomo Fiera Internazionale di Milano*
 - C-260/99 *Excelsior Snc di Pedrotti runa & C v. Ente Autonomo Fiera Internazionale di Milano*
 - C-18/01 *Korhonen and Others*

Bodies governed by public law – Flexibility

in-house procurement C-107/98, Teckal Srl v Comune di Viano

parameters for inapplicability of the public procurement Directives

1) similarity of control

- C-26/03 *Stadt Halle and RPL Lochau*
- C295/05, *Asociación Nacional de Empresas Forestales (Asemfo)*

2) Operational dependency

- C-237/99, *Commission v. France*
- C-380/98, *The Queen and H.M. Treasury, ex parte University of Cambridge*

In House Procurement

The conditions for inapplicability of public procurement rules

- in house entity carries out the essential part of its activities with the controlling local authority or authorities (**activity condition**)
- CA exercises over an entity a control which is similar to that which it exercises over its own departments (**control condition**)

The in-house exemption also applies to concessions

C-458/03, *Parking Brixen*

C-340/04, *Carbotermo*

In-House conditions NOT met

- Private capital negates similarity of control
 - C-26/03 *Stadt Halle and RPL Lochau*
- Possibility of imminent participation of private capital negates similarity of control
 - C-231/03 *Coname*
- Visibility of imminent participation of private capital negates similarity of control
 - C-458/03 *Parking Brixen*
 - C-410/04, *Associazione Nazionale Autotrasporto Viaggiatori (ANAV)*
- Semi-public entities or undertakings do not assume similarity of control (contracting authorities *ipso facto*)
 - C-29/04 *Commission v Austria (Modling)*

The in-house case-law

- C-94/99, ARGE
- C-349/97, Commission v. Spain
- C-26/03, Stadt Halle
- C-84/03, Commission v. Spain
- C-231/03, Coname
- C-458/03, Parking Brixen
- C-29/04, Mödling
- C-410/04, ANAV
- C-340/04, Carbotermo
- C-295/05, Asemfo
- C-220/06, Asociación etc.
- C-371/05, Mantua
- C-324/07, Coditel
- C-337/05, Commission v. Italy
- C-480/06, Commission v. Germany
- C-573/07, Sea
- C-196/08, Acoset
- C-17/09, Commission v. Germany

• Public-Public Partnerships

1) Public-Public cooperation → no similarity of control BUT remit of such relation to deliver a public task or service specified under Community law; 2 conditions: no intention to circumvent public procurement rules; not pecuniary contractual relation

C-480/06, Commission v Germany; C-352/12, Consiglio Nazionale degli Ingegneri

2) Inter-municipal co-operative societies whose members are contracting authorities and a jointly controlled entity

C-324/07, Coditel Brabant

3) *Inter-administrative contracts and assignments*

- *C-159/11 Ordine degli Ingegneri della Provincia di Lecce*
- *C-386/11, Piepenbrock*

The concept of Public Contracts

Definition:

- a pecuniary interest consideration given by a contracting authority
- in return of a work, product or service which is of direct economic benefit to the contracting authority
 - C-536/07 *Commission v Germany*, (Köln Messe)
- Concept of public contracts
 - Not materially or physically carried out for the contracting authority
 - Necessary for *immediate* economic benefit of contracting authority
 - C-451/08 *Helmut Müller v Bundesanstalt für Immobilienaufgaben*

Public Contracts are functional concept in Public Procurement

- pecuniary interest
 - Direct or deferred payment
 - Commitment to lease-back
 - Asset swaps
 - Conferral of an exclusive right to collect third-party payments
 - Leasing and sub-leasing arrangements

Evidence of public contracts

- The ability to specify the object of the public contract
 - The ability to install measures which define the type of works
 - Decisive influence over the design of a project or the executions of works
 - *C-536/07 Commission v Germany, (Köln Messe)*
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- Public contracts denote demonstrable elements of
 - economic benefit or risk
 - directly attributable to the contracting authority
 - *C-220/05, Jean Auroux*

Functionality and Public Contracts (con)

- Planning gain contracts are public contracts
 - C-399/98 *Ordine degli Architetti and Others*
- Agency or representation relations are public contracts
 - C-264/03, *Commission v. France*

Flexibility and Public Contracts

Urban planning not capable of attributing an immediate economic benefit

- *C-536/07 Commission v Germany, (Köln Messe)*

Asset or land sales are not public contracts

- *C-451/08 Helmut Müller v Bundesanstalt für Immobilienaufgaben*

Caveat

imminent and directly related public contract to that asset or land

Compliance with Public Procurement Legal Principles

1) The principle of transparency

publicity of contracts pre and post award

2) The principle of Objectivity

selection and qualification, award criteria

3) The principle of Equality

award procedures

4) The principle of Legal Certainty

Review procedures

1) The principle of transparency

publicity of contract notices above threshold values

- pre award
- post award

2) The Principle of Objectivity

- Drawing of technical specifications and standards

The “equivalent standard”

- labels and attestation
- national standards
- IP rights & trade marks as compulsory specifications
 - C-45/87, *Commission v. Ireland*
 - C-359/93, *Commission v. The Netherlands*
- Selection and Qualification of candidates
 - Financial and Economic standing
 - Technical capacity



Automatic exclusion

- Terrorism or offences linked to terrorist activities
- Money laundering or terrorist financing
- Child labour
- Trafficking of human beings
- Participation in a criminal organization
- Corruption
- Fraud against the financial interests of the European Union

Award criteria

Lowest price

MEAT / BPQR

Life Cycle Costing



Flexibility and Exclusion Grounds

Reasons for discretionary exclusion

- Bankruptcy or compulsory winding up or administration
 - Professional misconduct or serious misrepresentation
 - Violation of social, environmental or labour law
 - Non-payment of social security contributions
 - Non-fulfillment of obligations relating to the payment of taxes
 - Undue influence
 - Agreements aimed at distorting competition
 - Distortion of competition due to prior involvement
 - Conflicts of interest
 - Significant or persistent deficiencies in the performance of prior contracts
- *Self-Cleaning*
 - Compliance measures to re-establish reliability

3) The principle of Equality

Award Procedures

Open procedures

- Open procedures are those where every interested supplier, contractor or service provider may submit an offer

Restricted procedures

- Restricted procedures are those procedures for the award of public contracts whereby only those contractors invited by the contracting authority may submit tenders. The selection of the winning tender usually takes place in two rounds. In the first round, all interested contractors may submit their interest and the contracting authority selects, from the candidates, those who will be invited to tender. In principle, the minimum number of candidates to be selected is five. In the second round, bids are submitted and the successful tender is selected.

Negotiated procedures


- Negotiated procedures are such procedures for the award of public contracts whereby contracting authorities consult contractors of their choice and negotiate the terms of the contract with one or more of them. There are two different kinds of negotiated procedures: i) competitive negotiated procedures with prior notification and ii) negotiated procedures without prior notification.

Negotiated procedures without prior notification

- Negotiated procedures without prior notification may be conducted in one single round. Contracting authorities are allowed to choose whichever contractor they want, begin negotiations directly with this contractor and award the contract to him. The Directive provides for only a few rules with which this procedure must comply. A prior notice in the Official Journal is not required. Grounds for using negotiated procedure without prior advertisement
- Research and development;
- Technical or artistic reasons;
- Reasons connected with the protection of exclusive rights;
- Extreme urgency brought by unforeseeable events not attributable to the contracting authorities;
- Additional deliveries and supplies or works which would cause disproportionate technical operational and maintenance difficulties, if tendered.

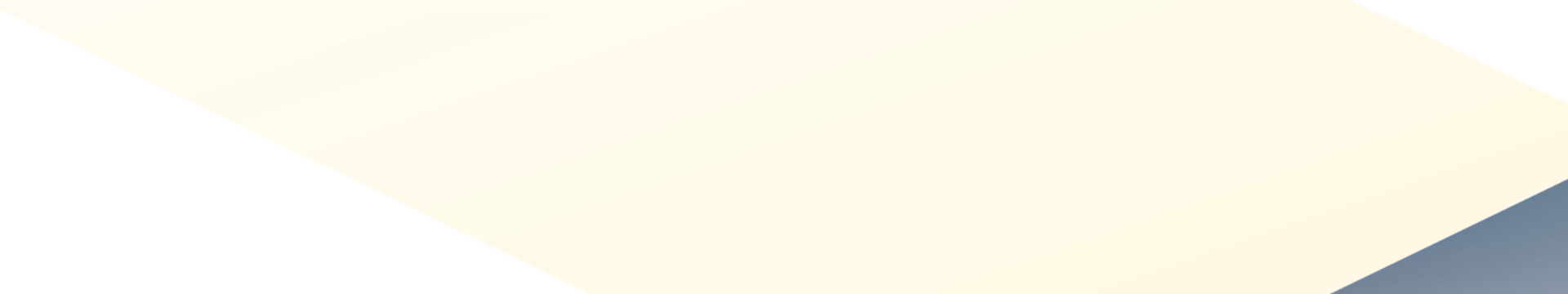



Competitive negotiated procedures

- Negotiated procedures with prior notification provide for selection of candidates in two rounds. In the first round, all interested contractors may submit their tenders and the contracting authority selects, from the candidates, those who will be invited to negotiate. In the second round, negotiations with various candidates take place and the successful tender is selected. In principle, the minimum number of candidates to be selected is three, provided that there is a sufficient number of suitable candidates.
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Competitive dialogue

- The competitive dialogue is an award procedure which is used exceptionally in cases of particularly complex contracts, where the use of the open or restricted procedures will not allow the award of the contract, and the use of negotiated procedures cannot be justified. A public contract is considered to be particularly complex where the contracting authorities are not able to define in an objective manner the technical specifications which are required to pursue the project, or they are not able to specify the legal or financial make-up of a project. The procedure is very complex, as it has three main phases and many options within these phases. Firstly, the advertisement phase obliges contracting authorities to publish a contract notice or a descriptive document outlining their needs and basic specifications of the project. After that phase and before launching a competitive dialogue for the award of a contract, contracting authorities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications, provided that such advice does not have the effect of precluding competition.
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Framework agreement

- A framework agreement is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

Dynamic purchasing system

- A dynamic purchasing system is a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification.

Electronic auction

- An electronic auction is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods. Consequently, certain service contracts and certain works contracts having as their subject-matter intellectual performances, such as the design of works, may not be the object of electronic auctions.

The Concepts of the Remedies Directives in Public Procurement

- Locus standi
- Pre-judicial stages
- Interim measures
- Set aside decisions
- Actions for annulment
- Actions for damages
- Ineffectiveness

Procurement QUIZZ



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- Are telecommunications contracts covered by the EU Public Procurement Directives?
YES NO
 - If a contract value falls below the thresholds specified by the EU Public Procurement Directives, does it have to be advertised to the OJEU?
YES NO
 - Is a University considered as a contracting authority?
YES NO
 - Is the purchase of land by a contracting authority considered as a public contract?
YES NO
 - Is the protection of the environment an award criterion for public contracts:
YES NO
 - Is Teckal an electric car?
YES NO



THANK YOU

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