

**BAN-ON-NEGOTIATIONS IN TENDER PROCEDURES:  
UNDERMINING BEST VALUE FOR MONEY?**

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**ABSTRACT.** Markets for public contracting are in the process of transition. Various public/private partnership arrangements replace conventional purchasing, especially within the local and regional government area. Municipal entities may not be in a position to define their needs up-front because they would not have the overview of what the market may have to offer. So one should ask: Is the traditional ban-on-negotiations in mandatory tender procedures (sealed bidding) - such as it is in EU public procurement law - counter-effective to genuine *best value for public money*? The article displays significant differences between European Union (EU) law, U.S. law and other regimes such as United Nations Model law, The World Trade Organisation's Government Procurement Agreement (WTO/GPA), The International Bank for Reconstruction and Development (IBRD), and the NAFTA (North American Free Trade Agreement). New avenues for public/private demand a new agenda and the recent EU 2004 directive scheme attempts to respond to the market challenges. The author accepts that the new directive on public contracting facilitates a more smooth approach than in current EU law with regard to high-tech complicated contract awards, but questions whether the 'competitive dialogue' really can afford tailor-made solutions to cope with long-term public/private partnership arrangements of the kind now spreading all over Europe.

**PRE-CONTRACTUAL SCENARIOS: PUBLIC AND PRIVATE SECTOR**

Prudent commercial contracting involves thorough planning and visionary negotiations. Sometimes, stage-by-stage contracting is required in terms of a "letter of intent." This pre-contractual framework arrangement comprises the achievement of part consensus on matters with the need to avoid pitfalls through avenues for escape before the final selection of the successful candidate takes place. The private contract law on negotiations is tough. In principle, there are very few restrictions on the means and methods of making the ultimate of a strong bargaining

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position for the purchasing party, even when it comes to beating down the price, the extension of workload – or commanding contract milestones set with time penalties.<sup>1</sup>

The more complex the contract, the greater the necessity to spend time, expertise, resources and efforts on details in negotiations. Long-term cooperative contracts in the planning procedure may fall outside the scope of legislative default regimes as well as of previous experiences gained by the negotiating parties. Thorough deliberations may prove essential to avoid litigation in infra-contract or post-contract disputes. Indeed, although modern concepts of alternative dispute resolution (ADR) and contractual basis for renegotiations in unforeseen contingent incidents<sup>2</sup> may substitute litigation or arbitration proceedings. In that connection, there is a need for a waterproof, well-prepared extensive contract reflecting not only the main-stream prospects and expectations, but may also reflect both parties' visions, foresight and imaginable ruling for the unexpected. Pre-contractual endeavours down to details of unexpected contingencies may prove to be cost-effective in the long run. All this is common ground in the commercial world of contracts.

In the world of public contracts, these observations seem to have limited bearing, at least under the EU European Economic Area (EEA) procurement law.<sup>3</sup> What is the reason for that? This question and certain aspects of restrictions on pre-contractual negotiations in public contracting is the subject of the following remarks.

#### **PRE-CONTRACTUAL NEGOTIATIONS: A LEGAL PERSPECTIVE**

In public contracting, pre-contractual negotiations are often coming to an dead end because they turn out to be incompatible with mandatory statutory regimes which require that any public<sup>4</sup> contract for suppliers, works or services should in principle be awarded through the strictly regulated non-negotiable tender procedures, equivalent to the U.S. Federal Acquisition Regulation (FAR) terminology 'sealed bidding.'<sup>5</sup>

The pan-*European* setting for the award of public contracts for supplies, works and services is currently regulated in a comprehensive directives' regime originating from the early European Economic Community (EEC) in the 1970s, which was consolidated in the 1990s, and which later (1997-1998) got amended by incorporation of the WTO/GPA member states' commitments covering the EU.<sup>6</sup> All of the

three present directives on traditional public sector contracting require the contracting authority<sup>7</sup> to strictly apply the competitive tender procedures, with very few exceptions.<sup>8</sup>

EU and EEA procurement law is presently undergoing a major change. The three contract-specific directives on public and utilities' contract awards have been substituted by two single comprehensive directives on public and utilities' procurement, entering into force as from May 1, 2004, required to have been implemented in national legislation in all Member States before January 31, 2006.<sup>9</sup> It is expected that the two 'remedy' directives Dir 89/665/EC (public) and Dir 92/13/EC (utilities)<sup>10</sup> – now left unaffected by the 2004 law reform - will be subject to changes, but, however, no draft texts have appeared yet.

Separate from public contracting are the required procedures for contracts awarded within the 'excepted' *utilities*' sector which implies water, energy, transport, and telecom governed by the Utility Dir 93/38/EC, permitting optional negotiated procedures as an accepted alternative to the formal tendering for contracts - Article 4 No. 1.<sup>11</sup> Contracts within the Utilities' sectors will not be dealt with in this article.

'Energy' includes oil and gas industry contract awards, extending even to private multinational oil companies operating under public licenses in the industry. In the Norwegian offshore industry, the established practice prior to Norway's signing of the EEA agreement with (then) EEC was to combine traditional tender procedures for fabrication and service contracts with subsequent hard-core negotiations. The industry has always underlined that only strict cost-effective commercial criteria have ruled the selection of successful contract candidates, thus, the EU procedures were regarded to be unnecessary bureaucratic red tape. Arguments in favour of extensive post-tender negotiations prior to the contract award could be based on the partial need of the contracting entity to adapt joint design and project schemes to the subsequent contract commitment. A strict procurement regime prohibiting flexibility in this respect may mean that the adaptation must be done after conclusion of the contract - by Variation Orders (VO) or worse: Re-negotiation of contents and scope of contract performance. In fact, in the early Norwegian oil and gas industry period of the 1970s, it would be fair to say that at the time of preparing tender documentation, neither the licensed operator issuing the tender invitation nor the bidders had anything but extremely sketchy ideas on what was actually to become the object of the contract! Subsequent to the Utilities' directive,

the so-called EC License Dir 94/33/EC on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons establishes a regime for non-discriminatory award of these licenses. This, in turn, has led to a Utility Directive provision in Article 3, allowing for member states subject to the License Directive to apply for exception from the utilities directive's regime. North Sea oil and gas industry is consequently generally no longer ruled by the Utilities' directive, but must, on the other hand, always honour Treaty and EEA principles such as the EC Treaty Article 12 (2004 EU Constitution Article I-4 (2)) prohibition against all discrimination on national grounds on the selection of contractors. Preferential contract awards to support domestic industries would be a blatant violation of these principles.

Similarly strict is the 1994 *UNCITRAL Model Law* on procurement of goods or construction, stating in Article 18:(1) that except otherwise provided 'a procuring entity engaging in procurement of goods or construction shall do so by means of tendering proceedings' (narrow exceptions from this in Article 18 (2)) while the procurement of services is made less rigid – Article 18 (3) with reference to Chap IV provisions on methods for procurement of service and Article 43 on lawful selection procedures with simultaneous negotiations.

Other legal public contract regimes are generally less strict on the question of mandatory procedures for contract awards. The legal techniques in these regimes vary.

Some of these simply state that tendering for contracts may take place with or without negotiations, provided that the contract candidates are duly notified of the procedure to be followed. The WTO 1994 GPA Article IX paragraph 2 leaves it to the entity's discretion whether the procedure will be a plain tendering procedure with or without the involvement of simultaneous negotiations. GPA Article XIV states (No. 1) that:

A Party may provide for entities to conduct negotiations:

- (a) In the context of procurements in which they have indicated such intent, namely in the notice referred to in paragraph 2 of Article IX (the invitation to suppliers to participate in the procedure for the proposed procurement); or

- (b) When it appears from evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation.

The WTO General Agreement on Trade in Services (WTO/GATS) Article XIII on exemption for Government Procurement also states:

1. Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.
2. There shall be multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement.

The NAFTA Part Four Chapter 10 on Government Procurement contains provisions basically similar to the WTO/GPA rules – cf NAFTA Act 1010 No. 2 (b) and Article 1014 No. 1 (a).<sup>12</sup> The U.S. FAR<sup>13</sup> (Parts 14 and 15, cf: “6.401 Sealed bidding and competitive proposals. Sealed bidding and competitive proposals, as described in Parts 14 and 15, are both acceptable procedures for use under Subparts 6.1, 6.2; and, when appropriate, under Subpart 6.3.”) applicable to all U.S. federal procurement.

The provision constitutes a preference for sealed bids in the situations envisaged in 6-401(a), but leaves wide discretion to the officer in charge of the purchase:

- (1) Time permits the solicitation, submission, and evaluation of sealed bids;
- (2) The award will be made on the basis of price and other price-related factors;
- (3) It is not necessary to conduct discussions with the responding offerors about their bids; and
- (4) There is a reasonable expectation of receiving more than one sealed bid.<sup>14</sup>

Sealed bidding resembles the EU/EEA tender procedure and involves a rather simple award procedure. After checking timeliness and

the responsiveness of the bids, the lowest bidder in price will become the preferred contracting candidate. In this connection, the FAR regime differs from an EU tender procedure opening up for award to the most advantageous offer. Negotiations and modifications are forbidden. In the negotiated procedures, proposals from the candidates can be handled with flexibility. An agency could set up a system that would rate the technical approach proposed by the offerors as ‘unacceptable,’ ‘marginal,’ ‘fair,’ or ‘outstanding,’ which would allow price/technical tradeoffs. If proposal A is outstanding but high-priced, and proposal B is good and inexpensive, the agency might be allowed to select either A or B. The solicitation must indicate in advance whether the evaluation will be pass/fail (low-price, technically acceptable) or will allow a cost/technical tradeoff (best value). Negotiations are not mandatory and are often omitted, but whenever ‘negotiations’ are initiated, the candidates having submitted proposals within competitive range should be invited for discussions. The U.S. trend has moved away from sealed bidding toward negotiated procedures, largely because the agencies like to be able to select a better, but more expensive item (which they cannot do under sealed bidding).

More restrictive regimes provide for tender bidding procedures without options or with very limited openings for negotiations. The World Bank (IBRD Loans and IDA Credits) Article 2.6 opens up for two-stage bidding, but assumes bid openings procedures of the traditional kind in Article 2.44. According to Article 2.45 (with limited exceptions):

Except as otherwise provided in paragraphs 2.61 and 2.62 of these Guidelines, bidders shall not be requested or permitted to alter their bids after the deadline for receipt of bids. The Borrower shall ask bidders for clarification needed to evaluate their bids but shall not ask or permit bidders to change the substance or price of their bids after the bids opening. Requests for clarification and the bidders' responses shall be made in writing.

A third variant is the current EU/EEA module, which states that a formal ‘one and final shot’ tender procedure shall be applied in all public contracting, ruling out negotiations except for minor clarifications in the contents of the submitted bids. Alternatively, but only in extraordinary situations, the regime allows for the ‘negotiated procedure’ which, however, is not to be treated as tendering at all. In the exceptional cases

of negotiated procedure, the latitude for selection and adaptation of potential contract terms is necessarily somewhat more open than in the tendered procedure – although not at all wide open. The ‘up-front’ published tender documentation should not be modified significantly, not even in the negotiated procedure. Neither should the detailed indications on which sub-criteria that will eventually decide the final award of the contract.<sup>15</sup> This protects the potential candidates, who have abstained from participation in the competition for the contract, trusting that the published indications would be indicative of qualifications and final selection of the winner.

The 2004 EU law reform maintains the negotiated procedure formula and introduces certain clarifications.<sup>16</sup> But more importantly, the new regime extends the area of negotiations to comprise also the novel concept ‘competitive dialogue’ applicable on ‘particularly complex contracts’ where national legislator may provide for the procedure defined in Dir 2004/18/EC Article 29.

Since the EU/EEA tender procedure is mandatory in supplies, works and service contract awards, one should not be surprised over the actors’ pressure for liberal interpretation of the provisions on alternative negotiated procedures as well as for conducting communications and dialogues in the ‘closed door’ tender procedure, both multilaterally (simultaneously) with competitive candidates and unilaterally with the apparent most preferential candidate while attempting to impact on potential contract terms under the disguise of ‘clarifications’ etc. The role of the parties change as the process moves along. Before award decision is taken, all participating parties may press for latitude and discretion to ‘win the beauty contest’. Afterwards, the litigant passed-over candidates and their attorneys will scrutinise the process to detect, identify and invoke any potential violation of the rules. Alleged unlawful negotiations are quite often invoked in national court cases or in cases put before national complaint boards. National courts and complaint boards will then police the regulations and administer remedies as provided for in the EU/EEA remedy directives.

The EU/EEA public sector ‘remedy’ Dir 89/665/EC Article 2 No. 1 requires Member States’ legislation to provide for injunctive measures in order to have the procedure stopped or reversed at least up until the conclusion of the contract, subject to explicit post-contract option (Article 2 No. 6), cf similarly at EU Treaty level the C-87/94 injunctive Court Order 1994-04-22 *The Wallonian Buses* (based on national

Belgian law) and the more doubtful Italian case C-272/91 injunctive Court Order 1992-01-31 *Lottomatica* (based on Treaty Article 243, now Constitution Article III-379 No. 2.). The European Communities' Court of Justice (ECJ) has recently stated that national legislation must have a procedure in place whereby all unsuccessful tenderers may have the award decision set aside – C-212/02 (Judgment June 24, 2004).

In contrast, the US GAO regime is tougher. A successful bid protest may render the awarded contract invalid or revocable even after conclusion of the contract – cf Bid Protests Regulations § 21.6. on suspension of contract performance and § 21.8 on Remedies, including (a)(2) ‘Terminate the contract.’

In the EU/EEA remedy regime, on the other hand, the call for remedies in damages is only dealt with in a sketchy way. Article 2 states that national law must provide ‘damages to persons harmed by an infringement.’ ECJ has not clarified the requirement of this provision, and national jurisdictions in cases of unlawful negotiations seem to vary. The Nordic approach has been to assume ‘negative interest’ damages for all participating non-successful tender bidders (costs and time spent in futile preparation of tender bids trusting that the contracting entity will not infect the procedure with preferential negotiations). ‘Positive interest’ for loss of contract has been accepted in all Nordic jurisdictions, provided (a) serious inexcusable violation(s) of the rules and (b) a high degree of probability that the claimant would have acquired the contract if the infringement had not taken place (claimant’s burden of proof). The Norwegian break-through for ‘loss of contract’ was the *Nucleus* Supreme Court judgment August 30, 2001, which, *inter alia* involved the unwarranted post tender amendment of figures in the tender bid of the claimant which consequently did not win the contract.

In the U.S. GAO Bid Protests Regulations regime, questions on damages for negative interest or loss of contract are probably less practical since an unauthorised award normally will invalidate the contract in favour of the bid protester. In protests before the U.S. GAO, money damages are usually limited to costs incurred in the protest litigation (Bid Protests Regulations § 21.8. (d), (e) and (f)), although bid preparation costs are sometimes awarded. More often, though, a protester that is successful at GAO, gets another chance at obtaining the contract.

The (EU) European concept of a genuine tender procedure (similar to U.S. sealed bidding) assumes that a fully operative commercial



contract may be established in the sequence of (1) soliciting, if necessary, of consultant resources for the project; (2) preparation of a documentation to be published, defining the concept and object of the contract, relevant technical information ('specs') as well as the contents of contract terms to be applied; (3) the up-front 'call for competition' invitation – open or restricted – to all or selected qualified potential candidates, published in appropriate means with indications on time limits for submission and on the procedure to be applied; (4) a potential intermediate clarification or necessary amendments of documentation subject to principles of equality preceding the submission of tender bids well within the set time limit; (5) the opening of the offers received by the bidders; (6) the subsequent unilateral internally closed checking on part of the contracting authority for non-qualified or non-suitable candidates, errors, miscalculations and possible deviations from the initial contract documentation; and thereafter, (7) according to standard directives' formula common for supplies, works and services (as in Dir 93/37/EC 'Works' Article 18):<sup>17</sup>

Contracts shall be awarded on the basis of the criteria laid down...after the suitability of the contractors not excluded...has been checked...in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to...

The award decision and subsequent conclusion of the contract with the successful candidate end the process of a comparative unilateral handling of competing tender bids according to (a) qualifications and suitability and (b) criteria for the preferences, both of which are required to be published up-front, similarly non-negotiable and non-amendable in accordance with rules set by statute or by the contracting entity itself.

**CONCEPTS OF CONTRACT AWARD:  
BORDERLINE CASES ON PRIVATE AUTONOMY WHICH FALL  
OUTSIDE THE SCOPE OF PROCUREMENT**

Are all contracts about services to be provided or could there be public/private contracts which fall outside the scope of procurement law? Would these be undoubtedly based on autonomous engagement by the participants and these admittedly serve private as well as public interests?

In the EU/EEA context, the scope provisions of the current and forthcoming 2004 directives to be implemented are legally decisive on the issue of this article. Contracting or quasi-contracting with private sector will come under the directives if the object is an award of a supplies, works or service commitment on the part of the private party. On the other hand, the bona fide formation of companies with joint public and private shares would not come under the directives' regime, nor would the mere acceptance of public conditions for the award of licenses, grants or permits.<sup>18</sup> This does not rule out EU/EEA law, especially in a transborder context where principles on non-discrimination and transparency to secure subsequent judicial review might come into play. The point here is simply the ruling out of traditional procurement law in terms of mandatory procedures on tender bidding, the publishing of call for competitive negotiations etc. There is a major difference in litigation strategies between law which only prohibits discrimination as opposed to mandatory law which prescribes in procedural details how non-discrimination and transparency are to be preserved.

Some procurement fringe scenarios have been dealt with in statute. The Dir 93/37/EC assumes in Article 15 that so-called works concession contracts as defined in Article 1 (d) ('public works concession') are not subject to the extensive award procedure provided for. Similarly, service concessions are in ECJ court practice and in Commission's communications considered to fall outside the scope of the 92/50/EC 'Service' Directive. In both these cases, there is an element of contract autonomy, but the excluding element is that the holder of the concession will be remunerated through the third party (the general public) oriented exploitation of the permit or grant in question and not through pecuniary consideration by the public. Provisions on Works Concessions are now found in 2004/18/EC Title III. Article 17 states that Service concessions (as defined in Article 1 No. 4) will fall outside the directive's scope.

In this context, the point is that even the 'award' of contract-based licenses, grants or permits to operate concession facilities may be awarded irrespective of the strict EU/EEA procurement procedures, provided that EU/EEA principles of non-discrimination are being honoured.

### **TENDER BIDDING PROCEDURE RULING OUT POST TENDER NEGOTIATIONS INDISPENSABLE?**

Strangely enough, the EU procurement ban-on-negotiations rule applicable in regards to tender procedures has never been expressed in any of the procurement directives themselves. Neither have other variants of the problem, such as the issue of amendments and modification of the bids, correction of mistakes in the bid, etc. Such issues have either been considered to have been evident, self-explanatory or – more probable – left to interplay between EU/EEA law and national law.<sup>19</sup> There is, however, a scent of Commission's hindsight in the EC Council separate statements published in 1989, 1990 and 1994 (See as for Dir 93/37/EC [1994] O J No. L 111/114), stating:

... in open and restricted procedures all negotiations with candidates or tender bidders on fundamental aspects of contracts. Variations in which are likely to distort competition, and in particular on prices, shall be ruled out...

The statements can either be understood as an assertion that all negotiations on fundamental aspects of contracts will necessarily distort competition (and thus prevent both equal treatment and 'best value'), or as a reference to those but only those negotiations which in each particular case could be said to have a distorting effect. Since competition may also take place in conjunction with or in prolongation of tendering procedures, and is actually practiced in many markets which allow for negotiations, it is somewhat hard to accept that the implication of parallel negotiations with compatible contract candidates necessarily must distort competition; that is, if one assumes a loyal intention on the part of the entity to really go for the commercially best value such as the lowest price or the most advantageous offer in the current actual market.

The EU formula for tender procedure bans post-tender communication on contractual matters between the public entity and any of the candidates for the contract, even when the successful candidate appears to emerge during the process. This means a barrier to price adjustments as well as adaptations, modifications in scope, and definition of the object of the contract and ad hoc agreed amendments of any of the already published terms contained in the tender documentation published.<sup>20</sup> The 'up-front' rule bars the entity from modifying the contract documentation in view of what now could seem to be a better means to achieve the object of the project.<sup>21</sup> Prior to time limit for bid

submittals, amendments and modifications may be affected by a so-called technical dialogue initiated by the contract entity itself, its consultants, as well as by way of suggestions from any of the potential contractors. On the other hand, after time limit for submitting the bids the ban-on-negotiations rule of the game closes the door and strikes down communications in a way as to allow only for minor clarification where the submitted bids are read to be ambiguous or truly questionable in their contents. Basically, neither the tender bid price nor the scope of commitments should be adjusted. Clarification of ambiguities or shortcomings of the tender documentations reflected in the tender bid do not fall under the narrow clarification rule.<sup>22</sup> Admittedly, however, the distinction between amending and clarification is ambiguous since the text in focus originates from the bidder and is not a result of joint deliberation involving the public entity.<sup>23</sup>

Strictness in the area of amendments and modifications serve first of all a need for transparent clear-cut order open for efficient legal review (complaint or dispute bodies, court proceedings). As pointed out above, many regimes accept negotiations as an optional alternative to tender procedures ('sealed bidding'), but once the award is indicated to follow the non-negotiable bidding formula, there seems to be general agreement on a 'catholic' approach to later modifications. These are the rules of the game that are well established in jurisdictions which have applied tender procedures prior to or concurrently with the EU regime. The ban-on-negotiations provide therefore a high degree of certainty and foreseeability. And even if many actors complain about the complexity of the EU regimes, the ban-on-negotiations seem to be rather clear-cut and therefore not hard to overcome.

A typical case for clarification could be discrepancies in the tender bids when compared to the up-front tender documentation. The contracting entity could be expected to formally reject tender bids which have ambiguities of a kind that makes the comparison with competing bids impossible, but one could also have a situation where the bid contains a deliberate deviation from the tender documentation, in the form of alternative suggestions,<sup>24</sup> reservations on contract terms, etc.

While clarifications assume communication with the tender bidder, errors and mistakes in tender bids create a different challenge. What should be done in cases where the checking of the tender bids reveals blatant errors, misunderstandings – varying from clear-cut miscalculation of figures to cases where there is a strong indication that the tender

bidder must have made a mistake in the pricing of units, say in construction contract documentation? Or is the tender bid intended to be ambiguous and open to be interpreted in alternative ways, either being the lowest bid or – alternatively – a somewhat higher bid total than expected by the contracting entity in the evaluation of the bids, according to what suits the tenderer the best after opening of the bids and having seen the tendered price of all competitors?

Plain calculation errors may and should be corrected, provided that there is no doubt at all as to whether there is a mistake and how it should be corrected.<sup>25</sup> Failing to do so may result in a wrong award, and if it is apparent that the winner would have been the candidate affected by the error, possible positive damages in loss of contract might accrue.

In construction contract awards, the question often arises in connection with apparent mistakes in unit pricing. The item of sub-service unit offer may appear suspiciously high or low in comparison with the competing bids. This is an argument for applying the clarification rule to ascertain whether or not there is a mistake. The issue is not a simple one, for after the opening of the tender bids preceding the evaluation and checking of all bids, any of the candidates has knowledge of the submitted prices and could adapt to that by speculation in a strategic effort to increase the chances for winning the contract.<sup>26</sup> Injecting ambiguous price quotations in the bid might serve such purposes and should not be encouraged. Unilateral correction puts the contracting entity at great risk. If the correction rules out the candidate, he may come back asserting that there was no mistake, which might also happen if the contracting entity chooses to reject the bid for being ambiguous and therefore impossible to ascertain.<sup>27</sup>

Numerous U.S. GAO bid protests deal with the issue of mistakes in bids, cf for illustration *Roy Anderson Corporation*, October 10, 2003, B-292555, 2003 CPD Para. 179:

An agency may permit correction of a bid where clear and convincing evidence establishes both the existence of a mistake and the bid actually intended. Federal Acquisition Regulation § 14.407-3(a). For upward correction of a low bid, work papers, including records of computer-generated software spreadsheets, may constitute clear and convincing evidence if they are in good order and indicate the intended bid price, and there is no contravening evidence (*Alpha Constr. & Eng'g, Inc.*, B-261493,

Oct. 5, 1995, 95-2 CPD ¶ 166 at 3; *McInnis Bros. Constr., Inc.*, B-251138, Mar. 1, 1993, 93- 1 CPD ¶ 186 at 5). In addition, where the mistake has a calculable effect on the bid price and that effect can be determined by a formula evident from the bidder's work papers, the overall intended bid may be ascertained by taking into account the effects of the error on other bid calculations based on the mistaken entry (*Continental Heller Corp.*, B-230559, June 14, 1988, 88-1 CPD ¶ 571 at 3). Moreover, correction may be allowed, even where the intended bid price cannot be determined exactly, provided there is clear and convincing evidence that the amount of the intended bid would fall within a narrow range of uncertainty and would remain low after correction (*McInnis Bros. Constr., Inc.*, *supra*). Our Office treats the question of whether the evidence of the intended bid meets the clear and convincing standard as a question of fact, and we will not question an agency's decision in this regard unless it lacks a reasonable basis.

The European ban-on-negotiation on tender procedures has its parallel in a very blunt provision in UNCITRAL Model Law Article 34 Article 34 (1)(a) ('No change...shall be sought, offered or permitted'). Similar restrictions are found in the World Bank *Guidelines* (2004) paragraph 2.46). The WTO/GPA approach - on the other hand - is far more flexible, structured so that entity may choose a 'proposed procurement', in which case the entity decides by itself whether the procedure is to be open or selective and whether or not it will involve negotiations (Article XIV, cf Article IX 6.b):

1. A Party may provide for entities to conduct negotiations:
  - (a) in the context of procurements in which they have indicated such intent, namely in the notice referred to in paragraph 2 of Article IX (the invitation to suppliers to participate in the procedure for the proposed procurement);  
or
  - (b) when it appears from evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation.
2. Negotiations shall primarily be used to identify the strengths and weaknesses in tenders.

3. Entities shall treat tenders in confidence. In particular, they shall not provide information intended to assist particular participants to bring their tenders up to the level of other participants.
4. Entities shall not, in the course of negotiations, discriminate between different suppliers. In particular, they shall ensure that:
  - (a) any elimination of participants is carried out in accordance with the criteria set forth in the notices and tender documentation;
  - (b) all modifications to the criteria and to the technical requirements are transmitted in writing to all remaining participants in the negotiations;
  - (c) all remaining participants are afforded an opportunity to submit new or amended submissions on the basis of the revised requirements; and
  - (d) when negotiations are concluded, all participants remaining in the negotiations shall be permitted to submit final tenders in accordance with a common deadline.

Since the EU/EEA procurement directives have not dealt with negotiations during tender procedure, there seem to be no indications in the new 2004 regime on that matter. This is somewhat surprising; since unlawful negotiations both in tender procedures and by applying unwarranted negotiated procedures (as well as direct purchases with no competition at all) is a current scenario for procurement disputes and complaints. The inherent implications stated by Commission in the 1990s and widely accepted in national procurement law on the matter, remains in EU and EEA contract situations even under the joint EU/GPA regime: Since the GPA provisions do not prevent EU/EEA from legislating on more restrictive rules and practices, the mandatory tender procedure will even apply in the EU regime after the GPA public contract incorporation in 1997. The EU GPA Dir 97/52/EC does not address the issue.

The relationship between GPA and EU/EEA directives with regards to negotiations seems to be that the more restrictive EU/EEA regime within its scope will prevail over the GPA negotiation principles expressed in Article XIV.

### **THE EU/EEA NEGOTIATED PROCEDURE: STILL LIMITS FOR THE AMBITS AND SCOPE OF NEGOTIATIONS?**

As demonstrated, the EU/EEA legal regime on cross-border public contracting is heavily based on the non-negotiable tender bid scheme for contracting. The exceptions for alternative negotiating contracts have been kept within extremely narrow limits ever since the first directives on public sector issued in the 1970s. The supplies, works, and service directives contain similar but not quite identical rules on the conditions under which the negotiated procedure may take place.<sup>28</sup>

The context of a negotiated procedure varies with the need and objectives of the parties concerned, except for one assumption: opening bids (in the U.S. FAR terminology ‘proposals’) may have been binding on the candidates, but the contracting entity must have displayed the intention to undertake discussions with the bidders on price, performance and contents of contract obligations. Hence, unless the exceptions even from call for competition apply, such as where the negotiated procedure succeeds a tender procedure with no award,<sup>29</sup> there should normally be a regular call for competition. This should indicate that the offers to be submitted are not ‘last shot’ tender bids of the classical kind, but opening offers (proposals) to be succeeded by further discussions with those of the candidates that are found to be commercially competitive.<sup>30</sup> For ascertaining the successful contract candidate, the public authority may seek either to adapt the project – that is the contract documentation - to the information contained in the market offers. Negotiations may have cost-savings as their object, inducing the candidates to cut prices or reduce elements of scope. In sophisticated projects, there might be a need to discuss major design to be prepared under progress of the work (options, formulas for Variation Orders or framework arrangements). In comparison to the tender procedure, the underlying principle of equal treatment of all competitive candidates becomes prerogative, although it must be accepted that the contracting entities gradually focus their attention on the fewer in the final lap – and maybe conclude the selective continued negotiations with only one of them, keeping the others ‘at hand’ without having discarded them. For transparency purposes, prudent minutes recording the progress of negotiations may prove indispensable to substantiate that ‘good practice’ has been applied.<sup>31</sup>

It seems to be a common feature that procurement regimes give very few answers on how to conduct the negotiated procedures, except for basic assumptions like the overriding EU principles of non-



discrimination, equal treatment of candidates, foreseeability, transparency and general code of conduct in line with good public governance (Arrowsmith, 1996; Trepte, 1993; Whiteford, 2003).<sup>32</sup> Inherent in this is the prudent management of apparent business trade secrets which are now in the possession of the public entity not to be revealed to competitors.<sup>33</sup>

### **POLICY CONSIDERATIONS: PRO AND CONTRA PRE- CONTRACTUAL BAN-ON-NEGOTIATIONS**

#### **Argument for Pre-Contractual Ban-on-Negotiations**

##### ***Securing EU/EEA Transparency for Cross-Border Award of Public Contracts***

As already indicated, the EU Commission as initial legislator holds a restrictive position on two fundamental issues: (a) a main rule on mandatory tender procedure with narrowly drafted exceptions; and (b) 'statement' assumptions that tender procedure is incompatible with post tender negotiations except for minor clarification. The argument is apparently that a basically rule-oriented regime based on a maximum degree of transparency is necessary to conduct an efficient *judicial review* of all decision-making on part of the contracting entity. Post-tender communication to bargain for a better price or at least adapt the intended purchase to what the market now can be seen to offer, might undeniably afford better value for money, but who will guarantee that potential negotiations in fact are not streamlined for a domestic contract candidate? The principle of equality in EU/EEA procurement law supports the call for transparency. Negotiations must necessarily imply parallel dialogues with several candidates, and even if negotiations should be recorded for subsequent supervision, the risk of discretionary preferences in the profiling and selection may not be ignored. ECJ has expressed strong criticism against discretionary overall assessments in the award of contract scenarios (C-513/99 *Concordia*, Judgment September 17, 2002).

##### ***Negotiations and Mal-Procurement***

The competition for public contracts could operate as an arena for corruptive activities. One does not like to admit that this is a reality in sophisticated Western World legal cultures for procurement practises. Such cases might rarely appear in disputes over tender bidding, but

where there is profit to earn, there are rotten apples and procurement – even on the EU public arena – cannot be taken as an evident exception.<sup>34</sup> In that context, there is another argument for pursuing a high degree of transparency, whereas cumulative competitive negotiations might undermine such objectives.

In the post-tender scenario this becomes even more realistic: after opening of the bids, each candidate knows his position – and leniency in dealing with casual or even intended ambiguities inherent in the tender bid might under given circumstances foster attempts to exercise undue influence which the actors may be able to hide from illuminated publicity. Accepting extras on scope would in situations like that be equal to amending the price.

***Legal Certainty: Common Appreciation of The ‘Rules of the Game’ and Considerations for Non-Participating Potential Candidates***

Mandatory tender procedures in public contracting combined with widespread market appreciation that a tender bid is the ‘last and only shot’ for the contract could be said to support simplicity, foreseeability, and therefore a general good climate for competition. Some might add that contracts should be awarded on the merits of the offer, not on the talents for strategic bargaining. Small and Medium Sized Entities (SME) may come out as losers in competition with major companies disposing vast expertise for combats involving legal, financial and commercial resources.

Foreseeability has bearing on initial decisions on whether to compete for the contract or not. The up-front publication of the subject matter of the intended award, together with the contract terms and other information, might very well be decisive on the estimates to be made on the chances to be a competitive candidate. If the rules of the game are changed by negotiations, this may affect a candidate’s assumptions in terms like: ‘Had I known what I know now, I would certainly have made a shot to negotiate for this contract, either in price, in scope or in the initial concept indicated by the contracting entity in the tender documentation.’ In the EU/EEA regime, any interested party may file a bid protest, even candidates who were never invited to participate or candidates who could forward arguments as in the quotation above.<sup>35</sup>

### **Arguments against Pre-Contractual Ban-on-Negotiations**

#### ***Public Entities Get Too Dependent on Pre-Tender Appreciation of Market: Alternative and Suggestive Bids***

Non-amendable tender documentation in the post-tender stage means that the public entity – in given circumstances – may not adapt to what the market has to offer according to the submitted tender bids. This may not matter in simple supplies of commodities, but could have adverse consequences in sophisticated purchases where the entities' foresight at the end of the day proves insufficient to achieve the best buy.

The dependency addressed here is related to the role of the commissioned consultant assisting the contracting entity.<sup>36</sup> That consultant may or may not have the necessary insight and overview to prepare the optimal documentation. Such services often prove inadequate, forcing the public entity to settle for something short of best value. On the other hand, in a small market the only expert really able to evaluate the design of the purchase may have strong links to the potential market and therefore be disqualified on account of partiality (bias) (Treumer, 1999). This could be described as one *Scylla/Charybdis* scenario: The market expert may be commissioned to prepare the tender specifications but should then not participate in the competition. Or the expert may stand back in order to tender himself or assist others in preparation for bids, but should not be on both sides of the fence, and therefore, valuable market expertise is not available for the contracting entity. This matter should have been dealt with in the EU/EA directives, but is only addressed in the Dir 97/52/EC under Preamble recital No. (10),<sup>37</sup> assuming that contracting authorities may seek or accept advice for use in the preparation of specifications, "...provided that such advice does not have the effect of precluding competition."

What this means exactly is in total not clear, but European jurisdictions seem to read the Preamble citations so that contracting entities should not hire anyone who might have an economical interest in the outcome of the tender procedure. The words 'precluding competition' may not be read literally, however, the substantial risk for impeding competition should as a matter of policy suffice.<sup>38</sup>

***Complex Purchases: IT Contracts, Major Composite Commitments, Long-Term Framework Agreements, etc.***

In certain contract schemes the tender procedure might prove to be a literal straightjacket. As already mentioned, the various regimes requiring tender procedure allow exceptions when the tender procedure is manifestly inappropriate in view of the contract to be awarded. The UNCITRAL Model Law distinguishes between narrow exceptions available for goods and construction contracts (Article 18 (1) cf Articles 19, 20, 21 and 22), whereas contracts for services in Article 43 allow for inter alia procedure with simultaneous negotiations. In the U.S. FAR regime Article 6.401 states that both sealed bidding and competitive proposals (Part 14 and 15) are acceptable procedures, and the provision leaves under (a) some discretion as to whether it is 'necessary to conduct discussions with the responding offerors about their bids.'<sup>39</sup> Restrictions on the modification and withdrawal of bids are stated in 14.303 and 14.304.

Under the current EU/EEA regime, complex contracts are not explicitly dealt with.<sup>40</sup> The exceptions allowing for negotiated procedures are not meant to suit the complex nature of the contract, but rather to skip tender procedures in situations where this would seem unnecessarily bureaucratic, such as succeeding a tender procedure which has proved unsuccessful since none of the tender bids were acceptable.

The rules allowing for negotiations after termination of a previous futile tender procedure may tempt to abuse. One has experienced that municipalities have conducted quasi-tender procedures only to be cancelled and followed by negotiations with the ex-tender bidders, thus, circumventing the statutory rule on non-negotiation. Under EU/EEA law, the protection for the bidders in a situation like this seems to be an ECJ stated principle that a contracting authority must come up with valid documentation to substantiate a termination of a tender procedure without having awarded the contract. Termination of a procedure must be reasoned in writing subject to judicial review.

Pressed on these issues, EU Commission has conceded to the practical needs the new single<sup>41</sup> 2004/18/EC public sector directive.<sup>42</sup> Article 29 opens up for a more flexible competitive dialogue, applicable in areas where the non-communicative tender procedure is unsuitable for complex purchasing such as IT services or supplies of a similarly sophisticated technological nature. But the main rule on tender procedure

is maintained, and many of the tender bidding characteristics are even preserved in the competitive dialogue, such as reverting to final post-dialogue tender bids prior to entity's final selection. The competitive dialogue is addressed below.

***Cost Shortcomings of Rigid Non-Negotiated Contracts in the Construction/Works Contracts Area: Disputed and Undisputed 'Variation Orders' May Undermine the Benefit of Lowest Price and Most Advantageous Offer***

Construction contracts and similar contracts designed on the 'unit price' formula present a special challenge in view of the post-tender ban-on-negotiations. In a turnkey contract the contractor takes the risk of both design and execution, vicariously liable both for employees, consultant engineer (architect) and subcontractors. Unless the public authority has been specific on details of the work to be done, extras not anticipated in the design project meeting the tender documentation will be the risk of the contractor.

In other works contracts the design and execution of the contract is divided between the contracting entity and the contractor. Preparing the tender bid means under these circumstances a meticulously detailed scrutiny of the contract documentation. The bottom total price sums up the added figures on each and every unit, work or service listed in the documentation. Items, units or service not listed for bidder's pricing will become extras, remunerable under standard schemes for so-called 'variation' or 'change' orders VO's). Whether the well-experienced contractor bidder has anticipated and therefore ascertained the necessity for such extras at this stage is generally irrelevant.

Design is a risk for the contracting entity. It is evident that a non-negotiable scenario for such contracts may place a high risk on the contracting entity. Omissions and design errors become virtual boomerangs. A worst-case scenario may turn out to prove that very little has been gained in selecting the lowest bidder, since in fact the VO's may amount to figures well above the difference up to the second lowest non-successful bidder.

'Tactical bidding' in a European context adds to this. Anticipating extras which the contracting entity either has failed to foresee and thus, opens up for speculation: Cutting the final price today may not turn out

to be bad business: At the end of the day the inherent extras will pay the costs incurred in combating for the contract.

### COMPETITIVE DIALOGUE

The competitive dialogue in Dir 2004/18/EC, Article 29 is the Commission's final response to the market discontent with the shortcomings of the 1990s directives in the area of non-negotiable award scenarios. The setting is framed in the Preamble recitals, especially recital (31), which in turn should be seen in the context of the preparatory drafts in the late 1990s preceding the final text.

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 needs 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 transport 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. To the extent that use of open or restricted procedures does not allow the award of such contracts, a flexible procedure should be provided which preserves not only competition between economic operators, but also the need for the contracting authorities to discuss all aspects of the contract with each candidate. However, this procedure must 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 the one selected as the most economically advantageous.

The Article 29 procedure is not a substitution for the negotiated procedure still regulated as exceptions from tender procedure in the provisions succeeding Article 29, namely Articles 30-31.<sup>43</sup> The relationship between the two procedures is left somewhat in the open. Some have even advocated that the still vaguely regulated negotiated procedure leaves more and not less flexibility than the competitive dialogue does (Brown, 2004).

The text of the article is too long for complete citation in this article. To summarise, the main points are:

- Scope with reference to particularly complex contracts (para 1);<sup>44</sup>
- Prior publication of the procedure to be applied (para 2);
- Opening up of multilateral negotiations with candidates to identify and shortlist those within a competitive range of the needs of the contracting entity (para 3);
- Two-stage procedure with distinction between stage one negotiations to achieve the preferred solution and stage two with more traditional tender procedure open for all participants of the dialogue;
- No limitations on the contents of such negotiations (para 3);
- Observance of principle of equal treatment (para 3);
- Confidential treatment of separate candidates' proposals for solutions (para 3);
- Progressive focus on the solutions of actual relevance to the contracting entity to avoid 'cherry picking' (para 4);<sup>45</sup>
- Admissible additional specifications, clarifications and fine-tuning of stage two tender bids (para 6); and
- Final award applying the criterion 'most economically advantageous tender', subject to additional clarification of aspect of the tender, confirmation of tender commitments short of modifying substantial aspects of the tender (para 7).

Whether the contracting authorities and the market will welcome the competitive dialogue remains to be seen.<sup>46</sup> The legal product is the output of a lengthy process which has been going on for the last decade, and some may have entertained expectations and later on, the market demands have not met entirely in the forthcoming regime. Regarding major infrastructure partnership, one should possibly not expect too much, but for genuinely complicated purchases, where the need for a thorough screening of market technological potentials to avoid hindsight surprises like the ones described above under 1, the Article 29, could come in very handy.<sup>47</sup>

In the context of this article, the distinction between the dialogue preceding the tender bidding and the acceptance of continuing dialogue

after that stage should be observed. Whereas any and all aspects of the contract may be discussed before the bidding stage, the traditional ban-on-negotiations are assumed to apply after having submitted the tender bids. A novel provision in Article 29 (6) allows for further clarifications, specifications and so-called 'fine-tuning' of the submitted bids, applicable at a stage prior to the identification of the most advantageous tender, after which additional discussions may take place. It is submitted that the protection against undue treatment of contract candidates in this post-tender stage is somewhat fragile, and possibly more likely than under the current directives. As correctly pointed out by Treumer (2004), "...the possibilities for conducting illegal negotiations after the submission appears to be excellent and can be normally performed at a low risk."<sup>48</sup>

#### **NEW AGENDA FOR PUBLIC PRIVATE COOPERATION**

The markets for public contracting are in the process of transition. Various public/private partnership arrangements replace in many areas conventional purchasing of goods and services. Concepts and terms vary greatly in this area,<sup>49</sup> and so do the substance underlying contracted arrangements. There is already abundant literature on the issue, proving that new avenues for joining private and public resources in common interest are firmly placed on the agenda for contemporary public procurement law. In a 'Green Paper,' EU (2004) has now specifically addressed the PPP public private partnership issues.

Not all-innovative contract designing deserves legal approval. The circumvention of mandatory regimes invoking sophisticated legal architecture has been observed in many jurisdictions. The object of innovative more or less fragile legal constructions may have been to avoid red tape time consuming tender procedures, but could also be applied to establish a negotiated contract with or without 'call for competition.' The normal scenario for public contracting is a procedure initiated by the public entity, but one may also experience private initiatives, such as in major land schemes initiated by a private party or jointly in dialogue with landowners or agents entrusted to carry out private building schemes.

The ECJ '*La Scala*' preliminary Judgment C-399/98 (Judgment July 12, 2001) is a 'state of the art' formula of considerable interest. The private party in this case operated with municipal permission to renovate



and rebuild downtown areas in Milan, involving the erection of new theatre facilities, commercial areas, housing, etc. Normally, an innovator would have to pay the municipality for infrastructural service. In this case, the private party was allowed to set off by way of undertaking such services by itself, thereby in a way performing partly its own project instead of having to pay for the public services. The Court stated that the innovator's soliciting contractors for the infrastructural services would have to be considered a 'public works contract' subject to the Dir 93/37/EC. On the other hand, the Court assumes that the contractual relationship between the private party and the municipality was neither considered a 'works' nor a 'service' contract. In other words, that relationship fell outside the scope of the directives and could be negotiated without any 'call for competition.' The most interesting part of the judgment is the recital No. 52, dealing with the overriding principle of *efficiency* in EU procurement law:

Since the existence of a 'public works contract' is a condition for application of the Directive, Article 1(a) must be interpreted in such a way as to ensure that the Directive is given full effect. It is clear from the preamble to the Directive and from the second and tenth recitals, in particular, that the Directive aims to abolish restrictions on the freedom of establishment and on the freedom to provide services in respect of public works contracts in order to open up such contracts to genuine competition. As the tenth recital states, the development of such competition entails the publication at Community level of contract notices.

It might be expected that the quoted passage will afford considerable help in scenarios where the public party participates in joint venture arrangements which substantially have 'as their object either the execution, or both the execution and design, of works...' even though the formal arrangement may attempt to satisfy a more liberal scope definition, for instance covert lease of land contracts for subsequent erection under a 'sale and lease back' arrangement which formally might be advocated to fall outside the scope of Dir 93/37/EC.<sup>50</sup>

It has been intended – and now expected - that the 2004 EU competitive dialogue might be suited to meet challenges within this area (Brown, 2004).<sup>51</sup> Prior to the 2004 law reform in the UK, it has been held that the negotiations for the preferred Private Finance Initiative (PFI) candidate may be held without conducting parallel negotiations with competitors (Brown, 2004).<sup>52</sup>

However, it might seem as if the two-stage procedure set forth in Dir 2004/18/EC Article 29 is not tailor-made to suit the establishment of multi-year atypical public/private arrangements which may be very different from the particularly complex technological commitments envisaged in the 2004 provision on competitive dialogue. It is not even a convincing argument that the preferred private partner should be expected to come up with a formal post-negotiation cost-effective tender bid to win the beauty contest for partnership. One could therefore ask the same questions as the one addressed to the current directives' regime: Are partnering contracts at all suited for the EU/EEA tender or quasi-tender procedure – now or after 2006?

#### TWO INFRA-CONTRACTUAL IMPLICATIONS

##### **Lack of Negotiated Historical Context for the Contract: Subject to *Sui Generis* Rules on Interpretation?**

Under common law outset, the 'parole evidence' rule limits the incorporation of the pre-contractual context in the process of interpretation. Under continental and Nordic law, the rule seems to be different: The pre-contractual dialogue and mutual assumptions contribute substantially in the interpretative and gap-filling process when the true contents of the contract are to be ascertained.

The 'ban-on-negotiation' mantra combined with the fact that the public contract has an up-front display of the buyer's demand would therefore create a somewhat *sui generis* climate for the contract interpretation in potential disputes.

The preference for individual terms above standard terms combined with the last shot rule<sup>53</sup> in contract interpretation would in this respect mean that the up-front tender documentation with its contract terms will prevail, but only as long as the tender bidder in his bid or the candidate forwarding an accepted proposal coincides. Open as well as intended or covert discrepancies between the accepted tender bid and tender documentation would normally favour the bidder. Allegations on part of the contracting entity that the bidder has acted in bad faith would in a non-negotiation situation like the ones envisaged in this article prove very hard to substantiate.

On the other hand, the contracting entity in the notoriously stronger position *before* the award procedure (having drafted the contract, defined

the scope of contract, issued the relevant 'specs') might come in a completely different position when doubts are tabled in disputes over ambiguities in the documentation. In some European contract law regimes, it is a well established principle that the party having conducted the contents of the contract and having been in a bargaining position to dictate its terms and conditions, should bear the risk of any ambiguities inherent in the contract. The rule on 'ambiguity' applies in consumer contracts, but is also applicable and relevant in commercial contracts. A very normal scenario would be the area of disputed Variation Orders. The fact that the contract was not negotiated in a way which could have clarified otherwise inevitable pitfalls in terms of inconsistencies and ambiguities, may turn out to be a boomerang for the contracting entity. Money saved in going for the lowest bid may be consumed by extras well observed by the contractor when preparing the bid, but hitting totally unexpected the ignorant contracting entity trusting that the commissioned consultant (with his limited liability insurance!) has done a good job.

**Infra-Contractual Negotiations after Award: Extended Scope, Prolongation, Options, etc.**

Procurement law ends with the conclusion of the contract.<sup>54</sup> After this point national contract law and principles for the interpretation of the contract take over. Negotiations which may have been ruled out in the pre-contractual stage, may be completely acceptable once the contract progresses. Simple contracts for immediate deliveries are short-termed and may not need any post-contractual attention. On the other hand, long term contracts, framework agreements, multi-annual contracts with options and terms on renewals and re-negotiations, may have to be reviewed and monitored by the parties as time goes by. Traditional issues of unexpected contingencies could occur, in worst cases re-negotiation in frustration scenarios.

- EU law contains very few special rules applicable to commercial, let alone public contracts.<sup>55</sup> Private 'lex mercatoria' schemes such as the 'Lando Commission' Principles of European Contract Law (PECL) Parts I-III (2009-2003) have no official status. The Commission's ambitious Green Paper -- COM(2001)398 final -- points in the direction of some kind of future approximation of European contract law, but no legislation is in place yet.

- CISG 1980 on international Sales of Goods applies to public transborder purchases of goods, but within the area of works' and services' commitments no default legal regimes exist.
- In short, public contract law in today's Europe is basically national law, partly codified (German 'Bürgerliches Gesetzbuch' (BGB), French 'Code Civil' and others) partly case law (common law jurisdictions). Scandinavian commercial contract law outside the Sales of Goods area is generally case made law.
- In the US federal area, and different from EU/EEA, Public Contracts are dealt with specifically in USCA Title 41 "Public Contracts" (2000) with a Chapter 9 on 'Contracts Disputes.'

All of this is not procurement law. But one issue is the long-term contracted exclusion of capable competitors in the market. The 2004 EU regime sets a time limit of 4 years for framework contracts in order to preserve market competition (Dir Article 32). This would in fact mean a ban-on-negotiations even for options and re-negotiations in order to avoid the breaking up of good relationships established under a current contract regime.<sup>56</sup> Whether actual renegotiating or insertion of various options to be availed of fall under freedom of contract without initiating a new call for market competition is not explicitly dealt with in the EU legal regime. The magnitude of private investments in the project may be relevant, as well as the public entity's more or less legitimate needs for a stable and lasting uninterrupted relationship with a particular private partner.<sup>57</sup>

The regime of variation orders in construction contracting may also prove counter to competition policies. Options for normal variations would not entitle competitors to invoke duty to open access for market competition. On the contrary, the contracting entity being discontent with its contractor may be precluded from calling for VO's in the form of reduction in order to import fresh competition. In the regime for construction contracts, it is generally accepted that the VO regime not only commits but also entitles the contractor to do all and any normal additional work on site (with sub-contractors). On the other hand, if the contracting entity wishes to continue a once established contractual relationship for future engagements legally outside the commercial scope of an existing contract project, this might be a case for a successful competitor's challenge.

### CONCLUDING REMARKS

Procurement law is a fascinating area of law, in crossroads between public administrative law, competition law, contract law, law of procedure and tort law. The challenges connected with contracting procedures without or with very limited communication between contracting entity and the contract candidates burning for a contract are no exceptions.

The article has discussed different approaches in legal regimes to balance the need for a pre-contractual dialogue in the act of selecting the winner of the award contest with general legal policies underlying restricted ban-on-negotiations rules of the game. Two main regimes seem to prevail. On the one hand, the strict EU/EEA call for tender procedures, ruling out such dialogues subject to limited statutory exceptions for a negotiated award as the European approach. On the other hand, there is the U.S. federal FAR which is a more lenient regime. It rules out negotiations in sealed bidding, but accepts options for negotiated contracts not applying sealed bidding.

Variations in WTO/GPA, NAFTA, UNCITRAL and IBRD regimes have been addressed as examples of compromises between strict and liberal approaches to the procedures for public contracting.

New avenues for public/private interplay call for a new agenda and the EU 2004 scheme attempts to respond to the increased use of partnership arrangements in the shape of PPP, PFI, sale and lease back of land, build-and-transfer, etc. The author believes that the new directive on public contracting facilitates a smooth approach to achieve optimal results in high-tech complicated contracts, but questions whether the competitive dialogue really can afford tailor-made solutions to cope with long-term public private partnership arrangements of the kind now spreading all over Europe.

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### NOTES

1. Scandinavian and continental jurisdictions apply statutory or non-statutory principles on *culpa in contrahendo*, requiring negotiating parties to honour good faith standards as well as duty to disclose certain information of relevance to the counter-negotiating party. The common law climate for such ‘soft law’ principles seems to be tougher, corresponding to the estoppel doctrines on ‘parole evidence’ which – contrary to at least Scandinavian law – rules out the legal relevance of pre-contractual communication in the process of interpreting the contract.
2. On duty to renegotiate commercial contracts, cf German major law reform 2002 on obligations § 313 BGB and *Principles of European Contract Law 2000* (PECL) Article 5:111.
3. EEA stands for the 1992 European Economical Area Agreement between the EU and the present remaining EFTA countries of Iceland, Lichtenstein and Norway. Public and Utilities procurement law is part of the EEA commitments, and consequently EEA law equals EU law on public and utilities’ contracting. Switzerland is a remaining non-EU EFTA member country, but has not entered the EEA Agreement. Subsequent to the 2004 extension, EU now comprises 10 new Member States also subject to the EU procurement regime (extending to the Baltic Sea States, and Member States within Central and Eastern Europe as well as Cyprus).
4. A ‘public’ contract in EU/EEA law extends beyond government procurement and includes regional and local municipal contracting, as well as contracting done by entities ruled by public law such as ex-public entities in a private market which operate under public ownership, funding or similar ‘control.’
5. The U.S. FAR regulations on government procurement rule the bid protest complaint regime under Government Accountability Office (GAO) implementing Title 4 Part 21 of the U.S. Code of Federal Regulations, a comprehensive set of ‘Bid Protests Regulations.’ On origins and present status of GAO, see Gordon (2004).
6. Uruguay Round commitments scheduled in the 1994 WTO Annex 4 (b) as well as in the GATS on Trade in Services Annex 1 (b) Article XIII. EU accession for member States took place with the issuing of Dir 97/52/EC and Dir 98/4/EC amendment directives, pursuant to

Council Decision 22.12.1994 (94/8000/EC). EEA (EFTA) states such as Norway adopted the WTO GPA regime separately. The Norwegian law reform took place in 1996. A number of non-EU states have adopted the GPA regime, such as USA, Canada, Switzerland, Israel, and Japan. On interpretation, the stricter rule of EU or GPA regime will apply.

7. 'Public' includes any entity governed by public law, including government entities, local municipalities and even private entities under public governance – cf as an example Dir 93/36/EC 'Supplies' Article 1 (b).
8. An example is Dir 93/36/EC Article 6 No. 4, stating that '[i]n all other cases" (other than where the preceding exceptions apply) 'the contracting authorities shall award their supply contracts using the open procedure or by the restricted procedure," hereby by Article 6 No. 1 assuming the tender procedure as defined in Article 1 (d) and (e). Similar provisions are contained in Dir 93/37/EC 'Works" Article 7 No. 4, Dir 92/50/EC 'Services" Article 11 No. 4.
9. The lengthy revision had as its starting point a 1996 Green Paper (COM (96) 583), 'Public Procurement in The European Union: Exploring the Way Forward," in 1998 succeeded by a White Paper (COM (1998) 143), 'Public Procurement in the European Union." The EU law reform and the new concept competitive dialogue are dealt with comprehensively by Brown (2004) and Treumer (2004).
10. On corrective measures and on liability for mal-procedure, leaving details and procedures to national autonomy.
11. The law reform has also resulted in an updated directive for utilities' sector, where postal services substitute previous telecom services (Dir 2004/17/EC). Both directives are published in *Official Journal* (O.J.), No. L 134/1 and 114 (April 30, 2004).
12. On NAFTA in relation to the U.S. federal procurement regime, see Eyester (2002).
13. On comparison between U.S. and EU public procurement, see Verdeaux (2003).
14. Critical comments on the U.S. sealed bidding regime by Haberbush (2000).

15. Entities may in theory choose between lowest price and 'economically most advantageous offer,' but any informed contracting officer will publish the latter since this affords more discretion than lowest price. On sub-criteria and the foreseeability duty to publish in advance and maintain substantially unchanged, see more or less identical provisions in current Dir 93/36/EC Supplies Article 26, Dir 93/37/EC Works Article 30 and Dir 92/50/EC Services Article 36. The forthcoming Dir 2004/18/EC Article 53 is drafted on the same module, but extending economically advantageous to comprise environmental characteristics, thus adopting the reasoning in the ECJ *Concordia* Judgment C-513/99 (Judgment September 17, 2002).
16. It is somewhat unclear whether the 2004 regulated negotiated procedure - not falling under the competitive dialogue formula - has been changed in relation to intermediate negotiations in the negotiated procedure. ECJ cases prior to the 2004 regime seem to have accepted some latitude in this respect C-337/98 *Rennes* (Judgment October 5, 2000)
17. Similarly Dir 93/36/EC Article 15 and Dir 92/50/EC Services Article 23.
18. Note that the private party in the *La Scala* case C-399/98 apparently was selected without call for competition or mandatory tender bidding, while the infrastructure works solicited by that private party to fulfil the obligation towards the municipality (on behalf of the municipality?) was considered a works or service contract to be awarded according to the relevant directives.
19. Except for ex-communist jurisdictions now within EU, all European jurisdictions did operate more or less extensive and detailed legal regimes on government procurement, such as construction works, prior to the EU regime. Many also extended to local government municipal contracting from private sector. Thus, one must expect a considerable amount of continuous interplay between national law and case precedents and supranational EU secondary legislation.
20. In fact, the rigidity applies both ways: It is fundamental that the contracting entities' rules of the game cannot be modified or adapted in view of the information supplied in the bulk of tender bids. This aspect of non-negotiations was clearly stated in one of the early ECJ cases in public procurement, the *Storebaelt* case C-243/89



(Judgment June 22, 1993). The only EFTA Court Judgment on pure tender bid amendments to the published documentation is the Case E-5/98 Fagthun, which, however, was not exactly to the point of the subject for this article. The Icelandic contracting entity inserted a ‘by Icelandic’ provision in the tender documentation effective after the tender procedure and had thereby violated EEA Agreement Article 11 which bans quantitative trade restrictions.

21. In trivial day-to-day procurement dispute recordings, such as in the handling of procurement disputes, violation of the up-front rule is one of the most common failures to conduct a proper procedure: The directives requires unbroken consistent shaping between the published contract for award, the tender documentation effective at the time of the submittal of tender bids, the internal proposal for selection of the successful tenderer – ending up with the reasoned decision for the award of the contract.
22. In C-87/94 *The Wallonian Buses* (Court Order April 22, 1994), the contracting entity violated the rules for tender procedure by derogating unilaterally from its own specifications in allowing for a tenderer’s amendment of tender bid without equal opportunities to the competitors.
23. How far the directives’ ‘clarification’ rule might go in allowing for adaptations is a debated issue. The stricter interpretation was advocated by this author (Krüger, 1998), later questioned by Arrowsmith (1998), arguing for more flexibility. But see Brown (2004, pp. 161-162) for comments on the relationship between current and 2004 directives. Previous statements in Arrowsmith (1996, pp. 247 and 520-521) are in the author’s opinion far too liberal, especially as regard to negotiations with successful tender bidder to improve the bid favouring the contracting entity.
24. According to the ECJ C-421-01 *Traunfellner* (Judgment October 16, 2003), the contract documentation (and not only the national regulations) should state minimum standards to be met when allowing for alternative suggestive solutions.
25. An example from the author’s experience in Norway: The tenderer summed up accumulate figures down each page, but at one point forgot to transfer the bottom figures to the top of the next page. The contract total offer was correctly amended to reflect the true unit price totals.

26. Certain items of the tender bid details may fall under trade secret protection such as most often the specified unit pricing in works contracts. The totals of the tender bids, however, must be open for access for the participating tenderers, most often also for the public (such as media looking into the procedure for major public projects). See further McClure (2002).
27. A 2003-10-30 Norwegian Supreme Court decision supports the arguments in the text: The bidder who got the contract claimed for upgrading of a unit price quotation allegedly based on mistake. The Supreme Court rejected to do so and based the reasoning on the special scenario present in a non-communication tender bid scenario. Interestingly, it seems that the very first filed 1924 U.S. GAO bid protest dealt with a similar issue (Gordon, 2004).
28. Dir 93/36/EC ‘Supplies’ Article 6 No. 2-3, Dir 93/37/EC ‘Works’ Article 7 No. 2-3, Dir 92/50/EC Article 11 No. 2-3. On the unauthorised use of the negotiated procedure challenged by the Commission before the ECJ, see for a *Belgian* case C-323/96 (Judgment September 17, 1998), a *French* case C-337/98 (Judgment October 15, 2000), a *German* case C-20/01 C-28/01 (Judgment April 10, 2003).
29. That applies generally to the ‘No. 3’ of the provisions of the preceding footnote (‘without prior publication of a tender notice’).
30. For this reason, the contracting authority should make it clear that the initiation of negotiations should not be considered as a refusal of the offers, for instance where negotiations lead to nothing and the entity may wish to settle for one of the first submitted offers. The ‘rules of the game’ might then be different than in the more traditional exchange of offers and acceptances, where a declared intention to negotiate the offer might release the offeror, cf CISG 1980 Part II Article 19.
31. Illustration from a Norwegian Complaint Board case where the conclusion of the written negotiation recordings of candidate A concluded with the consented option to come back with a revised offer while that item was left out in the minutes for the equally competitive candidate B. This was considered to be an infringement. Another illustration: Refusal to disclose candidates’ opening figures in the proposals submitted within time limit would undermine transparent review of the succeeding negotiations (and is certainly

unlawful and contra EU/EEA policies in a tender procedure – but this is done in practice!).

32. On recommendation of oral presentations in negotiated procurement, see Hannaway (2000). On Commission's dealing with UK negotiated PFI cases, see furthermore Brown (2004) with comments also on a Greek case dealt with by the Commission (The *Thessaloniki* case 2003). Also see Brown and Golfinopolous (2003). As pointed out by Brown (2004, p 175-176), the uncertainty on understanding the current directives on negotiated procedures have been transported on to the 2004 regime, where the negotiated procedure is maintained as an alternative to the competitive dialogue.
33. Total figures in offers or tender bids would normally not be considered trade secrets, whereas unit prices in complex offers or bids for construction works should be viewed differently. On the issue, see McClure (2002).
34. On corruption in public procurement, see articles in Arrowsmith (2002, Vol. I, Part III).
35. This is particularly true when the rules are violated by doing unauthorised direct purchase with no procedure at all, such as just buying or negotiating with the supplier with whom the contracting entity has already enjoyed a long-term pleasant business relationship, and therefore is reluctant to obey the required mandatory 'call for competition.'
36. In the EU/EEA, the commissioning of consultants is in itself a service to be tendered for under the procedures prescribed for in the 92/50/EC 'Service' directive.
37. Preambles are standard introductory policy considerations in all EU directives, most often offering relevant indications on how the formal provisions are interpreted, but more seldom – as in this case – in a format which resembles a legally binding provision.
38. The Norwegian Procurement Complaints board (effective from 2003) stated in a local KOFA case 2003/36 that it was a violation of the national version of the EEA regulations to allow an agent for a particular manufacturer to assist in preparing the specifications for particular lock devices in the construction project. The question whether the actual contract candidate (the major Norwegian manufacturer for such products) should have been rejected from

tender procedure participation was not the issue, but the Board was doubtful as to whether there was legal basis for rejection.

39. On U.S. FAR negotiated procurement, see Whiteford (2003).
40. See as an example Dir 93/37/EC Article 7 No. 2 (a-c) and No. 3 (a-e), and similarly Dir 93/36/EC Article 6 No. 3 and No. 3, Dir 92/50/EC Art11 No. 2 and No. 3. Provisions allowing for negotiated procedures make a distinction between situations where such negotiations may be initiated with or without prior publication of contract notice.
41. The single directive comprises both contracts for supplies, works and services, and is therefore a major practical simplification compared to the previous three separate directives with provisions partly identical, partly with minor technical nuances.
42. Advocated already in the 1998 Commission's White Paper (1998), but in a premature form, see criticism voiced by S Arrowsmith (2001), Boyle (2000), Brown (2004) and Treumer (2004).
43. Certain aspects on how to interpret the 2004 version of negotiated procedures not falling under Article 29 are addressed by Brown (2004) on comparison between the traditional and maintained negotiated competitive procedure with the new competitive dialogue.
44. Some explanation on the notion of 'particularly complex' is attempted in Article 1 (11) (c) – reference to the contracting authority's lack of ability to define the technical means...or satisfying their needs or objectives. Whether this formulation is really of any help is open. Preamble (31) cited in the text gives additional guidance.
45. On this very practical restriction on the Article 29 scope of negotiations, see *S Treumer* op cit pp 181-182, pointing to the question of whether a tender documentation may contain provisions which *extend* the authority of the contracting entity in this respect, answered in the affirmative, but in my opinion not entirely convincingly. Leniency in this may undermine the compromise character of the Article 29 provisions. 'Cherry picking' would favour the contracting entity and a provision as suggested by Treumer (2004) could therefore be 'the rule' and thus run counter to directives' policies.

46. Time limit for national implementation is by the end of January 2006 (Article 80). There are no express transitional provisions in the directive, but the immediate coming into effect of the directive would authorise Member States to implement and apply the competitive dialogue long before the statutory time limit. It is expected that Member States might launch law reforms even before 2006. Short of such national law amendments, the old regime will apply formally.
47. The criticism voiced by Brown in the article referred to in the preceding footnotes is in the author's opinion relevant in the context of infrastructure partnering contract, but the positive impact on truly high-tech public purchases are somewhat underestimated.
48. Treumer (2004) argues over apparent lack of transparency on specifications in the stage after having conducting the competitive dialogue with individual candidates, to which this writer totally agrees.
49. Some currently applied: PFI = Private Finance Initiative, PPP = Public Private Partnership, BOT = Build and Transfer.
50. Such as the Danish national Complaint Board 2002 decisions on the *Farum Park* and *Farum Arena* cases dated January 29, 2002 and 18.7.2002, striking down a sale-and-lease-back arrangement for the construction of public works found to be clearly within the scope of works contract regulations' regime.
51. On the UNCITRAL Model Law adaptation to public private partnerships (PPP), see Arrowsmith (2003).
52. The overriding call for competition even in negotiated procedures is in other EU/EEA jurisdictions read to mean that generally more than one candidate should be allowed to participate for the final selection, and that a certain number of candidates should have equal possibilities to amend or modify prices, commitments, time schedules for performance, etc.
53. The 'battle of forms' is equally familiar to U.S, Continental and Nordic jurisdictions, although the approach may vary from one legal system to another. The point here is that the ranging of elements from the contracting entity with the tender or proposal elements from the contract candidate is a perfect example on just this set of problems.

54. In the *Alcatel* intermission stated in C-81/98 (Judgment October 28, 1999), The European Communities Court of Justice introduced the distinction between the award decision and the separate subsequent actual entering into a binding contract with the successful candidate. The reason for this is to allow the un-successful candidates to challenge the award decision before the contract comes into existence. The ‘remedy’ Dir 89/665/EC allows (Article 2 No. 6) member states to restrict corrective or injunctive legal actions to the stage prior to the actual conclusion of the contract. Consequently, the ban-on-negotiations will apply even after the decision to award has been taken, even though the contracting entity may be restricted in its authority to revoke the contract. Potential allegations for invalid contracts, revocable contracts, termination on account of frustration, unconscionability etc are dealt with in contract law and not in procurement law.
55. In fact, only a handful of directives could be said to deal with commercial contracts – the Dir 86/653 on Commercial Agents, the Dir 2000/31 on Electronic Commerce and the Dir 2000/36 on combating late payment in commercial transactions. Apart from this are regulations on jurisdiction and choice of proper law in contract disputes – EC Regulation 44/2001/EC and the EU Convention on the law applicable to contractual obligations Rome June 19, 1980 (consumer and commercial). All of this might apply to public contracting in the EU or EEA.
56. A related question is whether amicable experiences gained with a particular supplier are legally relevant when another contract of a similar nature is published for award. It could be argued that both ‘good will’ and ‘bad will’ experiences acquired in a past contract relationship has a cost-effective dimension. On the other hand, the EU directives seem to focus on the cost figures apparent from the tender bids as such and apart from history, and a bidder not known to the public entity should be allowed to compete without having to prove that his ‘good will’ potentials equal the ones of the former actually associated supplier. The issue seems to be somewhat in the open under present EU procurement law.
57. The Norwegian 2003 Complaint Board ‘Ementor’ case is illustrative: A regional health institution in mid-Norway was considered to have violated the procurement mandatory call for competition through the conclusion of a 8-10 year contract for continuous IT supplies,

comprising further options and clauses on re-negotiations towards the end of the contract time axis. The Board's criticism also involved the vague and discretionary price estimate on supplies and services so many years from date of signing the contract.

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