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Public Procurement

What are the Public Procurement Procedures and When Can They Be Used?

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The basic presumption in public procurement is that contracts of a specified type and value will be procured using an advertised, competitive procedure that is open, fair and transparent, ensuring equality of opportunity and treatment for all candidates and tenderers. There are only limited circumstances where a procedure without advertised competition is permitted.

The main competitive procurement procedures available under the Directive are the open procedure, restricted procedure, competitive dialogue procedure, and negotiated procedure with prior publication of a contract notice.

The open procedure and the restricted procedure are the preferred procedures and these can be used without satisfying any conditions. The competitive dialogue procedure and negotiated procedure with prior publication of a contract notice may only be used where specified conditions are satisfied. There are also special procedures set out in the Directive, which can be used for the procurement of works contracts for subsidised housing schemes, public works concessions and design contests.

The Directive sets out the processes to be followed by a contracting authority when using each of these competitive procedures. The level of detail set out in the Directive differs according to the procedure.

The Directive also includes provisions covering procurement tools that a contracting authority may choose to use in conjunction with the competitive procedures, where permissible. These are framework agreements, electronic auctions and dynamic purchasing systems.

Where a contracting authority wishes to award a contract without competition, using what is known as the 'negotiated procedure without prior publication of a contract notice', then it can only do so if specific conditions set out in the Directive are met. The European Court of Justice (ECJ) had confirmed that these conditions were narrowly interpreted and that the award of a contract without competition should only occur in exceptional circumstances.

What are the main types of competitive procedures available for contracting authorities?

There are four main competitive procedures:

Open procedure: The open procedure is a single-stage process. A contracting authority advertises the contract opportunity and then issues full tender documents, including the specification and contract, to all economic operators that request to participate. Economic operators submit both selection (qualification) information and tenders at the same time in response to the contracting authority's advertised requirements. The contracting authority may receive a large number of tenders; it cannot control the number of tenders that it receives, but not all of those tenders will necessarily be considered. Only tenders from suitably qualified economic operators that have submitted the required documents and that meet the selection criteria are considered. Tenders can be evaluated on the basis of either the lowest price or the most economically advantageous tender. No negotiations are permitted with economic operators, although contracting authorities may clarify aspects of the tender with tenderers.

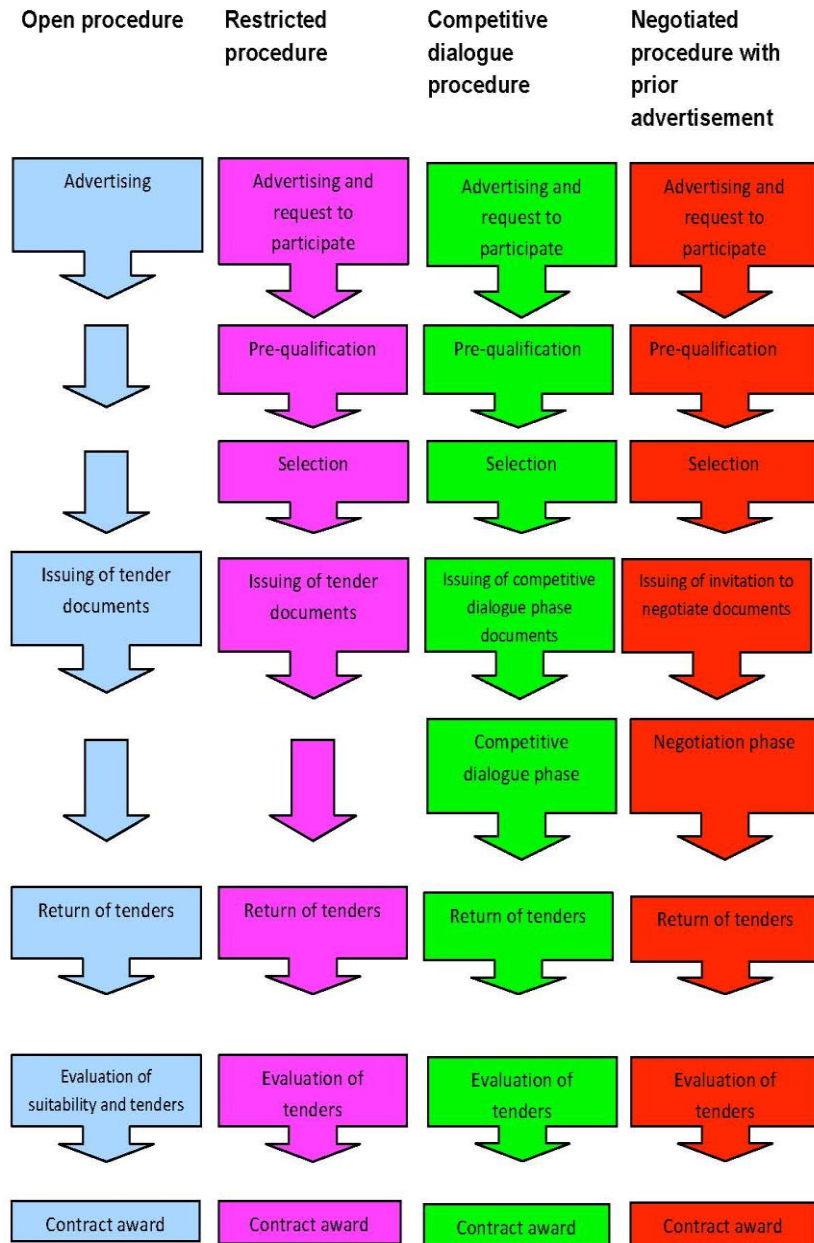
Restricted procedure: The restricted procedure is a two-stage process. The contracting authority advertises the contract opportunity and economic operators submit requests to participate and then provide selection stage (pre-qualification) information,

which is used by the contracting authority to establish whether the economic operators are qualified to perform the contract and to select the economic operators that are to be invited to tender. The contracting authority is permitted to limit the number of economic operators that it invites to tender and to draw up a shortlist of economic operators. This means that not all of the economic operators that qualify have to be invited to tender. The contracting authority issues the full invitation to tender documents, including the specification and contract, to the economic operators that it has selected or shortlisted. This means that, unlike the open procedure, the restricted procedure allows the contracting authority to limit the number of tenders that it receives. Tenders can be evaluated on the basis of either the lowest price or the most economically advantageous tender. No negotiations are permitted with economic operators, although contracting authorities may clarify aspects of the tender with tenderers.

Competitive dialogue procedure: The competitive dialogue procedure is a two-stage process. The contracting authority advertises the contract opportunity, and after submitting requests to participate the economic operators first submit pre-qualification and selection stage information, which is used by the contracting authority to establish whether the economic operators are qualified to perform the contract and to select the economic operators that are to be invited to tender. The contracting authority is permitted to limit the number of economic operators that it invites to tender and to draw up a shortlist of economic operators. The contracting authority issues the invitation to participate only to the economic operators that it has shortlisted, and it then enters into a competitive dialogue phase with those economic operators. During the competitive dialogue phase, all aspects of the project can be discussed with the economic operators and the number of solutions can be reduced as part of the process. Once the contracting authority is satisfied that it will receive proposals that will meet its requirements, it declares the competitive dialogue phase closed and invites tenders. Under this procedure, tenders can only be evaluated on the basis of the most economically advantageous tender.

Negotiated procedure with prior publication of a notice: The negotiated procedure with prior publication of a notice is a two-stage process. The contracting authority advertises the contract opportunity, and the economic operators first submit pre-qualification and selection stage information, which is used by the contracting authority to establish whether the economic operators are qualified to perform the contract and to select the economic operators that are to be invited to tender. The contracting authority is permitted to limit the number of economic operators that it invites to tender and to draw up a shortlist of economic operators. The contracting authority issues the invitation to negotiate only to the economic operators that it has shortlisted. It receives initial proposals and then enters into negotiation with the shortlisted tenderers in respect of those proposals. Tenders can be evaluated on the basis of either lowest price or most economically advantageous tender.

The four main competitive procedures



Other specialized procedures: There are other competitive procedures that are permitted for more specialised use. These procedures all require a contract notice to be advertised in the Official Journal of the European Union at the start of the process and the Treaty principles and general law principles must be complied with:

- **Subsidised public housing contracts procedure:** this is a competitive procedure which can only be used for specified types of contracts relating to the procurement of subsidised public housing schemes. The contracting authority has more flexibility than under the standard procedures to run a process to select an economic operator with which it then works in close collaboration to develop and deliver the public housing scheme.
- **Works concessions procedure:** this is a competitive procedure which can only be used for works concession contracts. It provides for a more flexible, competitive procedure for the appointment of a works concessionaire. It has detailed specific requirements relating to the appointment of sub-contractors.
- **Design contest procedure:** this is a competitive procedure that involves the use of a jury to judge the designs submitted. The outcome of the procedure may be the award of the design contract, prizes or both. There are no detailed requirements relating to the number of stages to be used, timing or the process. There are rules about the way in which the jury is constituted and operates. This procedure can only be used for the design of public works and is commonly used in the field of town and country planning, architecture and engineering.

When can each of the main competitive procedures be used?

Open and restricted procedures: A contracting authority is free to choose between the open procedure and the restricted procedure. No legal conditions apply to the circumstances where either of these two procedures may be used, and a contracting authority is not required to use one procedure in preference to the other and therefore has complete freedom of choice.

Open or restricted? Choosing which procedure to use

As part of the procurement planning process, the contracting authority should carefully consider which of the procedures is the most appropriate for the particular procurement. In the majority of cases it will be a choice between the open procedure and the restricted procedure.

For more complex procurement, the contracting authority may need to consider whether it can use the competitive dialogue procedure or the negotiated procedure with prior publication of a contract notice. For specialised procurement, the other procedures described later on in this section may be appropriate.

Advantages of the open procedure: The open procedure provides for the maximum amount of competition possible. It is also the most transparent procedure, as there is no discretion in selecting providers. The potential for corruption, with a particular economic operator being favoured, is lower. In general, collusion between economic operators is less likely.

The statutory time limits are also shorter than under the restricted procedure.

Disadvantages of the open procedure: The overall costs to the contracting authority when using the open procedure can be high, as the contracting authority must issue full tender documents to all parties (although these costs can be significantly reduced if the documents are available electronically). The contracting authority may have to evaluate many applications if there are a large number of interested economic operators, which can be costly and time-consuming. In addition, economic operators may be less keen to participate in an open procedure if

the contract is more complex, and as a result the tender documents are not routinely prepared and require high levels of input. The cost of preparing a full tender can be a disincentive to participation where the likelihood of success is lower due to the high level of competition.

Advantages of the restricted procedure: By restricting the number of economic operators participating at the tender stage, the contracting authority's costs can be lower and the time spent in evaluation may be less than under the open procedure. The restriction in the number of tenderers can assist in avoiding unnecessary costs related to economic operators that are not suitable. This can also result in more interested economic operators that submit better quality tenders, thereby facilitating more effective competition.

Disadvantages of the restricted procedure: There is more potential for corruption under this procedure due to the greater exercise of discretion, and the possibility of collusion may be higher. The statutory time limits are also longer than for the open procedure.

Good practice

The open procedure is generally suitable to be used for routine, straightforward and commodity-type purchases.

The restricted procedure can also be used for routine, straightforward and commodity-type purchases where the contracting authority is of the view that there will be benefits derived from limiting the number of tenderers. The restricted procedure is particularly suited to more complex procurement and to non-routine purchasing.

In determining which procedure to use, the contracting authority needs to weigh a range of factors, including the costs of running the procedure, the benefits of full, open competition, the advantages of restricting competition, and the likely risk of corruption and/or collusion.

Competitive dialogue and negotiated procedure with prior publication of a contract notice: The competitive dialogue and negotiated procedure with prior publication of a contract notice can only be used where specific conditions are met. There are no legal provisions in the Directive requiring a contracting authority to use one of these procedures in preference to the other.

When can the competitive dialogue procedure be used? To use the competitive dialogue procedure, there are two conditions set out in the Directive, both of which must be met: (1) the contract to be awarded must fall within the definition of a 'particu-

larly complex contract' and (2) the contracting authority must consider that the use of either the open procedure or the restricted procedure would not enable the award of the contract.

When can the negotiated procedure with prior publication of a contract notice be used? The Directive sets out the limited circumstances where this procedure may be used and the conditions that apply. The circumstances can be divided into those where (1) there has been a prior competitive procedure that has failed, and (2) there has been no prior competitive procedure. The circumstances and conditions can be summarised as follows:

- **There has been a prior competitive procedure and irregular and unacceptable tenders are received.** This applies to works, supplies and services contracts where irregular or unacceptable tenders are received as a result of an open, restricted or competitive dialogue process and when the subsequent procedure with does not substantially alter the original terms of the contract.

Example

A contracting authority in the health sector runs a restricted procurement process for a contract for an x-ray machine. Four tenders are submitted and evaluated, but all four tenders include minor variations, which are not permitted.

The contracting authority decides to advertise a negotiated procedure, inviting the four economic operators that had submitted the original tenders to submit new tenders, but still using the original terms of the contract.

- **There has been no prior competitive procedure where prior overall pricing is not possible.** This applies to works, supplies and services contracts where prior overall pricing is not possible due to the nature of the works, supplies or services or the risks attached thereto. This procedure may only be used 'in exceptional cases'.

Example

A local authority wishes to award a contract for the construction of a new office building in the centre of a town where it is known that there are likely to be archaeological remains that will need to be protected during the construction process. The local authority does not know how much risk economic operators are prepared to take in relation to the impact of the protection of the archaeological remains on the cost and timing of construction. This issue will require negotiation with the economic operators.

- **Services contract specifications cannot be prepared with sufficient precision.** This applies to services contracts only where services contract specifications

cannot be prepared with sufficient precision so as to permit the award of a contract using the open or restricted procedure.

- **The contract is a works contract for research, testing or development purposes.** This applies to works contracts only where the contract is for works that are performed solely for purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs.

Rules on the conduct of the competitive procedures: The Directive contains detailed rules on the conduct of the competitive procedures, covering issues such as advertising, the selection process and criteria to be used, the content of tender documents, tender evaluation criteria as well as statutory timescales which apply to each of the processes.

Statutory timescales: the main statutory timescales relate to the time to be allowed between dispatch of the contract notice to the Official Journal of the European Union and the closing date for receipts of request to participate, the time from dispatch of the invitation to tender to return of tenders and the standstill period following a contract award decision. There are also statutory timescales applying to the provision of information to economic operators in specified circumstances. An example of how statutory timescales affect a procurement process can be seen on the following flow chart, based on a restricted procedure tender process.

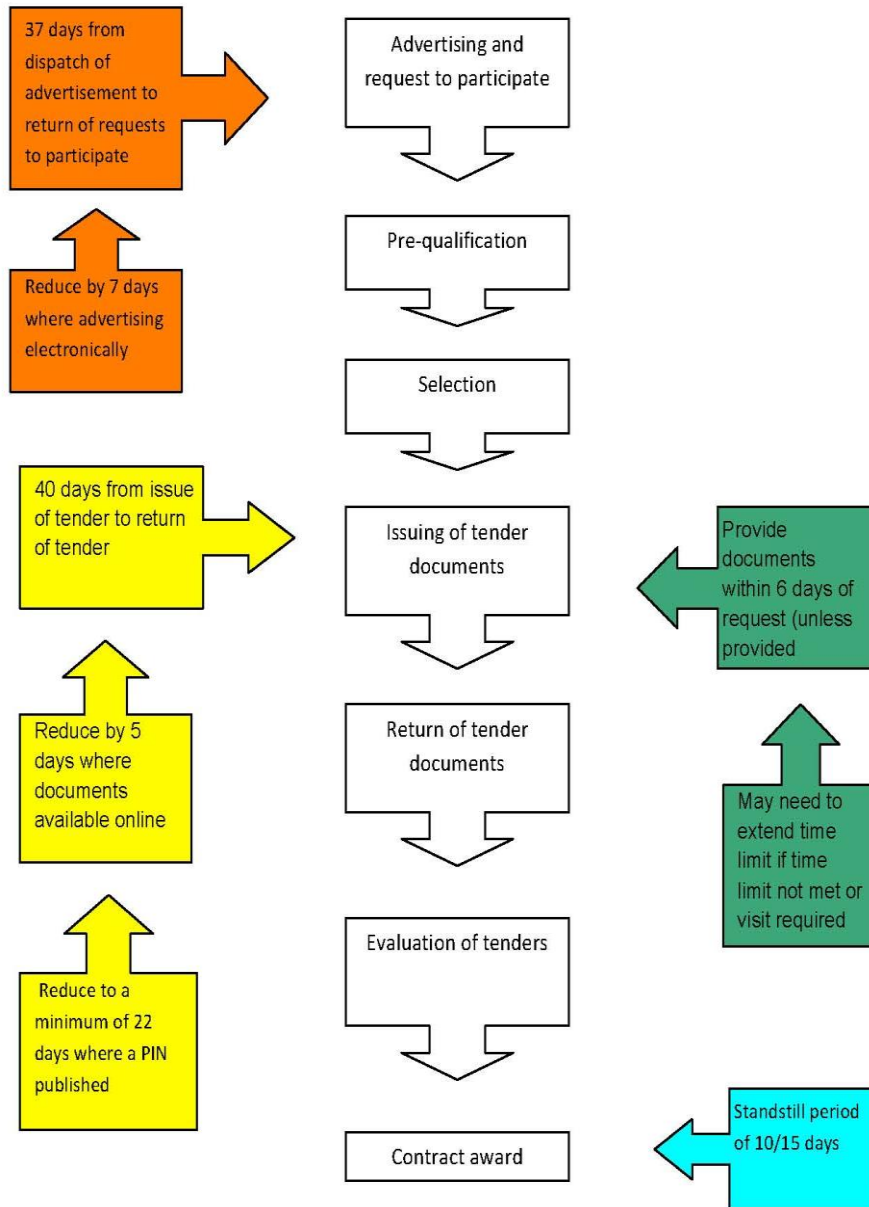
In certain circumstances it is possible to reduce the statutory time limits, subject to meeting a number of conditions which are set out in the Directive.

Utilities

Choice of advertising: Utilities have a free choice between three main forms of competitive procedure: the open procedure, restricted procedure, and negotiated procedure with a prior call for competition. Utilities generally have more flexibility in terms of how they advertise, which is referred to in the Utilities Directive as a 'call for competition'.

Conduct of the procurement process: The provisions in the Utilities Directive covering the conduct of the procurement process are generally less detailed and less proscriptive than the rules applying to the public sector. For example, there is no exhaustive list of selection stage criteria, and there are provisions allowing for the time limit for receipt of tenders to be set by mutual agreement.

Restricted procedure – statutory time limits: summary



Negotiated procedure without publication of a contract notice

Contracting authorities should start with the assumption that a competitive process with prior publication of a contract notice in the OJEU is required. There are only very limited circumstances where a contract that is of a certain type and value, which means that it is subject to the full provisions of the Directive, may be awarded without prior publication of a contract notice and without the use of a competitive process.

Warning! The case law of the European Court of Justice (ECJ) makes it clear that the availability of these derogations from the requirement to advertise using a contract notice in the OJEU and running a competitive process is very narrowly interpreted. The onus is on the contracting authority to demonstrate compliance with the conditions justifying this approach.

What are the derogations from the obligation to publish a contract notice and use a competitive process?

The derogations vary according to the type of contract and circumstance.

In summary:

Derogations for public works, public supplies and public services contracts:

- **Only irregular or unacceptable tenders were received:** In cases where an open or restricted procedure has already been conducted and only irregular or unacceptable tenders were received, provided that the conditions of the contract are not substantially altered.
- **Technical or artistic reasons or protection of exclusive rights:** Where for technical or artistic reasons or for reasons connected with the protection of exclusive rights the contract can only be awarded to a particular economic operator.
- **Extreme urgency:** Due to events that were unforeseeable by the contracting authority, where time limits available for the open or restricted procedure cannot be complied with, and where it is judged to be strictly necessary.

Derogations for public supplies contracts:

- **Products manufactured for research and development purposes only:** When the products involved are manufactured purely for the purpose of research, experimentation, study or development – and not where there is quantity production to establish commercial viability or to recover research and development costs.
- **Additional deliveries from an original supplier:** For additional deliveries from an original supplier that are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations and where (1) 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; and (2) provided that the length of such contracts as well as any recurrent contracts does not, as a general rule, exceed three years.

- **Supplies quoted and purchased on a commodity market**
- **Purchase of supplies on particularly advantageous terms:** Where supplies can be purchased on particularly advantageous terms from (1) a supplier that is winding up its business; or (2) the receivers or liquidators of a bankruptcy for arrangements with creditors or similar procedures under national laws or regulations.

Derogations for public services contracts:

- **Following a design contest:** Where the contract concerned is to be awarded, in accordance with the rules of a design contest, to the successful candidate(s), provided that, where there is more than one successful candidate, the negotiation is undertaken with all successful candidates.

Derogations for public works and public services contracts:

- **Additional requirements:** For additional works or services not included in the project that was originally considered or in the original contract, where a number of tightly drawn conditions are all satisfied.
- **Repetition of works or services:** For new works or services consisting of the repetition of similar works or services entrusted to the same economic operator under the original contract where a number of tightly drawn conditions are all satisfied.

Further reading:

[SIGMA Public Procurement Training Manual](#)