

Procurement Award Procedures under the European Union regulations

What types of Procedure are available to you under the EU framework?

Of interest to:

Staff responsible for systems procurement

Following the EU regulations

Explanations of the Open, Restricted and Negotiated Procedures for Procurement

Do the Directives always apply to Universities?

We present a case study from the European Court of Justice

Proposals to Amend the Directives

Changes that will be coming into effect

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Award Procedures

What Types of Procedure are available for my Procurement?

Under the Regulations, there are three permitted award procedures:-

Open Procedure – anyone can tender in response to a notice placed in the Official Journal. This procedure is mainly used for simple procurement requirements. All tenders are considered, and the University selects the winner on the basis of pre-specified contract award criteria.

Restricted Procedure – a notice is placed in the Official Journal but only persons selected by the University may submit tenders (a two-stage selection process, with the first stage effectively acting as a "filter"). This is the most common procedure. The University selects a limited number of tenderers after screening on the basis of the criteria set out in the Regulations. The University evaluates the tenders and selects the winner on the basis of pre-specified award criteria.

Negotiated Procedure – the University negotiates the terms of the contract with one or more persons selected by it (a two-stage selection process). Access to this procedure is strictly controlled, because of the possibility of abuse. There are two different negotiated procedures, one with an OJEC notice and one without an OJEC notice. The circumstances where each can be used are set out and are strictly limited. The University must justify the use of the negotiated procedure.

The Regulations also contain award procedures covering special types of contracts, eg design contests, works concessions and public housing schemes.

When Can the Negotiated Procedure be used?

The use of the negotiated procedure is allowed under the Regulations in very limited circumstances. Universities have a free choice as to whether to use the Open or Restricted Procedures. The use of the Negotiated Procedure is considered to be for exceptional cases only.

The "competitive" negotiated procedure (ie an OJEC Notice has to be placed first), is not widely available for the award of supplies contracts, but there exists more flexibility for works and services contracts.

Competitive negotiation is possible in the following circumstances:-

1. where a restricted or open procedure has failed – eg all bids were unacceptable – this is allowed for works, supplies or services contracts;
2. where overall pricing is not possible – perhaps because the nature of the requirement itself or the risks attached to it will depend to such a large extent on the approach to be taken by bidders, and the financial arrangements of funders – this is allowed for works or services contracts;
3. where specifications cannot be drawn up with sufficient precision – this usually applies when there is a high degree of input required from the provider, it is often relied on in PFI contracts where only an "output" specification is available – this is allowed for services contracts only;

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4. where the works involved are purely for research, experiment or development. This does not apply where the works are to assess viability or where costs will be recovered – this applies only to works contracts.

Negotiation without a call for competition is considered very exceptional, and as with the competitive negotiated procedure, the courts interpret the rules very strictly. However, the Regulations do make provision for negotiation without a call for competition in the following circumstances:-

1. where a restricted or open procedure has failed – eg all bids were unacceptable – this is allowed for works, supplies or services contracts, provided that all qualified providers who originally bid are involved;
2. where the contracts involved are purely for research, experiment or development – this applies to supply contracts only and would not apply where the contract is to assess viability or where the costs will be recovered;
3. only one possible provider – this procedure is available for works, supplies or services contracts where, perhaps because proprietary or artistic or design rights are held by one provider, there is no possibility of the university's requirements being met in any other way. Spare parts for machines already in use by the university might be such an example. The courts would expect that the university has assessed its requirements accurately and are sufficiently aware of the market that they are able to be certain that no other source of supply can be contemplated;
4. additional works, supplies or services are required from an existing provider. There is provision for the negotiation of contracts which were either:-
 - works or services unforeseen at the time of the original advertisement (but there must be technical and economic reasons why the new works or services could not be separated from those already provided); or
 - for works or services requirements which were foreseen at the time of original advertisement and constitute a repetition of the advertised contract (but a new contract award procedure must be commenced within three years of the original contract); or
 - for supplies only which are additional to or partial replacements for supplies already delivered (provided it can be demonstrated that the use of a different supplier would lead to incompatibility or disproportionate technical difficulty in the operation or maintenance of the existing installation – normally the term of this latter contract should not exceed three years);
 - design contests – for services contracts awarded following a design contest;
 - extreme urgency – this could be invoked for works, supplies and services contracts, only when there was no alternative and there would be severe consequences from any delay. It is also required that the need was "unforeseeable" (not simply unforeseen) by the university. It would need to be proved that the shortened time limits available within the accelerated restricted procedure were impracticable. It would be for the university to prove that these conditions applied and the courts could be expected to examine the facts critically, including the severity of the consequences expected from any delay.

Proposals to Amend the Directives

The European Commission have issued formal proposals to amend the public sector procurement Directives. Any changes are unlikely to come into effect before the end of 2003.

The key points of the proposal are as follows:-

- consolidation of the three public sector Directives;
- modified rules on standards and specifications;
- extension of the negotiated procedure (new rules for "complex contracts");
- recognition and regulation of framework agreements;
- modified time limits;
- facilitation and encouragement of electronic procurement;
- new rules on selecting suppliers to bid;
- increased transparency of award criteria.

The Cambridge University Case

Case C-380/98, R –v- HM Treasury ex parte University of Cambridge

European Court of Justice – Judgment of 3 October 2000

This case is of particular interest to universities and other bodies that receive some form of funding from the Government.

Facts

The case concerned the interpretation of the definition of "body governed by public law".

One of the categories of body covered by the Supply, Works and Services Directives under the definition of "contracting authority" is a "body governed by public law".

The ECJ case arose out of an action for judicial review brought in the High Court by the University of Cambridge. Essentially, the University wanted to challenge the interpretation of "body governed by public law" that HM Treasury had adopted in relation to universities.

To enable it to decide whether universities are covered, the High Court referred to the ECJ several questions.

Questions referred to the ECJ

1. The concept of "body governed by public law" is further defined in the Directives as a body which has legal personality established for the specific purpose of meeting needs in the public interest, not having an industrial or commercial character, and which is either:-
 - "financed, for the most part, by the State or regional or local authorities or other bodies governed by public law"; or
 - fulfils certain other criteria relating to appointment or supervision of the body.

What constitutes financing under the above provision?

The Court concluded that, in relation to universities, the provision does cover:-

- awards or grants made for the support of research work. This would apply even when the grant is made for a named individual;
- monies paid by the Government to cover tuition fees of named students.

The provision does not cover:-

- money paid to universities in return for contractual services, such as research work, consultancy and organisation of conferences.

Where the relationship between the University and the Government is a normal commercial one, that funding does not count as financing of the body for the purposes of the definition of "body governed by public law".

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2. What does the requirement that the body should be financed "for the most part" by the State or regional or local authorities, or other bodies governed by public law mean?

The Court concluded that this means "more than half".

3. Which sources of university income are to be included in the university's total in calculating whether financing is, for the most part, from the State etc?

The Court concluded that all sources of income must be included, including that resulting from purely commercial activities. Therefore the higher the percentage of income a university has from commercial activities, the less likely it is that "more than half" of its income will be public finance, and the less likely it is that it will be covered by the Directives.

4. Which time period is to be considered in deciding whether the financing of the University is "for the most part" from the State, etc?

This question is to be decided by reference to the University's own budgetary year. If the finance during that budgetary year is for the most part from the State, etc, then the University is covered by the Directives for that entire year. This must be determined at the start of each budgetary year, by reference to the figures for financing that are available at the start of the year, even if such figures are provisional only.

Finally, it is important to note that if the procurement is commenced in a year for which the University is covered, then that procurement is covered. The procurement will then remain covered, regardless of whether the University's sources of finance change during the time of the procurement procedure.

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