

# Spotlight on the new procedures

Prof. Dr. Ralf von Ameln

# Types of procedure

“tool box approach” → greater freedom to choose the type and design of procedure best suited to the needs: access to procedures involving negotiations is a great deal larger and more flexible than under the current Directives

- new **competitive procedure with negotiation** replaces the current negotiated procedure with prior publication of a contract notice
- **competitive dialogue** has been simplified and made more practicable
- new **innovation partnership** broadens the choice for contracting authorities

# Types of procedures

- new procedures are more clearly structured to ensure fairness, transparency and efficiency
- focus on the improvement of the tenders and providing contracting authorities with effective instruments to obtain the best possible procurement outcome in the negotiations
- transparency and documentation indispensable

# Toolbox approach

- **Art. 26 ff:** Member State systems will provide two basic forms of procedure: **open** and **restricted** procedure. They may, in addition, foresee
  - **competitive procedure** with negotiation
  - **competitive dialogue**
  - **innovation partnership**
- Contracting authorities have at their disposal six specific procurement techniques/tools intended for aggregated and e-procurement:
  - framework agreements
  - central purchasing bodies
  - joint procurement
  - electronic catalogues
  - dynamic purchasing
  - electronic auctions

# Overview

## Article 26:

- Choice of procedures

## Article 27:

- Open procedure

## Article 28:

- Restricted procedure

## Article 29:

- Competitive procedure with negotiation

## Article 30:

- Competitive dialogue

## Article 31:

- Innovation Partnership

## Article 32:

- Use of the negotiated procedure without prior publication

# Choice of procedures

- contracting authorities shall apply the national procedures adjusted to be in conformity with this Directive
- Member States shall provide that contracting authorities may apply open or restricted procedures as regulated in this Directive
- Member States shall provide that contracting authorities may apply innovation partnerships as regulated in this Directive
- Member States shall provide that contracting authorities may apply a competitive procedure with negotiation or a competitive dialogue

# Open procedure

- **any interested economic operator may submit a tender** in response to a call for competition
- **minimum time limit** for the receipt of tenders shall be **35 days** from the date on which the contract notice was sent
- **tender shall be accompanied by the information for qualitative selection** that is requested by the contracting authority
- where contracting authorities have published a **prior information notice** which was not itself used as a means of calling for competition, the minimum time limit for the receipt of tenders may – under certain conditions - be **shortened to 15 days**

# Open procedure

## WHO

- any interested economic operator

## WHEN

- works, supplies, services

## HOW

- call for competition accompanied by the information for qualitative selection
- 35 days response time
- award following criteria of lowest price or best value



# Restricted procedure

- any economic operator may submit a **request to participate** in response to a call for competition by providing the information for qualitative selection that is requested by the contracting authority
- **minimum time limit** for receipt of requests to participate shall be **30 days** from the date on which the contract notice or, where a prior information notice is used as a means of calling for competition, the invitation to confirm interest was sent
- only those **economic operators invited** to do so by the contracting authority following its assessment of the information provided may submit a tender
- contracting authorities may limit the number of suitable candidates
- **minimum time limit for the receipt of tenders** shall be **30 days** from the date on which the invitation to tender was sent

# Restricted procedure

## WHO

- after publication of the call, any economic operator may submit a request to participate
- only economic operators who are invited

## WHEN

- works, supplies, services

## HOW

- call for competition accompanied by the information for qualitative selection
- 30 days response time
- selection of economic operators to be invited
- time limit for receipt of tenders 30 days
- award following criteria of lowest price or best value

# Competitive procedure with negotiation

- any economic operator may **submit a request to participate in response to a call for competition** containing the information by providing the information for qualitative selection that is requested by the contracting authority
- minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice was sent
- only those **economic operators invited** by the contracting authority following its assessment of the information provided **may submit an initial tender** which shall be the basis for the subsequent negotiations.
- contracting authorities may **limit the number of suitable candidates** to be invited to participate in the procedure
- contracting authorities **shall negotiate** with tenderers the initial and all subsequent tenders submitted by them, except for the final tenders to improve the content thereof
- minimum requirements and the award criteria shall not be subject to negotiations

# Competitive procedure with negotiation

## WHO

- after publication of the call, any economic operator may submit a request to participate
- only economic operators who are invited

## WHAT

- supplies, works, services
- needs cannot be met without adaptation of readily available solution
- they include design or innovative solutions
- contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, complexity or the legal and financial make-up
- technical specifications cannot be established with sufficient precision
- with regard to works, supplies or services where, in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted

## HOW

- publication of the call incl.
  - subject-matter of the procurement
  - description of needs + characteristics
  - award criteria
  - minimum requirements to be met by all tenders
- minimum time limit 30 days
- selection of economic operators
- invitation of selected economic operators
- submission of the initial tender
- (successive) negotiations
- final tenders
- award on the basis of the award criteria

# Competitive dialogue

- any economic operator **may submit a request to participate in response to a call for competition** by providing the information for qualitative selection that is requested by the contracting authority
- **minimum time limit** for receipt of requests to participate shall be **30 days** from the date on which the contract notice was sent
- only those **economic operators invited** by the contracting authority following the assessment of the information provided **may participate** in the dialogue
- contracting authorities **may limit the number** of suitable candidates to be invited to participate in the procedure
- contracting authorities **shall open, with the participants selected, a dialogue** the aim of which shall be to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the procurement with the chosen participants during this dialogue
- contract shall be awarded on the **sole basis of the award criterion of the best price-quality ratio**

# Competitive dialogue

## WHO

- any economic operator may submit a request to participate in response to a contract notice by providing the information for qualitative selection
- invited economic operators

## WHAT

- **supplies, works, services**
  - needs cannot be met without adaptation of readily available solution
  - they include design or innovative solutions
  - contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, complexity or the legal and financial make-up
  - technical specifications cannot be established with sufficient precision
  - with regard to works, supplies or services where, in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted

## HOW

- contract notice setting out needs and requirements, definition of the chosen award criteria and an indicative timeframe.
- 30 days time
- invitation of selected economic operators
- opening of the dialogue and (successive) discussion of all aspects
- conclusion of the dialogue
- submission of final tenders
- award following best price-quality ratio

# Innovation Partnership

- any economic operator may submit a request to participate in response to a contract notice by providing the information for qualitative selection that is requested by the contracting authority
- contracting authority may decide to set up the innovation partnership with one partner or with several partners conducting separate research and development activities
- minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice is sent.
- only those economic operators invited by the contracting authority following the assessment of the information provided may participate in the procedure. Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure
- contracts shall be awarded on the sole basis of the award criterion of the best price-quality ratio
- contracting authorities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve the content thereof
- innovation partnership shall be structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works. The innovation partnership shall set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate installments.
- based on those targets, the contracting authority may decide after each phase to terminate the innovation partnership or, in the case of an innovation partnership with several partners, to reduce the number of partners by terminating individual contracts,

# Innovation partnership

## WHO

- any economic operator may submit a request to participate in response to a contract notice by providing the information for qualitative selection
- invited economic operators

## WHEN

- supplies, services, works that are innovative, cannot be met by purchasing products, services or works and are not already available on the market

## HOW

- contract notice, identifying the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market, description of minimum requirements to be met by all tenders
- time limit 30 days
- invitation of partners
- successive development of the product/service/work
- setting intermediate targets to be attained by the partners and payment of the remuneration in appropriate installments
- award following the best price-quality-ratio



# Use of the negotiated procedure without prior publication

- In specific cases and circumstances, Member States may provide that contracting authorities may award public contracts by a negotiated procedure without prior publication:
  - negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:
    - (a) where no tenders or no suitable tenders or no requests to participate or no suitable requests to participate have been submitted
    - (b) where works, supplies or services can be supplied only by a particular economic operator
    - (c) for reasons of extreme urgency brought about by events unforeseeable by the contracting authority
  - negotiated procedure without prior publication may be used for public supply contracts:
    - (a) where the products involved are manufactured purely for the purpose of research, experimentation, study or development
    - (b) for additional deliveries by the original supplier
    - (c) for supplies quoted and purchased on a commodity market
    - (d) for the purchase of supplies or services on particularly advantageous terms
  - negotiated procedure without prior publication may be used for public service contracts, where the contract concerned follows a design contest
  - negotiated procedure without prior publication may be used for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities awarded an original contract

# Summary

- procedures not yet tested under real conditions, no experience
- flexibility does not mean “legal vacuum”, undercover bargains or wheeling and dealing
- documentation and transparency
- focus on legitimate economic interest of confidentiality
- certain number of cases may be brought to the ECJ in the beginning